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Jarrett Barrios

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## People First: The Cuban Travel Ban, Wet Foot-Dry Foot and Why the Executive Branch Can and Should Begin Normalizing Cuba Policy

JARRETT BARRIOS<sup>†</sup>

### I. INTRODUCTION: THE ILLOGIC OF CUBAN EXCEPTIONALISM IN THE UNITED STATES

“Still?” The question hung in the air between us like a cloud of stale smoke.

My friend stared at me in disbelief. I knew what was coming next: a battery of “whys”. *Why* has the United States, the “home of the free,” restricted its citizens from travelling to Cuba? *Why* do Cuban-Americans support this—especially if it’s their Cuban family who suffer most from this restriction?<sup>1</sup> *Why* do we exempt Cuban exiles from the immigration

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<sup>†</sup>Jarrett Barrios is the CEO of the American Red Cross of Eastern Massachusetts. In 1999, he founded ACCESO, a humanitarian organization providing direct aid to Cubans and has led almost two dozen humanitarian delegations to Cuba. I am grateful to Professor Kaaryn Gustafson of the University of Connecticut Law School and Dean Anthony E. Varona of the American University Washington College of Law for their thoughtful reviews of drafts of this article, along with Sarah Stephens, Executive Director of Center for Democracy in the Americas. In addition, I am grateful to Department of Treasury officials for interpretive guidance regarding new administrative regulations with regard to Cuba travel. Finally, special thanks to Thomas Ziehnert and Caitlin Fahey of the Connecticut Public Interest Law Journal for their thoughtful editing of this piece.

<sup>1</sup> While public opinion among Cuban-Americans has shifted in recent years, the public perception persists that they are the primary opponents of normalizing travel policy. *See generally Cuban American Opinions Concerning U.S. Policy Toward Cuba and the U.S. Election*, INST. FOR PUB. OPINION RES., FLA. INT’L U. (Dec. 2, 2008), <http://www2.fiu.edu/~ipor/cuba-t/> (follow “Brookings summary of FIU Cuba Transition Poll results [PDF]” hyperlink). David Adams, *In Tough Economic Times, Public Opinion Shifts on Cuba Embargo*, ST. PETERSBURG TIMES, Sept. 13, 2009, <http://www.tampabay.com/news/world/in-tough-economic-times-public-opinion-shifts-on-cuba-embargo/1035898> (citing support by Cuban Americans despite surveys to contrary). Social science research supports the conclusion that Cubans on the island suffered consequences from the travel ban

laws which apply to everyone else in the world? And most amazing of all, *why* after fifty years of these failed policies, does the Obama administration still support them?

The history of the travel ban reads like a spy thriller. With their origins mired in cloak-and-dagger Cold War politics, these travel restrictions have evolved substantially since the fall of Communism, but still prohibit United States citizens from freely travelling to Cuba. At least as remarkable is U.S. immigration policy towards Cuban nationals, which includes a special visa lottery for Cubans, an additional, special humanitarian parole policy used almost exclusively for Cubans, and most unusual of all, the Wet Foot-Dry Foot policy that lets any Cuban setting foot on U.S. land adjust status to become a permanent resident—regardless of the legality of their entry.

These two people policies have been central in U.S. efforts to end the Castro regime—a goal advanced zealously by the powerful U.S.-based Cuban exile community for over 50 years<sup>2</sup>—though neither policy has ever been fully codified at law. Instead, interest group politics and judicial deference to administrative policies have defended and perpetuated a confusing web of executive branch regulations that are neither logical nor typical of United States foreign policy.<sup>3</sup> Equally remarkable is that both policies have failed entirely to achieve their goals of reforming Cuban politics and society.

Despite fifty years of failure, the “people policies” of the embargo have been largely maintained by the current administration. The troubling travel prohibitions have been modified ever so slightly and an exceptionalist immigration policy remains firmly in place.<sup>4</sup> If the goal of the “regime change” of the last fifty years remains the same, or more modestly, if it is to hasten such change and prepare Cuban civil society for transitioning to a democratic state when domestic circumstances in Cuba

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and restrictions on “family remittances.” See Deborah Weissman, *The Legal Production of the Transgressive Family: Binational Family Relationships between Cuba and the United States*, 88 N.C. L. REV. 1881, 1907–08 (2010) (arguing binational families suffer concrete harms from the ban, such as nutritional deficits and lack of medicine).

<sup>2</sup> See generally PATRICK J. HANEY & WALT VANDERBUSH, *THE CUBAN EMBARGO: DOMESTIC POLITICS OF AMERICAN FOREIGN POLICY*, vii, 1–2 (2005) (providing historical background to U.S. policies towards Cuba); DAVID RIEFF, *THE EXILE: CUBA IN THE HEART OF MIAMI* 14–15 (1993) (illustrating “the Dialogue” in the Cuban community during the 1970’s).

<sup>3</sup> Ted Henken, *Balseros, Boteros, and El Bombo: Post-1994 Cuban Immigration to the United States and the Persistence of Special Treatment*, 3 *LATINO STUDIES* 393, 394–96 (2005).

<sup>4</sup> See *Statement: Reaching out to the Cuban People*, OFFICE OF THE WHITE HOUSE PRESS SEC’Y (Jan. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people> (explaining how the Obama Administration has opened up family travel and widened the religious educational and journalist categories, but hasn’t gone nearly as far as its discretion permits to override the ban).

allow for such change,<sup>5</sup> there are surely alternatives which promise greater success.

These policies have not only failed in their stated objectives, but are also unfair. Fairness—the principle of treating all human beings with equal concern and respect<sup>6</sup>—has deep roots in the Anglo-American legal tradition.<sup>7</sup> Modern Anglo-American jurisprudence has widely applied principles of fairness to conceptions of justice and decision-making; this concept of fairness animates, too, policy pronouncements and justifications of governments like the United States which are built on this legal tradition.<sup>8</sup>

Applied in the instant case of Cuba policy, the travel ban is extraordinarily retributive towards Cuba as well as towards Americans seeking to travel to the island. This policy rule dramatically singles out Cuba as the only nation against which travel is banned in this fashion—and by association, unfairly circumscribes US citizens' right to travel in order to support its failed foreign policy goal. Similarly, a fairness analysis of U.S. immigration policy towards Cuban nationals points to a different brand of unfairness. The Cuban Adjustment Act ("CAA") permits any Cuban touching ground in the United States to naturalize immediately, effectively circumventing the elaborate system of quotas and visa application procedures applicable for nationals from every other country in the world. Targeting Cubans for extraordinarily generous treatment is unfair to others, and cannot be justified as sound policy.

Whether it is because they have failed or because they are unfair, the illogic of Cuban exceptionalism has yet to dissuade the current administration from applying these "people policies." Persisting into the present, the first and second sections of this article review the origins of these "people policies," including the jurisprudence that developed to protect their application, to better understand their tenacious rootedness in today's policy landscape.

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<sup>5</sup> See *id.* This latter reasoning typifies the explanations of the current Administration in its actions toward Cuba. For example, in its official statement on recent regulatory changes to Cuba travel policy, the White House observed these changes would be "a series of steps to continue efforts to reach out to the Cuban people in support of their desire to freely determine their country's future." *Id.*

<sup>6</sup> Perhaps one of the most notable scholars of fairness has been philosopher John Rawls whose "justice as fairness" principles have been broadly endorsed and applied by legal scholars. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 151–57 (1977) (applying Rawls' "justice as fairness" model to argue for the legitimacy of treating all human beings with equal concern and respect).

<sup>7</sup> See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 21–29 (1967) (writing to explain fairness as a legal principle that is to be distinguished from—and superior to—policy "rules," an examination of case law in which principles of fairness infuse judicial decision-making).

<sup>8</sup> Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 68 (1990) (providing an illuminating elaboration of "fairness" in policy); See generally AMY GUTTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

The third section examines how—and why—the travel ban and immigration policies continue today, despite dwindling public support<sup>9</sup> and data documenting their objectives remain unmet. In particular, this section examines how the *balsero*<sup>10</sup> crisis of 1994 and the Helms-Burton Act of 1996 shaped executive branch actions toward Cuba over the last 15 years.

Finally, the fourth section explores the scope of executive branch discretion and posits that substantial discretion exists within the Executive Branch to amend these policy tools; the section continues by outlining alternative policies within the present executive powers of the President—policies that preserve the foreign policy goal of democratizing Cuba, but which are more consistent with economic and immigration policies adopted towards other nations and nationalities.

## II. CUBAN IMMIGRATION TO THE UNITED STATES

Within almost every nation of the world, there are those striving mightily to take up residence in the United States. Whether they are family members of American citizens, applicants for professional positions or even refugees and asylum-seekers, a daunting immigration process exists through which these aspirants obtain legal entry and residence. Immigrants from every country in the world except one—Cuba—ignore the legal immigration process at their peril. For these unwise persons, presenting yourself at America’s doorstep would be an invitation to deportation.<sup>11</sup>

Immigration from Cuba is different. If you are Cuban and show up at a U.S. border without a visa, you are welcomed—even fast-tracked for a green card and into the pipeline for citizenship.<sup>12</sup> Born of Cold War politics, this policy has evolved only slightly in the years since its creation in the 1960s and makes immigrants from the island unique among all immigrants around the globe in this special treatment.

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<sup>9</sup> Public opinion can be gauged in a variety of ways, but no matter the metric you use support for the embargo has declined dramatically among US voters in general and Cuban-Americans in particular. See, e.g., *Cuba Study Group*, (Oct. 10, 2010, 10:00 AM), <http://www.cubastudygroup.org/index.cfm/polls> (providing a survey of current opinion).

<sup>10</sup> *Balsero* is the Cuban slang term for “boat person,” and refers to people who board any sort of watercraft, sound or not, to cross the Florida Straits in search of US shores. *Balsero*, CASSEL’S SPANISH DICTIONARY 88 (1978) (defined literally as “ferryman”).

<sup>11</sup> Over the decades of the 20th century, immigration policy evolved more broadly, evidencing a variety of biases based on politics and race-based preferencing. See Charles Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class and Reason*, B.C. L. REV. 755, 758–61 (2000).

<sup>12</sup> Clearly there are exceptions for excludable classes of immigrants—like those with violent criminal histories—but this process is one that has been uniformly applied for almost all Cubans since the 1960s.

### A. *The Cuban Adjustment Act*

As the opposition to the dictatorship of Fulgencio Batista spread across the Cuban island in the late 1950s, the flow of Cubans immigrating to the United States increased. The profile of these immigrants shifted after Batista fled in the late hours of December 21, 1958 and Fidel Castro took the reins of power. Initially, refugees were Batista loyalists, but over time those choosing to emigrate were middle- and upper-class Cubans with no particular political connection to Batista.<sup>13</sup> They were emigrants deeply concerned about their life opportunities under the Castro regime as it listed steadily toward communism.<sup>14</sup>

In October 1962, as relations soured between the United States and Castro over political changes within Cuba, the Cuban government ended scheduled flights between the two countries.<sup>15</sup> With the end of regular travel for Cuban citizens, the era of the “Cuban refugee” was born.<sup>16</sup> For the next few years, the United States response to these immigrants can best be labeled sympathetic, if *ad hoc*: Cuban refugees were characterized by the State Department as evidence of Communism’s failure, a useful strategy in its Cold War public relations battles.<sup>17</sup>

Cuban exiles to the United States were admitted under the Attorney General’s general powers of parole, most without immigrant visas, security checks or confirmed means of financial support required of other immigrants.<sup>18</sup> Until 1966, there was no order to this immigration process.<sup>19</sup> That year, in response to the desire to welcome Cuban citizens who were fleeing Communist Cuba and to improve on the orderliness of this process, Congress passed the Cuban Refugee Adjustment Act, a policy that clarified and continued the executive policy of admitting Cubans.<sup>20</sup>

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<sup>13</sup> YVONNE M. CONDE, OPERATION PEDRO PAN: THE UNTOLD EXODUS OF 14,048 CUBAN CHILDREN 6 (1999).

<sup>14</sup> See RUTH ELLEN WASEM, CRS REPORT FOR CONGRESS: CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 1–2 (2009), available at <http://www.fas.org/sgp/crs/row/R40566.pdf>.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> See generally CHARLOTTE J. MOORE, CONG. RESEARCH SERV., ED 206779. REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES tbl. 1, 34–35 (1980) (showing that the number of Cuban refugees as of Nov. 2, 1966 elevated significantly); see also Max J. Castro, *The New Cuban Immigration in Context*, 58 U. MIAMI NORTH-SOUTH AGENDA 3 (2002) (supporting the idea that after 1959 Cuban immigration into the United States skyrocketed).

<sup>17</sup> MARÍA DE LOS ANGELES TORRES, THE LOST APPLE: OPERATION PEDRO PAN, CUBAN CHILDREN IN THE U.S., AND THE PROMISE OF A BETTER FUTURE, 55 (2003).

<sup>18</sup> Wasem, *supra* note 14, at 1; Deborah Weissman, *The Legal Production of the Transgressive Family: Binational Family Relationships Between Cuba and the United States*, 88 N.C. L. Rev. 1881, 1896 (2010).

<sup>19</sup> See Castro, *supra* note 16, at 5 (“[D]e facto immigration policy of ‘open arms’ was driven by the Cold War, active U.S. opposition to Fidel Castro’s rule, and humanitarian concerns. Under this de facto policy, the United States instituted a massive visa waiver for Cubans in the early 1960s and paid for and organized an orderly departure program for more than 250,000 people, known as the ‘freedom flights,’ in place from 1965 to 1973.”).

<sup>20</sup> 8 U.S.C. § 1255 (1970).

Under the CAA, any Cuban admitted or paroled into the United States by the Attorney General and present for at least two years, was permitted to adjust to becoming a permanent resident.<sup>21</sup> In practice, this was accomplished by having Cubans routinely admitted at the border upon their arrival by boat or plane under the Attorney General's parole process; under the CAA, these paroled Cubans would apply two years later for legal residence and eventual citizenship. For the next decade, this policy governed as US-chartered "Freedom Flights" and boats continued to shuttle Cubans to the United States.<sup>22</sup>

In 1976, Congress exempted Cubans who could adjust under the CAA from the Immigration and Naturalization Act's numerical preference system,<sup>23</sup> and in 1980, again amended the law to reduce the physical presence requirement for permanent residence from two years to one.<sup>24</sup> These policies were designed to make it easier for Cubans to emigrate, supporting the principle of opposing communism by making its refugees' path to "freedom" as easy as possible.<sup>25</sup>

#### B. *The Cuban/American Immigration Agreements of 1994*

As communism in Europe crumbled, contracted Soviet oil no longer arrived on the island, and Cuba's replacement reserves had to be purchased on the open market.<sup>26</sup> The loss of Communist markets for sugar meant exports dropped precipitously. Less money for the government meant it purchased less for the people—and imports dropped 76 percent in a single year.<sup>27</sup> In 1990, Castro officially proclaimed Cuba to have entered a "special period in peacetime."<sup>28</sup>

By August of 1994, this "special period" had cost Cubans dearly. Years of extreme economic deprivation had taken their toll. Over the

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<sup>21</sup> *Id.*

<sup>22</sup> See Jorge Domínguez, *Cooperating with the Enemy? U.S. Immigration Policies Towards Cuba*, in WESTERN HEMISPHERE IMMIGRATION AND UNITED STATES FOREIGN POLICY 31, 34, Table 1 (Christopher Mitchell ed., 1992) (demonstrating that from 1966 to 1976, approximately 370,000 Cubans arrived in the United States).

<sup>23</sup> Immigration and Nationality Act of 1976, Pub. L. No. 94-571 (Codified as amended at 8 U.S.C. § 1255).

<sup>24</sup> The Refugee Act of 1980, Pub. L. No. 96-212 (codified as amended in scattered sections of 8 U.S.C.).

<sup>25</sup> The story of the 1980 Mariel refugees—where over 250,000 Cubans took to boats and traversed the Florida Straits to US shores—occurred in the context of this policy. Because it occasioned no legal changes, it is beyond the scope of this article, though remains of interest for its evolution of US attitudes toward this "exceptionalist" Cuba immigration policy. See generally Mirta Ojita, *The Long Voyage from Mariel Ends*, N.Y. TIMES, Jan. 16, 2005, <http://www.nytimes.com/2005/01/16/weekinreview/16ojito.html>.

<sup>26</sup> RICHARD GOTT, CUBA: A NEW HISTORY 287 (2004). See also Matias F. Travieso-Díaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 242–44 (1998).

<sup>27</sup> See GOTT, *supra* note, 26 at 288.

<sup>28</sup> *Id.* at 289.

previous years, the number of Cubans seeking to escape to the United States by sea—the so-called “*balseros*,” or rafters—had grown steadily. The number of US Coast Guard sea rescues of these Cubans had climbed from 2,203 in 1991 to 3,656 in 1993.<sup>29</sup>

Over the course of the summer in 1994, violent incidents in Cuba further fanned flames of discontent. In June, Cuban authorities shot and killed a Cuban who was attempting to escape the island. A series of boat hijackings by Cuban nationals during July and early August resulted in at least thirty-seven asylum seekers and two government officials being killed.<sup>30</sup> On August 5, a food riot erupted in Havana after police dispersed an unruly crowd.<sup>31</sup>

During the first two weeks of August, the number of *balseros* rescued by the US Coast Guard soared to over 21,000,<sup>32</sup> with thousands more Cubans taking to any sort of watercraft to escape. On August 13, Fidel Castro gave a televised speech blaming the United States for the riots and violence. In the speech, he threatened to permit Cubans to leave the country freely if the United States did not join in efforts to deter illegal boat departures.<sup>33</sup> With no response from the United States, Cubans kept getting on boats.

Finally, on August 19, 1994, President Clinton announced—in a reversal of a policy in place since the early days of Castro—that the Coast Guard would no longer bring Cubans rescued at sea into the United States. Intended to deter Cubans from taking their chances at sea, the administration explained it would henceforth deliver all *balseros* to Guantanamo Bay Naval Base with no opportunity for admission into the United States.<sup>34</sup>

Within a short time, over 33,000 Cubans were picked up and sent to Guantanamo Naval Base.<sup>35</sup> The pressures of this crisis and mass confinements compelled the United States and Cuba to enter into their first serious migration discussions in a generation.<sup>36</sup> These talks culminated in a modest agreement signed in the midst of the crisis on September 9, 1994.<sup>37</sup> These policies were the first major change to Cuban immigration policy since the 1966 CAA.<sup>38</sup>

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<sup>29</sup> Henken, *supra* note 3, at 398.

<sup>30</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS 3 (1995).

<sup>31</sup> *Id.* See also SILVIA PEDRAZA, POLITICAL DISAFFECTION IN CUBA’S REVOLUTION AND EXODUS 180 (2007).

<sup>32</sup> Henken, *supra* note 3, at 398.

<sup>33</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 30, at 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Henken, *supra* note 3, at 399.

<sup>37</sup> WASEM, *supra* note 14, at 2.

<sup>38</sup> *Id.*

The goal of the 1994 migration accord was to support safe, legal and orderly immigration to the United States.<sup>39</sup> To facilitate this goal, the U.S. agreed to admit 20,000 Cuban nationals annually, and to stop admitting most Cubans intercepted at sea.<sup>40</sup> Going forward, U.S. officials would send those picked up at sea to a “safe haven” third country; the Cubans agreed to use persuasive means to discourage such dangerous routes to emigrate.<sup>41</sup>

The unresolved issue of those 33,000 Cubans at Guantanamo and concern for future refugees compelled the parties to continue their discussions. On May 2, 1995 the two countries entered into a second agreement. In addition to admitting most of the Guantanamo detainees into the United States, the U.S. agreed to abandon its brief experiment in sending Cuban nationals to third country “safe havens” and instead to repatriate those Cuban nationals intercepted at sea who did not assert credible asylum claims.<sup>42</sup> This second migration accord finalized U.S.-Cuba talks and represented the biggest changes to Cuban immigration policy since 1966.<sup>43</sup>

In time, this Clinton Administration policy of repatriating Cubans picked up at sea would come to be called the “Wet Foot-Dry Foot” policy. Started in August 1994 and formalized through these accords, this interdiction policy adopted, for the first time since Castro came to power, a policy of forcibly returning Cubans to Cuba. Repatriation, it was believed, would discourage those willing to risk their lives in a raft.<sup>44</sup> Nonetheless, for those Cubans fortunate enough to elude the Coast Guard’s interdiction teams, landing on U.S. shores continued to guarantee immediate clearance as a legal immigrant—unlike any place else in the world.

### C. Cuban Immigration to United States Following the US/Cuba Accords

The immediate goal of the 1995 Wet Foot-Dry Foot policy was “normalization” of Cuban immigration to the United States. At the time of the agreement between Cuba and the United States, over 30,000 Cubans

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<sup>39</sup> Press Statement, Glyn Davies, Acting US Spokesman, Dep’t of State, U.S. – Cuba Migration Accords (Aug. 22, 1996), available at [http://dosfan.lib.uic.edu/ERC/briefing/press\\_statements/9608/960822ps.html](http://dosfan.lib.uic.edu/ERC/briefing/press_statements/9608/960822ps.html).

<sup>40</sup> MARK P. SULLIVAN, CRS REPORT FOR CONGRESS: CUBA ISSUES FOR THE 110TH CONGRESS 48 (2008), available at <http://www.fas.org/sgp/crs/row/RL33819.pdf>.

<sup>41</sup> GENERAL ACCOUNTING OFFICE, GAO-NSIAD-95-211, CUBA U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS 1, 3–4 (1995); see also WASEM, *supra* note 14, at 4.

<sup>42</sup> While repatriation became the general rule, Cuban nationals who were able to make the case to US officials that they had a well-founded fear of persecution, would still be sent to a third-party state. According to the Congressional Research Service, only 170 Cubans were resettled under this policy from its start in May 1995 through July 2003. While the Department of State (“DOS”) is required to monitor whether those migrants who are returned to Cuba are subject to reprisals, the Department has been unable to monitor returnees outside Havana since March 2003. WASEM, *supra* note 14, at 4.

<sup>43</sup> Castro, *supra* note 16, at 3–7.

<sup>44</sup> GENERAL ACCOUNTING OFFICE, *supra* note 41, at 3.

were interned at Guantanamo, and the threat of another wave of *balseros* was real. A senior Clinton White House official observed at the time, “[w]e think there is a general consensus in the United States that we can’t allow people to arrive on our shores in a disorderly, illegal manner.”<sup>45</sup> This short term policy was a success as the number of *balseros* immediately reduced to a trickle.<sup>46</sup>

The Wet Foot-Dry Foot policy continued under President George Bush<sup>47</sup> and President Barack Obama.<sup>48</sup> From the perspective of border security, this policy and others embodied in the U.S.-Cuban immigration agreement were intended to reduce the number of *balseros* entering US waters. In the months that followed, the policy seemed to achieve this goal: In the years immediately following the accords, U.S. Coast Guard interdictions of Cubans dropped dramatically.<sup>49</sup> The numbers of interdictions climbed again in recent years, reaching a twelve-year high of 2,868 in 2007, but still far below the crisis levels of 1994.<sup>50</sup>

Viewed through the lens of immigration policy, the CAA and the antecedent series of ad hoc policy decisions in the early 1960s birthed a confusing web of regulations that, by the 1990s were believed by experts to have contributed mightily to the *balsero* crisis.<sup>51</sup> The 1994–1995 accords’ new policy of Wet Foot-Dry Foot introduced a level of clarity for those considering the dangerous act of flight in a watercraft across the

<sup>45</sup> Steven Greenhouse, *U.S. Will Return Refugees to Cuba in Policy Switch*, N.Y. TIMES, May 3, 1995, [www.nytimes.com/1995/05/03/world/us-will-return-refugees-to-cuba-in-policy-switch.html](http://www.nytimes.com/1995/05/03/world/us-will-return-refugees-to-cuba-in-policy-switch.html).

<sup>46</sup> Henken, *supra* note 3, at 404 tbl.2. (In 1995, the combined total of interdictions by the Coast Guard and arrivals to US shores that evaded Coast guard detection was only 525 persons).

<sup>47</sup> Frank Davies, *Bush: Wet Foot-Dry Foot Policy Will Stay in Place*, Miami Herald 1 (Aug. 4, 2001), available at [http://www.cubainfolinks.org/webpage/Articles/wet\\_dry.htm](http://www.cubainfolinks.org/webpage/Articles/wet_dry.htm).

<sup>48</sup> Jeff Franks, *Expectations Low Ahead of U.S., Cuba Migration Talks*, REUTERS, <http://www.reuters.com/article/2010/06/17/us-cuba-usa-migration-idUSTRE65G6BM20100617?type=politicsNews>.

<sup>49</sup> WASEM, *supra* note 14, at 9–10.

<sup>50</sup> *Id.*

<sup>51</sup> Henken, *supra* note 3, at 398 (For a thorough review of how ad hoc US immigration policy decisions helped create the *balsero* crisis, Henken offers up data concerning US Coast Guard interdictions and visas granted at the US Interest Section in Havana to understand the crisis).

Between 1987 and 1994, the US Interest Section in Havana issued visas to only 11,222 (7.1 percent) of the 160,000 maximum allowable number of visas over that period (20,000 per year). “During the same period,” however, “the US admitted 13,275 Cubans [mostly rafters] who had arrived in Florida illegally.” Moreover, as the number of Cubans granted legal immigrant visas gradually dropped, the numbers of rafters interdicted rapidly increased. For example, from the mid-1980s with an average of 40 annual interceptions of Cuban rafters, numbers shot up to 391 in 1989 and 467 in 1990. Then, in the early 1990s, as economic impact from lost Soviet aid combined with the already acute lack of political and civil liberties on the island, the rafter exodus exploded. USCG sea rescues grew from 2,203 in 1991 to 3,656 in 1993. . . . “The net effect of US migration policies toward Cuba in the early 1990s stimulated the illegal or, at best, semi-legal entry of Cubans into the US . . . .”

*Id.* (citations omitted).

### Florida Straits.

In addition, the accords also created three additional pathways of legal immigration available to Cubans, a structure that continues to the present day. The first immigrant class consists of those in-country refugees who present circumstances that are “of special humanitarian concern to the United States.”<sup>52</sup> Under this classification, foreign nationals in countries designated by the State Department as “special concern” can present themselves at a United States embassy and be approved for refugee status if they can establish they are:

- Members of persecuted religious minorities;
- Human rights activists;
- Former political prisoners;
- Forced-labor conscripts (1965–1968);
- Persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment resulting from their perceived or actual political or religious beliefs or activities; or
- Persons who have experienced or fear harm because of their relationship—family or social—to someone who falls under one of the preceding categories.<sup>53</sup>

The United States State Department has explicitly designated Cuba as a country of special concern—a rare designation—and allocated almost all of the refugee visas—in 2011, approximately 5,000 of the 5,500 such visas for all of Latin America—to Cubans applying at the U.S. Interest Section in Havana.<sup>54</sup>

The second class of immigrants consists of those direct relatives of U.S. citizens or permanent residents “who are issued visas each year based on the family reunification criteria of US immigration law.”<sup>55</sup> Under this process, the U.S. citizen or permanent legal resident petitions for the immigrant family member, and Cuban family members who pursue this route remain subject to global immigration totals, often waiting several years before receiving permission to enter the United States under these family reunification policies.<sup>56</sup>

Finally, the 1994 and 1995 accords established a new visa program,

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<sup>52</sup> Pres. Determination No. 2011-17, 76 Fed. Reg. 62,597 (Oct. 11, 2011).

<sup>53</sup> *U.S. Refugee Program*, U.S. INTEREST SECTION: HAVANA CUBA, (Oct. 13, 2011, 12:02 PM), [http://havana.usint.gov/refugee\\_page.html](http://havana.usint.gov/refugee_page.html).

<sup>54</sup> *Id.* (designating Cuba as a country “of special interest”); Pres. Determination No. 2011-02, 75 Fed. Reg. 75,851 (Dec. 7, 2010).

<sup>55</sup> See Henken, *supra* note 3, at 401.

<sup>56</sup> *Id.*

providing for the admission of no less than 20,000 persons annually, exclusively for Cubans.<sup>57</sup> The Special Cuban Migration Program—known colloquially as the Lottery or “el Bombo”—implements this part of the accord.<sup>58</sup> Any Cuban between the ages of 18 and 55 years of age and who meet two of the following three conditions is eligible to apply: (1) have a high school degree or its equivalent; (2) have three years of work experience; and (3) have family in the United States).<sup>59</sup>

Viewed from the purist perspective of anti-communism, Wet Foot-Dry Foot was unquestionably a retreat from the cherished goal of providing a haven to all fleeing Cubans.<sup>60</sup> Viewed from the pragmatic perspective of immigration policy analysts that seek general applicability and consistency in immigration laws, these 1994 and 1995 accords didn’t go nearly far enough in normalizing the unique and anachronistic law of Cuban adjustment.<sup>61</sup> But this unique system of immigration rules for Cubans seemed to work politically for all three Administrations since the 1994/1995 immigration accords.

### III. TRAVEL TO CUBA

One pillar of U.S. policy towards “containing” Communist Cuba has been immigration; the other key pillar has been an economic embargo that has included curbing the unlicensed flow of U.S. citizens travelling to Cuba as part of the economic embargo.<sup>62</sup> Since the early 1960s, the embargo has prohibited most travel to Cuba and dramatically limited the remaining classes—humanitarian, religious, journalism and family visitation, for example—to only those travelling with licenses from the Department of the Treasury.

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<sup>57</sup> WASEM, *supra* note 14, at 2–3.

<sup>58</sup> Henken, *supra* note 3, at 401.

<sup>59</sup> *Id.* at 402.

<sup>60</sup> See, e.g., SILVIA PEDRAZA, *POLITICAL DISAFFECTION IN CUBA’S REVOLUTION AND EXODUS 199–200* (Camb. U. Press 2007) (the “interdiction policy for the ‘wet foot’ does constitute a dramatic change in policy.”).

<sup>61</sup> See Deborah Weissman, *The Legal Production of the Transgressive Family: Binational Family Relationships Between Cuba and the United States*, 88 N. C. L. REV. 1881, 1908–09 (2010); see also Henken, *supra* note 3, at 397–98 (discussing historical background of US policies towards Cuba prior to the 1994 and 1995 accords).

<sup>62</sup> In a telling commentary on his meeting with President Clinton at the height of the so-called “balsero crisis,” Cuban exile leader Jorge Mas Canosa identified the most important clarifications made by Clinton as support for the Cuban Adjustment Act and support for the embargo: “The President of the United States reaffirmed last night clearly that he supported the Cuban Adjustment Act [and] that he supported the embargo, and that he was not going to permit Castro to attempt to manipulate American politics.” JORGE MAS CANOSA, *EN BUSCA DE UNA CUBA LIBRE: EDICION COMPLETA DE SUS DISCURSOS, ENTREVISTAS, Y DECLARACIONES, VOL. III 1993 – 1997, 1893* (author translation) (2003).

### A. *The Cold War Origins of the Travel Ban to Cuba*

Restrictions on travel to Cuba were first put into place in 1963 when the Kennedy Administration issued the first Cuban Assets Control Regulations (“CACR”)<sup>63</sup> under the authority of the Trading With the Enemy Act of 1917 (“TWEA”).<sup>64</sup> Section 5(b) of the TWEA gave the President broad powers to impose economic restrictions on foreign countries at war or during peacetime.<sup>65</sup> These 1963 regulations were built on an existing series of economic sanctions against Cuba first initiated under the Eisenhower Administration in 1960<sup>66</sup> and continued by Kennedy.<sup>67</sup> “[E]xcept as specifically authorized by the Secretary of the

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<sup>63</sup> 31 C.F.R. § 515.415. (1963); *See also* MARK P. SULLIVAN, CRS REPORT FOR CONGRESS: *Cuba: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES* 9 (2011), *available at* <http://www.fas.org/sgp/crs/row/RL31139.pdf>.

<sup>64</sup> Trading with the Enemy Act of 1917, 50 App. U.S.C.A. §. 1. *See* Foreign Assets Control, Department of the Treasury, 28 Fed. Reg. 6,974 (July 9, 1963).

<sup>65</sup> Trading with the Enemy Act of 1917, 50 App. U.S.C.A. §5. In 1963, Section 5(b) of TWEA provided in relevant part:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise -

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . .

Enacted in 1917—only six months after the United States entered World War I—in its original form, TWEA only empowered the President to use these economic restrictions in war time. *See* Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. The Act was expanded in 1933 to grant the President the same authority in peacetime “national emergencies.” Act of Mar. 9, 1933, ch. 1, 48 Stat. 1. Under this statute, the President has delegated authority under TWEA to the Secretary of the Treasury’s Office of Foreign Assets Control. *See* Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942); Treasury Department Order No. 128 (Rev. 1, Oct. 15, 1962). In 1977, Congress reversed itself again limiting Presidential authority under Section 5(b) of TWEA to war-time emergencies, and enacting a new law to cover the President’s powers in response to peacetime crises. Accordingly, Cuba embargo regulations remained permissible. At first, the International Emergency Economic Powers Act (“IEEPA”) required the President to extend their exercise at one-year intervals provided that such an extension “is in the national interest.” *See* International Emergency Economic Power Act, Pub.L. 95-223, § 101, 91 Stat. 1625 (1977) (codified at 50 U.S.C. §§ 1701-1706). The Helms-Burton Act of 1996, codified at 22 U.S.C. §§ 6021-24, 6031-46, 6061-67, 6081-85 & 6091, revised this annual requirement, proscribing that the President may only lift the embargo when specific criteria are met. *See* 22 U.S.C. §§ 6061, 6064-6066.

<sup>66</sup> *United States Institutes Controls on Exports to Cuba*, DEP’T ST. BULL., Nov. 7, 1960, at 715 (denying export licenses to most industrial exports to Cuba).

<sup>67</sup> *See, e. g.*, Cuban Import, 27 Fed. Reg. 1,116 (1962) (total embargo on imports from Cuba). *See generally*, Report of the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. G/IV, 14–16 (1963); Cuba, Dept. of

Treasury,” Regulation 201(b) prohibited all “transactions involv[ing] property in which [Cuba has] . . . any interest of any nature whatsoever, direct or indirect . . . .”<sup>68</sup> The breadth of this language empowered the Office of Foreign Assets Control (“OFAC”) to interpret these “trade” regulations to cover not just standard trade between nations, but also to extend to travel-related expenditures that effectively made illegal all but fully-hosted travel to Cuba.

These travel limitations were eventually challenged and in *Regan v. Wald*, a divided Supreme Court found the regulations constitutional.<sup>69</sup> In general, the Supreme Court had previously held that the Constitution created a liberty of travel for US nationals that could not be abridged without due process of law.<sup>70</sup> In the 1965 *Zemel v. Rusk* case, the Court rejected a challenge to the State Department’s refusal to validate the passport of US citizens for travel to Cuba,<sup>71</sup> distinguishing an unconstitutional government prohibition of travel against a specific citizen from a constitutional government ban on travel to a specific nation—Cuba—that was applied equally to all citizens:

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State Pub. No. 7171, pp. 25–36 (1961). See also *Regan v. Wald*, 468 U.S. 222, 225–26 (1984); *Zemel v. Rusk*, 381 U.S. 1, 14–15 (1965).

<sup>68</sup> 31 C.F.R. § 515.201(b) (2006). A complete version of §515.201(b) gives even more context:

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term *foreign country designated under this part* and the term *designated foreign country* mean Cuba and the term *effective date* and the term *effective date of this section* mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963.

(e) When a transaction results in the blocking of funds at a banking institution pursuant to this section and a party to the transaction believes the funds have been blocked due to mistaken identity, that party may seek to have such funds unblocked pursuant to the administrative procedures set forth in §. 501.806 of this chapter.

<sup>69</sup> *Regan v. Wald*, 468 U.S. 222 (1984).

<sup>70</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“right to travel is a part of the “liberty” of which the citizen cannot be deprived without due process of law under the Fifth Amendment”).

<sup>71</sup> *Zemel*, 381 U.S. at 3.

It must be remembered . . . that the issue involved in [the passport challenges] was whether a citizen could be denied a passport because of his political beliefs or associations. . . . In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.<sup>72</sup>

Accordingly, across-the-board travel restrictions were found to implicate no First Amendment protections, and the Fifth Amendment right to travel standing alone was held to be insufficient to withstand important foreign policy justifications in support of the restriction:

That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.<sup>73</sup>

Subsequent interpretation from the Supreme Court has made clear that the long shadow of nuclear holocaust—a clear and concerning preoccupation in the 1960s—need not be demonstrated by the Executive Branch to justify its restriction of such travel. In general, courts have followed the well-settled principal of judicial deference accorded to executive branch activities in the arena of foreign relations. Further, when the Executive Branch was acting under a Congressional grant of power, principles of legislative intent further forbade the Court from second-guessing the application of the OFAC regulations.<sup>74</sup>

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<sup>72</sup> *Id.* at 13.

<sup>73</sup> *Id.* at 16.

<sup>74</sup> In 1984 the Court elaborated:

In the opinion of the State Department, Cuba, with the political, economic, and military backing of the Soviet Union, has provided widespread support for armed violence and terrorism in the Western Hemisphere. Cuba also maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. Given the traditional deference to executive judgment “[i]n this vast external realm,” *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 319 (1936), we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.”

*Regan*, 468 U.S. at 242 (citations omitted); see also *U.S. v. Plummer*, 221 F.3d 1298, 1309 (2000) (discussing TWEA and 1977's IEPA as requiring substantial deference to executive).

### B. *The Evolution of Regulatory Restrictions on Cuba Travel*

In the years that followed the 1963 promulgation of the Cuba travel ban, most attention on Cuba was focused on its emerging relationship with the Soviet Union and the steady flow of refugees leaving the island. The travel ban effectively eliminated almost all travel to Cuba.

In 1977, the election of President Carter brought with it a new perspective on Cuba. Early in his term, he acted to amend the CACR by adding Regulation 560.<sup>75</sup> This new regulation created a general license permitting all “persons who visit Cuba to pay for their transportation and maintenance expenditures (meals, hotel bills, taxis, etc.) while in Cuba.”<sup>76</sup>

The general license required no advance approval by OFAC and, overnight, those wishing to travel to Cuba found themselves largely exempted from the embargo.<sup>77</sup> Under the Carter-era general license provisions, persons engaging in travel-related “transactions” were only required to make “a full and accurate record of each such transaction” and to keep those records for at least two years.<sup>78</sup> Further, the general license remained subject to revocation or modification “at any time.”<sup>79</sup>

Republican Ronald Reagan’s victory in 1980 signaled a broad shift rightward from his Democratic predecessor, particularly towards containing Communism. Moreover, leaders in the Cuban exile community began to shift their strategies. During these early years of the Reagan Administration, they founded the Cuban American National Foundation, located in Miami, Florida and Washington, DC, to lobby for restrictions on trade and travel with Cuba.<sup>80</sup> Unsurprisingly, the Carter-era relaxation of the Cuba travel ban soon came under scrutiny.

In 1982, Reagan amended Regulation 560 to end general licenses in order to “reduce Cuba’s hard currency earnings from travel by U.S. persons to and within Cuba.”<sup>81</sup> The new Regulation 560 licensed only

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<sup>75</sup> 31 C.F.R. § 515.560 (1977). Regulation 560 was promulgated first on March 29, 1977, Cuban Assets Control Regulations, 42 Fed. Reg. 16,621, then amended on May 18, 1977 to relax then-existing Cuba travel restrictions even further. Cuban Assets Control Regulations 42 Fed. Reg. 25,499 (May 18, 1977).

<sup>76</sup> Cuban Assets Control Regulation, 42 Fed. Reg. 16,621 (Mar. 29, 1977).

<sup>77</sup> Not all restrictions were lifted. For example, travelers were limited to \$100 in their purchases of merchandise while in Cuba, and such goods could only be for personal use and not resold. 31 C.F.R. § 515.560(a)(3) (1977). In addition, contracts between US credit cards and Cuban enterprises “for the extension of credit to any traveler” were still prohibited, 31 C.F.R. § 515.560(a)(7) (1977), as was regular air and sea travel, 31 C.F.R. § 515.560(a)(5) (1977).

<sup>78</sup> 31 C.F.R. § 515.601 (1977).

<sup>79</sup> 31 C.F.R. § 515.805 (1977).

<sup>80</sup> See Damián J. Fernández, *From Little Havana to Washington, D.C.: Cuban-Americans and U.S. Foreign Policy*, in *ETHNIC GROUPS AND FOREIGN POLICY* 115, 124–25 (Mohammed E. Ahrari ed., 1987).

<sup>81</sup> Regulation 560 was actually amended twice—after the initial modifications to the general license, it was amended again in July of that year to further clarify the scope of permissible travel-related transactions with Cuba. Cuban Assets Control Regulation, 47 Fed. Reg. 17,030 (April 20, 1982)

travel-related economic transactions within a narrow set of categories, such as diplomatic visits, journalism, professional research, and visits to close relatives.<sup>82</sup> Explicitly prohibited in the new Cuban Asset Control Regulations were general tourist and business travel.<sup>83</sup> These regulations were to remain in place until the next Democratic administration in the mid-1990s.

#### IV. CUBA POLICY OVER THE LAST 15 YEARS: *BALSEROS*, HELMS-BURTON AND OTHER FIG LEAFS

Like a house of cards, Communism in the Eastern Bloc collapsed with amazing speed. From the Berlin Wall in 1989 to the dissolution of the Soviet Union in 1991: One by one, the Communist states in Europe abandoned their ideologies and pursued market-based economies. These changes forced profound change on Cuba, but also invited the United States to reexamine many of its foreign policy priorities based in Cold War assumptions—including its Cuba embargo.

##### A. *The Early 1990s: Growing Comfortable with Ending Cold War Cuba Policy in a Post-Communist World*

The election of Bill Clinton in 1992 signaled the possibility of changes in Cuba policy for the first time in over a decade.<sup>84</sup> Indeed, change to the travel ban began fast. In his first year, Clinton authorized OFAC to create two new classes of specific licenses through which U.S. citizens could travel legally to Cuba.<sup>85</sup> The first category permitted licensed travel to Cuba “for clearly defined educational or religious activities.” The second category permitted travel “for activities of recognized human rights organizations.”<sup>86</sup> The Cuban-American lobby strongly opposed this effort to loosen the travel restrictions, but the anti-Communist rationale that swayed previous presidents since the Cold War Era was no longer there.

A year later, the flood of Cubans into American waters during the *balsero* crisis forced President Clinton to challenge another sacred cow of the Cuban-American anti-Castro lobby: the Cuban Adjustment Act. This law’s authorization of an open-door immigration policy for Cubans was elevated to the national stage when the *balsero* crisis caused the Clinton

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(to be codified at 31 C.F.R. pt. 515); 47 Fed. Reg. 32,060 (July 23, 1982) (to be codified at 31 C.F.R. pt. 515).

<sup>82</sup> 31 C.F.R. § 515.560(a)(1) (1983).

<sup>83</sup> 31 C.F.R. § 515.560(a)(3) (1983).

<sup>84</sup> See e.g., MAS CANOSA, *supra* note 58, at 718–19 (indicating discussion amongst Cuban exile circles about the position this new administration would take, understanding that their interest group did not have the sway with Democrats that it had with Republicans).

<sup>85</sup> SULLIVAN, *supra* note 63, at 10.

<sup>86</sup> *Id.*

Administration to fear disastrous outcomes akin to the Mariel boatlift a decade before.<sup>87</sup> Ultimately, Clinton's adoption of the Wet Foot-Dry Foot policy in August 1994 would close the "open door" policy—or at least close it halfway. While still accepting all Cubans who touch ground in the United States (the "dry foot"), the policy instituted an interdiction practice that forcibly returned all *balseros* found at sea (the "wet foot") to Cuba.<sup>88</sup> Even while special immigration programs for Cubans remained,<sup>89</sup> many Cuban exiles saw this shift as a betrayal of the US government's historic anti-Communist commitments to welcome all who fled Castro's Cuba.<sup>90</sup>

Changes to both the travel ban and Cuban immigration policy evidenced a growing comfort among Executive Branch officials to shift away from Cold War-era Cuba policies. This comfort in moving away from Cuban exceptionalism was soon to end in fire, smoke and bombast.

#### *B. Turning Back the Clock: Brothers to the Rescue and the Helms-Burton Act*

On February 24, 1996 Cuban MiGs scrambled into flight on reports of unauthorized aircraft entering Cuban airspace. Minutes later, these warplanes shot down two small, civilian aircrafts—one in Cuban airspace—piloted by anti-Castro activists.<sup>91</sup> Despite having given ample warnings to Brothers to the Rescue following prior incursions into their airspace, the Cuban actions prompted hostility and outrage among Cuban-Americans in the United States, as well as a swift response from the Republican-led United States Congress.<sup>92</sup> Overnight, Cuban exile activists resurrected Cold War policy from history's dustbin, culminating in the passage of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, known better as the Helms-Burton Act.<sup>93</sup> President Clinton

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<sup>87</sup> See Ojita *supra* note 25.

<sup>88</sup> Henken, *supra* note 3, at 409.

<sup>89</sup> See *Id.*

<sup>90</sup> See FELIX MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS: CUBAN MIGRANTS TO THE US, 1959–1995 141 (1996) (calling these changes "a complete reversal of a thirty-five-year-old immigration policy designed to welcome as political refugees almost any Cuban who claimed to be 'escaping' Fidel Castro's repression"). The argument that the administration was "soft" on Cuba linked its earlier easing of the travel ban to this effort to change immigration policy. Some point to the Torricelli Act, known formally as the Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575, 2578 (codified at 22 U.S.C. § 6005(c) (2006)) as an example of Clinton remaining "tough". In truth, this was a legislative effort and OFAC acted to toughen its regulations, Cuban Assets Control Regulations, 56 Fed. Reg. 49,847, (Oct. 2, 1991) (codified at 31 CFR pt. 515), as required by this legislative initiative.

<sup>91</sup> See Phillip Brenner, Patrick J. Haney & Walter Vanderbush, *The Confluence of Domestic and International Interests: U.S. Policy Toward Cuba, 1998–2001*, 3 INT'L STUDS. PERPS. 192, 194 (2002) (highlighting role of exile group "Brothers to the Rescue").

<sup>92</sup> U.N. Secretary-General, *Report on the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996* 86–90, 140, U.N. Doc. S/1996/509 (July 1, 1996).

<sup>93</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 1,

acknowledged as much in his comments at the signing ceremony of the Helms-Burton Act: “The legislation I sign today further tightens [the] embargo. It sends a strong message to the Cuban government [that]...we will stand both with those inside and outside Cuba who are working for a peaceful transition to freedom and democracy.”<sup>94</sup> In practical terms, the Brothers to the Rescue incident and the Helms-Burton Act largely halted the trend away from exceptionalist policies regarding Cuba—both for those seeking to come to the United States as immigrants, and for Americans seeking to travel to Cuba.<sup>95</sup> The law’s long shadow would shape—for better or for worse—the policy landscape of United States/Cuban relations for the next 15 years.

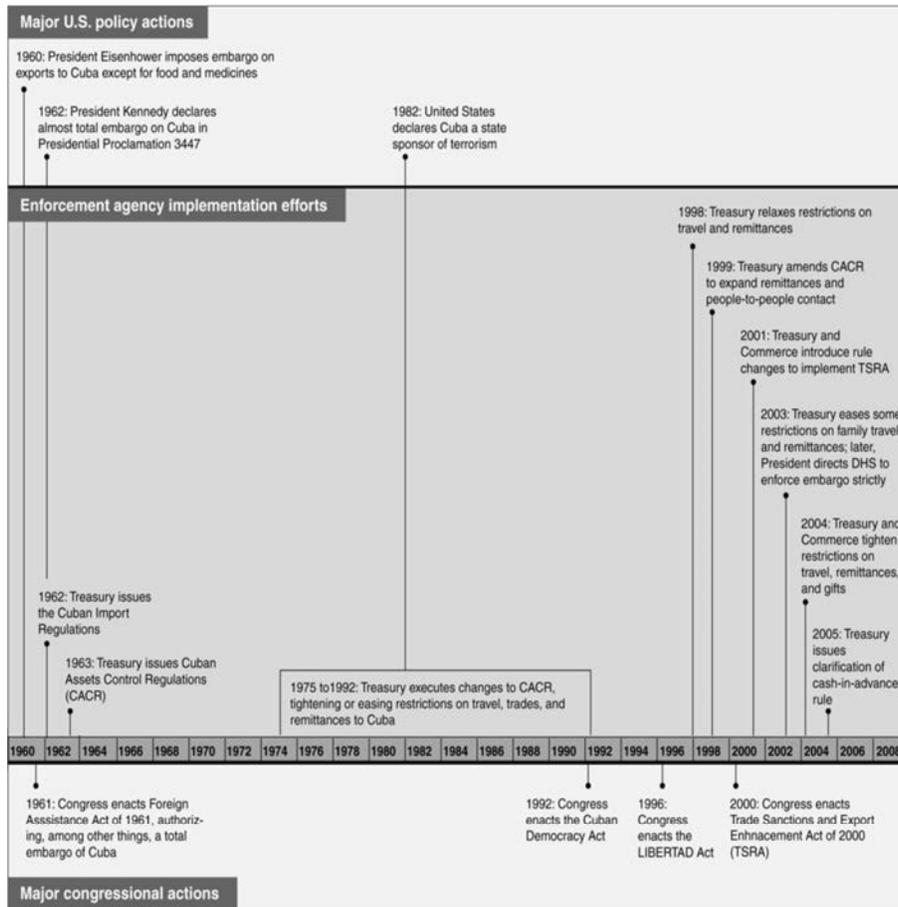
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110 Stat. 785, (codified at 22 U.S.C. § 6021 (2006)). In this article, I discuss generally the importance of the Helms Burton Act and do not discuss in any depth its antecedent, the Cuba Democracy Act of 1992, known more commonly as the Torricelli Act. See Cuban Democracy Act of 1992, Pub. L. No. 102-484, §§ 1701-12, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001–10 (2006)). The Torricelli Act extended the reach of the embargo until the Helms Burton Act expanded the restrictions even further in 1996. While it was a significant step towards toughening the law, the Torricelli Act did not stop the trend toward executive branch drift away from tough enforcement of these regulations.

<sup>94</sup> HANEY & VANDERBUSH, *supra* note 2, at 99.

<sup>95</sup> One exception to this tilt back towards “tough” Cuba embargo policy was a brief loosening in the travel regulations in the late 1990s to permit educational “people to people” travel. This broadening of the educational class of travel was eliminated soon after the election of George W. Bush in 2000. Cuban Assets Control Regulations: Sales of Food and Agricultural Inputs, 64 Fed. Reg. 25,808 (May 13, 1999) (to be codified at 31 CFR p. 515).

Figure 1: Major Events in the Development of the U.S. Economic Embargo on Cuba, 1960–2008<sup>96</sup>



Source: GAO analysis.

Primarily focused on toughening economic sanctions against Cuba, Helms-Burton's controversial penalization of other countries doing business with Cuba was the main focus of debate during its passage.<sup>97</sup> The law extended the 1992 Cuba Democracy Act—also called the Torricelli Act—by further regulating third-party transactions with Cuba.<sup>98</sup> It also

<sup>96</sup>DAVID GOOTNICK, U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-592R, U.S. EMBARGO ON CUBA: RECENT REGULATORY CHANGES AND POTENTIAL PRESIDENTIAL OR CONGRESSIONAL ACTIONS at 8, fig. 1(2009).

<sup>97</sup>See, e.g., *Bush Waives Controversial Portion of Helms-Burton Law*, CNN.COM (July 16, 2001), [http://articles.cnn.com/2001-07-16/politics/bush.cuba\\_1\\_helms-burton-act-democratic-solidarity-act-cuba-policy?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2001-07-16/politics/bush.cuba_1_helms-burton-act-democratic-solidarity-act-cuba-policy?_s=PM:ALLPOLITICS).

<sup>98</sup>See 22 U.S.C. § 6033 (2006).

directed the Executive Branch to work to oppose Cuba's membership in international financial institutions.<sup>99</sup>

Title III and Title IV of the Helms-Burton Act reached even further to give legal standing to US nationals who have claims to expropriated property in Cuba to sue in U.S. court any foreign person who deals in US property confiscated by the Cuban government,<sup>100</sup> and by requiring the State Department to withhold visas from foreign businessmen doing business with Cuba.<sup>101</sup> The goals of these provisions were to isolate Cuba by discouraging investment by non-U.S. corporations—a strategy that data does not support having worked.<sup>102</sup> In response, many corporations spun off their Cuba investment into separate companies so that the parent companies' assets were not at risk,<sup>103</sup> or they simply ignored the policy.<sup>104</sup> The extraordinary reach of these two provisions have been highly controversial with US allies like Canada and the European Union, and have never been fully implemented<sup>105</sup> in the wake of heavy criticism both internationally and domestically.<sup>106</sup>

In addition to these specific trade-related mandates, Section 102 of the Act explicitly “codified” the embargo. The bill language specifically gave the force of law to “all restrictions” in effect under the Cuban Asset Control Regulations (“CACR”).<sup>107</sup> Travel restrictions enforced by OFAC are part of these CACR regulations, and thus were codified in their then-current form allowing for broad discretion by the President to establish such categories and limitations on travel to Cuba.<sup>108</sup>

Section 112 of the Helms-Burton Act includes specific statutory language concerning the travel ban.<sup>109</sup> In pertinent part, this language does

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<sup>99</sup> See *Id.* at § 6034.

<sup>100</sup> See *Id.* at § 6082.

<sup>101</sup> See *Id.* at § 6091.

<sup>102</sup> Paolo Spadoni, *The Impact of the Helms-Burton Legislation on Foreign Investment in Cuba*, 11 ASSOC. OF STUDY OF THE CUBAN ECONOMY PROCEEDINGS 18, 34-35 (2001)(while foreign investment remains low in Cuba, it doesn't appear to have been impacted by Helms Burton).

<sup>103</sup> *Id.* at 32.

<sup>104</sup> *Id.* at 28.

<sup>105</sup> See Christopher Marquis, *Bush Forgoes Trying to Bar Cuba Deals by Foreigners*, N.Y. TIMES July 17, 2001, <http://www.nytimes.com/2001/07/17/world/bush-forgoes-trying-to-bar-cuba-deals-by-foreigners.html?ref=cuba> (Bush continues Clinton Administration refusal to enforce Section III of Helms Burton Act).

<sup>106</sup> See Christopher Marquis, *Congressional Leaders Approve a Deal to Allow Food Sales to Cuba*, N.Y. TIMES, Sept. 28, 2000, <http://www.nytimes.com/2000/09/28/us/congressional-leaders-approve-a-deal-to-allow-food-sales-to-cuba.html?ref=cuba>.

<sup>107</sup> 22 U.S.C. § 6032(h) (Pub. L. 104-114) (2000).

<sup>108</sup> See 22 U.S.C. §6032(c)(2006).

<sup>109</sup> *Id.* at § 6042. Section 112 of the Helms Burton Act reads in its entirety:

REINSTITUTION OF FAMILY REMITTANCES AND TRAVEL TO  
CUBA

It is the sense of the Congress that the President *should*—

(1)(A) before considering the reinstatement of general licenses for family

not limit the executive authority on determining who can travel to Cuba. Instead, Congress directs that

the President *should*. . . before considering the reinstatement of general licenses for travel to Cuba by individuals resident in the United States who are family members of Cuban nationals who are resident in Cuba, insist on such actions by the Cuban Government as abrogation of the sanction for departure from Cuba by refugees, release of political prisoners, recognition of the right of association, and other fundamental freedoms.<sup>110</sup>

The use of the permissive “should” instead of the mandatory “shall” reaffirms again that the Congress intended to incorporate the Presidential discretion already in CACR into its codification of the embargo.

The relatively minor impact of the Helms-Burton Act on the travel ban regulations has been widely misunderstood.<sup>111</sup> Many in Congress—on both sides of the debate—indicated that the bill would codify (and therefore tighten) travel restrictions to Cuba.<sup>112</sup> Executive officials have similarly parroted this message that the law limits executive discretion—including rulemaking and policy development—as a result of codification.<sup>113</sup> This misapprehension has been repeated by government officials<sup>114</sup> and academics,<sup>115</sup> further perpetuating the myth of legislative

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remittances to Cuba, insist that, prior to such reinstatement, the Cuban Government permit the unfettered operation of small businesses fully empowered with the right to hire others to whom they may pay wages and to buy materials necessary in the operation of the businesses, and with such other authority and freedom as are required to foster the operation of small businesses throughout Cuba; and

(B) if licenses described in subparagraph (A) are reinstated, require a specific license for remittances described in subparagraph (A) in amounts of more than \$500; and (2) before considering the reinstatement of general licenses for travel to Cuba by individuals resident in the United States who are family members of Cuban nationals who are resident in Cuba, insist on such actions by the Cuban Government as abrogation of the sanction for departure from Cuba by refugees, release of political prisoners, recognition of the right of association, and other fundamental freedoms (emphasis added).

<sup>110</sup> *Id.* (emphasis added).

<sup>111</sup> A strong indictment of Helms Burton optics having inordinate impact on policy making can be found in the New Ideas Fund report to President Obama. See Jake Colvin, *The Case for a New Cuba Policy*, NEW IDEAS FUND at 29, <http://www.newideasfund.org/proposals/Colvin%20-%20Cuba%20-%20Master.pdf>.

<sup>112</sup> 142 CONG. REC. 29, 3801 (1996).

<sup>113</sup> Saul Hudson, *Castro Handover Seen Unlikely to Change US Policy*, REUTERS Aug. 1, 2006, available at <http://cuba.blogspot.com/2006/08/castro-handover-seen-unlikely-to.html>

<sup>114</sup> Most prominently is the widely-relied upon Congressional Research Service-commissioned report by Mark Sullivan. Sullivan explicitly states:

Lifting all the restrictions on travel, however, would require legislative action.

“codification” by the Helms-Burton Act.

*C. Codifying the Cold War At Last: The Trade Sanctions Reform and Export Enhancement Act of 2000*

After languishing in Congress for years, a bill seeking to permit the export of agricultural products to Cuba finally found its legs in 2000. Passed as part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, its provisions finally opened the door for the commercial sale of some US-produced foodstuffs to Cuba and other nations despite existing economic sanctions.<sup>116</sup> Called the Trade Sanctions Reform and Export Enhancement Act of 2000 (“TSREEA”),<sup>117</sup> the law went further than its stated focus on agricultural exports to include specific restrictions on travel.<sup>118</sup> As the

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This is because of the codification of the embargo in Section 102(h) of the Cuban Liberty and Democratic Solidarity Act of 1996 (P.L. 104-114); *that act conditions the lifting of the embargo, including the travel restrictions, on the fulfillment of certain democratic conditions in Cuba*. Although the Administration retains flexibility through licensing authority to ease travel restrictions, the President may not lift all restrictions on travel as set forth in the CACR.

SULLIVAN, *supra* note 63, at 3 (emphasis added).

<sup>115</sup> In general, the codification of other trade-related policies, together with the explicit definition of what constitutes the conditions in Cuba to provide the President with discretion to end these statutorily-required restrictions have led legal scholars and other academics to conclude that a broader scope of codification—including a limitation on executive discretion on travel—resulted from the passage of Helms-Burton. *See, e.g.,* Deborah Weissman, *The Legal Production of the Transgressive Family: Binational Family Relationships between Cuba and the United States*, 88 N. CAR. L. REV. 1881, 1906 (2010) (“The Helms-Burton Act expanded restrictions, added new sanctions, and codified *all* aspects of the embargo, thereby prohibiting the executive branch from easing the restrictions without an act of Congress.”) (emphasis added); Spadoni, *supra* note 102, at 18 (“codifying the existing restrictions that collectively formed the U.S. economic embargo against Cuba, the Helms-Burton law aimed to complicate Havana’s access to external financing”); *see also* José M. Gabilondo, *Cuban Claims: Embargoed Identities and the Cuban-American Oedipal Conflict (El Grito De La Yuma)*, 9 RUTGERS RACE & L. REV. 335, 354 (2008) (asserting that Helms-Burton Act statutorily requires a “big bang” transition to democracy in Cuba “as a precondition to lifting the embargo”); Roland Estevez, *Modern Application of the Cuban Adjustment Act and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1289 (2002) (“The persistence of Helms-Burton in light of its categorical failures portrays the legislation as the codification of a monumental grudge”).

<sup>116</sup> H.R. 5426, 106th Cong. § 910(a) (1999-2000) (including TRSEEA as Title IX of H.R. 5426). *See generally*, Raymond Ahern and Vivian Jones, RL30227: Trade Legislation in the 106th Congress: An Overview, Cong. Rsch. Service (March 7, 2011) (Congressional Research Service summary of bill scope), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR05426:@@L&summ2=m&>.

<sup>117</sup> Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. § 7201 (2006).

<sup>118</sup> Jake Colvin explains the logic behind the legislation thus:

In exchange for exempting humanitarian trade from the embargo, pro-embargo members of Congress championed a provision that prohibits the executive branch from licensing “travel to, from, or within Cuba for tourist activities.” As a result, one of the most logical steps the next president might wish to take, lifting the travel ban, likely would require an act of Congress. “This time, Mr. Diaz-Balart got it right,” says Robert Muse, a Washington attorney who advises businesses on Cuba.

legislative history explains, TSREEA's goals were to encompass both "trade and travel restrictions with Cuba..."<sup>119</sup>

Although not the primary focus of the bill, language was included to limit travel to Cuba.<sup>120</sup> In relevant part, the language specifically excluded all "tourist-related travel."<sup>121</sup> The law defined "tourist-related travel" as "any activity...not expressly authorized" by the then-current OFAC travel regulations "either by a general license or on a case-by-case basis by a specific license."<sup>122</sup> This language referred to the twelve administratively-created classes of travel that existed at the time of this law's passage, thus codifying them.<sup>123</sup>

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Colvin, *supra* note 111, at 21.

<sup>119</sup> H.R. 5426, 106th Cong., (1999) (enacted).

<sup>120</sup> 22 U.S.C. § 7209 (2006). The section reads in its entirety:

***Requirements relating to certain travel-related transactions with Cuba.***

(a) Authorization of travel relating to commercial sales of agricultural and medical goods. The Secretary of the Treasury shall promulgate regulations under which the travel-related transactions listed in subsection (c) of section 515.560 of title 31, Code of Federal Regulations, may be authorized on a case-by-case basis by a specific license for travel to, from, or within Cuba for the commercial export sale of agricultural commodities pursuant to the provisions of this chapter.

(b) Prohibition on travel relating to tourist activities

(1) In general. Notwithstanding any other provision of law or regulation, the Secretary of the Treasury, or any other Federal official, may not authorize the travel-related transactions listed in subsection (c) of section 515.560 of title 31, Code of Federal Regulations, either by a general license or on a case-by-case basis by a specific license for travel to, from, or within Cuba for tourist activities.

(2) Definition. In this subsection, the term "tourist activities" means any activity with respect to travel to, from, or within Cuba that is not expressly authorized in subsection (a) of this section, in any of paragraphs (1) through (12) of section 515.560 of title 31, Code of Federal Regulations, or in any section referred to in any of such paragraphs (1) through (12) (as such sections were in effect on June 1, 2000).

<sup>121</sup> *Id.* at §7209(b).

<sup>122</sup> *Id.* at §7209(b)(2).

<sup>123</sup> The twelve categories of travel codified for either general or specific licenses by the TRSEEA include:

- (1) Family visits (general and specific licenses) (see §515.561);
- (2) Official business of the U.S. government, foreign governments, and certain intergovernmental organizations (general license) (see §515.562);
- (3) Journalistic activity (general and specific licenses) (see §515.563);
- (4) Professional research and professional meetings (general and specific licenses) (see §515.564);
- (5) Educational activities (specific licenses) (see §515.565);
- (6) Religious activities (specific licenses) (see §515.566);
- (7) Public performances, athletic and other competitions, and exhibitions (specific licenses) (see §515.567);
- (8) Support for the Cuban people (specific licenses) (see §515.574);
- (9) Humanitarian projects (specific licenses) (see §515.575);
- (10) Activities of private foundations or research or educational institutes (specific licenses) (see §515.576);

The effect of this language was to accomplish something that the Helms-Burton Act was unable to achieve despite its sponsors' anti-Castro zeal: the codification of the travel ban.<sup>124</sup> After nearly forty years of existing solely at the discretion of the President, the travel restrictions were now law.

How Congress codified the travel ban, however, was less clear. Travel was still permitted, but only by general or specific licenses under any of the enumerated license categories. Because the statute was silent on how OFAC makes determinations within these twelve categories, it is presumed that the President, through OFAC, retains the discretion to determine which of the twelve categories will be subject to general license requirements and which subject to more onerous specific—or “case-by-case”—review. Consistent with this interpretation of TSREEA, OFAC has in recent years changed existing categories from the specific license requirement to general licenses.<sup>125</sup>

In addition, OFAC has taken the position that, within these existing twelve categories, it has the power to narrow or widen the applicable class of activity and, correspondingly, narrow or broaden the numbers of individuals eligible to travel to Cuba. For example, pursuant to an announcement by President Obama in January 2011, OFAC broadened the journalist category to include freelance writers.<sup>126</sup>

Such OFAC actions show that, despite codification of the travel ban, travel remains far from banned; instead, efforts to limit or expand travel occur within the regulatory domain of OFAC regulation as conscripted by the then-existing regulatory regime of 2000—a conscription which limits the executive from making a wholesale administrative repeal of the travel ban, but not from making substantial changes to its current scope.

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(11) Exportation, importation, or transmission of information or informational materials (specific licenses) (see §515.545); and

(12) Certain export transactions that may be considered for authorization under existing Department of Commerce regulations and guidelines with respect to Cuba or engaged in by U.S.-owned or controlled foreign firms (general and specific licenses) (see §§515.533 and 515.559), 31 C.F.R. § 515.560 (2010).

<sup>124</sup> Section 515.560(b) explicitly permitted the President to create new classes of licensees in addition to the 12 codified by TRSEEA. 64 Fed. Reg. 25,814. § 515.560(b) (“Travel-related transactions in connection with activities other than those referenced in paragraph (a) of this section may be authorized on a case-by-case basis by a specific license issued pursuant to § 515.801.”) This discretion to create more categories is, accordingly, eliminated.

<sup>125</sup> See, e.g., Cuban Asset Control Regulations, 76 Fed. Reg. 5072, 5073 (Jan. 28, 2011) (amending OFAC regulation Section 515.566 that required religious organizations to receive a specific license to only require a general license).

<sup>126</sup> Cuban Asset Control Regulations, 76 Fed. Reg. 5072, 5074 (Jan. 28, 2011) (amending section 515.563(b) to “increase the scope of the statement of specific licensing policy for journalistic activities in Cuba to include free-lance journalistic projects other than ‘articles.’”).

#### D. Presidential Action on Current Cuban Immigration Policies

Unlike travel restrictions to Cuba, there have been few changes to the immigration framework since the 1995 migration accords. Wet Foot-Dry Foot remains the law of the land, and the prospects for “normalization” —a term used among immigration officials meant to describe regularizing policy on Cubans such that they are treated like other foreign nationals—are dim.<sup>127</sup>

Current changes in Cuba—including the prospect of reform with the transition in leadership to Raul Castro—have strengthened support for the Cuban Adjustment Act so as not to “send the wrong message” by abandoning its exceptional treatment of those Cubans who manage to reach the United States.<sup>128</sup> While the extant discretion remains for the President to exert substantial power in redrawing these immigration policies if he so chooses, there has been little appetite to adjust the lines of this policy debate.<sup>129</sup>

#### V. ENDING THE UNFAIR AND ILLOGICAL CUBAN EXCEPTIONALISM

Not only does pragmatic assessment of the failed Communist-era policy recommend change, but the moral guidepost of fairness strongly forces the hand of the administration to act in its discretion to normalize these policies. National security necessity cited under the Trading with the Enemy Act<sup>130</sup> to “trump” the fairness argument and standard international travel regulations makes little sense in a post-Communist era. At least as urgent is the need to address the unfair and failed Cuban Adjustment Act. The unique and privileged position of the Cuban seeking to immigrate to the United States under Wet Foot-Dry Foot offends the principle of fairness when no other immigrant from anywhere else in the world is treated with this exceptional brand of welcome. Indeed, at a time when immigrants are denominated and differentiated so painstakingly as “legal” and “illegal,” the creation of a special legal category for Cubans in which

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<sup>127</sup> WASEM, *supra* note 14, at 1.

<sup>128</sup> *Id.* at 17.

<sup>129</sup> *But see* Juan O. Tamaya, *Rivera Seeks to Restrict Some Cubans from Returning to Cuba*, MIAMI HERALD, (Aug. 16, 2011), <http://www.miamiherald.com/2011/08/16/v-fullstory/2362137/rivera-seeks-to-restrict-some.html> (The author describes a recent effort by at least one staunch anti-Communist Cuban-American Congressman, Rep. David Rivera, to repeal the Cuban Adjustment Act through a bill filed on August 1, 2011. *See also* Associated Press, *Congressman wants change to Cuban Adjustment Act*, VIVA COLORADO, (AUG. 17, 2011), [http://www.vivacolorado.com/comunidad/ci\\_18702039?source=pkg](http://www.vivacolorado.com/comunidad/ci_18702039?source=pkg) (describing Rivera’s efforts as seeking to penalize Cuban-born citizens for use of a loophole whereby they adjust their status as refugees and still continue to visit their families in Cuba, and mentioning broad opposition to Rivera’s bill, including from the Cuban-American National Foundation.).

<sup>130</sup> Trading with the Enemy Act, 50 App. USC § 5 (2006).

they are –by definition—always legal cannot withstand fairness critique.<sup>131</sup>

With both sound policy and fairness principles counseling policymakers to reset course on Cuba, the question of legislation comes to mind. But the curious politics of Cuban policy frustrate any sincere attempt of policy modification and have for nearly fifty years. Accordingly, the question of policy change turns to the Executive Branch.

A. *Executive Branch Repeal of Travel Restrictions to the Extent Permitted by TSREEA*

The Administration can and should discontinue travel restrictions to the extent possible under TSREEA. In relevant part, the 2000 law’s codification of twelve classes of travel prohibits wholesale elimination of the travel ban. Nonetheless, broad discretion remains to open up these categories to more US citizens desiring to travel to Cuba. This discretion permits a substantial reduction in scope of this barrier to travel.

The authority of the executive branch under TSREEA to define which groups are eligible within the extant twelve classes of licensees is substantial. The OFAC regulation-changes that followed the announcement of President Barack Obama in January 2011 demonstrate the substantial powers reserved for the President’s discretion. As part of these changes, Section 515.563 was amended to expand the specific license journalist category to permit freelance writers working on “projects other than ‘articles.’”<sup>132</sup> This new language broadens substantially the types of persons who can travel under this category. Anyone can be a freelance journalist; moreover, without the requirement that you have an article to be published, there is no check on such applicants or requirement that they secure a publisher in advance, thus allowing for individuals to characterize their travel as journalistic without the need to seriously demonstrate such an endeavor before or after such travel.<sup>133</sup>

Other categories lend themselves to such “broad” interpretation, too. The new general license for religion, for example, permits “[r]eligious organizations located in the United States, including members and staff of such organizations,... to engage in the travel-related transactions...”<sup>134</sup> As

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<sup>131</sup> It is just as much the responsibility of Cubans and Cuban Americans to call out and correct this unfairness. See Amy Gutmann, *Responding to Racial Injustice*, in COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 173 (1996) (Those of us who have unfairly benefited in the past, or will unfairly benefit in the future, if we do not act to change things, have special obligations, which flow from the general obligation to do our fair share to help others. We have these special obligations not because we asked to be unfairly advantaged but because we *have been* and *are* unfairly advantaged.”).

<sup>132</sup> Cuban Assets Control Regulations, 76 Fed. Reg. 5,073 (Jan. 28, 2011).

<sup>133</sup> *Id.* (“Paragraph (b) of section 515.563 is amended to increase the scope of the statement of specific licensing policy for journalistic activities in Cuba to include free-lance journalistic projects other than ‘articles.’”).

<sup>134</sup> 31 C.F.R. § 515.566(a) (2010).

with the journalist example above, this category could be broadened to include persons interested in religion and religious subjects in Cuba, but not affiliated with a church in the United States. Under the logic of the 2000 TSREEA legislation, the category is preserved but widened to allow more participating members.

Also within OFAC discretion is the decision of whether to require only general licenses in place of the more odious “specific license.” The specific license requires an application review and advance approval of travel by OFAC. By converting all categories currently classified as specific licenses into general license categories—permissible under the 2000 legislation—more people could travel to Cuba with less direct government oversight, reducing the administrative burden on the Treasury Department as well.<sup>135</sup>

The legality of this approach was endorsed by the United States General Accounting Office (“GAO”) in a 2009 analysis for members of Congress.<sup>136</sup> In relevant part, the report explains that the current laws still permit the President to authorize travel under the general license for travelers currently required to apply for a specific license, including “for example, freelance journalists; professional researchers undertaking research or professionals attending professional meetings and not qualifying for a general license; and enrolled students and full-time employees of academic institutions participating in educational activities.”<sup>137</sup> Further, the GAO explains that the President could increase the permissible daily spending limit on travelers visiting family in Cuba.<sup>138</sup>

There are ample reasons why the President should open up travel to Cuba: it supports the individual right to travel of U.S. citizens; it rejects the ethically questionable and controversial strategy of resource denial to advance foreign policy objectives; efforts to isolate Cuba have retarded efforts to grow civil society on the island; a majority of Cuban Americans now support such repeal; and it is not fair policy to promote in the present political context.<sup>139</sup>

It is time to try alternatives that resoundingly endorse and enact the stated goal of supporting democracy on the island in a post-Cold War context. Travel by Americans with continued economic sanctions

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<sup>135</sup> Colvin, *supra* note 111, at 25 (This second policy choice on the ban is described in detail in a policy brief of the New Ideas Fund).

<sup>136</sup> *See id.* at 29–31 (advocating for Obama to convert all specific licenses to general licenses); Gootnick, *supra* note 96, at 1–17.

<sup>137</sup> Gootnick, *supra* note 96, at 12.

<sup>138</sup> *See id.*

<sup>139</sup> For a thoughtful review of different policy reasons to reject the ban, see generally *Lifting Restrictions on Travel and Remittances to Cuba: A Case for Unilateral Action*, CUBA STUDY GRP. (Dec. 10, 2008), [http://www.cubastudygroup.org/index.cfm/files/serve?File\\_id=4003a70c-1b72-4597-924b-85967466e520](http://www.cubastudygroup.org/index.cfm/files/serve?File_id=4003a70c-1b72-4597-924b-85967466e520).

represents the kind of “conditional engagement” that is best. The engagement that comes in the form of people-to-people contacts represent the very best of bilateral relationships to support the growth of a strong civil society, and—in the words of one advocacy group—“far outweigh whatever financial benefits the Cuban regime may gain from the flow of people and resources.”<sup>140</sup>

### B. *Ending Immigration Preferences for Cubans*

The immigration policies of the United States should, for different reasons, be normalized. There are strong humanitarian reasons to oppose the Wet Foot-Dry Foot policy. A policy that holds out the promise of legal residence in the United States if you can arrive on US shores encourages individuals to engage in extremely risky behavior by crossing the Florida Straits or some other means of “touching ground” in the United States.<sup>141</sup> Moreover, it discourages those at sea from seeking any help from United States Coast Guard officials because of the justified fear of persecution and punishment resulting from interdiction and return to Cuba.<sup>142</sup>

Can this policy be ended without the repeal of the Cuban Adjustment Act? President Johnson enacted the Cuban Adjustment Act in 1966, stating that he “chose to enact this policy through the attorney general’s authority on immigration matters, rather than seek a bill from a Congress that would have likely been fully supportive, keeping control over Cuba policy inside the executive branch.”<sup>143</sup> In pertinent part, the CAA directs that “the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States. . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.”<sup>144</sup> The statute continues by clarifying that “[n]othing contained in this Act shall be held to repeal, amend, alter, modify, affect or restrict the powers, duties, functions or authority of the Attorney General in the administration and enforcement of the Immigration and Naturalization Act or any other law relating to immigration, nationality or naturalization.”<sup>145</sup>

The discretion that President Johnson sought to preserve for the

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<sup>140</sup> *Id.* at 10.

<sup>141</sup> WASEM, *supra* note 14, at 4. A number of immigrants actually go to Mexico and come up through Texas to get to the United States with Laredo being the most popular crossing point. *Id.* at 10–11.

<sup>142</sup> *Id.* at 16. See also Joyce A. Hughes & Alexander L. Alum, *Rethinking the Cuban Adjustment Act and the U.S National Interest*, 23 ST. THOMAS L. REV. 187, 217 (2011) (noting other reasons including reduced risk of espionage).

<sup>143</sup> HANEY & VANDERBUSH, *supra* note 2, at 21.

<sup>144</sup> Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (emphasis added).

<sup>145</sup> *Id.*

executive branch can be read into both sections of the CAA, the first giving clear, permissive authority to the immigration service without mandating they act. Further, under the current policy of Wet Foot-Dry Foot, the decision to parole in the first place remains with the agency, thus controlling whether this statute is even implicated for purposes of alien adjustment.

As was shown when it was created by executive fiat in 1994's *balsero* crisis, the Wet Foot-Dry Foot policy exists at the pleasure of the President. Accordingly, the decision of whether or not to continue to perpetuate a system of privileged entry to a Cuban immigrant, entry which immigrant aspirants from other nations are categorically denied access to—remains within the sole discretion of the Executive Branch.<sup>146</sup> Indeed, the CAA explicitly acknowledges and endorses this discretion.<sup>147</sup> The discretion was exercised by the Clinton Administration in August 1994 when, by executive order, President Clinton began repatriating Cubans in what was to become the current policy. The same discretion can be used today to end it totally.

Sadly, few Cubans and Cuban-Americans who have advocated ending the travel ban have spoken up as forcefully on normalizing immigration. There are many reasons for this, including that it impacts in a personal way all who have family in Cuba. Nonetheless there is another powerful reason for ending this exceptional treatment of Cubans. It isn't fair to the millions of other would-be immigrants from other nations who, like Cubans, would seek a world of economic security and personal liberty like a life in the United States would make possible.<sup>148</sup> It isn't fair to give a free pass to Cubans for long-extinct Cold War policies, policies which continue to seduce like a siren, thousands of Cubans annually to cross the deadly Florida Straits.

## VI. CONCLUSION

The dissolution of Communism and the growing irrelevance of Cold War rhetoric have combined to weaken policy justifications for the Cuban

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<sup>146</sup> For a thorough discussion of the President's parole powers delegated to him by Congress, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 501–505 (2009). While there are powerful arguments that the President's discretion would not extend to overruling a Congressional prohibition to paroling in a group, here the Congressional intent—as expressed through the CAA—is clear at extending the remedial powers of parole to the President. *Id.* at 505.

<sup>147</sup> *See id.*

<sup>148</sup> *See, e.g.,* Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 LAW & CONTEMP. PROBS. 163, 187–88 (1982) (illustrating a powerful example of this disparity during the Mariel Boatlift of 1980. At that time 125,000 Cubans arrived contemporaneous with 35,000 Haitians. The preferences of the CAA and the Cubans eligibility for public benefits led to Haitian activists charging discriminatory treatment).

embargo. Despite this trend, redoubled efforts by anti-Castro Cuban-Americans and their allies among conservative legislators have prevailed into the present in protecting the embargo's policies to achieve their goal of isolating Cuba and ending communism on the island.

With the weight of foreign policy thought tipping powerfully towards diplomatic and humanitarian engagement, the "twin pillars" of anti-Castro Cuban-American policy collapse in a puddle of irony: a single-minded focus on Cold War-style isolation—and the ideological orthodoxy and political litmus tests that have defended it—has been the very reason for failure.

With straightforward language and a resolve based in sound policy and principled fairness, the Obama Administration can and should repeal what remains within their discretion to eliminate the travel ban and to limit special treatment of Cubans in immigration practice.