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FLIGHT FROM CUBA

JOYCE A. HUGHES*

I. INTRODUCTION

We live, after all, in an age of mass exodus. The flight from Cuba has taken place on our very doorstep, affected our politics and contributed to the changing face of our culture.

According to one estimate, 100 million persons move from one country to another, which is about two percent of the world's population.² Cubans have been involved in that movement and those who migrate to the United States have been called its "special favorites."³ They have also been called

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1. David Richards, *The Epic Saga of a Cuban Family: 4 Plays in 6 Hours Span 50 Years*, N.Y. TIMES, Nov. 10, 1994, at B17.

2. See Stanley Meisler, *U.N. Cites Looming Migration Crisis*, CHI. SUN-TIMES, July 7, 1993, at 10.

3. GILBERT LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS—REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 66 (1986) [hereinafter LOESCHER & SCANLAN]. "A clear 'double standard' which governed the acceptability of migrants from particular countries emerged as a principal feature American refugee policy. Cubans were the principal beneficiary of this double standard. The Haitians were the principal losers." *Id.* See also FELIX ROBERTO MASUD-PILOTO, WITH OPEN ARMS: CUBAN MIGRATION TO THE UNITED STATES 111-15 (1988) [hereinafter MASUD-PILOTO I]. An incident which graphically illustrates the difference is recounted in congressional hearings:

[A] Haitian boat was coming in off the coast of Miami about five miles out. There were 131 Haitians on the boat. They stopped and picked up two Cubans who were drowning. Their boat had capsized and they were about to die. They then came into the port in Miami. The Haitians were all interned . . . and sent back to Haiti. The two Cubans were marched around on the shoulders of their fellow cubans [sic] in Little Havana and are eligible for citizenship in one year.

“self-imposed political exiles”⁴ and “consumer refugees.”⁵ These are labels that have been associated with Cubans’ migration since Fidel Castro took control in 1959.⁶ Prior to the United States closing its Consular Office in Cuba two years later,⁷ migrants could obtain visas.⁸ Then visas were waived.⁹ As the title of a book suggests, the United States welcomed Cubans “with open arms.”¹⁰ There were 690,000 Cubans admitted to the United States between 1962 and April 1979.¹¹ An additional 125,000 Cubans came in 1980 when Fidel Castro opened the port of Mariel. This opening spurred the “Freedom Flotilla” and resulted in those 125,000 Cubans being called Marielitos.¹² The United States is now home to almost one million Cubans/Cuban-Americans.¹³

The term “special favorites” was thus accurate for Cubans coming to the United States from 1959 until 1994. They were not required to qualify for a visa under the categories established for immigrants. Nor were they required to establish individually that they were refugees who qualified for asylum. In order to obtain asylum under U.S. law, an individual usually must show that he/she is a refugee. A refugee is one who has been persecuted or has a well-founded fear of persecution “on account of” race, religion, nationality, membership in a particular social group, or political opinion.¹⁴ The Cubans however, have not been required to make that showing until recently. While their original admission to the United States has been based on refugee status,

The Situation in Haiti and U.S. Policy: Hearings before the Subcomm. on Human Rights and Int'l Organizations and the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs, 102 Cong., 2d Sess. 3 (1992) (statement of Rep. Johnston).

4. LOESCHER & SCANLAN, *supra* note 3, at 66.

5. *Id.* at 75.

6. See generally John Scanlan & Gilbert Loescher, *U.S. Foreign Policy 1959-80: Impact on Refugee Flow from Cuba*, 467 ANNALS (1983) [hereinafter Scanlan & Loescher].

7. This Office was closed two years after Castro’s 1959 revolutionary triumph, which “triggered the largest migration ever of Cubans to the United States.” MASUD-PILOTO I, *supra* note 3, at 12.

8. See *id.* at 34; S. REP. NO. 1675, 89th Cong., 2d Sess. 2 (1966).

9. See H.R. 1978, 89th Cong. 2d Sess. (1996) at 2. Waivers were authorized by INA § 212(d) (3), 8 U.S.C. § 1182 (1993). It was argued that visa waivers are for “non-immigrants” and thus should not have been available at the time to Cubans who intended to remain indefinitely in the U.S. See J. Patton Hyman III, *The Status of Cuban Refugees in the United States*, 21 U.F. L. REV. 73 (1968).

10. See MASUD-PILOTO I, *supra* note 3.

11. See Ira Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 187 n.31 (1982).

12. See Lisandro Pérez, *Cubans in the United States*, 467 ANNALS 126, 130 (1986).

13. Miami, Florida “and its suburbs are home to half the 1.1 million Cubans and Cuban-Americans in the U.S. . . .” *Cuban Exiles Protest New U.S. Policy*, CHI. TRIB. May 9, 1995, at 12. See Melita Marie Garza, *The Cubanization of an American City, Review of CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI by Alejandro Portes and Alex Stepick*, CHI. TRIB., Nov. 18, 1993, at 3.

14. See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1999). Like “exile,” the term “refugee” implies that one has been forced to leave one’s country. However the possibility of return is often a concomitant of the notion of exile.

Cubans/Cuban-Americans are often referred to using the term “*exile*”¹⁵ instead of “refugee.”¹⁶ Consistent with this historical treatment of Cubans, Fidel Castro’s daughter was *assumed* to be a refugee entitled to asylum when she fled to the United States in December 1993.¹⁷ The U.S. response was such that Cubans “believe[d] that immigrating to the United States was their natural right.”¹⁸ In fact, rules for the migration were dictated mainly by political and not humanitarian considerations.¹⁹

The United States’ welcoming arms policy towards Cubans changed a few months after Castro’s daughter came, with the advent of rafters (*balseros*). The *balseros* were not allowed to reach the continental United States, but instead were detained at the U.S. naval base on Guantánamo Bay. A news photo, which would have been unthinkable shortly after Castro’s revolutionary triumph in 1959, appeared forty years later in 1999.²⁰ The photo showed U.S. Coast Guard officers blocking entry to Cubans a few yards from the U.S. shore.²¹ The Immigration and Naturalization Service (“INS”) 1999 appeal of a Florida Immigration Judge’s decision to grant asylum to Cuban migrants²² also suggests a new era.

This article takes no position on the Cuban revolution and Fidel Castro’s triumph of 1959. Its purpose is to chronicle migration from Cuba and the

15. See FELIX ROBERTO MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS (1996) [hereinafter MASUD-PILOTO II]; Mireya Navarro, *Miami’s Generations of Exiles Side by Side, Yet Worlds Apart*, N.Y. TIMES, Feb. 22, 1999, at A1; Julie Vorman, *Weather Foils Memorial*, CHI. SUN-TIMES, Mar. 3, 1996 at 3 (“flotilla of anti-Castro exiles”); Mireya Navarro, *Exile Returns, Lured by Memory of Cuba*, N.Y. TIMES, Sept 24, 1995, at 1; *Cuban Exiles Protest New U.S. Policy*, CHI. TRIB., May 5, 1995, at 12; Peter T. Kilborn, *White Males and the Manager Class*, N.Y. TIMES, Mar. 7, 1995, at A7 (“Cubans, who are ‘brave exiles from Communism’”) (emphasis added in all foregoing citations).

16. One commentator noted that Cubans “‘have succeeded as immigrants and failed as exiles.’” Max Castro, *quoted in* Mireya Navarro, *Miami’s Generation of Exiles Side by Side, Yet Worlds Apart*, N.Y. TIMES, Feb. 11, 1999, at A1.

17. See *A Daughter of Castro Flees Cuba and is Granted Asylum in U.S.*, STAR TRIBUNE, Dec. 23, 1993, at A2. Castro has never publicly acknowledged paternity and Alina Fernandez Revuelta said “I’ve never spoken of Mr. Castro as my father.” *Castro’s Daughter Tells Tale of Defection*, STAR TRIBUNE, Dec. 24, 1993, at A4.

18. MASUD-PILOTO II, *supra* note 15, at 1.

19. *Id.* at 3.

20. See *A Few Feet Short of Freedom*, N.Y. TIMES, June 30, 1999, at A17.

21. The effort was based on a reported distinction in treatment between those who reach land and those who do not.

When the Coast Guard blocked the Cubans’ rowboat, the Cubans jumped into the ocean and tried to swim the few dozen yards to shore. Two made it, despite frantic efforts to stop them; four were seized in the water. Touching land was crucial for the six men because Cubans halted by the American authorities at sea are usually returned to Cuba while those who make it to shore are generally allowed to stay in the United States.

Id. This statement confuses the high seas and territorial waters. See *infra* Section IV and note 200.

22. See *In re Bello-Puente, et al.*, *infra* Section V.

United States response thereto, concentrating on the issues of refugees and asylum. But there are limits to this approach. Written Immigration Judge decisions are not generally available and while their decisions can be appealed to the Board of Immigration Appeals (“BIA”),²³ only its precedent decisions are reported publicly. Most importantly, contested cases arise when there is a dispute. If persons are admitted to the United States because of presidential fiat or political policies, few cases result. Nonetheless, the available cases involving Cuban migrants do illuminate the parameters of U.S. policy.²⁴ The general U.S.-Cuba relationship will be described in Section I. In Section II, U.S. policy towards those who fled from 1959-1994 will be discussed. Section III will address the *balseros* in the 1990s and migration accords representing a policy change concerning Cuba-U.S. migration. Section IV will discuss claims for asylum by Cubans who arrived in the United States after 1996, and a concluding comment will finish the article.

II. CUBA AND THE U.S.

[One cannot describe] Cuba without reference to its socialist revolution, the most thorough and radical in twentieth-century Latin America, which [has] profoundly altered nearly every aspect of life on the island during the . . . years since its triumph on January 1, 1959.²⁵

Cuba is a Caribbean island located just west of Haiti and only ninety miles south of Florida. Christopher Columbus landed there in 1492 and Spaniard Diego Velázquez began colonization in 1513, resulting in destitution and misery for the native population. That population was augmented after 1713 when African slaves were imported. From 1820 to 1830 there were “several unsuccessful revolts for Cuban independence.”²⁶ While the Monroe Doctrine of U.S. president James Monroe “defended the rights of the newly independent republics [in the New World] against foreign interference,”²⁷ it supported Spanish domination over Cuba. A War of Independence was begun in 1895 under the inspiration of José Martí who underscored the need for Cuba to be free from *all* foreign power, both Spain and the United States. The sinking of the U.S. battleship Maine in Havana Harbor was the event that prompted the Spanish-American War of 1898.²⁸ The hos-

23. 8 C.F.R. § 3.1(b) (1997).

24. *Cf.* *Silva v. Bell*, 605 F. 2d 978 (7th Cir. 1979) involving the system of charging against the Western Hemisphere quota the visa numbers assigned to approximately 145,000 Cubans given permanent resident status from 1968-1976.

25. FOREIGN AREA STUDIES, AMERICAN UNIVERSITY, CUBA A COUNTRY STUDY *xix* (James D. Rudolph, ed. 1965) [hereinafter COUNTRY STUDY]. The following history is generally from Country Study. *See* Loescher & Scanlan, *supra* note 3, at 60-67.

26. COUNTRY STUDY, *supra* note 25, at 14.

27. *Id.*

28. One scholar argues that the conflict should not be called the Spanish-American War because that term erases Cuba's role. *See* LOUIS A. PEREZ, JR., THE WAR OF 1898: THE

ilities ended with the Treaty of Paris signed by the United States and Spain in October 1898 under which Spain lost Cuba.²⁹

When the Spaniards relinquished authority over Cuba on January 1, 1899, the United States installed a military government to administer the island.³⁰ The U.S. military government ended in 1902 when power was transferred to Tomas Estrada Palma, a newly elected Cuban president, who had been a "longtime resident of the United States."³¹ But from 1901 until its repeal in 1934, the U.S. Platt Amendment restricted Cuba's self-determination and "was a tremendous humiliation to all Cubans . . ."³² since it "turned Cuba into an American protectorate."³³ That enactment was the basis for the U.S. acquisition of rights to what became the Guantánamo Bay naval base.³⁴ Throughout the existence of the Platt Amendment, the United States intervened in Cuban affairs.³⁵ That enactment ended in 1934, the year that "Batista became the new arbiter of Cuban politics."³⁶ Batista assumed power after a bloodless *coup d'état* in 1952. Under his influence "the Presidential Palace became the home of some of Cuba's most notorious thieves."³⁷ Fulgencio Batista's own "corrupt and repressive dictatorship"³⁸ ended when Fidel Castro came to power in 1959.

In 1953, Fidel Castro led a revolt against Batista, known as the Moncada incident. This revolt failed and Batista inaugurated "repressive meas-

UNITED STATES AND CUBA IN HISTORY AND HISTORIOGRAPHY (1998); Karen J. Winkler, *New Wave of Research Changes Views of Cuba*, CHRONICLE OF HIGHER ED., Jan. 8, 1999. <<http://www.chronicle.com/weekly/b45i18i18a01701.htm>> Cuban scholars argue that "Cuban forces themselves were about to defeat the Spanish before the United States intervened . . ." *Id.*

29. "The terms of the armistice represented the end of the Spanish overseas empire. Spain lost Cuba, Puerto Rico, the Philippine islands, and other islands in the Pacific and the West Indies to the United States." COUNTRY STUDY, *supra* note 25, at 21.

30. U.S. attitudes were not pro annexation because of the large Black population in Cuba and the economic devastation caused by war. *See id.* at 22.

31. *Id.* at 24.

32. *Id.* at 23. The Platt Amendment provided, inter alia, that all acts of the U.S. military government had to be accepted as legitimate; Cuba had to lease lands for coaling and naval stations and had to grant the United States the privilege to intervene at any time to "preserve Cuban independence or to support a government capable of protecting life, liberty, and individual liberties." *Id.* The Amendment became part of Cuba's "organic law" by a one-vote margin of Cuba's Assembly. *See MASUD-PILOTO II*, *supra* note 15, at 12.

33. MASUD-PILOTO II, *supra* note 15, at 12.

34. The United States' right to occupy land for a naval base at Guantánamo Bay, Cuba began "under the terms of the May 1903 Treaty of Relations (also known as the Permanent Reciprocity Treaty of 1903) and the Lease Agreement of July 1903." COUNTRY STUDY, *supra* note 25, at 23.

35. "The United States regarded the island as a vantage point from which to monitor its growing interests in the Caribbean basin" and Cuban Independence "was tempered by the often-exercised power of intervention by the United States." COUNTRY STUDY, *supra* note 25, at 3. *See MASUD-PILOTO II*, *supra* note 15, at 16.

36. MASUD-PILOTO II, *supra* note 15, at 16.

37. *Id.*

38. *Id.*

ures" against some of its participants.³⁹ After two years in jail, Castro benefited from Batista's general amnesty, which freed most political prisoners. The date of the Moncada incident was the name of a movement which organized for another attack against the government, the 26th of July Movement, (*Movimiento 26 de Julio*). That attack also failed but some participants were able to escape to the Sierra Maestra mountains including Fidel, Raúl Castro and Ernesto (Chè) Guevara.

The revolution succeeded on January 1, 1959 when Castro and his followers came from the mountains.⁴⁰ Batista then fled.⁴¹ The first response to Castro in Cuba was positive. "The overwhelming majority of the Cuban people recognized Castro as a revolutionary hero, who, despite tremendous odds, had defeated [a] corrupt and brutal dictatorship Most important to the majority of Cubans, Castro represented the hope of a new beginning."⁴² Initially, American reactions to the Cuban revolution were "cautiously cordial."⁴³ But it soon became apparent that "Castro was unacceptable"⁴⁴

In April 1959 Castro accepted an invitation to the U.S. from the American Society of Newspaper Editors. President Eisenhower was against the visit but was advised not to refuse Castro a visa. Nonetheless, Eisenhower did not meet with him. "Clearly, Castro and the Eisenhower Administration differed as to what kind of revolution Cuba should have."⁴⁵ Then on July 5, 1960 the U.S. canceled Cuba's quota for sugar exports to the United States. Cuba then nationalized United States institutions operating in the country, as well as Cuban owned enterprises. On January 3, 1961 U.S. President Dwight D. Eisenhower broke diplomatic and consular relations.⁴⁶ Shortly thereafter John F. Kennedy, a newly inaugurated U.S. president, approved previous plans for the invasion of Cuba.⁴⁷ However, he prohibited any direct involvement of U.S. forces and did not allow United States aircraft to be used for

39. *Id.* at 36.

40. See Fidel Castro, *Speech on the 40th Anniversary of the Cuban Revolution, Jan. 1, 1999*, 29 BLACK SCHOLAR 39 (1999).

41. See MASUD-PILOTO II, *supra* note 15, at 18. Batista went first to the Dominican Republic and then to Portugal.

42. *Id.* at 19.

43. *Id.* at 20.

44. *Id.* at 21.

45. *Id.* at 21-22.

46. See *Statement of the president on terminating diplomatic relations with Cuba*, 1 PUB. PAPERS 388 (Jan. 3, 1961).

47.

Nowhere . . . was American involvement with guerrilla movements, or with the exiles who manned them, more extensive than in Cuba. That involvement, which had as its consistent goal the removal of Fidel Castro from power, contributed directly to the laissez faire policy which permitted tens of thousands of Cubans 'temporarily' to enter the United States during 1960 and the early months of 1961.

LOESCHER & SCANLAN, *supra* note 3, at 61.

the Bay of Pigs⁴⁸ invasion, which occurred on April 17, 1961. It was two days later that the 1297 invaders surrendered.⁴⁹ About 200 individuals had been killed and the rest were taken prisoner. However, they were released for return to the United States before Christmas 1962.⁵⁰ It was after the Bay of Pigs that Castro “stated the socialist character of the Cuban Revolution, and . . . declared himself a Marxist-Leninist. Analysts claimed that these were clear attempts to gain economic and military support from the Soviet Union and its allies.”⁵¹

Less than two years after the Bay of Pigs, the Soviet missile crisis occurred. There was a buildup of Soviet surface-to-air anti-aircraft missile bases in Cuba. When the United States learned of this, President Kennedy spoke on television on October 22, 1962 and warned that America was on the brink of nuclear war with the Soviets. A naval quarantine of Cuba was imposed. “Nuclear brinkmanship”⁵² between the Soviet Union and the U.S. ensued until October 28, 1962 when the matter was settled between John F. Kennedy and Nikita Krushchev.⁵³ An agreement between the then superpowers provided that “Cuba would have immunity against military aggression by the United States as long as it did not become a base for Soviet offensive weapons.”⁵⁴ Other key terms were for the withdrawal of the Soviet missiles and elimination of the American naval blockade.⁵⁵ Cuban President Fidel Castro was not consulted about this agreement, and Cuba’s relationship with the Soviet Union was strained “because the Soviets had initiated and resolved the situation with little regard for Cuba’s interests or its national sovereignty.”⁵⁶

Although “Moscow had nothing to do with the Cuban revolution’s tri-

48. The name comes from the point of disembarkation, the Bay of Pigs (Playa Girón). See COUNTRY STUDY, *supra* note 25, at 44. While the U.S. did not provide air cover, the U.S. Central Intelligence Agency (C.I.A.) trained the Cuban exiles. See *The U.S. and Cuba: A Tense History*, N.Y. TIMES, Aug. 22, 1994, at C7.

49. In a report on the incident, the C.I.A. listed its failure to recommend that the invasion be canceled as “success had become dubious” and there was not in Cuba “a responsive underground movement ready to rally to the invasion force.” *The C.I.A. on the C.I.A.: Scathing View of Invasion*, N.Y. TIMES, Feb. 22, 1998, at Y6.

50. Castro established a ransom of about \$62 million in medical supplies for their release. However, they were freed even before arrival of the ransom. See COUNTRY STUDY, *supra* note 25.

51. *Id.* at 43.

52. *Id.* at 46.

53. Ironically, the son of Nikita Krushchev became a naturalized U.S. citizen “four decades after his father . . . provocatively vowed from the Kremlin, ‘We will bury you’ . . .” *Krushchev is Pledging New Allegiance*, N.Y. TIMES, July 11, 1999, at 1.

54. COUNTRY STUDY, *supra* note 25, at 46. Defense Department documents reportedly show that a U.S. invasion to overthrow Castro was proposed in April 1992. See *Documents Reveal Anti-Cuba Schemes*, CHI. SUN TIMES, Nov. 19, 1997, at 42.

55. The terms are in letters exchanged between Kennedy and Krushchev. See LOESCHER & SCANLAN, *supra* note 3, at 245.

56. COUNTRY STUDY, *supra* note 25, at 46.

umph . . . the realities of a bi-polar world”⁵⁷ meant that Cuban-American relations were entangled in the Cold War. Cuba relied on Soviet economic aid until 1992.⁵⁸ “‘Moscow’s aid’ [went] from a torrent to a trickle and then to nothing.”⁵⁹ It was not until June 1993, during the “special period,”⁶⁰ that Soviet troops departed Cuba permanently.⁶¹ This occurred after twenty-five years of Soviet presence in Cuba.

While the focus of this article is on the interaction of the United States with those who have fled Cuba, the situation of those migrants should be viewed in the context of the United States’ relationship with that country. Although the Cold War is not a feature of the 1990s, still the United States’ relationship with Cuba has been marked by policies that emanate therefrom. It has been an acrimonious relationship ever since Castro came to power. Operation Mongoose was launched in 1961. Operation Mongoose, launched in 1961, included attempts to assassinate Castro by “exploding cigars, poisoned diving suits, paramilitary attacks, and a pen with a poisoned needle.”⁶² More than thirty-five years later, there was agitation to deny a visa for Castro to join 150 “leaders, including kings, presidents and prime ministers”⁶³ in New York to mark the United Nations 50th Anniversary.⁶⁴ Castro “was issued a very limited visa,”⁶⁵ but did receive “the strongest applause of any speaker in the opening session”⁶⁶ of the U.N. general assembly. Castro also found support for his view that the U.S. trade embargo of Cuba should end.⁶⁷

That embargo was imposed by President Kennedy in 1962 pursuant to

57. MASUD-PILOTO II, *supra* note 15, at 29.

58. See Andrew Phillips, *Soul-searching in Cuba*, MACLEAN’S, Feb. 2, 1998, at 34.

59. George J. Church, *Cubans Go Home*, TIME, Sept. 5, 1994, at 34.

60. MARCIA FRIEDMAN, CUBA—THE SPECIAL PERIOD (1998).

61. See CHI. SUN-TIMES, June 16, 1993, at 8; see also *Russia to Withdraw Brigade that was Sent to Cuba in 62*, N.Y. TIMES, Sept. 17, 1992, at A15. The Soviet Union then no longer existed, having dissolved in 1991. See Union of Soviet Socialist Republics, 1992 BRITANNICA BOOK OF THE YEAR 443. The previous constituent states were renamed the Commonwealth of Independent States. See U.S. COMM. ON REFUGEES, WORLD REFUGEE SURVEY 1992, 78 (1992); 1992 BRITANNICA BOOK OF THE YEAR (Cuba).

62. *The U.S. and Cuba: A Tense History*, N.Y. TIMES, Aug. 22, 1994, at C7. From 1960 - 1965 the U.S. Central Intelligence Agency (CIA) was involved in at least 8 attempts to assassinate Fidel Castro. See Scanlan & Loescher, *supra* note 6, at 117 n. 2.

63. Terry Atlas, *GOP howls, but Clinton will OK Castro visa for UN visit*, CHI. TRIB., Oct. 11, 1995, at 13.

64. “As host country for the UN, the U.S. has an obligation to grant [Castro’s] visa request and has never turned down such a request from a head of state to attend the UN . . .” *Id.*

65. Lizette Alvarez, *For Castro’s Visit, Both Cold Shoulder and ‘Fidelmania,’* N.Y. TIMES, Oct. 20, 1995, at A5. Castro was excluded from some social events associated with the U.N. Anniversary. See Atlas, *supra* note 63.

66. Doyle McManus, *Castro Chides UN, Blasts U.S.*, CHI. SUN-TIMES, Oct. 23, 1995, at 3; see Lizette Alvarez, *Castro Goes to Lunch, Dishes Up Old Themes*, N.Y. TIMES, Oct. 24, 1995, at A7.

67. See Alvarez, *supra* note 65.

Congressional authority,⁶⁸ and was linked to “the subversive offensive of Sino-Soviet Communism with which the Government of Cuba is publicly aligned”⁶⁹ The United States is the only country, which prohibits trade with Cuba,⁷⁰ and the United Nations has disagreed with that policy.⁷¹ Notwithstanding its isolated position, thirty years after the first U.S. embargo, the U.S. tightened its position with the Cuban Democracy Act (Torricelli Bill).⁷² It is understandable why the United States would resort to an economic boycott to attempt to force political changes in Cuba. Since the resolution of the nuclear crisis with the Soviet Union prohibited the United States from invading Cuba, it does not have that option to express its policy disapproval, as it did in 1983 with the invasion of another Caribbean nation.⁷³ The embargo represents an effort by the United States to force political changes in Cuba and has resulted in some convictions.⁷⁴ Although that embargo has been in effect since 1962, a year after the Bay of Pigs invasion, political changes have not materialized.⁷⁵ Nonetheless, the U.S. has added to

68. See Foreign Assistance Act of 1961, § 620(a), 75 Stat. 445 § 62 (1962).

69. Presidential Doc., Proclamation 3447, Embargo on All Trade with Cuba, Feb. 3, 1962.

70. See *The Senate Votes to Tighten Curbs on Trade With Cuba*, N.Y. TIMES, Oct. 20, 1995, at A5.

71. See Youssef M. Ibrahim, *U.N. Votes, 157-2, in Nonbinding Referendum Against U.S. Embargo of Cuba*, N.Y. TIMES, Oct. 15, 1998, at A12.

72. 22 U.S.C. §§ 6001-6010 (1993). See generally Julia P. Herd, Note, *The Cuban Democracy Act: Another Extraterritorial Act That Won't Work*, 20 BROOKLYN J. INT'L L. 397 (1994); Berta Esperanza Hernández-Truyol, *Out In Left Field: Cuba's Post-Cold War Strike-out*, 18 FORDHAM INT'L L.J. 15 (1994); Trevor R. Jeffries, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUSTON J. INT'L L. 75 (1993); Allen DeLoach Stewart, Comment, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LA. L. REV. 1389 (1993).

73. See Larry Rohter, *13 Years After Invasion, Grenada Agonizes Anew*, N.Y. TIMES, May 21, 1997, at A4; see also *Memories, emotions run high in Grenada during Castro visit*, STAR TRIB., Aug. 3, 1998, at A1. The U.S. justified its military intervention in Grenada by the need “to protect U.S. medical students at a university” *Id.*

74. See, e.g., *U.S. v. Mako*, 994 F. 2d 1526 (8th Cir. 1963) (conviction for exporting machinery to Cuba); *Wash v. Brady*, 927 F. 2d 1229 (D.C. Cir. 1991) (prohibition on poster importer from paying for travel to Cuba to obtain posters); *U.S. v. Fuentes-Coba*, 738 F. 2d 1191 (11th Cir. 1984) (conviction for shipment of airline parts and communication equipment to Cuba); *Capital Cities ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990) (involving broadcast of 1991 Pan American games). As exemplified by some of the above cases, the trade embargo is solidified by restrictions on travel-related transactions. See *infra* notes 86-95 and accompanying text.

75. Just before the 36th anniversary of the Cuban revolution, Fidel Castro acknowledged he has obtained some “political mileage” from the embargo, but he insisted that “it would never force the sort of political opening that has been its stated goal.” He said:

The United States did not blockade South Africa. It does not blockade Saudi Arabia where few rich families own all of the wealth. The United States does not dictate political conditions to China. It does not dictate political conditions to Vietnam. Why does it have to dictate political conditions to us?

Tim Golden & Larry Rohter, *An Evening With Castro, 36 Years and No Regrets*, N.Y. TIMES, Dec. 13, 1994, at A1. Castro also stated he had “reservations about market-oriented reforms

its legislative arsenal against Cuba.

Among the purposes of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (known as the Helms-Burton Act)⁷⁶ is strengthening the economic embargo. This Act codifies what were executive orders and thus Congress must now be involved in lifting the embargo.⁷⁷ The statute was passed in response to Cuba's shooting down civilian planes over international waters,⁷⁸ which killed three U.S. citizens and a Cuban national⁷⁹ operating for Hermanos Al Rescate or Brothers to the Rescue (BTTR). The BTTR "fits among the most uncompromising anti-Castro organizations in the political spectrum of Cuban exiles . . ." ⁸⁰ The BTTR incident has no direct relationship to nationals leaving Cuba, but provides a backdrop for United States response to that migration. Two provisions of Helms-Burton are controversial.

Title III⁸¹ permits suits in American courts against companies that "traffic" in Cuban property seized when Castro took power decades ago.⁸² Title

his government has undertaken to save an economy devastated by the collapse of the Soviet Bloc." *Id.*

76. 22 U.S.C. § 6022 (1997). See generally Note, *The Helms-Burton Act: Is the U.S. Shooting Itself in the Foot?*, 35 SAN DIEGO L. REV. 897 (1999); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289 (1997); Andreas F. Lowenfeld, Note, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) at: Congress and Cuba: The Helms-Burton Act*, 90 A. J. I. L. 419 (1996); Richard D. Porotshy, Note, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and the Utility of the 35-Year-Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901 (1995).

77. See Michael Wines, *Senate Approves Compromise Bill Tightening Curbs on Cuba*, N.Y. TIMES, Mar. 6, 1996, at A7.

78. There was a dispute between Cuba and the U.S. about the location of the planes, with the former claiming they were within Cuba's 12-mile territorial airspace and the latter denying it. See *U.S. Shows Cuba it Erred in Shootdown*, CHI. TRIB., Mar. 17, 1996, at 16. However, prior thereto BTTR "had apparently violated Cuban airspace in the past and a third plane did so [in the February 1996 incident] before returning safely to Florida at the time the other two were downed. Cuba had warned the United States that it might shoot down the pilots if they entered Cuban territory." *Clinton Seeking Wider Sanctions Against Cubans*, N.Y. TIMES, Feb. 27, 1996, at A1.

79. Of the citizens of Cuban descent, two were born in the United States and the third was born in Cuba although a resident of Miami from an early age who became a naturalized citizen. See *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S. D. Fla. 1997). Damages of \$187.5 million against Cuba were awarded. In *Alejandro*, plaintiffs were allowed to collect part of that judgment "by garnishing debts owed to a Cuban telecommunications company," but the judgment was vacated by *Alejandro v. Telefonica Large Dist. De Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999).

80. Mireya Navarro, *Pilots' Group, Firm Foe of Castro, Ignored Risks*, N.Y. TIMES, Feb. 26, 1996, at A5. It had flown 1800 flights before its first casualties in the February 1996 incident. Its supporters condemned Cuba for shooting down unarmed civilian aircraft while others contended that BTTR should not have engaged in provocative action. BTTR was founded by veterans of the Bay of Pigs and has engaged in provocative actions against Cuba, such as dropping leaflets over the island. See Bello-Puente, *infra* note 208, at 16.

81. 22 U.S.C. § 6081 (1998).

82. The President can suspend this provision and Clinton has waived it repeatedly. See *Helms-Burton: Two Years Later, Hearing before Subcomm. on International Economic Policy*

IV denies entry into the United States of any individual who “traffics” in property confiscated by Cuba or a person who is an officer, principal or controlling shareholder of an entity which has been involved with confiscated property.⁸³ Excluding persons from the U.S. “is a time-honored component of U.S. foreign policy, intended to signal to a foreign government that the U.S. does not approve of its actions.”⁸⁴ Other countries have expressed opposition to the Helms-Burton law.⁸⁵ This law attempts to isolate Cuba, by among other things, forcing companies to choose between doing business in Cuba and having its officials come to the United States. While Helms-Burton prevents persons from coming *into* the United States based upon certain involvement in Cuba, other measures are designed to keep persons from going *out of* the United States into Cuba. Refusing United States entry to executives of companies that “traffic” in confiscated Cuban property has not impacted large numbers of persons.⁸⁶ However, restrictions on travel *from* the United States *to* Cuba affect many more.⁸⁷

A travel ban was first imposed in 1961, and the Supreme Court considered its validity in *Zemel v. Rusk*,⁸⁸ a six to three decision. The majority held that the Passport Act of 1926⁸⁹ authorized the State Department’s refusal to validate U.S. passports for travel to Cuba. They further held that there was no constitutional impediment to area travel restrictions.⁹⁰ Significantly, the Court was impressed that the restriction was imposed “because of foreign policy considerations affecting all citizens.”⁹¹ Its necessity was found in the fact that “Cuba is the only area in the Western Hemisphere controlled by a

& Trade, Com. Int’l Relations, 105th Cong., 2d Sess. (Mar. 12, 1998) at 77-79.

83. See 22 U.S.C. § 6091 (1998).

84. 76 INTERP. REL. 293 (Mar. 11, 1996).

85. See Anthony DePalma, *Canada and Mexico Team Up To Oppose U.S. Law on Cuba*, N.Y. TIMES, June 15, 1996, at A9.

86. Since Helms-Burton, 19 “firms from over six countries have changed their plans for investment in Cuba or have pulled out of investments there.” Fifteen executives from one firm have been kept out of the United States because of involvement with U.S.-claimed property in Cuba. *Helms-Burton Two Years Later, Hearing before the Subcomm. on Int’l Policy and Trade of the Comm. on Int’l Relations*, H.R. 105th Cong., 2d Sess. (Mar. 12, 1998).

87. Between 120,000 and 140,000 people are estimated to travel from the U.S. to Cuba annually. See Todd S. Purdum, *Clinton Seeking Wider Sanctions Against Cubans*, N.Y. TIMES, Feb. 27, 1999, at A1. But the travel restrictions function as a deterrent to persons who do not qualify for a license and/or will forego travel to a location where transportation must be through a third country.

88. 381 U.S. 1, *reh’g denied*, 382 U.S. 873 (1965).

89. 44 Stat. 887, 22 U.S.C. § 211a (1958), *cited in Zemel v. Rusk*, 381 U.S. 1 (U.S. Conn. 1965).

90. The Court found that under the 1926 Act, the President could impose area restrictions since he had “openly asserted the power” under earlier versions of the statute. Since the Congress did not change the language, it was concluded that the legislature intended to maintain that authority. By a 1938 Executive Order (E.O. 7856, 3 Fed. Reg. 681, 687) the President had delegated to the Secretary of State the authority to establish area restrictions, which were in effect at the time of the *Zemel* decision. See 22 C.F.R. § 51.75.

91. *Zemel*, 381 U.S. at 13.

Communist government . . . [and] that a major goal of the Castro regime is to export its Communist revolution to the rest of Latin America . . . [and] that travel . . . is an important element in the spreading of subversion"⁹²

Although *Zemel* upheld the State Department's 1961 area passport ban, a 1978 amendment to the Passport Act prohibited the executive branch from establishing peacetime travel restrictions, except for health and safety reasons.⁹³ It thus removed the authority of the Secretary of State to place area restrictions on U.S. passports.⁹⁴ But that had no effect on the government's restrictions on travel to Cuba or the Court's need to consider constitutional questions. Upholding restrictions on travel-related transactions with Cuba in *Regan v. Wald*,⁹⁵ the Supreme Court noted their prevention of travel to Cuba was "justified by weighty concerns of foreign policy."⁹⁶ Those concerns undoubtedly prompted cancellation of direct flights from Miami to Havana following the BTTR incident mentioned above.⁹⁷ Foreign policy concerns certainly dictated the U.S. response to flight from Cuba discussed in the following sections.

III. CUBAN MIGRATION POST-CASTRO TO 1994

The revolution introduced a massive redistribution of political power and wealth 'away from those entrenched groups that benefited from the pre-Revolutionary order and toward those who have been disadvantaged. . . .' This revolution eventually brought about the most equitable intra-national distribution of income in Latin America.⁹⁸

92. *Id.* at 14. Dissenting Justices Douglas and Goldberg were concerned that the ban on travel to Cuba was not based on a congressional determination or congressional action specifically giving the executive the right to do so, but only on State Department action. In dissent, Justice Goldberg believed that Congress had the power to impose area restrictions on travel, but could not find it had done so or granted authority to the executive by the Passport Act of 1926.

93. *See generally id.*

94. *See* Pub. L. No. 95-426 § 124, 92 Stat. 971 (1978).

95. 468 U.S. 222 (U.S. Mass. 1984). In a previous case, the court had reversed convictions of persons who arranged travel to Cuba as there was no statute authorizing criminal sanctions. *See* U.S. v. Laub, 385 U.S. 475 (U.S.N.Y. 1967).

96. *Regan*, 468 U.S. at 242. *See* 28 Fed. Reg. 5974, 31 C.F.R. § 515.101 (1963). Currently, travel restrictions are implemented by the Cuban Assets Control Regulations (CACR) promulgated by the Department of Treasury, Office of Foreign Assets Control, pursuant to the Trading With the Enemy Act of 1917 under which the president delegated rule-making authority. "The basic goal of the sanctions is to isolate Cuba economically and deprive it of U.S. dollars." U.S. Treasury Department, Office of Foreign Assets Control, Cuba Travel Restrictions (May 1998). Travel to Cuba is not banned per se but the expenditure of U.S. currency for these purposes is prohibited. *See* 50 U.S.C. § 5(b) (1988). There are exceptions from current prohibitions for journalists and persons with close relatives in Cuba.

97. *See* Purdum, *supra* note 87, at A1.

98. PETER H. KOEHN, REFUGEES FROM REVOLUTION—U.S. POLICY AND THIRD-WORLD MIGRATION 59 (1991).

The phenomenon of Cubans coming to the United States predates Castro's ascension to power in 1959. In fact, it "precedes the establishment of the Cuban nation" and was "linked to major political events and economic conditions on the island."⁹⁹ However, the massive wave of Cubans who came after Castro undoubtedly influenced "a series of steps undertaken by the United States to isolate diplomatically, deprive economically, discredit ideologically, and—prior to 1965—overthrow violently the Castro regime."¹⁰⁰ The U.S. responded politically to Cuban migration to the United States beginning with President Eisenhower, and continuing through Presidents Kennedy, Johnson, Nixon, Carter and Clinton. There was the free airlift starting in August 1961;¹⁰¹ followed by the Camarioca Boatlift in September 1965; then the Cuban Airlift from November 1965 until April 1973; next came the "Freedom Flotilla" of the Marielitos¹⁰² in 1980; followed by the *balseros* in 1994, and finally those attempting entry after Cuba-U.S. migration agreements of 1994 and 1995. The Cubans' flight is bracketed by U.S. foreign policy issues and Fidel Castro's use of human migration for his own purposes.

Unlike tourists who come for temporary visits, immigrants who seek to remain in the United States, generally come with family based or employment based visas.¹⁰³ There are also those who are admitted as refugees, which generally requires that the person be outside of his/her country of nationality.¹⁰⁴ Each year the number of refugees to be admitted from a particular region, are specified.¹⁰⁵ However, foreigners who are already in the United States may seek asylum, for which they must be determined to be a refu-

99. Lisandro Pérez, *Cubans in the United States*, 467 ANNALS AM. ACAD. 126, 127 (1986). For a statistical compilation of Cubans admitted to the United States from 1871 to 1958 see *id.* at 128, tbl. 1.

100. *Id.* at 117. The option of Castro's violent overthrow was curtailed by resolution of the missile crisis which resulted in a pledge by the U.S. not to use military aggression against Cuba. See *supra* text accompanying note 54.

101. For example, President Kennedy responded to Cuba's requirement that flights be paid for in dollars by providing air transportation at a cost of \$350,000. See MASUD-PILOTO II, *supra* note 15, at 52.

102. Although the author has been advised that some consider the term Marielito to be pejorative, its use herein is not so intended. It has often been employed to refer to the 125,000 Cubans who migrated from the Port of Mariel, so it avoids confusion to use the same term. Marielito implies no negative opinion about the Cubans involved therein. Moreover, the characterization of Marielitos as "criminals or social misfits" is a totally false image. See MASUD-PILOTO II, *supra* note 15, at 94, 97.

103. See INA § 203(a), (b), 8 USC § 1153(a), (b) (1999).

104. Not considered separately in this article are Cubans who obtain entry to the United States by being designated refugees while still in Cuba. To be outside of ones country is an aspect of the refugee definition. However, "in special circumstances" INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B), allows persons to be deemed refugees notwithstanding location in his/her own country. Persons from three countries are eligible to be so considered under the 1999 designation: Cuba, Vietnam and the Soviet Union. See William J. Clinton, *Memorandum for the Secretary of State re FY 1999 Refugee Admissions Consultations*, 75 INTERP. REL. 959 (July 13, 1998).

105. See Clinton, *supra* note 104.

gee.¹⁰⁶ Of greater importance as one considers flight from Cuba is the admission to the United States of persons apart from the above scheme envisioned by the Immigration and Nationality Act (“INA”).

Among the early arrivals in the United States were persons associated with Batista, the Cuban president deposed by Castro.¹⁰⁷ They came as “self-imposed political exiles” who in Cuba had “held positions of wealth, privilege, and power . . .”¹⁰⁸ They were not determined to be refugees, which requires that one be individually persecuted or in danger of persecution because of race, religion, nationality, social group or political opinion.¹⁰⁹ Indeed, they came before the U.S. Refugee Act of 1980.¹¹⁰ Until the U.S. Consulate closed in January 1961, Cubans could obtain visas.¹¹¹ Persons who obtained nonimmigrant tourist visas merely overstayed the visa and remained in the U.S. Then possession of a visa was waived.¹¹² Following a speech by President Kennedy during the Cuban missile crisis in 1962, Castro stopped Cubans from emigrating to the U.S.¹¹³ and commercial air traffic was halted.¹¹⁴ As President Lyndon Johnson signed a bill to change the basis of immigration to the United States,¹¹⁵ he welcomed all Cubans as refugees,

106. See INA § 208, 8 U.S.C. § 1158 (1999).

107. See Scanlan & Loescher, *supra* note 6, at 117.

108. *Id.* at 119.

109. Currently the refugee definition is in INA § 101(a)(42), 8 U.S.C. § 101(a)(42) (1999). However, the U.N. Convention relating to the Status of Refugees July 28, 1951, 19 U.S.T. 6529, T.I.A.S. No. 6577 contained the same requirement as early as 1951.

110. Refugee Act of 1980, Act of Mar. 11, 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980), codified in scattered sections of 8 U.S.C.

111. MASUD-PILOTO I, *supra* note 3, at 34. See also S. Rep. No. 1675, 89th Cong., 2d Sess. 2 (1966).

112. See H.R. 1978, 89th Cong., 2d Sess., at 2 (1966). INA § 212 (d)(4), 8 U.S.C. § 1182 (1993) authorizes waivers for unforeseen emergencies. It has been suggested that in the 1960's the visa waiver program was for nonimmigrants and thus inapplicable to Cubans who intended to remain in the U.S. for an indefinite period. See J. Patton Hyman, III, *The Status of Cuban Refugees in the United States*, 21 U. FLA. L. REV. 73, 75 (1968). The Peter Pan (Pedro Pan) program was intended to be temporary. See MASUD-PILOTO II, *supra* note 15, at 39. Over 14,000 children came. See *id.* at 40, 41. “[T]he State Department gave a young Miami priest the extraordinary authority to allow entry, without a visa, of Cuban children, age 6 to 16.” *Pedro Pan—60's evacuation of Cuban kids created broken families*, CHI. TRIB. Jan. 12, 1998, at 11. The children were sent unaccompanied to the U.S. waiting for their parents to obtain visas or for Castro to be ousted, which was expected shortly. But the Cuban missile crisis of October 1962 led to the cessation of flights to the U.S. and the children were under foster care with funding by the U.S. government. See generally YVONNE M. CONDE, OPERATION PEDRO PAN: THE UNTOLD EXODUS OF 14,000 CUBAN CHILDREN (1999).

113. See LOESCHER & SCANLAN, *supra* note 3, at 64.

114. See vol. 12, pt. 17 CONG. REC. 22,914 (1966) (statement of Rep. Feighan).

115. President Johnson talked of a bill which had its genesis under President Kennedy and which changed the basis of immigration to the U.S. He indicated that persons would “be admitted on the basis of their skills and their close relationship to those already here. . . .” and noted that in the past, “only 3 countries were allowed to supply 70 percent of all the immigrants.” As for Cubans, he said “. . . I declare this afternoon to the people of Cuba that those who seek refuge here in America will find it.” *Remarks at the Signing of the Immigration Bill, Liberty Island*, 2 PUB. PAPERS 1038, 1039 (Oct. 3, 1965). For an analysis of the changes

even though a CIA assessment indicated that most Cubans were “disaffected because of the economic situation and not political repression.”¹¹⁶ An “airlift, also called the freedom flights, started in December, 1965 and lasted until 1973.”¹¹⁷

There were 690,000 Cubans who gained entry to the U.S. between 1962 and April 1979 through the parole power.¹¹⁸ Initially that power was intended to provide for the temporary entry of an *individual* alien in emergency circumstances.¹¹⁹ But parole was used for Cubans as a “highly politicized admission device” for massive numbers.¹²⁰ Neither Cubans nor the U.S. government officials thought the former would stay for any significant period. But in 1966, eight years after Castro assumed power, the Cubans who fled were still in the United States. Most of these Cubans were not permanent

wrought by the 1965 immigration revisions, see Charles B. Kelly, *Effects of the Immigration Act of 1965 on Selected Population Characteristics of Immigrants to the United States*, 8 DEMOGRAPHY 157 (1971).

116. MASUD-PILOTO II, *supra* note 15, at 60. If a person is forced to leave his country “exclusively by economic considerations, he is an economic migrant and not a refugee.” Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 62 (Jan. 1992) [hereinafter *Handbook*]; see also *Kovac v. INS*, 407 F.2d 102, (9th Cir. 1969); *Youssefina v. INS*, 784 F.2d 1254, 1261 (5th Cir. 1986); *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996).

117. Pérez, *supra* note 99, at 130. More than 260,000 persons came on the flights which occurred 2 times per day.

118. See Ira Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 867 n.31 (1982).

119. See INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1952) (amended 1980) provided:

The attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall for with return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any applicant for admission to the United States.

Currently the law prohibits the Attorney General from using parole to bring refugees into the United States unless there are “compelling reasons in the public interest with respect to that particular alien”

INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B) (emphasis supplied):

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than admitted as a refugee

Id. Nonetheless, parole was used to admit more than 20,000 Cuban *balseros* in 1995. See *infra* text accompanying notes 184-187.

120. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 18-19 (1981). In 1956 upon the request of President Eisenhower, parole was used to admit 21,500 Hungarians following the Soviet invasion. *Id.* at 15. See also *infra* Sections III and V.

resident aliens. This lawful resident alien status is a precursor to citizenship, and also necessary for certain occupations.¹²¹ Hence the Cuban Adjustment Act of 1966 [CAA],¹²² and a case decided thereunder is illustrative of the nature of the U.S. response to Cubans.

Indeed, there are few reported federal court cases dealing with pre-1980 Cuban migrants,¹²³ but two involve the CAA,¹²⁴ which makes inspected and admitted or *paroled* Cubans eligible to become permanent residents after one year in the United States. The result in *Matter of Masson*,¹²⁵ a 1968 BIA decision, demonstrates that while the CAA's purpose "was to grant benefits to Cubans who had fled as refugees from the Fidel Castro government of Cuba,"¹²⁶ in fact it encompassed all Cubans. Masson was born in Cuba but left that country long before the Castro revolution. Yet he was able to adjust his status under CAA.¹²⁷ The result in *Masson*, along with knowledge that President Kennedy launched for Cubans "the largest, longest-running, and most expensive aid program for refugees from Latin America ever undertaken by the United States"¹²⁸ initially might suggest that court decisions would always favor Cubans. But just as the expenditure of over a billion dollars on the Cuban Refugee Program, which aided more than 700,000 Cubans, "failed to overthrow Castro,"¹²⁹ so too being a hero of anti-Castro efforts failed to extricate a Cuban from the adverse consequences of general United States law applicable to migrants.

Avila v. Rivkind,¹³⁰ involved an anti-Castro Cuban who initially came to the U.S. as a nonimmigrant visitor in 1958 and again in 1960. Orlando Bosch, a "hero of Cuban resistance to Castro's Communist takeover,"¹³¹ was affected adversely by legal rules then governing immigration. In 1968 he was convicted in the U.S. of various criminal offenses "associated with placing explosives on vessels of foreign registry"¹³² and threats made to heads of

121. At the time, 41 states insisted that physicians be either permanent residents or U.S. citizens in order to obtain a license. See CONG. REC. 22,915 (1966). The same was true for "architects, dentists, lawyers, nurses and teachers." *Id.*

122. Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (1999)).

123. See *Ribas v. Commissioner of Internal Revenue*, 54 T.C. 1347 (T.C. 1970); *Bosch v. Commissioner*, 29 T.C.M. (CCH) 284 (1970). Both cases were tax court cases involving Cubans who came to the United States in 1960 and 1961. Claims in both cases were entangled with Cuba's nationalization of properties left behind.

124. See *Federation for American Immigration Reform (FAIR) v. Meese*, 643 F. Supp. 983 (S.D. Fla. 1986); *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).

125. 12 I. & N. Dec. 699 (BIA 1968).

126. *Id.*

127. See *id.*

128. *MASUD-PILOTO II*, *supra* note 15, at 54.

129. *Id.*

130. 724 F. Supp. 945 (S.D. Fla. 1989).

131. *Id.* at 946. Although the case caption does not have the hyphen usual in Spanish and Latin names, plaintiff was Orlando Bosch-Avila.

132. *Id.* at 946.

countries which traded with Cuba to destroy planes and ships of that country's registry. He was sentenced for the crime and paroled but then violated its terms by leaving the U.S. In Central and South America he was the head of CORU, an anti-Castro organization. While in Venezuela he was imprisoned based on charges of conspiracy to bomb a Cuban plane. Upon release from Venezuelan confinement he entered the U.S. without any documents and was arrested because of a warrant issued previously for violating parole. His sentence for that violation was just three months but he was then placed in custody of the Immigration and Naturalization Service [INS]. After his case was considered for more than a year, INS officials concluded that he should *not* be excluded from the U.S. as a security risk. But when the case was sent to the Attorney General for further review, a Final Order of Exclusion was issued based on a finding that plaintiff *was* in fact a security risk.¹³³

The Florida district court noted that an alien seeking admittance to the U.S. has "no absolute substantive constitutional right,"¹³⁴ but rather is "requesting a privilege."¹³⁵ It concluded Bosch's exclusion was supported under the then existing statutory grounds.

Avila foreshadows the result for some Cubans who came with the Mariel Freedom Flotilla. Like Bosch, some Marielitos were ruled inadmissible when existing immigration laws were applied to them, despite the fact they fled from a country considered by the United States to be a pariah. Thus, usual legal practices trumped the foreign policy and political motivations for treatment of Cuban migrants. Initially, the annual flow of Cubans to the U.S. was "a small enough number to allow for a relatively normal immigration procedure."¹³⁶ The U.S. handled the Camarioca Boatlift and the "Cuban airlift, the largest airborne refugee operation in American history,"¹³⁷ without making any adjustments to the legal regime governing admission to the United States. Cubans were simply paroled¹³⁸ into the U.S. There were also no adjustments to the view that persons who fled Cuba were voting against Communism although a Central Intelligence Agency assessment concluded that most were "disaffected because of the economic situation and

133. *See id.* at 947. Orlando Bosch was responsible for Cuba unilaterally disavowing in 1976 an anti-hijacking agreement with the United States of three years earlier. After he blew up a Cuban plane, which Cuba deemed a "CIA plot," the agreement was terminated. *See MASUD-PILOTO II*, *supra* note 15, at 96.

134. *Avila*, 724 F. Supp. at 947.

135. *Id.* Relying upon the 1953 Supreme Court decision in the leading case of *Mezei*, the court said the procedural process for one seeking admission is only that which Congress determines. *See Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206 (U.S.N.Y. 1953).

136. *MASUD-PILOTO II*, *supra* note 15, at 58. The phrase "normal immigration procedure" is somewhat misleading in that Cubans did not come by having to qualify for available visas or to individually establish refugee status. Indeed, *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979) argued that charging against the Western Hemisphere quota the visa numbers assigned to approximately 145,000 Cubans operated to the detriment of plaintiffs, unprocessed visa applicants from other Western Hemisphere countries.

137. *MASUD-PILOTO II*, *supra* note 15, at 68.

138. *See supra* notes 118-20 and accompanying text.

not political oppression.”¹³⁹ Before the Freedom Flotilla in 1980, President Carter had announced the U.S. would “continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation brought about primarily by Fidel Castro and his government.”¹⁴⁰ The “open heart and open arms” speech prompted 125,000 Cubans to leave from the Port of Mariel to come to the United States in what is known as the Freedom Flotilla. A boatlift had already commenced after an incident at the Peruvian embassy in April 1980, a month before the speech. Initially only six Cubans were involved, but after “Cuban radio announced that anyone who wanted to leave the country should go to the Peruvian embassy,”¹⁴¹ it was inundated by 10,000 people. Castro’s view was that they were not persecuted refugees but merely people who wanted a better economic life.¹⁴² However, he opened the Port of Mariel to “anyone whose relatives in the states came to Mariel to claim them.”¹⁴³ Thus, “Carter’s ‘open hearts and open arms’ remarks were interpreted as a signal of proceed with the boatlift.”¹⁴⁴ But unlike prior administrations, the legal landscape had changed.

Under the Refugee Act of March 1980, passed only five weeks before Mariel, the United States had placed a yearly quota of 19,500 refugees from Cuba. In addition, individual case reviews were required before refugee status was granted. . . . Technically and legally, the Cubans were simply undocumented aliens seeking asylum, not refugees.¹⁴⁵

The U.S. tried to dissuade the Freedom Flotilla, but ultimately 125,000 Cubans came. Some Marielitos became “confused and frustrated”¹⁴⁶ as they were detained, although most ultimately were released. Issues of inadmissibility and detention are associated with the Marielitos but “the treatment of members of the Freedom Flotilla was only unusual because for the first time Cuban refugees were encountering some of the same problems that refugees from other countries had encountered.”¹⁴⁷ However, some Mariel Cubans did

139. MASUD-PILOTO II, *supra* note 15, at 60.

140. Remarks of President Jimmy Carter made in response to a question from a representative of the League of Women Voters at a May 5, 1980 press conference, referred to as the “open heart and open arms statement.” See *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 n.16 (N.D. Ga. 1985). To link the word “refugee” with economic deprivation as the “open hearts, open arms” speech did, expands the legal understanding of “refugee.” See *supra* notes 109-10.

141. MASUD-PILOTO II, *supra* note 15, at 79.

142. See *id.* at 80.

143. *Id.* at 83.

144. *Id.*

145. MASUD-PILOTO II, *supra* note 15, at 84.

146. *Id.* at 86.

147. Richard A. Boswell, *Throwing Away the Key: Limits on the Plenary Power? Review of Felix Masud-Piloto, from Welcomed Exiles to Illegal Immigrants: Cuban Migration to the U.S., 1959-1995 and Mark S. Hamm, The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People*, 18 MICH. J. INT’L L. 689, 703 (1997).

differ from predecessor Cuban migrants. Of importance is “a matter that has been largely ignored by most writers on the subject of the freedom flotilla,” “[T]hose who arrived in the Flotilla and were subsequently incarcerated were (*sic*) overwhelmingly Afro-Cuban origin . . .”¹⁴⁸ While the indefinite incarceration of some Mariel Cubans is beyond the scope of this article,¹⁴⁹ it should be emphasized that because those incarcerated are mostly Afro-Cuban, their detention implicates the U.S. color-based approach to decision-making rather than proving that Cubans are not “special favorites.”

In fact, the “special favorites” notion is confirmed by the result of a legal challenge associated with the entry of Marielitos. An *en banc* Eleventh Circuit Court of Appeals affirmed the dismissal of eighty-four indictments against persons who brought 125,000 Cubans to Florida.¹⁵⁰ One author asserts “the Mariel boatlift clearly showed that the United States had no control over immigration from Cuba.”¹⁵¹ Indeed, when the U.S. tried to stop the departure from Cuba, Castro “defiantly told Carter that Mariel Harbor would remain open.”¹⁵² As Masud-Piloto concludes:

From April 20 to September 26, 1980, Cuban immigration to the United States was directed from Havana, not Washington. The Cuban government unilaterally decided when to open and when to close Mariel Harbor for emigration, directed marine traffic to and from Mariel, and decided on each of the 125,000 Cubans who came to the United States during the five months the operation lasted.¹⁵³

While Cuba did play a central role in the events of 1980, it was the U.S. political policies that set the stage. Castro’s “good riddance” to “anybody

148. Boswell, *supra* note 147, at 707. It could be argued that color based discrimination thus trumps favored nationality status.

149. See, e.g., Elizabeth Gail Marlowe, *The Availability of Constitutional Safeguards to Detain Cuban Aliens*, 17 GA. J. INT’L. & COMP. L. 153 (1987); Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VANDERBILT J. TRANSNAT’L L. 925 (1984); Philip Erickson, *The Saga of Indefinitely Detained Mariel Cubans: Garcia-Mir D. Meese*, 10 LOY. L.A. INT’L & COMP. L.J. 271 (1998). See also *Gisbert v. U.S.*, 988 F.2d 1437, 1439 n.4 (5th Cir. 1993):

In December, 1984, Cuba and the United States reached an agreement pursuant to which Cuba was to take back 2,746 Mariel Cubans. Cuba suspended the agreement in May 1985, after only 201 excludable Cubans had been returned. In November 1987, Cuba agreed to resume implementation of the 1984 agreement.

Id. Another agreement in 1993 related to Marielitos who had committed crimes in the U.S. In September 1993 there were “4500 Cuban prisoners in 37 federal prisons.” *U.S. Returning 1500 Cuban Prisoners to Castro*, CHI. TRIB., Sept. 29, 1993, at 12.

150. See *Pollgreen v. Morris*, 770 F.2d 1536 (11th Cir. 1985). See also *U.S. v. Armendaris*, 600 F. Supp. 119 (S.D. Fla. 1984); *United States v. Anaya*, 509 F. Supp. 289 (S.D. Fla. 1980), *aff’d*, 685 F.2d 1271 (11th Cir. 1982).

151. MASUD-PILOTO II, *supra* note 15, at 87.

152. *Id.* at 85.

153. *Id.*

who wishes to go to any other country where he is received,"¹⁵⁴ obviously was dependent on the attitude of the receiving country. Therefore, the 1980 Freedom Flotilla from Cuba did not depend on either Cuba or the United States alone. Indeed, the 1980 "Mariel exodus proved that both sides could play refugee politics."¹⁵⁵ That political game was played again almost fifteen years later. The practical result for those fleeing Cubans was the same: parole into the United States. But as the next section demonstrates, there was a major U.S. policy change.

IV. THE *BALSEROS* AND A POLICY CHANGE

They set out in foam boxes, inner tubes and packing crates that pass for rafts, loading their flimsy vessels with bare essentials—a plastic container with water, fried meat and bread, an image of the Catholic virgin or a Santeria deity tucked away, a compass pointing north.¹⁵⁶ On August 19, 1994, President Bill Clinton closed the doors that had been opened to Cubans for more than thirty-five years. From that day on, Cubans were intercepted at sea and transported to detention camps at the U.S. Naval Station at Guantánamo Bay, Cuba.¹⁵⁷

In December 1980, Fidel Castro said "'Mariel has not been resolved, it has simply been suspended.'"¹⁵⁸ In August 1994 another exodus from Cuba occurred which some called Mariel II.¹⁵⁹ This time the migrants came in rafts, leading to their appellation *balseros* (rafters). Many were people born after Castro took power in 1959 and it was whispered that many were dark-skinned.¹⁶⁰ Their reception by the U.S. was significantly different from those who came in the 1980 Freedom Flotilla. Instead of promising an "open heart and open arms," President Clinton initially did not allow the *balseros* to en-

154. MASUD-PILOTO II, *supra* note 15, at 85 (quoting MIAMI HERALD, May 2, 1980, at 30a).

155. MASUD-PILOTO II, *supra* note 15, at 95.

156. Mireya Navarro, *Scores of Cubans, in Flight, Perish in Florida Straits*, N.Y. TIMES, Aug. 24, 1994, at A1.

157. MASUD-PILOTO II, *supra* note 15, at xix.

158. Pérez, *supra* note 99, at 130.

159. See *Cuban Exodus is Unlike 1980 Flight*, N.Y. TIMES, Aug. 24, 1994, at A8. "In Mariel they were coming over in freighters, tankers and large vessels' . . . many of which were hired by Cuban-Americans who cruised to the port of Mariel to take family members to Florida." *Id.*

160. See Jon Nordheimer, *Cuban-Americans Ambivalent on Shift—Many Criticize U.S. Move but Also Fear Another Mariel*, N. Y. TIMES, Aug. 20, 1994, at 8:

Another element that has not gone unnoticed and is grist for private conversations (sic) is that many of the new refugees are dark-skinned. How they will be received in Miami among light-skinned refugees of a generation ago is a subject open to debate.

Id.

ter the United States.¹⁶¹ Rather, they were intercepted en route to the United States¹⁶² and detained at the U.S. naval base at Guantánamo Bay, ironically a facility located in their homeland of Cuba. So about 35,000 *balseros* left Cuba only to be returned to that country, albeit a portion leased by the United States.¹⁶³ Although separated from the Cubans, Haitian migrants were also detained on Guantánamo Bay. It could be argued that the reversal of long-standing U.S. policy to welcome fleeing Cubans did respond “to criticism that [the U.S.] had been treating Cuban refugees differently from Haitian refugees, a policy criticized by many black lawmakers as racist.”¹⁶⁴ Neither Cuban nor Haitians were able to establish a *legal right* of entry to the United States following interdiction. However, Guantánamo Bay Cubans, unlike Haitians,¹⁶⁵ ultimately gained access to the U.S. even though the Cu-

161. President Clinton referred to the *balseros* as illegal refugees, an inexact term. Presumably he meant to suggest they had no visas and also did not qualify for refugee status under applicable law.

Today I have ordered that illegal refugees from Cuba will not be allowed to enter the United States. Refugees rescued at sea will be taken to our naval base at Guantánamo while we explore the possibility of other safe havens within the region.

To enforce this policy, I have directed the Coast Guard to continue its expanded effort to stop any boat illegally attempting to bring Cubans to the United States. The United States will detain, investigate and, if necessary, prosecute Americans who take to the sea to pick up Cubans. Vessels used in such activities will be seized.

Excerpts From News Conference Announcing Policy on Refugees, N.Y. TIMES, Aug. 20, 1994, at 10.

162. *Balseros* expected to be rescued by the U.S. Coast Guard as the rafts were not designed to withstand the 90-mile journey to the U.S. Some critics contended “that the Coast Guard and Navy rescue effort, by operating right up to the 12-mile limit on Cuban territorial waters” actually served as a magnet for potential migrants. George de Lama, *Wily Castro backs Clinton into corner*, CHI. TRIB. Aug. 25, 1994, at 1, 27. While rescue may have been expected, the policy of detaining Cubans on Guantánamo undoubtedly was not anticipated.

163. See MASUD-PILOTO II, *supra* note 15, at xix. At the time of the 11th circuit decision discussed in text accompanying notes 166-79, *infra*, 20,000 were in “safe havens” on Guantánamo or Panama. See *Cuban American Bar Ass’n v. Christopher*, 43 F.3d 1412, 1419 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995).

164. William Neikirk & Terry Atlas, *Pulling Up the Welcome Mat*, CHI. TRIB. Aug. 20, 1994, at 1. Interdiction of Haitians on the high seas first occurred on October 12, 1981 when a Coast Guard cutter stopped the *Exoribe* with 56 Haitians on board. See *Haitian and Cuban Interdiction: Hearings before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 219 (1989) (report of National Coalition for Haitian Refugees). A Floridian commented that “‘There’s absolutely no difference between these new Cuban refugees and the Haitians trying to get here by boat. . . They’re all coming here for jobs. The only real difference is 99 percent of the Haitians are black so no one cuts them a break.’” Jon Nordheimer, *Where the Sounds of Spanish Grate*, N.Y. TIMES, Aug. 22, 1994, at C7; see also Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch’s Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1, 4 n.12 (1993).

165. A challenge to the first Haitian interdiction program was not successful. See *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1400 (D.D.C. 1985), *aff’d*, 809 F.2d 794 (D.C. Cir. 1987). See also *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993); Joyce A. Hughes

ban's "day in court" was not successful.

Cuban American Bar Association, Inc. v. Christopher ["CABA"]¹⁶⁶ involved 20,000 *balseros* held at the U.S. naval base at Guantánamo Bay, Cuba. Before the case, the Attorney General had already used her power of parole to bring to the U.S. various Cuban migrants: those over seventy years of age; those who were ill; unaccompanied minors under age thirteen. The approximately 20,000 at Guantánamo primarily were young men. The case commenced with high drama:

On October 25, 1994 upon learning that at 11:30 a.m. that day the government would return to Cuba, by plane, twenty-three Cuban migrants who had previously volunteered for repatriation, the Cuban Legal Organizations and the individual Cuban plaintiffs filed an emergency motion for a temporary restraining order and request for an emergency hearing to block the repatriation. Approximately one minute before the plane was to take off, the district court verbally ordered the government to halt the repatriation. . . .¹⁶⁷

In *CABA*, the Eleventh Circuit relied upon the Supreme Court's decision in *Sale v. Haitian Centers Council*,¹⁶⁸ in which the Supreme Court ruled that the INA and its provision against repatriation¹⁶⁹ did not apply extraterritorially.¹⁷⁰ So the crucial question was whether the U.S. Naval facility at Guantánamo Bay was United States territory. The court rejected "the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functional[ly] equivalent' to being land borders or ports of entry of the United States or otherwise within the United States."¹⁷¹ Since the Guantánamo Bay Cubans were seeking asylum in the United States the legal requirements for that status are important. As indicated previously, one must be a refugee.¹⁷² Additionally, in

& Linda Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747 (1993). In addition, Guantánamo Cuban minors were ultimately allowed in the United States while Haitian minors were not. See *CABA v. Christopher*, 43 F.3d 1412, 1427 (11th Cir. 1995), *cert. denied*, 516 U.S. 913 (1995).

166. 43 F.3d 1412 (11th Cir. 1995), *cert. denied*, 516 U.S. 913 (1995).

167. *Id.* at 1420.

168. 509 U.S. 155 (U.S.N.Y. 1993).

169. Previously called withholding of removal, the nomenclature is now restriction on removal. See INA § 241(b)(3), 8 U.S.C. § 1251(b)(3) (1999). It was designed to codify the prohibition against *refoulement* (return) of refugees which is in Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (T.I.A.S. No. 6577, 19 U.S.T. 6259) and the Protocol Relating to the Status of Refugees (T.I.A.S. No. 6577, 19 U.S.T. 6223) to which the U.S. acceded in 1968.

170. See *Sale*, 509 U.S. at 163-64, 169.

171. *CABA*, 43 F.3d at 1425. See also *supra* text accompanying note 14. The rental fee for land leased from Cuba for the Guantánamo Bay U.S. naval base is \$1,000 a year. "As a symbol of protest, Castro's . . . regime hasn't cashed any of the checks since taking power in 1959." George de Lama, *U.S. beefs up naval presence to snare Cubans*, CHI. TRIB., Aug. 23, 1994, at 6.

172. See INA § 101(A)(42), 8 U.S.C. § 1101(42) (1999).

order to apply for asylum an alien must be “physically present in the United States.”¹⁷³ Therefore, if Guantánamo Bay is not considered part of the United States, the Cubans located there *had no legal right to apply for asylum*.

Prior to the 11th Circuit’s decision in *CABA*, the United States and Cuba had reached a migration accord (Communiqué).¹⁷⁴ Pursuant to this, “the Attorney General ordered that no Cuban who had accepted safe haven in Guantánamo Bay or Panama would be allowed to apply for a visa or for asylum in the United States.”¹⁷⁵ The Communiqué also provided that a *minimum* of 20,000 Cubans per year would be admitted or paroled into the U.S.¹⁷⁶ The agreement is unprecedented since the United States has not guaranteed a *minimum* number of entrants from any other country.¹⁷⁷ Indeed, the INA is structured to prevent admission of too large a number from one country. So legislation expresses the yearly *maximum* from any one country.¹⁷⁸ As *CABA* found the *balseros* had no *legal right* to admission in the United States, the previously agreed upon Communiqué, a political migration accord, governed their fate and those who subsequently sought to leave Cuba. The Communiqué was clear in denying Cubans on Guantánamo Bay any right to enter the United States from that location. It was equally clear in offering Cubans a carrot by providing for means of entry to the United States if they returned to Cuba. While the ostensible effect of not accepting applications for a visa or asylum from Guantánamo was to force *balseros* back to Cuba, even before the *CABA* decision, “the U.S. . . .” offered the Cuban migrants safe haven [on Guantánamo] for as long as they wished.¹⁷⁹

Five months after the court ruled in *CABA*, the Clinton Administration announced that “Cubans in safe haven ‘will be admitted into the United States on a case-by-case basis as special Guantánamo entrants.’”¹⁸⁰ The decision, reached after secret discussions with Cuban representatives,¹⁸¹ in effect

173. INA § 208(a) (1), 8 U.S.C.A. § 1158(a)(1) (1999).

174. See *Joint Communiqué between U.S. & the Republic of Cuba*, Sept. 9, 1994, 71 INTERP. REL. 1236 (Sept. 12, 1994), 1994 WL 621517 (treaty) [hereinafter *Communiqué*.]

175. *CABA*, 43 F.3d at 1418. The ostensible effect of this provision was to force *balseros* back to Cuba to apply to come to the U.S. but actually they were ultimately paroled from Guantánamo. See *infra* text accompanying note 178.

176. See *Communiqué*, *supra* note 174.

177. See *U.S.-Cuba Reach Important Migration Agreement*, 71 INTERP. REL. 1213 (Sept. 12, 1994).

178. See INA § 202(a), 8 U.S.C. § 1152(a) (1999). In the year before the Communiqué, fewer than 3000 Cubans received immigrant visas. See U.S., *Cuba Reach Refugee Accord*, CHI. TRIB. Sept. 10, 1994, at 8. The cause: Perhaps to make “things tougher than necessary, perhaps to make them tougher for the Cuban Government.” Tim Golden, *For Cubans Seeking Visas, ‘Lamentations,’* N.Y. TIMES, Sept. 1, 1994 at A6. The 3000 visas given to Cubans in 1993 was far less than the per country annual maximum of 27,884. See Sean Holten, *Law Limits Cuban Immigration, Officials Say*, CHI. TRIB., Sept. 1, 1994, at 26. Hence, the Communiqué contemplated a substantial increase in Cuban immigrants to the U.S.

179. See *CABA*, 43 F.3d at 1418.

180. *Clinton Administration Reverses Policy on Cubans*, 72 INTERP. REL. 622, 623 (May 8, 1995) [hereinafter *Reversal*].

181. See *id.* at 623.

renounced the policy behind the Communiqué which prohibited entry to the U.S. for Guantánamo Cubans. Cost savings were cited since \$1 million per day was expended to keep Cubans at Guantánamo and \$100 million in upgrades had been planned.¹⁸² More significantly, “the Administration made the decision to allow the Cubans into the U.S. after members of Congress and others warned that a crisis was in the making . . . as the Guantánamo Cubans could riot, and thousands more Cubans could take to the sea.”¹⁸³ The decision to allow Guantánamo Cubans into the United States was not extended to Haitians. It caused Cubans joy,¹⁸⁴ but there was criticism of the simultaneous announcement that Cubans on the high seas trying to reach the United States would be interdicted and returned to Cuba.¹⁸⁵

Actually, the 1994 Communiqué had already provided that “migrants rescued at sea attempting to enter the United States will be taken to safe haven facilities outside the United States.” In addition, it specifically noted discontinuance of the “practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways.”¹⁸⁶ But the 1995 policy position—emanating from a May U.S.-Cuba Joint Statement (“Joint Statement”)¹⁸⁷—made a significant change in that Cubans were to be returned to Cuba and could no longer expect to be taken to Guantánamo Bay and hope for ultimate entry into the U.S. While *balseros* enjoyed that fate under the Joint Statement, theoretically it would not happen to subsequent migrants. That 1995 migration accord provided the U.S. could count Guantánamo *balseros* towards meeting the minimum number of Cubans it was to admit each year pursuant to the September 9, 1994 agreement.¹⁸⁸ Thus the entry of

182. *See id.*

183. *Id.*

184. *See Viva Guantánamo Libre*, TIME, May 15, 1995, at 50. “[T]he decision to admit most of the Guantánamo Cubans is . . . in contrast to the treatment being accorded most Haitians. There was no reversal of the decision not to allow most of the 251 unaccompanied Haitian children and 225 Haitian adults now at Guantánamo into the United States.” *Reversal*, *supra* note 180; *see also* Bill Frelick, *Needed: A Comprehensive Solution for Cuban Refugees*, 72 INTERPR. REL. 121, 122 (Jan. 23, 1995).

185. *See* Mireya Navarro, *New Policy on Cubans Met By Protest Drive*, N.Y. TIMES, May 17, 1995 at A10; *The Clinton Administration’s reversal of U.S. immigration policy toward Cuba*, *Hearing before the Subcomm. on the Western Hemisphere of the Com. on Int’l Relations*, 104th Cong. 1st Sess., May 18, 1995; *Cuban exiles protest new U.S. Policy*, CHI. TRIB. May 9, 1995, at 1; Steven Greenhouse, *US Will Return Refugees To Cuba In Policy Switch*, N.Y. TIMES, May 3, 1995, at A1; James Yuenger, *Experts Question Timing of Decision on Cubans*, CHI. TRIB., at 12. The late chairman of the Cuban American National Foundation, Jorge Mas Canoso was so antagonistic to the announced interdiction and repatriation policy that “fifteen thousand sponsors that were waiting to help with resettlement expenses for the Guantanamo Cubans [were withdrawn]. ‘They made this policy alone,’ said Mr. Más Canoso. ‘Let them now solve the problems of Guantanamo alone.’” *Reversal*, *supra* note 180, at 624.

186. *Communiqué*, *supra* note 174.

187. *See Joint Statement on Normalizing Migration between Cuba and the United States*, May 2, 1995, 35 INT’L LEGAL MATERIALS 328 (1996) [hereinafter *Joint Statement*].

188. *Id.*

Guantánamo Bay Cubans was not by legal right, but by political decision, a result forecast by *CABA*:

While we have determined that these migrants are without legal rights that are cognizable in the courts of the United States, we observe that they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. . . . Nevertheless, we cannot contravene the law of this Circuit and of the Supreme Court of the United States in order to frame a legal answer to what is traditionally and properly a problem to be addressed by the legislative and executive branches of our government.¹⁸⁹

While those Cubans on Guantánamo in May 1995 were the “beneficiaries of the American tradition of humanitarian concern and conduct,”¹⁹⁰ those subsequently interdicted and returned to Cuba would benefit from no such tradition.¹⁹¹ Yet unlike other migrants, the U.S. continues to express concern for returned Cubans. Congress requires biannual reports of “the treatment by the government of Cuba of persons who have returned to Cuba pursuant to the United States-Cuba agreement of May 1995.”¹⁹² Also, as an “extraordinary measure,” the 1994 Communiqué authorized entry to the U.S. of Cubans on the waiting list for visas in September 1994.¹⁹³ The Communiqué also stated how, “in conformity with United States law” the number could be expanded beyond 20,000: immediate relatives of U.S. citizens are not subject to numerical limits.¹⁹⁴ The 20,000 is to include those selected by lottery, a feature important to persons like the *balseros*, many of whom were “young men in their 20’s and 30’s . . . and often without family in the United States.”¹⁹⁵ Like other migrants, Cubans who actually reach the United States—by whatever means—are “physically present” and thus meet the statutory requirement to apply for asylum.¹⁹⁶ Nonetheless, the “presumptive

189. *CABA*, 43 F.3d at 1429.

190. *Id.*

191. From May 2, 1995 through September 30, 1998 the U.S. interdicted approximately 2,000 Cubans, a majority of whom were returned directly to Cuba. U.S. Dept. of State, Office of Cuban Affairs, Report to Congress U.S.—Cuba Migration Accord, June 8, 1999 (on file with author).

192. Omnibus Consolidated Emergency Supplemental Appropriations Act, Pub. L. 105-277, § 2245 (Oct. 21, 1998).

193. That waiting list totaled 19,700. See Tim Golden, *For Cubans Seeking Visas, ‘Lamentations,’* N.Y. TIMES, Sept. 1, 1994, at A6.

194. Immediate relatives are parents, spouses and children of U.S. citizens. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151 (b)(2)(A)(i) (1999).

195. Steven Greenhouse, *U.S. Planning to Hold a Lottery to Pick Some Cuban Immigrants*, N.Y. TIMES, Sept. 29, 1994, at A4. See also *INS Announces Second Cuban Migration Program*, 73 INTERP. REL. 319 (Mar. 18, 1996).

196. See INA § 208, 8 U.S.C.A. § 1158(a)(1) (1999). The physical presence requirement has lured Chinese to “take a boat to Guam, a U.S. territory 1,700 miles from the Chinese mainland.” Craig S. Smith, *Wanna Leave China? Make It To Guam, and the U.S. Beckons*, WALL ST. J., Aug. 4, 1999. Given that water within 12 miles of a country’s shore is considered its territory under the U.N. Convention on the Law of the Sea, Art. 3, 21 I.L.M. 1272 (Jan. 1982), the attempt to prevent Cubans in those waters from setting foot on U.S. soil be-

refugee status for all Cubans”¹⁹⁷ theoretically has ended. This is illustrated by the cases discussed in the next section.

V. A NEW DAY

We must not let any nation, even a nation as close to us as Cuba, even with so many American citizens of Cuban descent, control the immigration policy of the United States and violate the borders of the United States.¹⁹⁸

When Fidel Castro came to power in 1959, he was not expected to remain at the helm. However, he began his fourth term as Cuban president in March 1993.¹⁹⁹ The U.S. no longer believes “that the implosion of the existing order in Havana is imminent.”²⁰⁰ The U.S. has also recognized that Castro has played “David to our Goliath.”²⁰¹ From the airlift in the 1960s and 70s to the boatlift in the 80s, the U.S. arrived at a 1994 policy, which seeks to “deter irregular migration . . . and to prevent the chaotic, uncontrolled arrival of undocumented migrants from Cuba.”²⁰²

This new day is seen clearly by contrasting approaches to Cuban hijackers. Until 1994, “the United States had routinely granted refugee status to Cubans who had seized military jets, commercial aircraft, helicopters, crop-dusting planes and a variety of sea-going vessels.”²⁰³ A celebrated occurrence was that involving Orestes Lorenzo, a major in the Cuban airforce, who hijacked his MIG plane to the U.S. in the early 1990s. Lorenzo appeared on U.S. television and was once a parade grand marshal at Disney World.²⁰⁴ Indeed, just before the Joint Statement in May 1995, a “man accused by President Fidel Castro of hijacking a Cuban Government boat and killing a naval

cause of an assumed distinction between land and water is arguably not tenable. *See supra* text accompanying note 21. Yet the Immigration and Nationality Act can be read to support U.S. right to interdict aliens even though they are in U.S. waters since the statutory language treats U.S. waters equivalent to international waters. *See* INA § 208(a)(1), 8 U.S.C. § 1158 (a)(1) (1998).

197. Bill Frelick, *Needed: A Comprehensive Solution for Cuban Refugees*, 72 INTERP. REL. 121, 128 (Jan. 23, 1995).

198. White House Office of Communication, Pres. Statement on Crime Bill Procedural Vote, Aug. 25, 1994, available in 1994 WL 459663.

199. *See Castro Elected to 4th Term as Cuban President*, CHI. SUN-TIMES, Mar. 26, 1993, at 26.

200. Speech by Michael Ranneberger, Coordinator for Cuban Affairs, Dept. of State, to Governor’s Free Cuba Task Force, Newark, N.J., Apr. 30, 1997 <http://www.state.gov/www/regions/wha/970430_ranneberger.html>.

201. *Id.*

202. *Id.*

203. Larry Rohter, *Cuba Gives Long Prison Terms to Six Who Tried to Flee to U.S.*, N.Y. TIMES, Feb. 13, 1997, at A10.

204. *See* Peter Michelmore, *Rendezvous in Cuba*, READER’S DIG., May 1993, at 67-73; *Love and Guts: Cuban Returns for Family*, CHI. TRIB., Dec. 21, 1992, at 3.

officer . . . [was] granted political asylum in the United States.”²⁰⁵ But among the first sent back to Cuba after the 1995 accord were persons who commandeered a tugboat.²⁰⁶ Then, toward the end of 1997, a U.S. Immigration Judge in Virginia denied asylum to Cuban Military officer Jose Fernandez Pupo even though a Washington D.C. jury had acquitted him of hijacking (Fernandez).²⁰⁷ On the other hand, a Florida Immigration Judge granted asylum to Cubans Jose Roberto Bello-Puente, Adel Regalado Ulloa (Regalado) and Leonardo Reyes Ramirez (*Bello-Puente*), after they were acquitted of hijacking in Tampa, Florida.²⁰⁸ At the current time, the Immigration and Naturalization Service (INS) is appealing the latter decision to the BIA, asserting applicants are ineligible for asylum.²⁰⁹

Among the exclusions from eligibility for asylum, is being inadmissible to the U.S. because one “has engaged in terrorist activity.”²¹⁰ Such an activity includes “the hijacking . . . of any conveyance . . .”²¹¹ That activity has been an issue of concern between Cuba and the United States for some time. In 1973 there was an anti-hijacking agreement, “but the Cubans unilaterally renounced [it] in 1976 in retaliation for the blowing up of a Cuban airliner off the coast of Barbados by Cuban exile terrorist Orlando Bosch.”²¹² Then in the 1980s there were several instances in which Marielitos hijacked U.S. commercial planes to return to Cuba.²¹³ While Cuba promptly returned the plane and passengers to the U.S., the hijackers were not sent back for trial in the U.S. Cuba claimed “the U.S. government was responsible for the hijackings.”²¹⁴ In the 1994 Communiqué, Cuba and the U.S. agreed “to oppose and prevent the use of violence by any persons seeking to reach or who arrive in,

205. *Cuban Hijacker Released*, N.Y. TIMES, Apr. 20, 1995, at A20.

206. Cuba’s displeasure was expressed with sentences from 8 to 20 years. See Larry Rother, *Cuba Gives Long Prison Terms to Six Who Tried to Flee to U.S.*, N.Y. TIMES, Feb. 13, 1997, at A10.

207. See *In re* Jose Leonardo Fernandez Pupo, #A 74-060-494, Dept. of Justice, Exec. Off. for Immig. Rev., 11/14/97 (on file with author) [hereinafter Fernandez].

208. See *In re* Jose Roberto Bello-Puente, #A 72-560-015; *In re* Adel Regalado Ulloa, #A 72-560-016; *In re* Leonardo Reyes Ramirez, #A 74-933-218, Dept. of Justice, Exec. Ofc. for Immig. Rev. 12/15/98 (on file with author) [hereinafter Bello-Puente]

209. Telephone interview with Attorney Ralph E. Fernandez, Counsel to asylum claimants (June 28, 1999).

210. INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (1999). Another exclusion—firmly resettled—was applied to a Cuban who had lived 6 years in Spain before seeking asylum. *In re U.S. Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, available in 1991 WL 353529 (BIA 1991).

211. INA § 212(a)(3)(B)(ii)(I), 8 U.S.C. § 1158(a)(3)(B)(ii)(I) (1999).

212. MASUD-PILOTO II, *supra* note 15, at 96. For a discussion of the case excluding Bosch from the U.S., see *supra* text accompanying note 133.

213. See MASUD-PILOTO II, *supra* note 15, at 96.

214. *Id.* That claim is supported by persons who defended a charge of air piracy by claiming “the hijacking was authorized by the Central Intelligence Agency (“CIA”) . . .” *U.S. v. Lopez-Lima*, 738 F. Supp. 1404 (S.D. Fla. 1990). See also *U.S. v. Mena*, 933 F.2d 19 (1st Cir. 1991) (defendant unsuccessfully sought conviction reversal since hijacking did not succeed).

the United States from Cuba by forcible diversions of aircraft and vessels.”²¹⁵

Although Cuban asylum claimants in both *Fernandez* and *Bello-Puente* were acquitted of criminal air hijacking charges,²¹⁶ immigration judges (IJ) reached opposing results on asylum. Of course, a criminal proceeding cannot dictate a result in a civil proceeding. The former is guided by the proof standard of beyond a reasonable doubt while the preponderance of evidence standard applies in civil immigration proceeding.²¹⁷ In addition, “committing” a terrorist act, to use the language of the immigration statute, arguably is different from being “convicted” of such an act. However, the acquittal of hijacking was not the important factor in both of the above decisions. In *Fernandez*, the IJ did not find the applicant credible, and ruled “that any fear of persecution was not ‘on account of’ Applicant’s political opinions.”²¹⁸ Given that *Fernandez* did not meet the threshold requirement of being a refugee, finding him ineligible for asylum based on hijacking was dicta.²¹⁹ Nonetheless, it is clear that the IJ was hostile to “hijacking a plane with innocent men, women, and children aboard.”²²⁰ In addition, he pointed out channels for departure from Cuba to the U.S. since the 1994 Communiqué. The IJ later noted that Cubans “flee successfully from Cuba each year by swimming, fence jumping, or rafting.”²²¹ In noting this, he failed to take cognizance that such migrants are subject to interdiction and return to Cuba after the 1995 Joint Statement, and that they have no automatic right to parole in the U.S. under the 1994 migration accord.

A major difference between *Fernandez* and *Bello-Puente* is that asylum applicant *Fernandez* used “euphemisms like ‘diversion’ and ‘commandeering’ of the plane.”²²² However, in *Bello-Puente* it was claimed that Pantoja, the Cuban pilot of the plane who subsequently returned to Cuba, had “assisted with the plans and agreed to fly . . . to the United States.”²²³ Thus, the *Bello-Puente* asylum applicants claimed that they never hijacked the plane,²²⁴ and the IJ agreed with them, finding that the Cuban pilot who testified against them was not credible.²²⁵ If the BIA upholds the conclusion of no hi-

215. *Communiqué*, *supra* note 174. (The quoted material is located in the section of Alien Smuggling). In fact, the criminal prosecution of asylum applicants in *Bello-Puente* was assisted by Cuba providing “government documents and materials relevant to their own investigation of the alleged hijacking.” *Bello-Puente*, *supra* note 208, at 12.

216. *See* 49 U.S.C. § 46502(a)(b) (1999).

217. *See* *Bello-Puente*, *supra* note 208, at 25.

218. *Fernandez*, *supra* note 207, at 2.

219. *See id.* at 14.

220. *Id.* at 15.

221. *Id.*

222. *Id.* at 10.

223. *Bello-Puente*, *supra* note 208, at 5.

224. *See id.* at 9. Applicants “initially represented that they hijacked the plane from Mr. Pantoja but later recanted their admission, explaining that they created the story to protect Mr. Pantoja upon his expected return to Cuba.” *Bello-Puente*, *supra* note 208, at 28.

225. *See id.* at 26-27.

jacking, then the *Bello-Puente* applicants are not precluded by statute from gaining asylum. The critical issue is whether they are refugees.

The fear of persecution claimed was “on account of” political opinion. The only evidence of political activity by *Bello-Puente* claimants in Cuba was releasing pro-democracy political leaflets from the plane just before heading “north for Florida.”²²⁶ The more crucial basis for claimed refugee status was activity by Regalado in the U.S. following the hijacking trial and the association of Ramirez and Bello-Puente with him. “A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘sur place.’”²²⁷ However, as the INS has observed, “activities by an alien against his or her home country while in the U.S. have not been given as much weight as activities in the persecuting country.”²²⁸ The *Bello-Puente* and *Fernandez* cases took divergent views on this issue. In the latter, the IJ ruled that “respondent’s revelation while in the United States that he is a dissident should not form the factual predicate for a finding . . . that . . . [there is] a well-founded fear of persecution.”²²⁹ A contrary conclusion was found in *Bello-Puente*. Here, the Court found that events in the U.S. could form that predicate. This was aided by an INS stipulation “that if one were to cooperate with the FBI as a witness against the government of Cuba, then such a person would be at risk of persecution upon return to Cuba.”²³⁰ The stipulation was buttressed by testimony of Jose Basulto, a founding member of BTTR, that information provided by Regalado would show “the Cuban government did premeditate the downing of the BTTR planes”²³¹

It undoubtedly helped that the asylum applications in *Bello-Puente* could be related to the 1996 BTTR incident. The witness Jose Basulto was flying a third plane and escaped injury when, as the INS stipulated, “on February 24, 1996 two Cuban Migs shot down two BTTR planes”²³² As indicated above, that incident prompted the passage of the Helms-Burton Act,²³³ and provoked outrage,²³⁴ and then U.S. retaliatory actions.²³⁵ However,

226. *Bello-Puente*, *supra* note 208, at 5.

227. Handbook, *supra* note 116, ¶ 94.

228. U.S. DEPT. OF JUSTICE, INS, THE BASIC LAW MANUAL 71 (1994).

229. *Fernandez*, *supra* note 207, at 14.

230. *Bello-Puente*, *supra* note 208, at 18. Rejecting the INS argument that since neither Ramirez nor Bello-Puente participated in debriefings by the FBI on the BTTR incident as did Regalado, they could not qualify as refugees, the IJ concluded they were “similarly situated” and that all three would be persecuted as a “particular social group,” a statutory basis for refugee qualification. *Bello-Puente*, *supra* note 208, at 35-37, 40-41.

231. *Id.* at 17.

232. *Bello-Puente*, *supra* note 208, at 15. The U.S. resident was a Cuban national. All the citizens were of Cuban descent, two of whom were born in the United States. *See supra* text accompanying note 79.

233. *See supra* notes 78-87 and accompanying text.

234. Madeleine K. Albright, now U.S. Secretary of State and then US delegate to the U.N., was “visibly angry” at a press conference when she made the strong comment that the action of Cuban pilots was “not cojones (balls) . . . [but was] cowardice.” Barbara Crossette,

some of those sanctions have been lifted.²³⁶ Asylum applicant Regalado cooperated with the FBI in investigating the incident. This cooperation may have favorable political consequences for those who want to paint Cuba as an evil empire. But does that indicate his political opinion? To be a refugee requires persecution or a well-founded fear of persecution “on account of” a statutory factor, one of which is political opinion. In *Bello-Puente*, the INS stipulated that cooperation with the FBI could lead to persecution by Cuba. But an essential question is whether it would be “on account of” political opinion. That requires an assessment of whether the claimed refugee has a political opinion and whether the prior or anticipated persecution is because of that opinion. In *Bello-Puente* the IJ did not reference any direct testimony by *Bello-Puente* claimant Regalado of a political opinion.²³⁷ Thus, a critical issue is whether his telling the FBI that Cuba did premeditate the attack on the BTTR planes is a political opinion.²³⁸ Actually, the substance of what Regalado told the FBI should make no difference. The question is whether his cooperating with the FBI at all, is the expression of a political opinion.

In a similar situation, although it involved silence rather than speaking out, the majority in a Second Circuit case found political opinion. *Chang v. INS*²³⁹ involved the head of a delegation of visiting Chinese who did not report violations by other delegates of China’s security rules. The majority deemed this action of failing to report the violations political.²⁴⁰ However, the dissent was impressed that asylum seeker Chang never articulated a specific political opinion opposed to the government. It might be argued that Regalado’s actions in cooperating with the FBI were a political statement against the Cuban regime. However, his situation is unlike *Chang*, where the events allegedly creating a need to report only occurred after the delegation was in the U.S. The BTTR incident happened six months before Regalado left Cuba and he did not begin talking with the FBI until after he remained in

U.S. Says Cubans Knew They Fired on Civilian Planes, N.Y. TIMES, Feb. 29, 1996, at A1.

235. President Clinton cancelled all charter flights between Miami and Havana. In addition, he ordered stricter enforcement of travel restrictions on United States’ citizens traveling to Cuba. See *Pres. Clinton’s Remarks Announcing Sanctions Against Cuba Following the Downing of American Civilian Aircraft*, 1 PUB. PAPERS 339 (Feb. 26, 1996).

236. See Steven Erlanger, *U.S. to Ease Curbs on Relief to Cuba and Money to Kin*, N.Y. TIMES, Mar. 20, 1998 at A1. In addition, direct flights between New York and Los Angeles and Cuba have been instituted as “part of the process . . . to improve people-to-people contact’ . . .” Philip Shenon, *U.S. to Allow 2 More Cities To Set Flights to Havana*, N.Y. TIMES, Aug. 4, 1999, at A8.

237. The alleged opinion was evidence given by witness Basulto, a BTTR founding member. See *Bello-Puente*, *supra* note 208, at 17.

238. It is not surprising that Cuba would “premeditate” an attack on BTTR planes which had previously violated Cuban airspace as Basulto confirmed in his testimony. See *Bello-Puente*, *supra* note 208, at 16. Six months prior to the February 1996 incident, “Castro warned that any plane violating Cuban airspace risked being shot down.” William Neikirk, *U.S. Promises to Punish Cuba*, CHI. TRIB. Feb. 26, 1996, at 1.

239. 119 F.3d 1055 (3d Cir. 1997).

240. See *id.*

immigration detention even following acquittal in a hijacking trial. In addition, the only political activity in Cuba was dropping anti-Castro leaflets from an airplane *en route* to the United States.

Regardless of the ultimate result on appeal in *Bello-Puente*, it and *Fernandez* are significant in illustrating the effect of no presumption of refugee status or an automatic grant of parole. Where a migrant who seeks asylum is not found credible, as in *Fernandez*, he/she will not be deemed a refugee. With no presumption of refugee status, Cubans now run the same risk of being found incredible as other asylum applicants.²⁴¹ Moreover, without automatic right parole, there could be prolonged detention before an asylum decision.²⁴² Detention of undocumented aliens is mandatory under U.S. law since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA").²⁴³ Therefore, unless paroled to meet the floor of 20,000 admittees under the 1994 Communiqué, the absence of automatic parole for Cubans with "irregular" arrival, means detention.²⁴⁴ No presumption of refugee status and no automatic parole suggest a new day, along with Castro's pronouncements that mass exodus from Cuba will not be allowed.²⁴⁵ But there are still benefits to Cuban nationality. For Cubans who avoid repatriation from the high seas or who arrive "irregularly,"²⁴⁶ the failure to presume refugee status is of no concern if parole is granted. A Cuban migrant given parole only need be present for a year and adjust status to that of permanent resident alien pursuant to the Cuban Adjustment Act.²⁴⁷ In addition, there is a statutory exemption for Cubans arriving by air from the requirement that an undocumented migrant, seeking asylum, must make a preliminary showing

241. See Handbook, *supra* note 116, ¶¶ 41-43.

242. Regalado, Bello-Puente and Ramirez came to the U.S. on August 16, 1996 and were detained. It was only during a removal hearing that their claims for asylum were granted on December 15, 1998. They were freed on Christmas Eve, 1998 after protests from Florida Cuban-American representatives Ileana Ros-Lehtinen & Lincoln Diaz-Balart. See *U.S. Frees 3 Who Flew Cuba in Plane in '96*, N.Y. TIMES, Dec. 25, 1998, at A21. Fernandez came to the U.S. on July 7, 1996. His application for asylum in a removal hearing was denied November 19, 1997 but as of May, 1999 he remained detained in Virginia. Interview by Margarita Musa with Wilfredo O. Allen, Attorney for Fernandez, Miami, Fla. (May 18, 1999).

243. See Pub. L. No. 104208, 110 Stat. 3009, Div. C (Sept. 30, 1996); INA § 235(B)(iii)(IV), 8 U.S.C. § 1225(B)(iii)(IV) (1999).

244. See *FAIR v. Reno*, 93 F.3d 897, 899 (D. D.C. 1996).

245. Although Castro has denounced the U.S. "immigration policy toward Havana," he has asserted "categorically there is not the slightest possibility that Cuba will break its obligations in the migration accords, and allow massive departures of illegal immigrants' . . ." Andrew Cawthorne, *Cuba's Castro Rules Out Allowing New Sea Exodus*, <<http://news.excite.com/news/r/990804/04/politics-cuba-castro>>.

246. "Irregular" arrival, which precludes automatic parole under the Communiqué, may mean arrival at other than a port of entry.

247. For a discussion of the Cuban Adjustment Act, see *supra* text accompanying notes 122-129. The Communiqué's prohibition against automatic parole was undercut by the INS commissioner stating that "the availability of CAA [Cuban Adjustment Act] adjustment should ordinarily weigh heavily in favor of a grant of parole." *INS Clarifies Policy on Cuban Adjustment*, AILA MONTHLY MAILING, June 1999 at 543 (Memorandum from INS Commissioner Doris Meissner) [hereinafter Meissner].

of “credible fear” of persecution to avoid immediate removal.²⁴⁸ Moreover, inadmissibility “based on an alien’s having arrived at a place other than a port-of-entry *does not* apply to CAA applicants.”²⁴⁹ As there are still elements in U.S. law that can be cited to claim Cubans remain “special favorites,” the new day where they are treated no more favorably than other nationalities is still early in the morning. More importantly, politics and foreign policy concerns remain a constant in the U.S. response to flight from Cuba.

VI. CONCLUSION

Attempting to control the political process in Cuba, the United States sacrificed some control over its own borders. . . . It is time for the United States to adopt a single, nonideological, humanitarian standard for granting refugee status.²⁵⁰

The new day in the United States response to flight from Cuba can be attributed primarily to politics and foreign policy considerations, and perhaps to the racial composition of the current Cuban population. But the prior policy of favoring Cuban migrants has not completely disappeared. Contradictory ideas on the U.S. approach to Cuba are evident in other areas as well. For example, while the Helms-Burton legislation takes a tough stand against Cuba by permitting Americans to sue those who use property nationalized years ago, Title III allows the President to suspend that right.²⁵¹ Similarly, the economic embargo of Cuba has been in U.S. public policy for decades. Yet, there are those who believe the embargo should end,²⁵² and in fact are plan-

248. See INA § 235(b)(1)(F); 8 U.S.C. § 1225(b)(1)(F) (1999).

249. Meissner, *supra* note 247.

250. MASUD-PILOTO II, *supra* note 15, at 148-50.

251. 22 U.S.C. § 6081 (1998). President Clinton has exercised his right to suspend repeatedly. See David E. Sanger, *Clinton Grants, Then Suspends, Right to Sue Foreigners on Cuba*, N.Y. TIMES, July 17, 1996, at A1; *Helms-Burton: Two Years Later, Hearing before Subcomm. on International Economic Policy & Trade, Com. Int’l Relations*, 105th Cong., 2d Sess. 77-79 (Mar. 12, 1998).

252. “Sen. Christopher Dodd (D-Conn) [led] . . . an attempt to allow food and medical experts to Cuba so the most vulnerable of its Cubans don’t suffer” Deborah Ramirez & William E. Gibson, *Cuban Exiles Look for New Leadership*, CHI. TRIB., Nov. 25, 1997, at 3. See also Randall Robinson, *Why Black Cuba is Suffering*, ESSENCE, July 1999, at 166 (Trans Africa delegation “agreed that the embargo is inhumane”); *American VIPs Criticize U.S. Limits on Food Sales to Cuba*, CHI. TRIB., Jan. 14, 1998, at 13 (“Castro is still standing. The Cuban people are on their knees.”); *Republicans Give Clinton Some Cover on Cuba*, TIME, July 19, 1999, at 20 (U.S. Chamber of Commerce opposed to unilateral trade sanctions); Todd S. Purdum, *Clinton Seeking Wider Sanctions Against Cubans*, N.Y. TIMES, Feb. 27, 1996, at A1 (Antonio Maceo Brigade and the Alliance of Workers of the Cuban Community opposed); Steve Chapman, *Detached From Reality on Castro, Cuba*, CHI. TRIB., Feb. 29, 1996, at 23 (“The embargo . . . is conspicuously obsolete . . . [a] hardship on ordinary Cubans.”); Louis Uchitelle, *Who’s Punishing Whom?* N.Y. TIMES, Sept. 11, 1996, at C1 (“possibility of retaliation by foreign governments and companies”).

ning on it.²⁵³ Until aspects of the economic embargo were enshrined in law,²⁵⁴ the President had some flexibility and could weigh various opinions. Of course, with foreign policy matters, different groups always try to advance their interests with the executive. Thus, the president conducts foreign policy but external groups and events influence it. Such was the case with the Helms-Burton legislation, which President Clinton intended to veto *until* the BTTR February 1996 incident favored a change.²⁵⁵ But BTTR did not advocate the change in policy on Cuban migration linked to the 1994 Communiqué.

It is noteworthy that of the three U.S. citizens who perished in the 1996 BTTR incident, two were persons of Cuban descent born in the United States and the third came to this country very young and became a naturalized citizen. They were unlike those who came to the U.S. in prior years. Because of the existent Cold War alignment, the U.S. could claim it was winning that war when Cubans fled after Castro assumed power. But that war is over. While Castro “has outlasted eight American presidents and the odds are good that Bill Clinton will also leave office long before Castro does,”²⁵⁶ and although “some Cuban exiles in the United States are still trying to kill Castro,”²⁵⁷ the political realities have changed. The exile thinking of those allegedly plotting against a post-retirement age Castro is characteristic of the Cuban-American National Foundation.²⁵⁸ The late Más Canosa,²⁵⁹ head of the Foundation, withdrew U.S. sponsors for Cuban *balseros* after the 1994 Communiqué, which eliminated the prior policy of automatically granting Cubans parole, and the 1995 Joint Statement, which called for repatriation.

253. A trade mission to Cuba was sought by an Illinois governor who said “‘Cuba is going to open up one of these days and we want . . . to be ready to go down there and do business.’” CHI. SUN-TIMES, Aug. 14, 1999, at 10.

254. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1966 (Helms-Burton) 22 U.S.C. § 6021.

255. See Stephen Chapman, *Classic Waffling*, CHI. TRIB., Jan. 9, 1997, at 25.

256. See *id.* at 23.b.

257. Roberto Suro, *7 Charged with Plotting to Kill Castro*, CHI. SUN-TIMES, Aug. 26, 1998, at 36; see Larry Rohter & Ann Louise Bardah, *Cuban Exile Leader Among 7 Accused of Plot on Castro*, N.Y. TIMES, Aug. 26, 1998, at A3. Initially set for trial in Puerto Rico, the alleged perpetrators won a motion to transfer the case to Miami, although former prosecutors have believed juries there “would be unwilling to convict such defendants, and the outcomes of many cases filed in the 1970’s and 80’s supported such views.” *A Miami Trial For 7 Accused of Castro Plot*, N.Y. TIMES, Jan. 13, 1999, at A5.

258. “At some point, all of the alleged plotters have been affiliated with the foundation and although the indictment did not mention the foundation . . . [it] took the indictment as an attack on itself.” *A Miami Trial For 7 Accused of Castro Plot*, N.Y. TIMES, Jan. 13, 1999, at A5.

259. See Deborah Ramirez & William E. Gibson, *Cuban Exiles Look for New leadership*, CHI. TRIB., Nov. 25, 1997, at 3. Mas Canosa’s death was the reason given for a Cuban exile terrorist to disclose Mas Canosa financially supported him. See Ann Louis Bardah & Larry Rohter, *His Decades of Life in the Shadows, Trying to Bring Down Castro*, N.Y. TIMES, July 13, 1998, at A1. However, he subsequently said he “deliberately misinformed” the interviewers. *Cuban Exile Says he Lied to Times About Financial Support*, N.Y. TIMES, Aug. 4, 1998, at A7.

While his group disapproved of the changes, like other foreign policy initiatives, they resulted from changed political realities. Moreover, the color of the population remaining in Cuba has changed from what it was before the post-Castro exodus. It could be that alteration of U.S. official policy to no longer automatically recognize migrants from Cuba as refugees by granting parole was prompted by that fact.

Cuba is a country of 11 million people, and “a stroll on a Havana street . . . [will] confirm government estimates of upwards to 60 percent black or mixed population.”²⁶⁰ Cuba has been referred to as a black majority country,²⁶¹ and a “largely Black country”²⁶² That demographic fact may have influenced the U.S. policy change, along with a different political reality engendered by the demise of the Cold War. Even before it denied a *legal right* of entry to Cubans detained at Guantánamo Bay, the Supreme Court upheld U.S. interdiction and repatriation of those seeking asylum from Haiti, a Black country adjacent to Cuba.²⁶³ In *Sale v. Haitian Centers Council*, Justice Stevens wrote for the majority that “to gather fleeing refugees and return them to the one country they had desperately sought to escape . . . may . . . violate the spirit”²⁶⁴ of the U.N. Convention Relating to the Status of Refugees, but it does not violate U.S. law.²⁶⁵ Although some argue repatriation violates more than the “spirit” of the law,²⁶⁶ the Supreme Court has spoken. Thus, the policy of repatriating Cubans is not subject to attack in U.S. courts. Although repatriation has been carried out only against people of color—Asians (Chinese),²⁶⁷ Blacks (Haitians) and Latinos (Cubans), the Supreme

260. Alfredo Lanier, *Family Ties and Tangled Race Relations*, CHI. TRIB., Jan. 20, 1998, at 13. “Both the Cuban government and analysts at the U.S. State Department and CIA agree on a number [of Afro-Cubans] around 63%.” <<http://AfroCubaWeb.com/raceident.htm>. It is estimated that Cubans in Miami are over 97% Spanish origin. “At the very least, 85% of them describe themselves as being White in a recent survey.” *Id.*

261. See Afro-Latin Americans, <http://www.the_chronicle.demon.co.uk.tomste/7_8_12af.htm>.

262. Randall Robinson, *Why Black Cuba is Suffering*, ESSENCE, July 1999, at 166.

263. Ultimately all Cubans detained at the U.S. naval base on Guantánamo were allowed in the United States, but by political decision and not by *legal right*. See *supra* text accompanying notes 180-85.

264. *Sale v. Haitian Centers Council*, 509 U.S. 155, 182 (U.S.N.Y. 1993).

265. The *nonrefoulement* (nonreturn) provisions of U.S. law previously were called withholding of deportation. Currently the concept is termed restriction on removal. See INA §241(b)(3), 8 U.S.C. §1231 (b)(3) (1999).

266. All of the alleged plotters have been affiliated with the foundation and although the indictment did not mention it, “the Cuban-American National Foundation took the indictment as an attack on itself.” *A Miami Trial For 7 Accused of Castro Plot*, N.Y. TIMES, Jan. 13, 1999, at A5. See also Tim Golden, *Six Men Accused of Plot Against Castro Go on Trial*, N.Y. TIMES, Nov. 16, 1999, at A14.

267. In July 1993 the U.S. Coast Guard surrounded boats carrying Chinese in Mexican waters for 13 days. It is presumed the U.S. was there at the “request” of Mexico as INS officials helped process the Chinese for repatriation. See Tod Robberson, *Credibility Gap for Mexico?*, CHI. SUN-TIMES, July 25, 1993. There was a “news blackout” on this incident so detailed information was not available. Telephone interview with Office of Public Affairs, U.S. Dept. of State (July 26, 1993).

Court's pronouncement in the Haitian case means statutory provisions on *nonrefoulement* do not apply extraterritorially. In addition, statutory provisions which prohibit discrimination in visa issuance²⁶⁸ are not germane to migrants without visas who seek refugee status and asylum. Moreover, claims of discrimination in parole into the U.S. are not cognizable.²⁶⁹

The Federation for American Immigration Reform, Inc. (FAIR), a conservative immigration organization, challenged the Communiqué between Cuba and the U.S.²⁷⁰ Ostensibly that agreement ended automatic parole for Cubans who reach the U.S. irregularly. The Communiqué specified an annual minimum of 20,000 visas to the U.S. for Cubans, including persons selected by lottery. A federal district court rejected the contention that FAIR's objections to the agreement presented nonjusticiable political questions and observed that even though foreign policy impacts immigration, the question before a court is one of statutory interpretation.²⁷¹ Nonetheless, FAIR was held to lack standing²⁷² so statutory provisions impacting the Communiqué were not discussed.

In actuality, most provisions in both the Communiqué and the Joint Statement broke no new ground. Those provisions include 1) support for prohibitions against alien smuggling; 2) repatriation; 3) discontinuance of automatic parole; 4) admittance or parole of an annual minimum of 20,000, including those selected by lottery. In general, these items are all governed by existing legal norms. U.S. criminal sanctions against alien smuggling were involved decades ago in the situation of one who smuggled persons from Cuba to the U.S.²⁷³ Two years before the Joint Statement, the Supreme Court upheld high seas interdiction and repatriation of migrants trying to

268. See, e.g., INA § 202(a)(1), 8 U.S.C. § 1152(a)(1) (1999) prohibiting discrimination in visa issuance "because of a person's race. . . nationality . . . or place of residence." Cf., *Legal Assistance for Vietnamese Asylum Seekers v. Department of State Bureau of Consular Affairs*, 404 F.3d 1349 (D.C. Cir. 1997); see also *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997).

269. See, e.g., INA § 202(a)(1), 8 U.S.C. § 1152(a)(1) (1999) prohibiting discrimination in visa issuance "because of a person's race. . . nationality . . . or place of residence." Cf., *Legal Assistance for Vietnamese Asylum Seekers v. Department of State Bureau of Consular Affairs*, 404 F.3d 1349 (D.C. Cir. 1997); see *CABA v. Christopher*, 43 F. 3d 1412 (11th Cir.), cert. denied, 516 U.S. 913 (1995), rejecting claims of unaccompanied minor Haitians that they should be paroled into the U.S. from Guantánamo the same as unaccompanied minor Cubans.

270. *Federation for American Immigration Reform, Inc. v. Reno*, 897 F. Supp. 595 (D.D.C. 1995), aff'd, 93 F.3d 897 (D.C. Cir.), cert. denied, 521 U.S. 1119 (1996).

271. See *id.* at 602.

272. As did the district court, the circuit court of appeals focused on standing rather than the migration questions. See *Federation for American Immigration Reform, Inc. v. Reno*, 93 F. 3d 897 (D.C. Cir.), cert. denied, 521 U.S. 1119 (1996).

273. See *Campbell v. U.S.*, 47 F.2d 70 (5th Cir. 1931). Smuggling of Cubans "has soared since U.S. efforts to tighten interdiction . . ." Juan O. Tamayo, *U.S. Cool to Cuban Offers to Free Alleged Smugglers*, MIAMI HERALD, July 7, 1999, at 1A. Although the subtitle of the previously cited article is "Convictions Unlikely Here", U.S. law does make it a crime to smuggle aliens, which includes Cubans. 8 U.S.C. §1324 (1999).

reach the U.S.²⁷⁴ Immigration parole is committed to the discretion of the Attorney General who can act for “humanitarian reasons or significant public benefit or for reasons deemed strictly in the public interest.”²⁷⁵ Arguably those standards are broad enough to permit consideration of political and foreign policy concerns in granting parole.²⁷⁶ Nonetheless immigration parole involves a discretionary decision. An alien has no fixed right thereto.²⁷⁷ However, parole of Guantánamo Cubans was “beyond those eligible under existing criteria”, as acknowledged by the Joint Statement.²⁷⁸

Along with lottery winners, annually 5,000 of those parolees are to be counted toward reaching the 20,000 minimum number of Cuban entrants to the U.S. This *minimum* number does stray from the statutory scheme. Although there are statutory provisions for a lottery²⁷⁹ and per-country limits on immigration,²⁸⁰ no country has a statutory guarantee of a minimum number of admissions.²⁸¹ But there are statutory standards for determining who is a refugee, and thus eligible for asylum.

Persecution or a well-founded fear thereof must be because of race, religion, nationality, particular social group or political opinion. This definition shines the spotlight on the asylum applicant’s political views. The *Bello-Puente* case discussed above is troublesome because it is not clear whether the focus remained on the political opinions of the applicants. Diverting attention to the Cuban regime risks a decision on the alleged persecuting country and not the particular applicant. For example, Cuba’s actions *vis a vis* the BTTR planes, no matter how reprehensible, is not a basis for asylum. Although legislation was enacted as a result of the incident, that was a political decision. Whether a person is a refugee is not a political question, but a legal

274. *Sale v. Haitian Centers Council*, 509 U.S. 155 (U.S.N.Y. 1993); *see supra* note 271, and accompanying text.

275. INA § 212(d)(5)(A), (B), 8 U.S.C. § 1182(d)(5)(A), (B) (1999).

276. It is doubtful a court ultimately will consider the use of parole to meet the 20,000 annual minimum Cuban entrants, particularly in light of the ruling that FAIR lacks standing. *See Federation for American Immigration Reform, Inc. v. Reno*, 897 F. Supp. 595 (D.D.C. 1995), *aff’d*, 93 F. 3d 897 (D.C. Cir.), *cert. denied*, 521 U.S. 1119 (1996).

277. In a case involving a Cuban alien, the court indicated all that is required to support the Attorney General’s action is “a facially legitimate and bona fide reason for a parole decision.” *Garcia-Mir v. Smith*, 766 F.2d 1478, 1482 (11th Cir. 1985).

278. *See Joint Statement, supra* note 187. Refers to parole of Guantánamo detained Cubans being counted to meet the annual minimum of 20,000 entrants as “beyond those eligible under existing criteria.” That could be a reference to the failure to engage in a case-by-case assessment before parole was granted, as the statute contemplates. INA § 212(d)(5)(A), (B), 8 U.S.C. § 1182(d)(5)(A), (B) (1999).

279. Visas under the diversity category are awarded based upon a lottery. *See* INA § 203 (e)(2), 8 U.S.C. § 1153 (e)(2) (1999).

280. The approximate per-country limit is 25,000. *See* INA § 202(a)(2), 8 U.S.C. § 1152 (a)(2) (1999). In 1994, the formula worked out to 27,845 for Cuba. *See* Sean Holton, *Law Limits Cuba Immigration, Officials Say*, CHI. TRIB., Sept. 1, 1994, at 26.

281. “This per-country provision is sometimes misunderstood. It does not mean that each nation is entitled to send 25,000” persons to the U.S. each year. ALEINIKOFF, MARTIN & MOTOMURA, *IMMIGRATION AND CITIZENSHIP* 295 (4th ed. 1998).

one. In determining whether a Cuban is a refugee, the decision should be made absent political and foreign policy considerations. It should not be assumed that merely because one lives in a socialist country that one has been persecuted as required under the statutory provisions governing refugee status. It has been almost twenty years since the enactment of the Refugee Act of 1980, the purpose of which was to remove ideological slants from refugee determinations. As the Second Circuit noted: "Examination of the history and purpose of the relevant legislation shows that Congress intended to insulate the asylum process from influences of politics and foreign policy."²⁸² In the past, it was just assumed that those who fled Cuba were refugees who were guided by an ideology which met the approval of the United States, and had a fear of persecution because of that ideology. That assumption removed the incentive to examine the individual circumstances of migrants, many of whom may not have qualified as refugees under the statutory standard. The past cannot be undone. But future refugee decisions should be made absent foreign policy and political considerations.

282. *Doherty v. INS*, 908 F.2d 1108 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992).

