

The Cuban Adjustment Act of 1966: More Than Forty Years Later a Proposal for the Future

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I. INTRODUCTION – THE YEAR WAS 1966

United States' armed forces, 250,000 soldiers strong, conduct raids in efforts to capture, wound, and kill the Viet Cong.¹ Meanwhile, Americans hold demonstrations throughout the homeland in protest.² Martin Luther King, Jr. leads a civil-rights march in Chicago, Illinois, during which he is struck by a rock thrown from an angry white mob.³ Actor Ronald Reagan, a Republican, is elected Governor of California,⁴ and Lyndon B. Johnson is President of the United States.⁵ “The Man Trap,” the first episode of the science fiction television series *Star Trek*, airs,⁶ and the Beatles play their annual American concert in New York’s Shea Stadium on a makeshift stage placed over second base.⁷ The U.S. Supreme Court rules in *Miranda v. Arizona*⁸ that the police must inform criminal suspects of their rights before proceeding to question them.⁹ The Freedom of Information Act¹⁰ is enacted into law. The year was 1966.¹¹ Also in this colorful, yet dark, year in American history, Cuban nationals immigrated to the United States in record numbers,¹² and on November 2, 1966, Congress enacted, and President Lyndon B. Johnson signed, the Cuban Adjustment Act (“CAA”) into law.¹³

November 2, 2006, marked the 40th Anniversary of the establishment of the CAA. The Act today reads as follows:

[T]he 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 subsequent to January 1, 1959, and has been physically present in the United States for at least one year, 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 if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence The provisions of this Act . . . shall be applicable to the spouse and child of any alien described in this

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¹ *U.S. Strength Rises to 250,000*, N.Y. TIMES, Apr. 29, 1966, at 3.

² Douglas Robinson, *Vietnam Protest Snarls Times SQ*, N.Y. TIMES, Feb. 2, 1966, at 1.

³ Gene Roberts, *Rock Hits Dr. King as Whites Attack March in Chicago*, N.Y. TIMES, Aug. 6, 1966, at 1.

⁴ Lawrence Davis, *Reagan Elected by a Wide Margin*, N.Y. TIMES, Nov. 9, 1966, at 1.

⁵ *Johnson Greeted '66 with Family; Spends Most of First Day at His Desk*, N.Y. TIMES, Jan. 1, 1966, at 21.

⁶ Ron Wertheimer, *Captain's Log: We're Back and, Boy, Are we Young*, N.Y. TIMES, Sept. 4, 1998, at E25.

⁷ Paul L. Montgomery, *Beatles Bring Shea to a Wild Pitch of Hysteria*, N.Y. TIMES, Aug. 24, 1966, at 40.

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁹ *Id.*

¹⁰ 5 U.S.C. § 552 (1966).

¹¹ See *supra* notes 1-10 and accompanying text (landmark events of 1966).

¹² *Kennedy's Conduct Hearing on Cubans*, N.Y. TIMES, Apr. 14, 1966, at 9 (indicating that 300,000 Cubans awaited permanent residency in the U.S. in 1966).

¹³ *Cuban Refugees Seek New Status*, N.Y. TIMES, Nov. 14, 1966, at 15.

subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States¹⁴

Since the establishment of the CAA over forty years ago, Cubans have been granted unparalleled access to the U.S.¹⁵ Known as America's "special favorites," "self-imposed political exiles," and "consumer refugees," Cubans are the only group granted such "special privileges" and "favorable immigration laws."¹⁶

The favoritism is best illustrated through an anecdote.¹⁷ Five miles off the coast of Miami, Florida, a vessel carrying 131 Haitian nationals who had fled Haiti stopped and picked up two Cubans at sea. They were near death because their boat had capsized. When the vessel arrived in Miami, the Haitians were all sent back to Haiti. The two Cubans were granted access to the U.S. and after one year were eligible to receive green cards solely based on their nationality.¹⁸

Ordinarily, to qualify for admission to the U.S., an immigrant¹⁹ must fit within one of the various categories established by Congress.²⁰ If an immigrant fits within a class he or she will be given a visa, a pass obtained at a U.S. consulate office outside the U.S. issued by the American government for the purpose of entering the U.S.²¹ The system provides two opportunities to examine the alien's eligibility. First, while abroad, and second, on U.S. soil by Immigration and Customs Enforcement ("ICE").²² A nonimmigrant alien, one who enters the U.S. not intending to achieve permanent-resident status, e.g., a tourist, who later intends to permanently reside in the U.S., may adjust status under INA § 245.²³ If an alien enters the U.S. without a visa, he or she is inadmissible, subject to removal from the U.S., and if removed from the U.S., barred from reentering for a period of ten years.²⁴ The reason for highlighting these general procedural processes is because Cubans, under the CAA, are exempt from the visa process.²⁵ Cubans upon arrival in the U.S. without a visa may still achieve permanent residency in the U.S.²⁶ All they need is the CAA. The bill allows "Cubans who have been living in the United States . . . to obtain full residence. This in turn will qualify them for eventual citizenship."²⁷ The CAA when enacted also applied retroactively up to thirty months; thus, those Cubans who arrived in the U.S. after June 2, 1964, could "waive half the waiting period of five years that is required for citizenship."²⁸

¹⁴ 8 U.S.C. § 1255 (2006) (alterations in original) (citations omitted). For further clarification, the Immigration and Nationality Act (INA) defines an alien as "any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006). The term "admitted" with respect to aliens means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Immigration and Nationality Act § 101(a)(13)(A).

¹⁵ See Berta Esperanza Hernández-Truyol, *On Becoming the Other: Cubans, Castro, And Elian – a LatCritical Analysis*, 78 DENV. U. L. REV. 687, 708 (2001) [hereinafter *The Other*].

¹⁶ See Alberto J. Pérez, *Wet Foot, Dry Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA. L. REV. 437, 437 (2004) [hereinafter *No Foot*].

¹⁷ See Joyce A. Hughes, *Flight From Cuba*, 36 CAL. W. L. REV. 39, 39-40 (2000) [hereinafter *Flight*].

¹⁸ Note, *The Cuban Adjustment Act of 1966: ¿Mirando Por Los Ojos De Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 902 (2001) [hereinafter *Don Quijote*].

¹⁹ Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2006) (the term "immigrant," as defined by Congress in the INA, is every alien who does not fit within the classes of non-immigrants).

²⁰ See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 239 (4th ed., Foundation Press 2005) (1992) [hereinafter *Legomsky*].

²¹ See Immigration and Nationality Act § 101(a)(16), 8 U.S.C. § 1101(a)(16) (2006).

²² CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, 1-1 *IMMIGRATION LAW AND PROCEDURE* § 1.03 (C) (I) (2006).

²³ See Immigration and Nationality Act § 245, 8 U.S.C. § 1245 (2006) (the CAA is a footnote of this section of the INA).

²⁴ See Immigration and Nationality Act § 212(a)(7), 8 U.S.C. § 1212(a)(7) (2006).

²⁵ See Peter Slevin, *Policy on Cuban Immigration Tangled in Contradiction*, Miami Herald, May 23, 1993, at 22A

²⁶ *Id.*

²⁷ *Senate Approves Residence Status for Cuba Refugees*, N.Y. TIMES, Oct. 21, 1966, at 7.

²⁸ See *id.*; *Adjustment of Status for Cuban Refugees: Hearings Before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives*, 89th Cong. 11-20 (1996) [hereinafter *Hearings*] (Rep. Ball did not consider the waiver of 30 months to be a "large consideration." The 5-year period was implemented to give aliens a reasonable opportunity to adjust and assimilate to life in the U.S. This period allowed an alien to "learn the ways of this country, and in that way to make himself or herself better qualified to assume the

Additionally, the CAA applies to all future Cuban refugees, and continues to serve its favorable and expedited immigration benefits on Cubans in the U.S.²⁹

This immigration dichotomy, i.e., the distinction made between Cubans and all other groups, as well as the present realities and future of the CAA are the focuses of this comment. Part II of this comment takes a look at the events that led to the enactment of the CAA.³⁰ Part III considers the effects of the CAA over the past 40 years based on the considerations and statements made by the Members of Congress that created the CAA.³¹ Part IV proposes balancing the benefits of the CAA by including groups similarly situated to Cubans, particularly Haitians.³² Part V concludes this comment by summarizing how to eliminate the “preferential” treatment of Cubans by recognizing that Cubans and Haitians are inseparable for immigration purposes.³³

II. BACKGROUND – SUPPORT AND CRITICISM OF THE CAA

A. PRESIDENT LYNDON B. JOHNSON’S SPEECH AND THE CONGRESSIONAL HEARINGS REGARDING ADJUSTMENT OF STATUS FOR CUBAN REFUGEES

On October 3, 1965, President Lyndon B. Johnson addressed the nation with regard to changes in America’s immigration policies.³⁴ The presidential speech was given from Liberty Island, home of the Statue of Liberty, and at the base of an American flag about 75 yards from the statue.³⁵ A more patriotic setting could not have been scripted. The President announced that he

[opened] the nation’s gates to all Cubans who wanted to escape the regime of Fidel Castro and ‘seek freedom’ in the United States [T]hat it was in the spirit of America’s ‘tradition as an asylum for the oppressed’ that he was telling ‘the people of Cuba that those who seek refuge [in the United States] will find it.’³⁶

President Johnson was responding directly to a claim made by then-Prime Minister of Cuba, Fidel Castro, just days earlier.³⁷ First, on September 28, 1965, and then again on September 30, 1965, Castro announced there was no penalty or consequence for Cuban nationals who wished to flee the island of

responsibilities of citizenship. The Hon. Ball, after explaining the necessity of the 5-year period, transitioned to why Cubans do not need the 5-year period, and never gave an explanation. “It would seem to us . . . that Cubans nationals who have been in this country for 3 or 4 years, even though they may have been here under parole status, would have probably acquired as much knowledge of the United States, as if they had come in under an immigrant visa in the first instance. So there would seem to us to be a slight equity in having this date run from the time in which their first entry was made.” The Hon. Ball did, however, mention that this was a matter to be argued).

²⁹ See *id.*; Richard Eder, *Ball Urges Immigrant Status for Cuban Refugees*, N.Y. TIMES, Aug. 11, 1966, at 12 (originally left open to apply in the future to an estimated 4,000 Cubans that were brought by airlift to Miami on a monthly basis).

³⁰ See *infra* Part II.

³¹ See *infra* Part III.

³² See *infra* Part IV.

³³ See *infra* Part V. This comment is not meant in any way to advocate against the special treatment of Cubans; however, it will expose forty years of trends and consequences that are no longer supported by the initial rationales behind the Act. Instead, the Act now is supported by a new set of rationales. Additionally, the need for expansion of the CAA, based on my research and personal experiences with how the Act plays-out in the real world, is a result of the new rationales supporting the CAA. I am the son of Cuban immigrants. My mother arrived in the U.S. in 1980 as part of the Mariel Boatlift. She continues to save the slip of paper issued to her by the U.S. government that indicates her arrival and acceptance to the U.S. My parents and I, as well as a large portion of my community and law school, have benefited from the special privileges; however, I do not feel a selfish need to keep the focus of the treatment solely on Cubans. My position, which I intend to explain throughout this comment, calls for increased access to all similarly-situated immigrant groups.

³⁴ Robert B. Semple Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. TIMES, Oct. 4, 1965, at 1.

³⁵ *Id.*

³⁶ *Id.* (alteration in original).

³⁷ THE WORLD FACTBOOK 2006, <https://www.cia.gov/cia/publications/factbook/geos/cu.html> (last visited Apr. 8, 2008) (Fidel Castro held the position of Prime Minister of Cuba from February 1959 until February 1976 when that position was abolished. He later took office as President).

Cuba for the U.S.³⁸ The diplomatic feud that ensued between the two governments led to President Johnson's approval of the most liberal U.S. immigration policies in over forty years.³⁹

On August 10, 11, and 17 of 1966, the spirit of President Johnson's speech carried-over to a set of congressional hearings conducted by a subcommittee of the House Committee on the Judiciary. The reason for discussion was the various "views of the immediately concerned departments of government on the question of authorizing adjustment of status for Cuban refugees."⁴⁰ Adjustment of status, as previously mentioned, is the procedural process for achieving legal and permanent immigration standing in the U.S.; but, generally a visa is still required.⁴¹

However, in 1966, the only means for a Cuban refugee in the U.S. to obtain a permanent visa was by leaving the U.S. and applying at an American consulate abroad, usually in Mexico or Canada.⁴² According to the Hon. George Ball, a participant in the August 10, 1966, hearing, this procedure had "not proved satisfactory" for three practical reasons.⁴³ First, "the trip abroad is costly for many Cuban refugees; for many the cost is prohibitive."⁴⁴ An estimated 300,000 Cuban refugees were present in the U.S. in 1966.⁴⁵ "Only about 70,000 of the 300,000 . . . could afford this."⁴⁶ Second, American consulates abroad are too understaffed to handle claims by persons outside the local consulate district; thus, only a small percentage of applicants were being considered and a smaller percentage were granted visas.⁴⁷ Third, admission into other countries was not often granted for the purpose of applying for an American visa from within said country.⁴⁸

Other more politically loaded concerns were expressed by the subcommittee while debating the "strongly supported"⁴⁹ bill that created an expedited process and means for Cuban refugees to adjust their status to permanent residency.⁵⁰ For example, the U.S. desired to "play a full and sympathetic role as a country of asylum for refugees from communism, whether the country of flight is located in the Eastern or Western Hemisphere."⁵¹ Theoretically, every Cuban who fled Cuba for the U.S. inevitably became one more vote that favored a free, capitalist world.⁵² Furthermore,

[American] policy . . . is one of opposition to the Communist regime in Cuba. Our goal and strong desire is that Cuba shall be freed from Communist domination and shall return again to the free world [T]his special help to Cubans . . . in no way reflects any change in our attitude or any lessening in our determination.⁵³

The bill in no way was meant to indicate that the U.S. supported or recognized Castro's regime as legitimate.⁵⁴ The subcommittee found it essential that this "basic consideration be fully clarified and

38 Robert B. Semple, Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. TIMES, Oct. 4, 1965, at 4.

39 *See id.*

40 *Hearings, supra* note 28, at 3 (statement of Rep. Feighan).

41 *See* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 112-113 (5th ed., Thomson West 2005); Immigration and Nationality Act § 245, 8 U.S.C. § 1245 (2006).

42 *See Hearings, supra* note 28, at 4; *Cuban Refugees Seek New Status*, N.Y. TIMES, Nov. 15, 1966, at 15.

43 *Hearings, supra* note 28, at 4; Richard Eder, *Ball Urges Immigrant Status for Cuban Refugees*, N.Y. TIMES, Aug. 11, 1966, at 12.

44 *Hearings, supra* note 28, at 4.

45 *See* Robert B. Semple, Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. TIMES, Oct. 4, 1965, at 1.

46 *Id.* (enactment of the CAA meant Cubans could become permanent residents of the U.S. by simply filling out an application. "The usual \$25 fee for changing immigration status was waived.")

47 *See Hearings, supra* note 28, at 4.

48 *Id.*

49 Richard Eder, *Ball Urges Immigrant Status for Cuban Refugees*, N.Y. TIMES, Aug. 11, 1966, at 12.

50 *See Hearings, supra* note 28, at 4.

51 *Id.*

52 *See Changes, infra* note 80, at 234.

53 *Hearings, supra* note 28, at 4.

54 *Id.*

emphasized . . . [to ensure no] public misunderstanding . . . ”⁵⁵ Immigration reform provided relief to the Cuban people while maintaining a stringent anti-Castro position.⁵⁶ “[The] decision to grant citizenship to the refugees should not be understood as an implicit concession that the . . . [Cuban] Government [is] more or less permanent.”⁵⁷ Less political rationales for the CAA were peppered throughout the subcommittee’s hearings, but the tension between Cuba and the U.S. could not be denied. “This subcommittee appreciates the assurances that . . . have been given today that adjustment of status for these Cuban refugees which the Department recommends be authorized, in no way reflects or infers a change in basic U.S. policy toward the Communist occupation of Cuba.”⁵⁸

In a letter written by Deputy Attorney General Ramsey Clark on August 4, 1966, to the Hon. Emanuel Celler, Chairman of the Committee on the Judiciary, Mr. Clark detailed other justifications for exempting Cubans “from the proscription against natives of other Western Hemisphere countries as to eligibility for adjustment of immigration status.”⁵⁹ First, an estimated 164,000 Cubans had arrived in the U.S. in a one-month period.⁶⁰ Upon arrival in the U.S., the Cubans remained in an “indefinite and nonresident status [due to] the upheaval in their native country causing them to flee and remain in the United States.”⁶¹ Second, the U.S. severed all diplomatic ties with Cuba on January 3, 1961.⁶² This was a decision made by former-President Dwight D. Eisenhower after a series of failed negotiations with Cuba over sugar quotas and the increase of Cuban relations with the Soviet Union.⁶³ Since then, it has been impossible for Cubans in Cuba to apply for an immigration visa for the purpose of seeking permanent residency in the U.S.⁶⁴ Third, many professionally-trained Cubans who “would be a credit to this country” were prevented from gaining professional employment in the U.S. due to statutes that required full citizenship or a declaration of intent of citizenship before practicing certain professions (e.g., dentists, lawyers, physicians, and teachers).⁶⁵ “Enactment of this legislation would remove many bars to the self-sufficiency of Cuban refugees” in the U.S.⁶⁶ Fourth, the financial burden on the American government, with regards to unsettled Cubans, would be reduced.⁶⁷ These rationales or concerns will later be discussed in Part III of this comment in light of the past forty years of political stalemate and change.

Perhaps the most interesting dialogue took place between the Hon. George Ball, Under-Secretary of State, and Rep. Frank L. Chelf from Kentucky.

Mr. Chelf: Mr. Secretary, I listened very carefully to your testimony. I would like to ask you again, for the record, just to be sure, outside of the humanitarian feature that is involved here, do you sincerely believe that this legislation is in the best interests of the United States? That is the thing that I am interested in. I want to do all that I can to help

⁵⁵ *Id.* at 5.

⁵⁶ *See id.*

⁵⁷ Richard Eder, *Ball Urges Immigrant Status For Cuban Refugees*, N.Y. TIMES, Aug. 11, 1966, at 12.

⁵⁸ *Hearings*, *supra* note 28, at 10 (statement of Rep. Feighan, addressing the letter of Deputy Attorney General Ramsey Clark).

⁵⁹ *Id.* at 8 (several letters were presented as evidence during the hearings. They were read aloud to the Subcommittee members, and then discussed).

⁶⁰ *Id.* at 9.

⁶¹ *Id.*

⁶² *See id.*

⁶³ JORGE I. DOMÍNGUEZ, *TO MAKE A WORLD SAFE FOR REVOLUTION: CUBA’S FOREIGN POLICY 23-25* (Harvard University Press 1989). Sugar quotas were constantly in debate between the U.S. and Cuba. After Castro took control of Cuba, he eliminated the quotas “for the sake of independence.” In 1960, the U.S. attempted to improve relations with Cuba, but “the Castro regime virtually paralyzed the negotiations with various excuses and evasions which were designed to gain time until” a pact was signed with the Soviets. On July 6, 1960, President Eisenhower cut the sugar quota by 95 percent, and three days later, on July 9, 1960, the Soviet Union agreed to buy from Cuba all the sugar that the U.S. refused to purchase. In December 1960, the U.S. sugar quota was fixed at zero. On January 1, 1961, Cuba restricted the personnel of the American embassy in Havana as the U.S. “broke off diplomatic relations” with Cuba.

⁶⁴ *Hearings*, *supra* note 28, at 9.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* In Part III of this comment these rationales will be discussed in light of the past 40 years of political stalemate and change.

others, but the point that worries me – you see, we have helped 100 nations and we have given 122 billions of our dollars away, only to have the fellows overseas now, who are fat and sleek and rich, to take our own dollars and demand our gold out of Fort Knox. Now, I know it is going on and everybody else knows it, but will this help us here?

. . . .

Mr. Ball: We would be extending to [the Cubans] the privilege of living in a free society. This is consistent with the principles that we have followed in our dealing with nations around the world, to encourage freedom, to encourage resistance to totalitarianism. We have a feeling that this would be a contribution to creating a consistent vision of the United States of a nation that practices what it preaches and which extends to people who are hard pressed under totalitarian regimes the possibility of becoming useful citizens of the United States working toward the general cause of freedom.

Mr. Chelf: Being very much interested in it, and to the extent that I paid my own way out of my own pocketbook, I made a trip, incognito, down to Florida in April of this year. I had been hearing about the Cubans and how many we had and what they were doing, and all that sort of thing [N]o newspaper, nowhere, at no time knew I was there. I got some good information and I just want to say this to you: I think that you are exactly right, for the very simple reason I saw lawyers and doctors and other professional men working at menial tasks, something that was foreign to them but yet they had mastered to the best of their ability that trade. I saw with my own eyes firsthand these people and I talked to them in my broken Spanish as best I could, and let me tell you something, I was very much impressed with them. They are very fine people and they come from good stock.⁶⁸

The debate continued, but the essence of the conversation is summarized by a point made by the Hon. George Ball. He found that the adjustment of the immigration status of Cuban refugees was “necessary.” “If we do not take this step . . . [it] is going to be a pretty unedifying spectacle to many nations of the world. And many people are going to doubt whether the United States really means what it says.”⁶⁹

Nicholas De B. Katzenbach, then Attorney General of the United States, also backed the bill.⁷⁰ “Such legislation would be a humane postscript to the message formulated by our Government and voiced by the President,”⁷¹ said the Attorney General while referencing President Johnson’s speech from Liberty Island. However, the Attorney General noted that the adjustment of status was not automatic.⁷² It was to be voluntary on the part of the Cubans, and subject to the discretion of the Attorney General.⁷³

B. STATISTICAL BACKGROUND

At this point, some statistical background will help clarify why former President Lyndon B. Johnson and Congress found it necessary to install the Cuban refugee reform laws. On August 17, 1966, the Hearings continued. This time representatives of the Department of Health, Education, and Welfare

⁶⁸ *Id.* at 11-12.

⁶⁹ *Id.* at 13.

⁷⁰ *Hearings, supra* note 28, at 31.

⁷¹ *Id.*

⁷² *See id.*

⁷³ *See id.*

(“Department”) were in the hot seat.⁷⁴ According to the Department, there were three stages in Cuban migration to the U.S.⁷⁵

The first period was January 1959 – October 1962. On January 2, 1959, Fidel Castro marched into Havana and proclaimed, “[t]he revolution begins now.”⁷⁶ At this stage, no one could predict the future of the regime, but as the Cuban government began to enact “agrarian reform laws and other measures to confiscate private enterprises,” there was an increase of Cubans seeking asylum to the United States.⁷⁷ The years 1960-1962 saw more confiscations by the Cuban government, and the eventual management and control of these properties.⁷⁸ At this stage, professionals and technicians, those formerly in control, left Cuba for the U.S.⁷⁹ These persons have been called the “Golden Exiles” for their high level of education, political and business connections, and entrepreneurial know-how.⁸⁰ Diplomatic tensions grew to a destructive stage in 1961 when the U.S. government was forced to sever its relations with Cuba; meanwhile, Cubans continued to flee the island.⁸¹ An estimated 215,000 refugees fled Cuba during this three year period.⁸²

The second period was October 1962 – October 1965. Cuban migration to the U.S. was brought to a standstill for three years after the Cuban Missile Crisis in October of 1962.⁸³ After the Cuban Missile Crisis, the vast majority of Cuban refugees already in the U.S. were in Miami, and an estimated 68,000 were receiving financial assistance from the U.S. government.⁸⁴ During this three year period, an estimated 74,000 Cubans emigrated to the U.S.⁸⁵ The total number of Cuban refugees nearly doubled as a result of Castro’s September announcements when he permitted the release of Cubans with no penalty or consequence,⁸⁶ and “opened the fishing port of Camarioca to all exiles [in the U.S.] wanting to take their relatives from the island.”⁸⁷ The sea and weather caused a dangerous combination, and both governments found it necessary to negotiate an accord.⁸⁸ The U.S. agreed to transport nearly 4,000 Cubans per month by air as a continuation of its open arms policy, while Cuba regulated its ports.⁸⁹ The “Freedom Flights” provided a means to reach the safe haven of the U.S. for more than 260,000 Cubans over a span of eight years.⁹⁰

The third period was October 1965 – August 1966. After President Lyndon B. Johnson announced the new policies that governed the arrival of Cuban refugees, an influx began and nearly 93,000 Cubans settled in the Miami, Florida, area.⁹¹ In general, the Department of Health, Education, and Welfare found that the Cubans were “cooperative and worthy, in every respect of our assistance.”⁹² Reasons given for

74 See *Hearings*, *supra* note 28, at 49.

75 *Id.*

76 DOMÍNGUEZ, *supra* note 63, at 16.

77 *Hearings*, *supra* note 28, at 50.

78 *Id.*

79 See *id.*

80 Heike C. Alberts, *Changes in Ethnic Solidarity in Cuban Miami*, 95 (2) THE GEOGRAPHICAL REV. 231, 233 (Apr. 2005) [hereinafter *Changes*].

81 See *Hearings*, *supra* note 28, at 50.

82 *No Foot*, *supra* note 16, at 441.

83 See *Changes*, *supra* note 80, at 234.

84 See *Hearings*, *supra* note 28, at 50.

85 *No Foot*, *supra* note 16, at 442.

86 See *id.* at 443.

87 ALEJANDRO PORTES & ALEX STEPICK, *CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI* 103 (University of California Press 1993) [hereinafter *Transformation*].

88 *Changes*, *supra* note 80, at 234-35.

89 *Id.*

90 *Id.*

91 See *Hearings*, *supra* note 28, at 51.

92 *Id.* at 52.

these sentiments included the following: excellent adjustment into American communities, good work record, employers sought them out for employment, and few needed public assistance.⁹³

C. REFUGEES AND THE LAW

International refugee law began to take shape in 1921 with the issuance of what was known as a “Nansen passport.”⁹⁴ Fridtjof Nansen was the High Commissioner for Russian Refugees of the League of Nations in 1921.⁹⁵ “The task of the High Commissioner in the legal field was the legal and political protection of refugees.”⁹⁶

In 1950, the United Nations established the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Statute of UNHCR to develop the functions of predecessor organizations, as well as to promote international conventions protecting refugees, supervise their application, propose amendments, and promote admission of refugees.⁹⁷ In 1951, the United Nations adopted the Convention Relating to the Status of Refugees.⁹⁸ The Convention is regarded as “the most important international instrument relating to refugees.”⁹⁹ It defines refugees broadly in order to ensure a universal approach to the Convention and the protection of refugees.¹⁰⁰ The term refugee according to the Convention applies to a person who:

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁰¹

The protections of the Act apply to refugees regardless of their country of origin.¹⁰²

Most importantly, Article 33 of the Convention, through the principle of *non-refoulement*, restricts expulsion or deportation of refugees. “No refugee shall . . . be expelled or returned in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰³ The principle of *non-refoulement* is the cornerstone of refugee law, and has risen to the level of general principle of law, customary international law, and *jus cogens*.¹⁰⁴ More specifically, as *jus cogens*, the principle of *non-refoulement* and Article 33 of the Convention are a “mandatory or preemptory norm of general international law accepted and recognized by the international community as a norm from which *no derogation is permitted*. A preemptory norm can be *modified only by a later norm that has the same character*.”¹⁰⁵

93 *See id.*

94 Paul Weis, *The Development of Refugee Law*, 3 MICH. YBI LEGAL STUD. 27, 28 (1982) [hereinafter *Refugee Law*].

95 *Id.*

96 *Id.* (internal quotations omitted).

97 *See Legomsky, supra* note 20, at 925.

98 *Refugee Law, supra* note 94, at 28.

99 *Id.* at 29.

100 *Id.*

101 *See id.* at 31 (citing Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137).

102 *Refugee Law, supra* note 94, at 29.

103 *Id.* at 31.

104 *Id.*

105 BLACK'S LAW DICTIONARY 876 (8th ed. 2004) (emphasis added).

On January 31, 1967, the U.S. ratified the Protocol relating to the Status of Refugees, a broader version of the Convention that removes the January 1, 1951 date from the refugee definition.¹⁰⁶ Contracting states of the Protocol apply the substantive provisions and refugee definition in the Convention with the omission of the January 1, 1951.¹⁰⁷ However, nothing in the Convention or Protocol “requires any nation to admit overseas refugees in the first place.”¹⁰⁸ The Convention and Protocol allow for the exclusion of certain persons from protection: persons resettled elsewhere and certain criminals.¹⁰⁹ What has ensued are certain exclusions that “nullify the protection against refoulement . . . [and] render the entire Convention inoperative.”¹¹⁰

When President Clinton ordered the U.S. Coast Guard to intercept Haitians attempting to reach the U.S. by sea and to return them to Haiti without determining their qualification as refugees, the Supreme Court of the United States, in *Sale v Haitian Centers Council, Inc.*, held that Article 33 had not been violated because it did not apply to the situation.¹¹¹ According to the Court, “the text and negotiating history of Article 33 . . . are both completely silent with respect to the Article’s possible application to actions taken by a country outside its own borders [B]oth the text and the negotiating history . . . affirmatively indicate that it was not intended to have extraterritorial effect.”¹¹² The respondents argued that the words “any alien” and “return” are not limited to aliens within the U.S.,¹¹³ but the Court found that “return” had a narrower legal meaning compared to its common meaning.¹¹⁴

The majority expressly acknowledged that the drafters of the Convention and Protocol may not have contemplated a contracting state “gather[ing] fleeing refugees and return[ing] them to the one country they had desperately sought to escape.”¹¹⁵ The majority expressly stated that such action may “violate the spirit of Article 33,”¹¹⁶ but it was not persuaded.¹¹⁷ Justice Blackmun, however, was compelled to dissent.¹¹⁸ He believed any expelling or return (*refoulement*) is a violation of Article 33.¹¹⁹ “The terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, the Government consistently acknowledged that the Convention applied on the high seas.”¹²⁰

The UNHCR supervises the implementation of the Convention and cooperation of the contracting states.¹²¹ Unfortunately, neither the Convention nor other sources of international law give the UNHCR the power to compel or issue binding interpretations.¹²² In the U.S., no statute authorizes the admission of refugees.¹²³ Instead, Congress has occasionally passed ad hoc legislation to deal with specific crises, i.e., Cubans who left Cuba after Fidel Castro assumed power, rather than addressing possible violations of international law.¹²⁴

¹⁰⁶ See *Refugee Law*, *supra* note 94, at 31.

¹⁰⁷ See *id.*

¹⁰⁸ See *Legomsky*, *supra* note 20, at 926.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ *Sale v. Haitian Centers Council, Inc.* 509 U.S. 155 (1993).

¹¹² *Id.* at 178-79.

¹¹³ *Id.* at 170.

¹¹⁴ *Id.* at 180.

¹¹⁵ *Id.* at 183.

¹¹⁶ *Id.*

¹¹⁷ *Sale*, 509 U.S. at 183.

¹¹⁸ *Id.* at 188-208.

¹¹⁹ See *id.* at 189-190.

¹²⁰ *Id.* at 191.

¹²¹ See *Legomsky*, *supra* note 20, at 926.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

The Convention and the Protocol are the most important instruments regarding refugees, but they are not the only treaties that afford refugees broad rights and protections.¹²⁵ The Agreement relating to Refugee Seamen was adopted on November 11, 1957, and extends protection to seamen who are “in the absence of documents, frequently unable to go on land.”¹²⁶ It requires contracting states to issue travel documents to refugee seamen who are linked to the contracting states either through previous residence, previous travel documents, or service on a ship carrying a contracting state’s flag.¹²⁷ The U.N. Convention relating to the Status of Stateless Persons, September 28, 1954, protects refugees who are not considered to be nationals of any state, thus extending protection to stateless persons who are not covered by the 1951 Convention.¹²⁸ The U.N. Convention on the Reduction of Statelessness, August 28, 1961, helps stateless refugees acquire nationality.¹²⁹ The U.N. Convention on the Recovery Abroad of Maintenance and Protocol No. 1 to the Universal Copyright Convention also extend benefits specifically designed for refugees.¹³⁰

In 1980, Congress was led to pass the first comprehensive refugee legislation in U.S. history.¹³¹ The Refugee Act of 1980 is the principal U.S. statutory law governing overseas refugees.¹³² It provides the first domestic definition of refugee,¹³³ requiring “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹³⁴ In what appeared to be a step in the right direction for refugees wishing to reach the U.S., the 1980 Act deleted all ideological and geographical limitations from the refugee definition.¹³⁵ However, the courts have narrowed the definition in various ways,¹³⁶ and refugees, such as Haitians, continue to be refouled to their home country.

D. CRITICISMS FROM 1966

The CAA did not pass without some criticism.¹³⁷ Some House Representatives were concerned with allowing too many Cubans to enter the United States in a short period of time.¹³⁸ According to these conservative Representatives, they were trying as best they could to “protect the rights – that is, the job rights – of our own people, and particularly our southern colored people.”¹³⁹ The more liberal countered by pointing to the fact that the country’s unemployment rate was at its lowest ever, but Rep. Arch Alfred, Jr. from West Virginia responded to the liberals:¹⁴⁰

¹²⁵ See *Refugee Law*, *supra* note 94, at 31-32.

¹²⁶ *Id.* at 32.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *id.*

¹³⁰ See *id.*; The Convention on the Recovery Abroad of Maintenance, May 25, 1957, 268 U.N.T.S. 3 (facilitating the establishment and execution of claims of maintenance); Protocol No. 1 of the Universal Copyright Convention, revised at Paris July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (assimilating refugees and stateless persons to the nationals of their country of habitual residence as regarded by copyright laws).

¹³¹ See *Legomsky*, *supra* note 20, at 928.

¹³² See *id.*; Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (2006)).

¹³³ See *Legomsky*, *supra* note 20, at 929.

¹³⁴ Refugee Act of 1980, *supra* note 132; *Legomsky*, *supra* note 20, at 929.

¹³⁵ See *Legomsky*, *supra* note 20, at 929.

¹³⁶ See *Legomsky*, *supra* note 20, at 947-49. In the congressional committee notes that accompanied the Refugee Act of 1980, the committee assumed, as the Board does in *Acosta*, that persecution means a threat to the life or freedom, or the infliction of suffering or harm that is more than offensive. *Matter of Acosta*, 19 I & N Dec. 211, 235 (BIA 1985) (“an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country – he must show that the threat of persecution exists for him country-wide.”).

¹³⁷ See *Hearings*, *supra* note 28, at 31.

¹³⁸ See *id.*

¹³⁹ *Id.* (statement of Rep. Chelf).

¹⁴⁰ See *id.* at 32-33.

“Sure we have a low rate of unemployment, but I remind my colleagues that we have 500,000 men . . . in South Vietnam, and we are experiencing the largest draft call we have ever had in any period of time So as we consider this legislation let’s keep [the war and the unemployment rate] in mind.”¹⁴¹

Rep. Arch Alfred, Jr. warned the Committee of the return of American soldiers from Vietnam, and their need for jobs.

Today’s most forthcoming concern was foreshadowed by Rep. Moore. He wondered whether another group would factually fit the mold of Cubans and what would happen to them?¹⁴² He asked the Attorney General, “[w]ould you feel free to make parole available on any set of fact which you might want to characterize as being refugee in character?”¹⁴³ Essentially, Rep. Moore was asking whether persons similarly situated to Cuban refugees would receive the same special treatment. The Attorney General responded:

It seems to me it would be foolish for me to flatly predict there could not be another situation. *I don’t foresee one.* I don’t know of any. I would hope to goodness there is not going to be another Castro kind of situation within this hemisphere. I don’t foresee one. I don’t think it will occur, but would say this: *If you have the same kinds of facts that we have had with respect to Cuba, then I would suppose that we would do the same thing and feel that this was exercising the power in the public interest, but I don’t foresee that.*¹⁴⁴

The Attorney General’s predictions were not accurate.¹⁴⁵

The conservative Representatives had a problem with the “administrative liberalization of parole,” i.e., the extension of the law with regards to refugees in a manner that favored a group at the discretion of the Attorney General.¹⁴⁶ The Attorney General was continuously questioned on the matter, but in the end, Rep. Moore disclosed that the reasoning behind the questioning was only to “determine how far this might be . . . stretched to accomplish anyone of a number of ends I just made the observation so that he might know that there are some of us in the Congress just wondering how far this . . . could possibly go. . . .”¹⁴⁷ Apparently, from the tone of the Representatives and the line of questioning, Congress appeared to be willing to grant this one time exemption to Cubans, but it was hoping to not deal with this or any other refugee group claim in the future. Nevertheless, three months after the Hearings, H.R. 15183, the Cuban Refugee Adjustment Act of 1966, was enacted into law.¹⁴⁸

E. THE UNDERPINNINGS OF THE HEARINGS

One fact mentioned at length throughout all three days of Congressional Hearings focused on the Cubans’ length of stay. The bill passed under the expectation that the majority of refugees would return to Cuba once freedom reigned on the island.¹⁴⁹ The Subcommittee also did not expect the Castro regime

¹⁴¹ *Id.* (alteration in original) (citations omitted).

¹⁴² *Id.*

¹⁴³ See *Hearings*, *supra* note 28, at 32-33.

¹⁴⁴ *Id.* (alterations in original) (emphasis added).

¹⁴⁵ See Pierre M. Atlas, *U.S. Must Change Policies That Harm Haitians, Cubans*, INDIANAPOLIS STAR, Oct. 6, 2005, at A12 “[T]hanks . . . in part to U.S. policies, Haiti is in many ways worse off than Cuba. The poorest country in the Western Hemisphere, Haiti is rife with armed gangs, a corrupt government and ineffective United Nations peacekeepers.” *Id.* The U.S. government should “care about people and not just ideologies. Lifting the outdated sanctions against Cuba and supporting genuine democracy in Haiti could be a start.” *Id.*

¹⁴⁶ *Hearings*, *supra* note 28, at 40.

¹⁴⁷ *Id.*

¹⁴⁸ Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255).

¹⁴⁹ See *Hearings*, *supra* note 28, at 53.

to survive.¹⁵⁰ Not only did the Subcommittee expect that Communism would fail in Cuba, they also expected the paroled refugees to return to Cuba.¹⁵¹ The Hon. Ball, in a statement to the Subcommittee, mentioned that once Cuba was free again, “the status of the Cubans as residents and parolees would in no way affect their freedom to return to their native land.”¹⁵² Later during the Hearings, the Hon. Ball further mentioned that the U.S., through passage of the bill, only “extend[ed] the option [of adjustment] to those who want it [E]ven though at some time in the future, when Cuba does become free – because I am certain it will – some of them may wish to go back and resume their life there.”¹⁵³

A dialogue between Rep. Robert Thomas Cahill from New Jersey and the Hon. Ball ensued on this issue.

Rep. Cahill: Don’t you think the efforts that will pave the way for eventual American citizenship will be a deterrent rather than an incentive for them to return to Cuba?

Hon. Ball: I wouldn’t think so because the reasons that would lead them to return to Cuba is that love of country which I think you will find is very deep among most Cubans. They want to go back to Cuba. They want to rebuild their country and they will do so when the opportunity –

Rep. Cahill: Then why should we grant these people American citizenship?

. . . .

Rep. Cahill: . . . [I]sn’t there some other way of doing this besides granting of citizenship?

. . . .

. . . .

. . . .

Rep. Cahill: This legislation would be open-ended, would it not; there would be no termination, and there could be unlimited number.

. . . .

Re. Cahill: Therefore, it seems to me that the Cuban refugees . . . will love the way we live and won’t want to go back to their native land. We are really closing our eyes to reality if we expect that these people will return to the conditions from which they have come A great deal of thought . . . should be given to [the bill] because we are indeed, in my judgment, setting a precedent which will have far-reaching effects in the future.¹⁵⁴

The Representative from New Jersey was correct, but his concern with setting precedent was never realized because Congress has refused to extend the same preferential treatment to other similarly situated refugees.¹⁵⁵ Perhaps Rep. Cahill’s true concern was not with setting a precedent, but having to regularly replicate a pro-refugee decision in the future.

¹⁵⁰ See *id.* at 5.

¹⁵¹ See *id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 14 (alteration in original).

¹⁵⁴ *Id.* at 18-19.

¹⁵⁵ See *No Foot*, *supra* note 16, at 454; *Legomsky*, *supra* note 20, at 610-611. There have been other forms of special treatment of non-citizens, but not of the kind extended to Cubans through the CAA. *Id.* In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, Title II, 111 Stat. 2160, 2193 (1997) (codified as amended in scattered sections of 8 U.S.C. (2006)) (NACARA). It provided two kinds of relief. Certain nationals of Guatemala, El Salvador, and the former U.S.S.R. received the right to apply for cancellation of removal, a form of immigration relief, under less rigorous substantive requirements. NACARA, Pub. L. 105-100, Title II, 111 Stat. 2160, 2197 (1997). The second form of relief was a grant of amnesty to Nicaraguans and Cubans who had been continuously physically

F. AN IMAGE CHANGE

The Congressional Hearings provided a romantic image of the Cuban immigrant – the model minority.¹⁵⁶ They had been characterized as hard working professionals who were an asset to American communities.¹⁵⁷ However, this image changed in 1980. In April of 1980, a group of Cubans seeking political asylum crashed a bus through the gates of the Peruvian embassy in Cuba.¹⁵⁸ The Peruvian government refused to hand over the Cubans at the request of the Cuban government.¹⁵⁹ In response, Fidel Castro announced that any Cuban who wished to leave Cuba should assemble at the Peruvian embassy.¹⁶⁰ An estimated 10,000 men, women and children squeezed into the embassy faster than negotiations with third party states initiated.¹⁶¹ Meanwhile, Cuban exiles in the U.S. began to prepare a massive boatlift.¹⁶² Fidel Castro once again opened a port in Cuba, and caused an exodus of Cuban immigration in the U.S.¹⁶³

The 1980 “Freedom Flotilla” consisted of Cuban exiles in the U.S. venturing by boat to the port of Mariel, Cuba, to pick up their relatives.¹⁶⁴ “In May 1980, the boatlift was at its height. More than 16,000 refugees arrived in one six-day period alone. “By the time the 159-day exodus ended on Sept. 26, 1980, nearly 125,000 Cuban refugees escaped to the United States.”¹⁶⁵ Boats of ex-immigrants returned to Cuba to help Cubans escape,¹⁶⁶ but this time the U.S. was not receiving boat loads of professionals. Castro sent the U.S. what he described as the scum of his country, i.e., antisocialist, homosexuals, drug addicts, and gambling addicts.¹⁶⁷ Almost half of the new arrivals had criminal backgrounds that ranged from theft, possession of drugs, fraud, and crimes against the normal development of sexual relations.¹⁶⁸ The influx caused then President Jimmy Carter to take steps contrary to the spirit of the CAA, President Lyndon B. Johnson’s speech, and the thoughts expressed during the 1966 Congressional Hearings. The boats carrying refugees were ordered to be stopped and seized.¹⁶⁹

The arrival of these Cubans coincided with a departure from the political outlook toward Cuban immigrants. “Until 1980, Cuban exile politics had focused on the idea of returning to the island,”

present in the United States since December 1, 1995. *Id.* at 2193. If the requirements were met under this second form of relief, the Attorney General was required to adjust their status. *Id.* NACARA left a gap, however, for Haitians who needed it as much as the above mentioned groups. Congress in 1998 enacted the Haitian Refugee Immigration Fairness Act, Pub. L. 105-277, Title IX, 112 Stat. 2681-538 (1998) (codified as amended at 8 U.S.C. § 1255 (2006)) (HRIFA). Like NACARA, HRIFA provided adjustment of status for certain Haitians who had resided in the United States since December 31, 1995 and applied for asylum or had been paroled before that date. HRIFA, Pub. L. 105-277, Title IX, 112 Stat. 2681-538 (1998) (codified as amended at 8 U.S.C. § 1255 (2006)). NACARA and HRIFA are steps in the right direction, but they apply to aliens present in the United States before 1995. The CAA applies to Cubans who arrived in the United States for a period before 1959, and all those after. Cuban Refugee Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255) (1966).

¹⁵⁶See *The Other*, *supra* note 15, at 690-91.

¹⁵⁷See *id.* at 691.

¹⁵⁸*Changes*, *supra* note 80, at 237.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³See *Transformation*, *supra* note 87, at 18.

¹⁶⁴See *id.* at 20.

¹⁶⁵E.A. Torreiro & Luisa Yanez, *From Mariel to Miami Cuban Refugees Changed the Face of South Florida*, SUN-SENTINEL, May 21, 1995, at 1A.

¹⁶⁶See *id.* (“Cuban-Americans spent more than \$1 million to charter boats to pick up relatives,” in a flotilla that stretched 90 miles from Key West, Florida, to Mariel, Cuba, and back.)

¹⁶⁷See *Transformation*, *supra* note 87, at 21.

¹⁶⁸See *id.* at 20; Torreiro, *supra* note 165, at 1A (stating that the refugees were labeled criminals). “The perception that they were all criminals . . . is Mariel’s most misunderstood legacy.” *Id.* Castro perhaps caused this misperception in a May 1980 speech, calling those who left Cuba, “the scum of the country.” *Id.* By the end of summer 1980, some Marielitos contributed to the misconception. *Id.* Crime in Miami had increased; “robberies up 775 percent; burglaries up 191 percent; homicides up 66 percent.” *Id.* Years later, experts have dubbed the increase in criminal activity as “an aberration caused by desperate refugees trying to survive.” *Id.* Nearly half of the Cuban refugees that arrived during the Mariel did have criminal records, but most turned out to be political crimes. *Id.*

¹⁶⁹See *Transformation*, *supra* note 87, at 22.

however, the new exodus in addition to a lack of imminent diplomatic change in Cuba, lead to the realization that the Cuban exiles intended to stay in the U.S.¹⁷⁰ Nevertheless, the 1980 group of Cubans received the same treatment as the group that immigrated in the late 1960's.¹⁷¹ The Carter administration's Open Hearts and Open Arms Policy relied on the CAA as it allowed the Cuban immigrants to find refuge from political persecution in Cuba and seek asylum in the U.S.¹⁷²

More change in the treatment of Cubans resulted as Castro attempted to repeat the events of 1980. In 1994, Castro once again pried open the exit doors of Cuba to those wishing to take flight; however, this group was dissimilar to both previous groups.¹⁷³ Unlike the first two groups, the majority this time set sail on rafts made of inner tubes, boxes, planks of wood, and any floating material that could be tied together.¹⁷⁴ Not only did they arrive in a different manner in comparison to the predecessor groups, but they also received different immigration treatment from the U.S. government.¹⁷⁵

In August of 1994, President Bill Clinton and Cuba opened diplomatic discussion with the goal of "defusing the refugee crises."¹⁷⁶ The Clinton Administration took the position that Cubans were risking their lives at sea on rafts, and thus the Cuban government should stop the exit flow.¹⁷⁷ The U.S. now sent a new message to Cubans who wished to reach the U.S. "The boat people would not be admitted."¹⁷⁸ Roughly 12,000 Cubans were intercepted at sea by the U.S. Coast Guard, and on August 19, 1994, President Clinton "reversed longstanding policy and ordered that the boat people be barred from the United States and instead be taken to Guantánamo Bay [U.S. Naval Base, Cuba]."¹⁷⁹ However, the agreement to completely stop the flow of immigration to the U.S. was not successful.¹⁸⁰

G. FIDEL CASTRO'S VIEW

According to Castro, "this is the killer Cuban Adjustment Act."¹⁸¹ "It is a perverse policy, deliberately conceived to destabilize and suffocate Cuban society, cynically calculated to provoke death and suffering, shamelessly manipulating the tragedies that this law causes."¹⁸² Cubans are encouraged to immigrate illegally and place their lives in danger.¹⁸³ Further, the Act is to blame for the international custody battle of Elian Gonzalez.¹⁸⁴ The CAA is a form of political ammunition for his enemies "who describe the migrants as desperate boat people fleeing their communist homeland for freedom."¹⁸⁵ For support, Cuban leaders point to Haitians and Dominicans.¹⁸⁶ These groups seek the same opportunities in

¹⁷⁰ See *id.* at 27.

¹⁷¹ See *No Foot*, *supra* note 16, at 445.

¹⁷² See *id.*

¹⁷³ See *Flight*, *supra* note 17, at 58.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ Steven Greenhouse, *Clinton Will Open Talks With Cuba on Refugee Crises*, N.Y. TIMES, Aug. 28, 1994, at 2. (the immigration only issue of the New York Times).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 13.

¹⁷⁹ See *id.*

¹⁸⁰ See Tim Golden, *Cuba's Hidden Gain*, N.Y. TIMES, Sept. 10, 1994, at 4.

¹⁸¹ Anita Snow, *Cuban Assembly Condemns Law*, MIAMI HERALD, Jul. 13, 2000, at A12.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*; See *Key Figures in the Elian Gonzalez Case*, ST. LOUIS POST-DISPATCH, Apr. 23, 2000, at A4. On November 25, 2000, Elian Gonzalez, a 6-year old Cuban national, was found adrift on an inner tube off the Florida coast. *Id.* His mother and others died in the sea voyage. *Id.* Elian became the subject of an international standoff between his father in Cuba and Miami relatives. *Id.* After his Miami family refused to hand him over, an extremely media publicized raid took place, after which Elian was returned to his father and Cuba. *Id.*

¹⁸⁵ Snow, *supra* note 181, at A12.

¹⁸⁶ *Id.*

America as Cubans, but they are not allowed to stay.¹⁸⁷ “In a colossal operation of falsification . . . and promotion of lies, [the U.S.] has tried to present Cubans as people who want to ‘escape’ to North America, and that the United States as a ‘generous’ nation receives them. [That argument] doesn’t contain an atom of truth.”¹⁸⁸

III. ANALYSIS – THE CUBAN ADJUSTMENT ACT TODAY

A. THE WET FOOT, DRY FOOT POLICY

Cuban immigrants who seek to invoke their special privileges under the CAA must now rely on an immigration legislation anomaly. The significance of the 1994 agreement between the Cuban government and Clinton Administration is that when coupled with the CAA, those Cuban immigrants who are captured at sea are returned to Cuba, but those who reach American soil may invoke their rights under the CAA.¹⁸⁹ The anomaly has come to be known as the Wet Foot, Dry Foot Policy.¹⁹⁰

The struggle to reach the U.S. now extends beyond the rigorous and life-threatening voyage through the 90 mile straight between the U.S. and Cuba.¹⁹¹ Today, the highest drama takes place on the beaches of South Florida.¹⁹² “Cubans try almost anything, including threatened self-immolation and suicide, to hold off the Coast Guard long enough to put at least a foot on dry sand.”¹⁹³ Cuban mothers have gone as far as threatening to drown their own children if Coast Guard members come too close.¹⁹⁴ Altercations are numerous, and guaranteed to continue in the future.¹⁹⁵ Therefore, “the politics of applying migration law have to be revised to become more humane.”¹⁹⁶ Change in Cuba does not appear to be imminent, and Cubans will continue to risk their lives in hopes of setting foot on American soil and invoking the CAA.¹⁹⁷

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (alteration in original).

¹⁸⁹ See *No Foot*, *supra* note 16, at 445.

¹⁹⁰ See *id.*

¹⁹¹ See Rick Bragg, *Cubans Now Choosing Smugglers Over Rafts*, N.Y. TIMES, Jul. 21, 1999, at 1.

¹⁹² See *id.*

¹⁹³ *Id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*; *Cuban Immigrants Land in So. Florida*, UPI NEWSTRACK, Jan. 21, 2007 (27 Cuban immigrants land on an island near Key Biscayne, Florida; however, earlier in January 2007, 91 refugees were captured at sea and returned to Cuba); *Cuban Landing Shows Security Flaw*, WORLD, Jan. 2, 2007 (25 Cubans were found huddled on the beach of Beer Can Island off the west coast of Florida); *Immigration Issues: Cubans Make It to the United States*, S. FLA. SUN-SENTINEL, Dec. 29, 2006, at A22 (15 Cubans reached an abandoned portion of the Old Seven Mile Bridge in the Florida Keys. They were wrongfully repatriated as U.S. immigration officials claims the bridge did not constitute dry land under the Wet Foot, Dry Foot Policy. Months later, 6 of the wrongfully repatriated Cubans did the impossible – “they made another perilous escape to the United States, this time being admitted.”); Joel Maroney, *Cuban Boats No Surprise – Marco Landing of 20 Refugees Comes With Local Officials Watching Layout Space*, NEWS-PRESS, Aug. 16, 2006, at A1 (20 Cubans land on the shores of Marco Island, Florida. The small island off the west coast of Florida is accustomed to these arrivals, but authorities mention that they are not the first in line for Cuban refugees. The Florida Keys are only 90 miles from Cuba, and are the more logical choice of destination. The seas are difficult to navigate, so refugees often mist their intended marks; Madeline Baro Diaz, *Family In Floating Cab Ask to be Let Into U.S.*, S. FLA. SUN-SENTINEL, Jun. 9, 2005, at B1 (a Cuban family tried to float to Florida on a vintage vehicle-turned boat. The family had applied for exit visa, but one was denied because she was a doctor and another because he was old enough for military service); *Copter Flies 34 Cubans to Freedom Asylum-Seekers Land Near Miami After Commandeering Craft in Daring Escape Plot*, ROCKY MOUNTAIN NEWS, Jan. 4, 1992, at 2 (34 Cubans commandeered a tourist helicopter and flew from a resort in Varadero, Cuba, at low heights to avoid Cuban radars, to the U.S. At least on one other occasion, a Cuban major flew a Mig fighter jet to the U.S. Cubans have also flown small crop-duster planes to the U.S.).

¹⁹⁶ Bragg, *supra* note 191 (statement of Ramon Saul Sanchez, delegate with Movimiento Democracia, a Miami based anti-Castro group).

¹⁹⁷ Growing up Cuban in Miami, Florida, you develop a thick skin against news from the island because rumors about change in Cuba are constantly presented and proven to be untrue. See Vanessa Arrington, *From Appendicitis to Poisoned Cigars, Fidel Castro Has Repeatedly Defied Death*, ASSOCIATED PRESS ARCHIVE, Aug. 6, 2006. In 1961, the C.I.A. trained Cuban exiles for the Bay of Pigs invasion and Castro’s assassination. *Id.* Nearly 150 Cubans were killed, but Castro was unharmed. *Id.* There have been more than 30 plots to assassinate Castro. *Id.* All of which were unsuccessful. *Id.* With each attempt or illness, hope of a better future rises. *Id.* With each failed attempt or recovery, hope slips away. *Id.* “Cubans have no idea whether dictator Fidel Castro is lying at death’s door or sitting up and watching reruns of ‘Jeopardy.’” Stephanie Mansfield, *Cubans in Dark on Fate of Fidel – Parallel Noted in Soviet Deaths*, WASH. TIMES, Aug. 8, 2006, at A01. Cubans in Cuba and the U.S. were left wondering what had happened to Castro. *Id.* In Miami, they awaited news of Castro’s death with champagne, beeping car horns, and Cuban flags. *Id.* Expectations once again proved to be untrue. *Id.* For example, rumors about Castro’s death caused uproots of

B. COMPARING THE CONCERNS VOICED DURING THE 1966 CONGRESSIONAL HEARINGS AND THE CURRENT STATE OF CUBAN AFFAIRS AND IMMIGRATION POLICY

The current diplomatic situation between the U.S. and Cuba is inadequate.¹⁹⁸ In the past, when confronted with various exoduses of Cuban immigrants, Congress held Congressional Hearings or discussions with the government of Cuba.¹⁹⁹ Today, Cuba and the U.S. continue to be at a diplomatic stalemate.²⁰⁰ In light of the diplomatic silence and the current anomaly posed by the Wet Foot, Dry Foot policy, I offer a foreshadowing of what Congressional Hearings on the state of Cuban affairs and immigration policy would appear like in 2008. Comparing the remarks and concerns of the representatives present at the 1966 Hearings prove useful to understanding the growing concern over the current preferential treatment of Cubans. The following is a selection of the issues raised in 1966 followed by modern hypothetical responses.

According to the 1966 Hearings, the CAA was passed to improve the plight of the thousands of Cubans who left Cuba because of the oppression faced at the hands of a communist Cuban government.²⁰¹ The U.S. desired to play a “full and sympathetic role” as a home for refugees from a communist government.²⁰²

Today, there have been no significant changes in the approach the Cuban government takes in controlling life in Cuba.²⁰³ The totalitarian regime controls all aspects of life in Cuba through pressure from the Communist Party.²⁰⁴ “The government continues to commit serious abuses, and denies citizens the right to change their government.”²⁰⁵ Cuban nationals are incarcerated for manifesting their political beliefs, and though the Cuban constitution provides for freedom of speech, all speech must conform to socialist thought.²⁰⁶ “The government does not tolerate dissent.”²⁰⁷ In 2006, harassment and intimidation of critics and dissidents increased.²⁰⁸ At least 67 “prisoners of conscience” – teachers, journalists, human rights defenders – are imprisoned throughout Cuba after unfair trials that do not meet international standards.²⁰⁹ All print and media are under control of the state. Internet access is severely limited.²¹⁰

celebration in the Cuban enclaves of South Florida, but once again, like so many times before, possible change in Cuba turned out to be a hoax. See *After Fidel Miami Smartly Reconsiders Post-Castro Event*, S. FLA. SUN-SENTINEL, Feb. 3, 2007, at A18.

¹⁹⁸ See Pablo Bachelet & Frances Robles, *Cuba Cuts Power to U.S. Mission*, THE MIAMI HERALD, Jun. 13, 2006, at A1. “Electricity to the U.S. Interests section – not quite an embassy because Cuba and the United States do not have formal diplomatic relations – was cut off at 3 a.m. on June 5, [2006].” *Id.* The electricity incident was another event in what has been a “dramatic escalation of a campaign of harassment of American diplomats that allegedly includes poisoning a family pet and shutting off water.” *Id.* Other examples of harassment on the part of Cuba officials include the following: not awarding visas to newly appointed U.S. diplomats; denying requests for transportation, computers, and other supplies; preventing the hiring of Cuban maintenance workers; restricting gasoline access; and denying exit permits to Cuban employees who need training abroad. *Id.*

¹⁹⁹ See *Hearings*, *supra* note 28.

²⁰⁰ Bob Deans, *U.S. Relations With Cuba Ripe For Thaw With a Democratic Majority, Those Who Favor Closer Ties See Opportunity to Reverse Strict Bush Policy*, ATLANTA JOURNAL-CONSTITUTION, Feb. 4, 2007, at A18. The former Republican controlled House and Senate have been hesitant to challenge restrictions on Cuba. *Id.* “Conservative Cuban-Americans in South Florida have long been active in pressuring Washington and flexing their political muscle within the GOP to maintain sanction on Cuba.” *Id.* However, with the new Democratic control of the House and Senate, some sanctions may be challenged. *Id.* Some argue that common sense leans toward the creation of a strong relationship with Cuba. *Id.* “Whether we like or dislike, or agree or disagree, with the government there,” said Rep. Ray LaHood (R-Ill). *Id.* Others counter by calling any potential lift of sanctions against Cuba as a victory for Castro. *Id.* To many, the sanctions “remain[] a powerful symbol of U.S. opposition to Castro.” *Id.*

²⁰¹ See *Hearings*, *supra* note 28, at 3 (statement of the Hon. George Ball).

²⁰² *Id.* at 4.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ *Id.*

²⁰⁶ See *id.*; *Amnesty International Raps Cuba on Human Rights*, EFE NEWS SERVICES, Jan. 29, 2007 [hereinafter *Amnesty International*] (according to Amnesty International, the government of Cuba continues to commit assorted abuses of human rights, such as the imprisonment of political dissidents and severe restrictions on the freedoms of expression, association, and assembly).

²⁰⁷ Bureau of Western Hemisphere Events, <http://www.state.gov/r/pa/ei/bgn/>.

²⁰⁸ See *Amnesty International*, *supra* note 206.

²⁰⁹ *Id.*

²¹⁰ *Id.*

Nor does governmental change appear to be imminent.²¹¹ According to a poll conducted in 2004 by the Institute for Public Opinion Research and Cuban Research Institute at Florida International University, 16% of Cuban-Americans polled felt that political change will never occur in Cuba.²¹² In light of the above mentioned facts, the situation in Cuba does not warrant abolishment of the CAA; rather, because Cubans in Cuba continue to face oppression by the Cuban government, the adjustment of status Congress has granted Cubans via the CAA is justified and upheld.²¹³

According to the 1966 Hearings, the only means to obtain a visa was if a Cuban who had arrived in the U.S. left the country and applied at an American consulate abroad.²¹⁴ Since diplomatic ties with Cuba were severed on January 3, 1961, Cubans cannot apply for an immigration visa from within Cuba for the sole purpose of acquiring permanent residency in the U.S.²¹⁵

Today, immigration processing from within Cuba is possible, to a limited extent.²¹⁶ “Immigration processing in Cuba is regulated by the September 4, 1994, Joint Communique between the U.S. government and the government of Cuba.”²¹⁷ Currently, 20,000 visas are awarded to Cubans who fall within the following three groups: (1) family based; (2) refugee protection; and (3) discretionary parole under the Special Cuban Migration Program referred to as the Cuban Lottery.²¹⁸ However, an additional procedure employed by the Cuban government complicates an already imperfect system. Cubans must obtain an exit visa before departing from Cuba.²¹⁹ Over 500 applicants who were awarded an exit visa have not been allowed to exit Cuba.²²⁰ Further, Cuba has refused to initiate a new registration for the supposedly annual U.S. visa lottery.²²¹ The last registration was held in 1998.²²²

Efforts to correct the backlog have failed, and since 2003, when a meeting with the Cuban government was canceled because of its unwillingness to collaborate with the U.S., there have been little communications between the two sides with regards to immigration issues.²²³ In light of Cuba’s non-cooperation, specifically with the U.S. visa lottery, there is no reasonable method by which a Cuban in Cuba may apply for a visa to enter the U.S. or a Cuban visa to exit Cuba.²²⁴ The CAA should remain intact as Cubans are continually forced to risk their lives at sea in order to reach the U.S.²²⁵

According to the 1966 Hearings, an adverse result of preventing Cubans from receiving permanent residence in the U.S. is that “skilled and professionally trained individuals who would be a credit to this country are prevented from obtaining gainful employment [in the U.S.], either because of conditions

211 *Id.* (as of late January 2007, reports indicate that Cuba continues to fail international standards of human rights).

212 *See* Florida International University Cuba Poll, <http://www.fiu.edu/orgs/ipor/cubapoll/index.html>. [hereinafter *The Cuba Poll*].

213 *See Hearings, supra* note 28, at 3 (the political oppression that led the Representatives present at the 1966 Congressional Hearings presently remain in Cuba).

214 *Id.*; *Cuban Refugees Seek New Status*, N.Y. TIMES, Nov. 15, 1966, at 15.

215 *See Hearings, supra* note 28, at 8.

216 *See* U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis>.

217 *Id.*

218 *See id.*

219 *See* Oscar Corral, *U.S. Says Cuba Not Trying To Halt Migrants*, THE MIAMI HERALD, Sept. 29, 2005, at 1A [hereinafter *U.S. Says Cuba*]; Andres Viglucci, *Costly Exit Fees Keep Some Cubans From Using Visas*, THE MIAMI HERALD, Aug. 9, 1998, at 1A. By 1998, 5,700 of the 42,000 Cubans granted a U.S. immigration visa had not reached the U.S. due to high exit fees. *Id.* The fees, \$500 for adult and \$400 for children to be paid in U.S. currency only, are coupled with air travel to the U.S. and mandatory medical exams. *Id.* “In some cases, the visas, which are good for six months and renewable for six months, expire and recipients must reapply.” *Id.* Some must give up their dream of reaching the U.S. for lack of money. *Id.* “There are other impediments as well. In a relatively small number of cases, mainly involving young men of military service age and relatives of high level defectors, the Cuban government refuses exit visas.” *Id.*

220 *See U.S. Says Cuba, supra* note 219, at 1A.

221 *See id.*

222 *See id.*

223 *See id.*

224 *See supra* notes 165-172 and accompanying text.

225 *See Hearings, supra* note 28, at 3. Cubans in 1966 could not apply for a U.S. visa from within Cuba. *Id.* Cubans in 2006 are not being granted the U.S. visas they are entitled to under the Joint Communique. *Id.*

imposed independently by employers, or because of restrictive statutes. Enactment of [the CAA] . . . removes many bars to the self-sufficiency of Cuban refugees.”²²⁶

Today, many Cuban professionals who would be a credit to American society are being prevented from gaining access to the United States. For example, 171 of the estimated 500 Cubans who have been awarded a U.S. visa, but have not been allowed to exit Cuba, are doctors.²²⁷ Cuban doctors, who wish to leave Cuba for the same reasons non-professionals immigrate, customarily defected while in a third country; however, this has been difficult to accomplish.²²⁸ Professionals who perform their trained skills in third countries are often considered to live in that country, and thus are no longer escaping the oppression at the hands of the Cuban government.²²⁹ An estimated 500 medical personnel have recently defected.²³⁰ The above mentioned facts taken into consideration, Cuban professionals who would be an asset to American society are being prevented from gaining access to the U.S.²³¹ In an effort to facilitate the admission of these individuals, U.S. policy “announced in August [2006], enables Cuban medical personnel working abroad to come to the United States once they passed routine background checks.”²³² In light of this policy and the benefits of permitting these individuals to remain in the U.S., the CAA should continue to ensure at least one avenue that provides professionals such as doctors, nurses, and other needed medical personnel to stay in the U.S.²³³

According to the 1966 Hearings, the efforts taken by the U.S. to welcome the Cuban immigrants are “humanitarian gestures,” and in no way indicate a change in political posture toward Cuba.²³⁴ In other words, the CAA in no way is indicative of a direct agreement with the Cuban government; rather, it is a form of relief to the Cuban people.²³⁵ The essence of the American posture toward Cuba is that Cuba one day will return again to the “free world family of nations,” while the gates to the U.S. remain open to those who wish to flee the oppression of the totalitarian government.²³⁶

Today, the American stance on Cuba has not changed since the inception of the CAA in 1966.²³⁷ Cuba and the U.S. continue to have no diplomatic relations,²³⁸ and the U.S. embargo continues to restrict trade with Cuban industries.²³⁹ Earlier this year, concern over Cuba grew once again as the nation wondered – or at least South Florida and other Cuban enclaves – whether the death of Fidel Castro and the transfer of power to his brother, Raul Castro, would cause diplomatic change on the island.²⁴⁰ According to Thomas Shannon, Assistant Secretary of Western Hemisphere Affairs, “[i]t is our view that

²²⁶ *Id.* at 9 (statement of the Hon. Emanuel Celler).

²²⁷ See *U.S. Says Cuba*, *supra* note 219, at 1A.

²²⁸ See Alfonso Chardy, *U.S. Tweaks Cuba Policy*, THE MIAMI HERALD, Aug. 12, 2006, at 1B [hereinafter *U.S. Tweaks*].

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *Asylum Bid Stalls For 38 Cuban Doctors*, CHI. TRIB., Feb. 3, 2007, at 9. Thirty-eight Cuban doctors have defected from a mission in Venezuela, and await refugee status in Venezuela. *Id.* They hope to seek asylum in the U.S., but have been waiting a Venezuelan response for 6 months. *Id.*

²³² *Id.*; Vanessa Bauza, *Cuban Troupe Defects in Vegas: 44 Performers of Music Group Seek Asylum in the U.S.*, SOUTH FLORIDA SUN-SENTINEL, Nov. 16, 2004, at 1A. Forty-four performers of the Havana Night Club show took place in large mass defection from Cuba. *Id.* They feared group disbandment after a trip to perform in the U.S.; they filed for political asylum in Las Vegas. *Id.* “They felt they were given no choice on the way out the door [of Cuba].” *Id.*

²³³ See *Hearings*, *supra* note 28, at 9 (Congressional interest in granted adjustment of status via the CAA to Cuban professionals).

²³⁴ See *Hearings*, *supra* note 28, at 17.

²³⁵ See *id.*

²³⁶ *Id.*

²³⁷ See Pierre M. Atlas, *U.S. Must Change Policies That Harm Haitians, Cubans*, INDIANAPOLIS STAR, Oct. 6, 2005, at A12 [hereinafter *U.S. Must Change*]. During the Cold War, Cuba and the Soviet Union marched side-by-side. *Id.* “Thanks to the 40-year old trade embargo and especially the demise of the Soviet economic subsidies, Cuba is no longer a threat.” *Id.* However, though the rationales for the embargo are no longer convincing, trade with Cuba remains restricted. *Id.*

²³⁸ See Bachelet & Robles, *supra* note 198, at 1A.

²³⁹ See *U.S. Must Change*, *supra* note 237, at A12.

²⁴⁰ See Thomas Shannon, Assistant Sec’y of State for W. Hemisphere Affairs, *U.S. Policy Toward Cuba* (Aug. 23, 2006), transcript available at <http://fpc.state.gov/fpc/71065.htm>.

Cuba's future has to be determined by the Cuban people. That ultimately no political solution can be imposed from the outside, neither from the United States, nor any other country [I]t's imperative that the Cuban people be able to choose their future."²⁴¹

Secretary of State Condoleezza Rice also spoke to the Cuban people as the death of Fidel Castro appeared imminent.

Much is changing [in Cuba], yet one thing remains constant: America's commitment to supporting a future of freedom for Cuba, a future that will be defined by you -- the Cuban people.

. . . [W]e will stand with you to secure your rights.

. . . [A]nd we stand ready to provide you with humanitarian assistance, as you begin to chart a new course for your country.

. . . .

It has long been the hope of the United States that a free, independent, and democratic Cuba would be more than just a close neighbor – it would be a close friend. This is our goal, now more than ever, and throughout this time of change, all of you must know that you have no greater friend than the United States of America.²⁴²

As evidenced by the statements of Assistant Secretary Thomas Shannon and Secretary of State Condoleezza Rice in conjunction with the continuation of restrictive and limiting U.S. policies toward Cuba such as the embargo, the furthering of humanitarian aid to Cuban immigrants via the CAA in no way changes the U.S. government's stance against the totalitarian regime.²⁴³

According to the 1966 Hearings, Cubans do not intend to reside permanently in the United States.²⁴⁴ Once conditions improve in Cuba, the immigrants will return to their homes abroad.²⁴⁵

Today, a poll conducted in 2004 by the Institute for Public Opinion Research and Cuban Research Institute at Florida International University indicates that 46.2% of Cubans polled are not at all likely to return to Cuba if the Cuban government shifts from a totalitarian to a democratic form.²⁴⁶ It should come as no surprise that the population of Cubans in the U.S. has increased since the establishment of the CAA. In 1980, nearly 570,000 Cubans called Miami, Florida, their home.²⁴⁷ The U.S. Census Bureau's 2000 census indicates that over 833,000 Cubans live in Florida.²⁴⁸ "Members of the first generation that fled Cuba after Fidel Castro came to power were always sustained by the dream of one day seeing their homeland free of its Communist government."²⁴⁹ But in time . . . [t]hey remade themselves and [the cities they live in]."²⁵⁰ Over time, the Cuban immigrants have settled in the U.S. and have realized that they and their children cannot pack up and leave the U.S. for a country they either left decades ago or have never

²⁴¹ *Id.* (alteration in original).

²⁴² Condoleezza Rice, *Sec'y of State Condoleezza Rice Message to the People of Cuba* (Aug. 4, 2006) (alteration in original), transcript available at <http://www.state.gov/secretary/rm/2006/69974.htm>.

²⁴³ See generally, *Hearings*, *supra* note 28, at 17-18 (accepting Cuban immigrants in 1966 as a humanitarian gesture does not change the overall outlook of the U.S. government toward Cuba).

²⁴⁴ See *id.* at 18; *Cuban Refugees Seek Asylum*, N.Y. TIMES, Nov. 15, 1966, at 15 (the thousands of Cubans that filled immigration offices in 1966, just after enactment of the CAA, did not all intend to stay in the U.S. permanently. "They were more interested in the immediate benefits of becoming permanent residents than in seeking citizenship after five years of residency." Some did not intend to give up their Cuban citizenship, hoping to return home someday).

²⁴⁵ See *id.*

²⁴⁶ See *The Cuba Poll*, *supra* note 212.

²⁴⁷ See *Transformation*, *supra* note 87, at 20.

²⁴⁸ U.S. Census Bureau, Census 2000 Demographic Profile Highlights, Selected Population Group: Cuban.

²⁴⁹ See *supra* note 195 and accompanying text (describing the hope many Cubans retain of one day returning to Cuba).

²⁵⁰ David Gonzalez and Abby Goodnough, *Cubans in U.S. Feel the Tug of Two Homes*, N.Y. TIMES, Aug. 3, 2006, at A1 (hereinafter *Tug of Two Homes*).

known.²⁵¹ The reality for many Cuban immigrants “is that home is here now.”²⁵² It has become evident that Cubans who arrive in the U.S. and adjust their immigration status through the CAA are not contemplating a temporary stay in the U.S.²⁵³

According to the 1966 Hearings, Cuban immigrants prefer to settle in the U.S., “particularly the Miami area and Florida.”²⁵⁴ Americans and Cubans know one another through tourist excursions and business experiences.²⁵⁵ Cubans have visited the Miami area and other parts of the U.S. on holidays, and “know this part of the world.”²⁵⁶ “[Cubans] know how to live with Americans.”²⁵⁷ Additionally, Central and South Americans have less in common with Cubans than do Americans.²⁵⁸ The Spanish that is spoken in some Latin American countries is different from that spoken in Cuba, and we must not underestimate the diversity between Latin America and Cuba.²⁵⁹

Today, Argentina shares a close relationship with the people of Cuba because of the honored and beloved icon Ernesto “Che” Guevara.²⁶⁰ Bolivia is another ally of Cuba in South America.²⁶¹ Arguably, Cuba has no greater ally than Venezuela.²⁶² Cuba, as part of an agreement with Venezuela, sends doctors, teachers, and sports instructors to Venezuela in return for over 50,000 barrels of oil per day.²⁶³ More recently, Cuba and Venezuela agreed with Bolivia to buy all of Bolivia’s soy beans in exchange for access to Bolivian oil.²⁶⁴ Additionally, Cuba remains a powerful ally of Mexico,²⁶⁵ while the U.S. continues its non-diplomatic relationship with Cuba.²⁶⁶ Cubans who wish to find refuge from the oppressive Castro government do have alternatives in Central and South America.²⁶⁷ The comfort level of Cubans in these countries is high, as is the opportunity of sustaining a life of quality.²⁶⁸ Bolivia, Mexico, Argentina, and Venezuela are Spanish-speaking countries with ties to Cuba and large metropolitan centers.²⁶⁹ While Cubans may prefer to immigrate to the U.S., the historical relationship that once existed

²⁵¹ See Bill Steigerwald, *What’s Next For Cuba After Castro?*, THE JERSEY JOURNAL, Aug. 14, 2006, at A17 (“You’re not talking about exiles who arrived a year ago. You’re talking about thousands of people who came in more than 40 years ago. They married here. They have children. Their children married here. There are folks who have spent two generations in the United States. They are elected to Congress, they pay taxes, they serve in the armed forces. I’m sure that some Cuban-Americans will go back to stay in Cuba and many others will go back to visit. But I think a large percentage of Cubans now living in the United States after Castro is gone are going to discover that they see themselves more like Irish-Americans in Boston or American Jews in New York or German-Americans in the Pittsburgh area.”) (statement of Frank Calzon, executive director of the Center for a Free Cuba – an independent, non-partisan institution dedicated to promoting human rights and a transition to democracy and the rule of law on the island of Cuba).

²⁵² See *Tug of Two Homes*, *supra* note 250.

²⁵³ See *Hearings*, *supra* note 28, at 18.

²⁵⁴ *Id.* at 24; Kevin Manahan, *Away From Big Game, Boos for Castro*, STAR-LEDGER, Feb. 5, 2007, at 1 (“Miami is home to more than a million Cuban-Americans, and last week a citizens’ committee announced plans to celebrate Castro’s death with a party at the Orange Bowl. Let your spite be your invitation.”).

²⁵⁵ See *Hearings*, *supra* note 28, at 24.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See *id.* at 25.

²⁵⁹ See *id.* at 24.

²⁶⁰ See Monte Real, *In Latin America, A Warm Spotlight for Socialist Icon*, WASH. POST, Aug. 2, 2006, at A8.

²⁶¹ See *id.*

²⁶² See Magdalena Morales, *Chávez Cultivating Cuban Idea*, SEATTLE TIMES, Apr. 22, 2003, at A17 (Cuban instructors have offered farming lessons to Venezuelans as part of “Cuba’s latest export to its closest South American ally, Venezuela.” The farming lessons have been criticized as “little more than a political gimmick and another sign of Chávez’s close ideological ties with his friend and ally Cuban President Fidel Castro.”).

²⁶³ See *The Americas: Another Cuba?; Venezuela*, THE ECONOMIST, July 12, 2003, at 47.

²⁶⁴ See Anita Snow, *Cuba, Bolivia, Venezuela Ink Alternative Trade Agreement*, BOSTON HAITIAN REPORTER, May 2002, at 22.

²⁶⁵ See Robert S. Leiken, *With a Friend Like Fox*, FOREIGN AFFAIRS, Sept./Oct. 2001, at 91.

²⁶⁶ See Pablo Bachelet & Frances Robles, *Cuba Cuts Power to U.S. Mission*, THE MIAMI HERALD, Jun. 13, 2006, at 1A.

²⁶⁷ See *supra* notes 210-216 and accompanying text.

²⁶⁸ See Rodrigo Lazo, *Promise of Help Still Good, Cubans in Venezuela are Told*, THE MIAMI HERALD, June 16, 1989, at 4B (Cubans have settled in Venezuela, Panama, Costa Rica, and Spain. Many see their time in these countries as temporary stops on their voyage to the U.S.; however, the possibility for prosperity outside of the U.S. for Cubans exists).

²⁶⁹ See *supra* notes 210-218 and accompanying text.

between Cuba and the U.S. is no more, and Cuba and the previously mentioned Central and South American countries are now closely tied together.²⁷⁰

The above-mentioned hypothetical responses to the concerns from the 1966 Hearings are similar for the most part to those given in 1966. Cubans remain oppressed;²⁷¹ the formal process for receiving access to the United States is inadequate;²⁷² professionals are being prevented access to the United States;²⁷³ and the American stance on Cuba has not changed.²⁷⁴ However, at least two of the rationales for passing the CAA no longer carry the same weight. Exiled Cubans in the U.S. do not ultimately intend to return to Cuba;²⁷⁵ and, arguably, Cubans prefer to live in South and Central America over the U.S.²⁷⁶ The majority of the rationales support the continued use of the CAA, but with a minority of rationales no longer supporting the CAA, the debate over the continued use of the CAA has grown.

IV. COMMENTARY - THE FUTURE OF THE CAA

A. CONTINUED PREFERENTIAL TREATMENT OF CUBANS

One man felt so passionate about the current state of U.S.-Cuba relations, or the lack thereof, that in January 2006, after 15 Cuban refugees were sent back to Cuba, he went on an eleven-day hunger strike.²⁷⁷ It ended only after President Bush agreed to meet with Cuban exile leaders to discuss Cuban immigration policies.²⁷⁸ This event – to some – exemplifies America’s stance on the fair treatment of immigrants; however,

[t]he allusion is far from reality. It would be more fitting to say that [the U.S. is] very concerned about fair immigration practices only when it comes to the Cuban exile community. For it has been many years that Haitian refugees have been neglected and even mistreated by U.S. immigration policy.²⁷⁹

Over forty years after the CAA became law, preferential treatment of the kind solely demonstrated toward Cuban immigrants may no longer be a reasonable practice of American immigration policies.²⁸⁰

At least one possible future for Cuba is consistent with the concerns voiced during the 1966 Congressional Hearings.²⁸¹ Raul Castro’s takeover of Cuba likely will be reminiscent of Communist China as indicated by a number of trips he has made to China since 2003 to study Chinese economic policies.²⁸² This likely opens Cuba to some economic change, but also supplies the government with a “more forceful hand in denying human rights.”²⁸³ The standard of living for the average Cuban remains

²⁷⁰ See *supra* notes 210-219 and accompanying text.

²⁷¹ See *supra* notes 152-164 and accompanying text.

²⁷² See *supra* notes 165-176 and accompanying text.

²⁷³ See *supra* notes 177-187 and accompanying text.

²⁷⁴ See *supra* notes 188-194 and accompanying text.

²⁷⁵ See *supra* notes 195-203 and accompanying text.

²⁷⁶ See *supra* notes 204-220 and accompanying text.

²⁷⁷ See Isheka Harrison, *Asylum Policies Outrageous*, MIAMI TIMES, Jan. 25-31, 2006, 1A.

²⁷⁸ See *id.*

²⁷⁹ *Id.* (alteration in original).

²⁸⁰ See Maura Possley, *Cuban Policy Sparks Cries of Inequity – Critics Seek Fairness in Controversy Over ‘Wet Foot, Dry Foot’*, BRADENTON HERALD, Dec. 20, 2006, at 1A (the disparity created by pro-Cuban policies “points to a desperate need for equity in U.S. immigration laws.” Most immigrants who attempt to reach the U.S. face similar strife, but only Cubans receive the special treatment. The critics are not anti-Cuban or anti-immigration; rather, they seek fair policies toward all immigrants. On the other hand, some view the critics, especially those Latino or Hispanic critics, as traitors, but no other country in the world receives this treatment from U.S. immigration. It appears to not follow any logic. Immigrants are jealous of the sensitive favoritism. It just doesn’t make sense to choose between groups of immigrants when all these groups are assemblies of persons suffering from similar strife).

²⁸¹ See *supra* notes 152-220 (referring to the concerns from 1966 and the modern day responses of 2006-2007).

²⁸² See George Diaz, *New ‘Jefe’ Same as Old ‘Jefe’*, KNIGHT RIDDER TRIBUNE NEWS, Nov. 19, 2006, at 1.

²⁸³ *Id.*

lower today compared to life in Cuba prior to 1990, when Cuba's paternalistic ally, the Soviet Union, collapsed.²⁸⁴ As a result of the Soviet Union's collapse, about \$6 billion were lost annually.²⁸⁵ Cubans have been left with so few options that many hunt and eat the cats off the street.²⁸⁶ Further, the deficiencies in nutrition have caused an epidemic of optic neuropathy, resulting in temporary blindness.²⁸⁷

Strife in Cuba is in part due to U.S. policies, i.e., the embargo.²⁸⁸ Economic sanctions and the embargo against Cuba perhaps create a duty to accept Cuban refugees who flee Cuba due to economic decline.²⁸⁹ The U.S. has consistently strengthened sanctions against the Cuban government as a means of accelerating democracy on the island.²⁹⁰ As recently as November 2006, U.S. prosecutors announced the creation of a task force that will increasingly prosecute the import/export of goods to and from Cuba, unapproved visits to Cuba, and exchanges of hard currency to and from Cuba.²⁹¹ Cuba has lost an estimated \$4 billion in 2006 due to lost business, cancelled contracts, and higher shipping and financial costs.²⁹² Nearly every U.N. member nation currently opposes the U.S. embargo on Cuba, but the Bush Administration continues to tighten enforcement of the nearly 45-year old economic blockade.²⁹³ Clearly, there is a negative history between Cuba and the U.S.²⁹⁴ Perhaps the continued preferential treatment of Cubans today is a form of compensation for past mistakes.²⁹⁵

The special treatment possibly continues because Cubans in the U.S. have found various ways to become prominent and self-sustainable.²⁹⁶ The presence of well-known Cuban-American individuals is a sign of the ability of Cubans to assimilate, adjust, and influence the American way of life. The same argument, however, can be made for various other immigrant groups who do not receive the same immigration treatment or positive attention from the American public or government.

For example, Haiti, like Cuba, is known for its "politically-tumultuous history and . . . abject poverty."²⁹⁷ Many Haitians made the 700 mile sea voyage to Miami, FL in the 1960's to "escape the torture and killings perpetrated by François 'Papa Doc' Duvalier and his Tonton Macoutes thugs. When

284

285 *See id.*

286 *See* Jose de Cordoba, *Guns and Butter: Cuba's Military Puts Business On Front Lines; Under Castro's Brother, Army Built Joint-Venture Empire; From Hotels to Dolphins*, WALL STREET JOURNAL, Nov. 15, 2006, at A1.

287 *See id.*

288 *See Flight*, *supra* note 17; *Amnesty International Raps Cuba on Human Rights*, EFE NEWS SERVICES, Jan. 29, 2007 (Amnesty International has called for an end to the economic embargo on Cuba. The embargo has been detrimental to Cubans' enjoyment of economic and social rights such as food, health, and sanitation. It has hampered family reunification. The embargo's negative impact on Cuba coincides with Cuba's violation of human rights).

289 *See* Roland Estevez, *Modern Application of the Cuban Adjustment of 1966 and Helms-Burton: Adding Insult to Injury*, 30 HOFSTRA L. REV. 1273, 1286 (2002).

290 *See U.S. Tightens Embargo*, CARIBBEAN UPDATE, Nov. 2006, at 3.

291 *See The Cost of U.S. Sanctions*, CARIBBEAN UPDATE, Nov. 2006, at 3.

292 *See id.*, at 4.

293 *See id.*; Warren Hoge, *Vote Reaffirms Opposition To U.S. Embargo*, N.Y. TIMES, Oct. 31, 2007, at A.6 (U.N. General Assembly voted for the 16th consecutive year against the Cuban embargo. Only three nations voted in favor of the U.S. policy: Israel, the Marshall Islands and Palau).

294 *See supra* notes 231-36 and accompanying text.

295 *See supra* notes 188, 231 and accompanying text (describing the strife caused by the embargo).

296 *See* http://en.wikipedia.org/wiki/Cuban_American; *supra* note 177 and accompanying text (the subcommittee during the 1966 hearings voiced an interest in procuring the self-sustainability of the Cuban people).

297 *No Foot*, at 437; Bill Bishop, *Eugene Native Sees Haitian Strife Up Close*, REGISTER-GUARD, Feb. 17, 2004, at 1D ("[V]iolence spreads in the streets of Haitian cities ... over the political upheaval that is claiming scores of lives." The poor nation is in battle with itself. "The conflict is hardly new to Haitians, who have had 32 coups in their 200-year history." Haitians have no jobs, money, food, or hope for the future. They can't agree on a solution, but they wish for the violence to stop. Haitians know that no matter what policies are created or enforced, more people will die); Jacqueline Charles, *Congress is Asked to Let Haitians Stay*, THE MIAMI HERALD, Jan. 19, 2007, at 10A (hereinafter, *Let Haitians Stay*) ("[S]chools in Port-au-Prince were forced to close days early following a spike in for-ransom kidnappings of Haitian kids. At least 48 such kidnappings were reported Nov. 10-Dec. 15."; Micheal Deibert, *For U.S. Haitians, Home is Both Near and Far*, INTER PRESS SERVICE, Nov. 21, 2006 (hereinafter *U.S. Haitians*) ("Some 80 percent of the country's population lives in poverty, and Haiti's rate of hunger is ranked as the world's third highest, surpassed by only Somalia and Afghanistan. Two-thirds of the labor force has no formal jobs. Deforestation has resulted in 90 percent of Haiti's tree cover being destroyed for charcoal and to make room for farming in the past 50 years, leaving little to hold topsoil when the Caribbean rains fall.").

the dictator died in 1971, his son, Jean-Claude ‘Baby Doc’ Duvalier, continued the terror, and the exodus burgeoned.”²⁹⁸ In 1980, about 25,000 Haitians arrived in South Florida along with 125,000 Cubans during the 1980 Mariel boatlift; however, “because of the 1966 Cuban [Adjustment] Act . . . the Cubans were allowed to stay while most Haitians were sent back.”²⁹⁹

Like Cubans, the Haitians’ only means to reach freedom is via the high seas.³⁰⁰ More than one million Haitians live in the U.S.³⁰¹ Over one third live in New York’s metro areas.³⁰² An estimated 20,000 Haitians are living illegally in the U.S.³⁰³ In 1992, an estimated 37,000 Haitians attempted to reach the U.S. by boat after a military coup drove Haiti’s first freely elected president, Jean-Bertrand Aristide, into exile.³⁰⁴ However, “Cuba is the only one that has an agreement with the United States regarding the rights of its citizens to ask for political asylum. The Haitians have no such agreement and have become disillusioned with what they perceive is a double standard on the part of the United States.”³⁰⁵ Similar to U.S.-Cuban relations, it has been said that the U.S. is responsible for the economic and political predicament in Haiti.³⁰⁶

Today, “Haitians are the only refugees that are intercepted in the waters and returned to their country.”³⁰⁷ Further, those that do reach U.S. soil have not been subject to the same fate as Cubans.

On October 29, 2002, over two hundred Haitian emigrants successfully reached American soil; many scrambled in desperation through bumper-to-bumper traffic on the Rickenbacker Causeway in Miami, in an effort to elude authorities. Unfortunately touching American soil for Haitians means nothing, unless they evade authorities and seek refuge with family, friends, and/or human right organizations.³⁰⁸

In April 2006, “a fishing boat with 43 Haitians, one Jamaican and one Cuban made its way to land at Hillsboro Beach, [Florida].³⁰⁹ The Haitians and Jamaican will more than likely be sent back to their countries, while the Cuban is almost sure to stay.”³¹⁰ More recently, on March 28, 2007, over 100 Haitian refugees boarded a 40-foot sailboat to escape the situation in Haiti.³¹¹ “Bewildered family members [already in the U.S.] watched as the government has warehoused their loved ones in secrecy, behind barbed wire in Pompano Beach, [Florida] and sent them back to Haiti one by one. Prayers to God and voodoo spirits haven’t saved them. Nor have immigration lawyers.”³¹²

²⁹⁸Janine Zeitlin and Amy Guthrie, *Washed Up: 101 Haitian Refugees Sailed North Full of Hope. They Got Screwed*, NEW TIMES BROWARD/PALM BEACH, Nov 29 – Dec 5, 2007, at 14 (hereinafter *Washed Up*).

²⁹⁹*Id.*

³⁰⁰*See No Foot*, *supra* note 16, at 437.

³⁰¹*See U.S. Haitians*, *supra* note 312.

³⁰²*Id.*

³⁰³*Let Haitians Stay*, *supra* note 312.

³⁰⁴J.P. Slavin, *4 Boat People Arrested by Haitian Police*, WASH. POST, Aug. 25, 1992, at A18.

³⁰⁵*No Foot*, *supra* note 16, at 438; *Let Haitians Stay*, at 10A (U.S. Rep. Alcee Hastings currently leads an effort to extend “temporary protected status” to Haitians living illegally in the U.S. “[t]hat would give them residence and work papers for up to 18 months.” Congress can pass legislation that designates temporary protected status to a group of immigrants, but it generally defers to the Department of Homeland Security. According to the U.S. Citizenship and Immigration Services, temporary protected status has only been extended once – El Salvador); Trenton Daniel, *Haitians Protest U.S. Policy After 43 on Boat are Detained*, THE MIAMI HERALD, Apr. 11, 2006, at 1B (hereinafter *43 on Boat*) (Haitians should be granted temporary protected status not only because of the great political upheaval, but also because they have suffered natural disasters).

³⁰⁶*See No Foot*, *supra* note 16, at 446; *Let Haitians Stay*, at 10A (Haitian government has “blamed a surge in violence and kidnappings following the 2004 ouster of former Haitian President Jean-Bertrand Aristide on the U.S. government’s long-standing deportation policy.”).

³⁰⁷*No Foot*, *supra* note 16, at 449.

³⁰⁸*Id.* at 456.

³⁰⁹Hansen Sinclair, *Haitians Protest U.S. Policy after Haitians are Sent Home, Cuban Stays*, WESTSIDE GAZETTE, Apr 13-19, 2006, at 1A (hereinafter *Haitians Protest*).

³¹⁰*Id.*

³¹¹*Washed Up*, *supra* note 313.

³¹²*Id.*

President Ronald W. Reagan, on September 29, 1981, proclaimed that, “the ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States.”³¹³ Today, with the immigration anomaly created by the Wet Foot, Dry Foot Policy, Cubans and Haitians are often involved in confrontations with the U.S. Coast Guard, but only the Cubans get to stay in the U.S.³¹⁴ “For many Haitian-Americans, the United States’ preferential treatment of Cuban immigrants has gone too far.”³¹⁵ Additionally, Haitians who do make it to the U.S. and evade authorities face a low percentage opportunity at gaining asylum.³¹⁶ Over 21,000 Haitians applied for political asylum between the years 1997-2002, but only about 1,200 were approved.³¹⁷ In fact, more than 80 percent of asylum seekers from Haiti have been denied asylum since 2000.³¹⁸ According to one report, one immigration judge in the Miami area “denied 97.6 percent of Haitian cases . . . between 2000 and 2005.”³¹⁹

B. THE PROPOSAL FOR THE FUTURE

The Cuban Adjustment Act of 1966 has kept the doors to the U.S. open for Cubans for forty years. It has been lenient at times; it has been restricted at times, but it has always provided a means to freedom for the Cuban people. A more stringent policy would deprive the U.S. of a most valuable resource – eager individuals who are prepared and willing to contribute to the American economy, culture, and society. However, for 40 years, the preferential treatment and the lack of attention to other groups has deprived this country of such influential persons. “We are asking the U.S. government to give the Haitians the same rights that they afford the refugees of other nations,” said Marleine Bastien, director of the Haitian Women of Miami.³²⁰ “We are asking that all . . . refugees be given [fair] interviews.”³²¹ This country has in a way screened out certain refugees, specifically Haitians, who are in dire need of the aid that has been provided to Cubans for over four decades.³²²

Precedent supports a more lenient and broad immigration policy that does not distinguish between a refugee’s nationality.³²³ In *Matthew v. Diaz*, the Supreme Court of the United States distinguished between American citizens and aliens, as well as the constitutional protections that apply to these groups.³²⁴ While the Court recognized that all aliens do not need to be treated homogeneously, the main issue of the case was “whether statutory discrimination within the class of aliens . . . is permissible.”³²⁵ Further, the Court’s rationale focused on the nature of the requirement Congress places on aliens, i.e., whether the requirement is wholly irrational.³²⁶ Courts have later interpreted “wholly irrational” to mean a rational basis scrutiny.³²⁷ “If there is a rational relationship between the disparity of treatment and some legitimate governmental purpose,” the legislation should be upheld.³²⁸ Thus, Congress must only be

313 *No Foot*, *supra* note 16, at 451.

314 *See supra* notes 19-20 and accompanying text.

315 *No Foot*, *supra* note 16, at 454.

316 *See id.* at 456

317 *See id.*

318 *See* Rachel L. Swarns, *Study Finds Disparities in Judges’ Asylum Rulings*, N.Y. TIMES, Jul. 31, 2006, at A15.

319 *Washed Up*, *supra* note 313 at 19.

320 *See Haitians Protest*, *supra* note 324.

321 *See 43 on Boat*, *supra* 320.

322 *See id.* (“The stark differences in immigration policy came into the spotlight again.” Protests over this issues are not new).

323 *See* *Matthew v. Diaz*, 426 U.S. 67 (1976).

324 *See id.*

325 *See id.* at 78, 80.

326 *See id.* at 82-83.

327 *See* *Rodriguez v. U.S.*, 169 F.3d 1342 (11th Cir. 1999).

328 *See id.* at 1342.

rationale in its discrimination amongst aliens.³²⁹ But, what if Congress, in discriminating between Cubans and all other refugee groups, has been irrational, and after forty years, can no longer express a legitimate governmental purpose? What if the continued use of the CAA is justifiable, i.e., the government could continue to express a legitimate purpose for allowing Cubans to enter the U.S., but discriminating between Cubans and other refugees, specifically Haitians, is wholly irrational?³³⁰

It should be noted that the Supreme Court views the admission of aliens as the subject which Congress has the most complete power to legislate.³³¹ The Court has long viewed Congress' "power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."³³² Further, "although few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed, limits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area."³³³ Congress has, however, provided some—not all—refugees with aid, and the Court has respectfully allowed Congress to make distinctions.³³⁴ The Court has even acknowledged that, "[w]ith respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status," to others who deserve it.³³⁵ Thus, the issue of extending the use of the CAA to, at a minimum, all refugees who arrive to the U.S. by sea is possible according to the Supreme Court.³³⁶ It requires a shifting of the line drawing.³³⁷ However, it is not within the jurisdiction of the Court; rather, it requires an additional act of Congress.³³⁸

Congress, over the past forty years, has approved of the CAA and its preferential treatment of Cubans.³³⁹ Inadvertently, it has denied others access to the U.S.³⁴⁰ If Congress were to allow, for example, Haitians to enter the U.S. in the same fashion as Cubans, neither group would acquire an automatic right to permanently reside in the U.S.³⁴¹ In other words, the debate over the CAA arises because of the access granted to Cubans above all other refugees, not an actual grant of status. Immigrant groups seek an equitable opportunity to apply for status in the U.S.³⁴²

C. EQUAL TREATMENT OF CUBANS AND HAITIANS

Cubans and Haitians belong in the same immigration class. Though Haiti has received less attention than Cuba, the interests of Haitians and pro-Haitian activists sound a lot like those expressed by Cubans.

³²⁹ See *No Foot*, *supra* note 16, at 461.

³³⁰ *Id.*; see *supra* note 149-220 and accompanying text (in Section III of this comment, I anticipated how a representative of the 2006 House of Congress would respond to the concerns of the 1996 House Committee that debated the CAA. My goal for that portion of the comment was to justify the CAA in its fortieth year).

³³¹ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (the Supreme Court of the United States has held that decisions to exclude aliens are the exclusive province of Congress); *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (The Chinese Exclusion Case).

³³² *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953).

³³³ *Fiallo*, 430 U.S. at 798.

³³⁴ See *id.*

³³⁵ *Id.*

³³⁶ See *id.*

³³⁷ See *id.*

³³⁸ See *supra* note 270-276 and accompanying text.

³³⁹ See *Cuban Refugees Seek New Status*, N.Y. TIMES, Nov. 14, 1966, at 15.

³⁴⁰ See *supra* note 19-20 (anecdote describing how the CAA affects refugees from Cuba different from refugees of all other nations).

³⁴¹ See 8 U.S.C. § 1255 (text of the Cuban Adjustment Act) ("May be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe." This language indicates that Cubans are granted an opportunity to receive permanent residents unparalleled to any other group, but they must still comply with all other immigration regulations, and "may" not be adjusted if the Attorney General deems it proper).

³⁴² See *supra* note 26 and accompanying text (explaining that the author of this comment does not intend to criticize Cubans or pro-Cuban attitudes; rather intends to open and extend the privileges to persons who also deserve, and perhaps need special privileges more than Cubans).

According to former President Clinton, the United States has a “significant interest in Haiti.”³⁴³ The most obvious and important reason for this interest is Haiti’s geographic location.³⁴⁴ Haiti is located in America’s backyard.³⁴⁵ Further, the United States is interested in the establishment of order in Haiti.³⁴⁶ In part, this interest stems from a history of failed intervention in Haiti³⁴⁷ and the effect of U.S. policy toward Haiti.³⁴⁸

A refugee from Cuba and Haiti who takes to the sea in attempting to reach the U.S. faces many of the same hurdles: (1) the reality of leaving their homeland and loved ones indefinitely; (2) the sea; (3) avoiding the U.S. Coast Guard and being subject to the Wet Foot, Dry Foot policy; (4) access to immigration relief; and (5) a favorable grant of relief from U.S. immigration services. This general timeline of what a refugee faces does not begin to account for the realities a seafaring rafter faces, but it can be used to highlight the procedures Cubans face versus all other refugees.

In terms of the Haitians’ access to immigration relief, only Cubans have an automatic right to apply for adjustment of status.³⁴⁹ If a Cuban does not meet the requirements set out by the CAA or is otherwise found to be inadmissible he/she may not adjust under the CAA. But, generally speaking, a Haitian and a Cuban who face the same persecution in their native country, face the same dangers at sea, and seek the same life in the U.S., do not receive the same attention under U.S. immigration laws.³⁵⁰ Simply being Cuban gives rise to a claim for adjustment of status, but being Haitian does not.³⁵¹

Specifically, on the Department of Homeland Security application for adjustment of status, section (e) and (f) of Part 2 of the application reads as follows:

(e) I am a native or citizen of Cuba admitted or paroled in the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year;

(f) I am the husband, wife or minor unmarried child of a Cuban described above in (e) and I am residing with that person, and was admitted or paroled in the United States after January 1, 1959, and thereafter have been physically present in the United States for at least one year.³⁵²

The application for adjustment of status does not expressly mention any other group aside from Cubans.³⁵³

What would the Act look like if it served a wholly rational purpose and a legitimate governmental purpose?

D. THE CUBAN/HAITIAN ADJUSTMENT ACT OF 2007 (“CHAA”)

[T]he status of any alien [~~who is a native or citizen of Cuba and~~] *who is a native or citizen of Cuba or Haiti or any other country that the Attorney General recognizes and who has been inspected and admitted or paroled into the United States [subsequent to January 1, 1959] subsequent to January 1, 2007* and has been physically present in the

³⁴³Christopher Marquis and Robert A. Rankin, *Clinton Lists 6 Reasons Why U.S. Might Use Force in Haiti*, THE MIAMI HERALD, May, 20, 1994, at 1A.

³⁴⁴*Id.*

³⁴⁵*See id.*

³⁴⁶*See id.*

³⁴⁷*See generally* Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nation*, 36 Harv. Int’l L.J. 341, 349 (1995).

³⁴⁸*See generally* Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT’L L REV. 389, 427 (1995).

³⁴⁹*See supra* notes 21-25 and accompanying text.

³⁵⁰*See id.*

³⁵¹*See id.*

³⁵²Form I-485, Application to Register Permanent Residence or Adjust Status, <http://www.uscis.gov/files/form/i-485.pdf>.

³⁵³*See id.*

United States for at least one year, 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 if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence The provisions of this Act . . . shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States . . .

³⁵⁴

The CHAA is not an extension of the CAA, though it may appear like one. Rather, it is a fairer and less preferential version of the CAA. After all, Haitians over the past forty years have been subject to far less special treatment by U.S. immigration, yet have faced an almost identical persecution and oppression to that of Cubans.³⁵⁵ In turning to the six concerns from the 1966 Congressional Hearings—with a few modifications and revisions—Haiti appropriately and justifiably fits within the grand scheme of the CAA.³⁵⁶

E. HYPOTHETICAL CONGRESSIONAL HEARINGS ON HAITIAN AFFAIRS AND IMMIGRATION POLICY

According to the 1966 Hearings, the Act was passed in order to improve the plight of Haitians.³⁵⁷ These refugees left their home country because of the oppression of their government.³⁵⁸

Today, Haitian farmers have resorted to eating the seeds that would have produced the next harvest of crops.³⁵⁹ Few hospitals and health clinics are functional, and those that are, have been filled with malnourished children.³⁶⁰ Haiti is a country of endemic, political violence and a stinging poverty.³⁶¹ Nearly 23,000 Haitians sought to reach the U.S. in the 1980's.³⁶² Today, the “majority of the population . . . teeters on the brink of death from hunger, disease, and displacement . . . [and nationals] of Haiti are subject to forced repatriation into a country where the government cannot prevent immediate threats to their lives, freedom, and welfare.”³⁶³ Therefore, because both Haitians and Cubans are subject to unstable and oppressive governmental and non-governmental regimes, the plight of both is lessened if admitted to the U.S. and given the opportunity to seek status.

According to the 1966 hearings, the formal process for achieving access to the United States from Haiti is inadequate.³⁶⁴ An individual from Haiti could not apply for an immigration visa to enter the U.S. from within Haiti.

Today, Haiti and the U.S. do have a diplomatic relationship; however, this does not ensure a fair visa application process within Haiti. Since 2003, natives of Haiti are not eligible for the Diversity Visa Lottery Program (“Program”).³⁶⁵ The Program gives individuals from certain countries – not Haiti – the opportunity to register and win a visa to seek permanent residency in the U.S.³⁶⁶ Due to the state of affairs

³⁵⁴8 U.S.C. § 1255 (alterations in original) (citations omitted) (emphasis added).

³⁵⁵See *supra* note 231 and accompanying text.

³⁵⁶See *supra* notes 149-220 and accompanying text (borrowing from the language and themes of the 1966 Hearings to create a hypothetical set of concerns and responses geared toward Haiti forty years after enactment of the CAA).

³⁵⁷See *Hearings, supra* note 28, at 3 (statement of the Hon. George Ball).

³⁵⁸*Id.*

³⁵⁹See Howard W. French, *Haitians Return to Deepening Misery*, N.Y. TIMES, Mar. 15, 1992, at 14 (hereinafter *Haitians Return*).

³⁶⁰See *id.*

³⁶¹See *id.*

³⁶²See *id.*

³⁶³Yvonne Abraham, *Suits Filed to Freeze Haitian Deportations*, BOSTON GLOBE, Jan. 20, 2006, at B1.

³⁶⁴Support for the hypothetical claims and responses made in this section is derived from a study of the Congressional Hearings in 1966 that led to the enactment of the CAA, and a general understanding of past and current affairs regarding Haiti.

³⁶⁵2008 Diversity Visa Lottery Program, <http://www.state.gov/r/pa/prs/ps/2006/72835.htm>

³⁶⁶*Id.*

in Haiti and the unavailability of visas, an opportunity to apply for adjustment of status should be granted to Haitians and Cubans.

According to the 1966 Hearings, professionals and skilled persons from Haiti are being denied access to the United States.³⁶⁷ These persons would be a great benefit to American society.³⁶⁸

Today, even with the lack of access to the U.S., Haitians have had a great influence on American society and culture. In 2006 elections, Kwame Raoul, a Democrat, was re-elected to the Illinois state Senate 13th District.³⁶⁹ M. Rony Francois heads the Florida Department of Health.³⁷⁰ “The suburban Miami, [Florida] enclave of El Portal became, in 2000, the first municipality in the United States to elect a Haitian-American mayor, followed by North Miami and Spring Valley, N.Y.³⁷¹ Haitian-Americans serve on city councils and municipal bodies throughout the country.”³⁷² Edwidge Danticat, author, has successfully written six novels and won various literary awards including being named one of New York Times Magazines “30 under 30” to watch.³⁷³ Lylah M. Alphonse, journalist, is a news editor for the Boston Globe and is also author to a book. Garcelle Beauvais-Nilon, actress, has modeled for various cosmetic lines, but is best known for her role on N.Y.P.D. Blue. Wyclef Jean, musician/producer/humanitarian, has explored various entertainment roles while creating his own foundation, Yéle Haiti, to aid and rebuild Haiti. The list of Haitians that have impacted American society is not as long as the Cuban list, but this ties back to preferential treatment Cubans have received over the past forty years. Additionally, at least fourteen universities in Haiti are currently functional, indicating that there is a means to education and that the U.S. could benefit from allowing these professionals and skilled persons to adjust their immigration status.

According to the 1966 Hearings, the efforts taken by the U.S. to welcome immigrants are “humanitarian gestures,” and in no way indicate a change in political posture toward the oppressive governments.³⁷⁴ In other words, the CHAA is in no way indicative of any agreement with the foreign government; rather, it is a form of relief to the oppressed people.³⁷⁵ The essence of the American posture toward the foreign country is that the foreign country one day return again to the “free world family of nations,” while the U.S. government’s doors remain open to those who wish to flee the oppression from the totalitarian government.³⁷⁶

Today, the U.S. has remained involved to some degree in the transition to peace and democracy in Haiti. An arms embargo has been in place for a number of years in an effort to prevent violent militias from rising against the government.³⁷⁷ However, more recently, the U.S. government has lessened the embargo to support Haitian police that need aid in keeping order.³⁷⁸ Nevertheless, a U.S. policy that opens the gateway to America for Haitians who exit Haiti in search of freedom would in no way be indicative of a change in diplomatic stance. The U.S. would continue to support peace and economic prosperity in Haiti.

According to the 1966 Hearings, as the conditions improve in Haiti, immigrants will return to their home land.³⁷⁹ They do not intend to remain permanently in the United States.³⁸⁰

³⁶⁷ See Hearings, *supra* note 28 at 9.

³⁶⁸ *Id.*

³⁶⁹ See Michael Deibert, *For U.S. Haitians, Home is Both Near and Far*, INTER PRESS SERVICE, Nov. 21, 2006.

³⁷⁰ See *id.*

³⁷¹ ³⁷² *Id.*; see also Jonathan P. Hicks, *Haitian Candidate Seeks to Add His Voice*, N.Y. TIMES, Feb. 5, 2007, at 1 (Dr. Mathieu Eugene seeks to become the first Haitian member of the New York Council).

³⁷⁴ See Hearings, *supra* note 28, at 17.

³⁷⁵ See *id.*

³⁷⁶ *Id.*

³⁷⁸ ³⁷⁹ ³⁸⁰ *Haiti: US Hold Talks on Lifting Arms Embargo*, XINHUA NEWS AGENCY, Oct. 21, 2004

³⁷⁶ *Id.*

³⁷⁹ See *id.* at 18.

³⁸⁰ See *id.*

Today, this concern, similar with Cubans, is perhaps the least accurate. According to the 2000 U.S. Census, there were nearly 100,000 Haitians in Miami-Dade County, Florida, and nearly 550,000 Haitians in the United States.³⁸¹ An estimated 360,000 Haitians living in the U.S. are foreign born.³⁸² A Haitian and Cuban that leaves his/her home country likely never completely cuts ties with his/her homeland, but once a new life has begun in the U.S., once an immigrant accomplishes what he/she seeks after making the difficult voyage to the U.S., return to Haiti or Cuba is not likely.

According to the 1966 Hearings, immigrants prefer to settle in the U.S., “particularly the Miami area and Florida.”³⁸³ They know how to live with Americans,³⁸⁴ and have less in common with other regions of the world.

Today, similar to Cubans, this rationale has also grown weaker. In November 2005, “[e]ighteen Haitian refugees who claim that they are fleeing political persecution and civil unrest in their homeland, landed in [Jamaica].³⁸⁵ In October 2005, fifteen Haitians migrated to Jamaica in search of a better life, but Haitian immigration to Jamaica has remained small in comparison to the migration toward the U.S.

The U.S. government has been determined to protect national security and public order through restricting borders and migration. Government officials like former Attorney General John Ashcroft have indicated that “Haitian restrictions are a matter of national security—that migrants from countries such as Pakistan have used Haiti as a staging point for entry into the United States.”³⁸⁶ However, Haiti is not on the U.S. Border Patrol’s list of nations considered to be “special interest” for hosting or supporting terrorism.³⁸⁷ More liberal immigration advocates criticize the U.S. government for covering up its real intentions, “[not] tolerat[ing] a large irregular movement of poor, black immigrants into a politically important state, Florida.”³⁸⁸ While immigration officials have not publicly admitted to race being a policy factor, Alex Stepick, director of the Immigration and Ethnicity Institute at Florida International University says, “[c]onsciously or unconsciously . . . the American policies on Haitians are driven by racism.”³⁸⁹ There is a perception, a misperception, that all Haitians are “pathetic” that hails from stereotyping of Haitians based on Haiti being the Western Hemisphere’s poorest nation.³⁹⁰ “If you come here from a communist country, it’s OK. If you come from a white country, it’s OK. If you come here from a black country, noncommunist, it’s not OK.”³⁹¹

The majority of the hypothetical rationales and responses support a Haitian act similar to the CAA granting access to Haitians similar to that given to Cubans.³⁹² In recognition of the continued hardship faced by Haitians and Cubans, the level of assimilation exemplified by both, and the hypothetical modern Haitian responses to the concerns of the 1966 Hearings, the U.S. should open its doors to both Haitians and Cubans so that they may seek adjustment under the immigration laws of the U.S in an equal and justifiable manner.

399 U.S. Census Bureau, Census 2000 Demographic Profile Highlights, Selected Population Group: Haitian 400*Id.*

383 *Id.* at 24.

384 *Id.*

385 *More Haitians Land in Jamaica*, WEEKLY GLEANER (Kingston), Nov. 17-23, 2005, at 10.

386 Pauline Arrillaga, *Haitians: U.S. Policy Biased*, MIAMI HERALD, Aug. 13, 2006, at 1B (herein after *U.S. Policy Biased*).

387 *Id.*

388 Kathleen Newlan & Elizabeth Grieco, *Spotlight on Haitians in the United States*, MIGRATION INFORMATION SOURCE, Apr. 2004, <http://www.migrationinformation.org/USFocus/display.cfm?ID=214> (alteration in original).

389 *U.S. Policy Biased*, at 1B.

390 *See id.*

391 Sabra Ayres, *Haitians Seek Same Treatment as Cubans*, SUN-NEWS, Nov. 17, 2002, at A15.

392 *See supra*, notes 290-300.

V. CONCLUSION

What American principles does the U.S. government intend to project to the rest of the world? When dealing with Cubans, the 1966 Subcommittee considered and resolved this concern with the following response: We are a nation that encourages freedom and resistance to totalitarianism.³⁹³ We are also a nation of consistency, one that “practices what it preaches;” those persons who are hard pressed under totalitarian regimes should be extended the possibility of becoming U.S. citizens, so long as they work toward the general good and freedom.³⁹⁴ So what is the rest of the world to make of the CAA and the preferential treatment of Cubans when denied to similarly situated groups like Haitians?

Cubans are “fine people and they come from good stock,” but so are many of the individuals who have been denied the opportunity to adjust their status within the U.S.³⁹⁵ Cubans have adjusted well to America, worked hard, and are no longer a financial burden to the U.S. government,³⁹⁶ but other groups would also be characterized as such if granted forty years of preferential treatment.³⁹⁷ The CAA set a precedent; the U.S. will open its doors to groups of individuals who, in the opinion of Congress, will benefit our society.³⁹⁸ This once was the “give-and-take” of the CAA. Cubans got access to the U.S., and the U.S., putting aside its violation of Article 33 of the Convention relating to the Status of Refugees and the principle of *non-refoulement*, looked good in the eyes of the international community. Cubans have made the U.S. look great, but forty years later, though Cubans continue to make an impact on American society, the number of individuals who have been denied the same rights are beginning to outnumber and cast a shadow over America’s “special favorites,”– Cubans. In other words, the benefit of accepting Cubans over all other groups is now outweighed by the number of other willing and worthy individuals who are as deserving as Cubans, but have been denied access to U.S.

The recent decline in the health of Fidel Castro has led many in Congress to question the future of Cuban migration.³⁹⁹ The big question tends to be, “are the Coast Guard and other Homeland Security agencies are prepared” for another mass migration?⁴⁰⁰ An estimated 500,000 Cubans could flee Cuba if, upon the death of Castro, more unrest breaks out.⁴⁰¹ “Even an influx of 50,000 would be too much . . . straining schools, jobs, housing, social services and other resources.”⁴⁰² The list of potential drawbacks to any plan implemented to deal with a future influx is long;⁴⁰³ nevertheless, the drawbacks spring from the same root—the special treatment of Cubans. “U.S. policy allows Cubans who reach American soil to have automatic legal status.”⁴⁰⁴ Those who favor tightening controls on immigration in this “already testy

³⁹³ See *Hearings*, *supra* note 28, at 11-12.

³⁹⁴ See *id.*

³⁹⁵ See *id.*

³⁹⁶(to this day, there is no accurate figure for what Cubans have financially cost U.S. taxpayers. The following are some estimates of the costs undertaken after the Mariel Boatlift: (a) \$1 billion on relocating and screening refugees; (b) \$325 million allocated by the U.S. government to local governments to help with needs; (c) \$60 million spent by the Immigration and Naturalization Service to detain refugees; (d) \$29 million spent by the Department of Justice, per year, on Cuban programs. “South Floridian governments still claim they are owed \$150 million from the federal bureaucracy for unreimbursed costs.”)

³⁹⁷ See *Transformation*, *supra* note 87, at 52.

³⁹⁸ See *id.* at 18-19.

³⁹⁹ See Tamara Lytle, *Mica: U.S. Ready For Cuban Exodus*, ORLANDO SENTINEL, Feb. 1, 2007, at A4.

⁴⁰⁰ *Id.* (alteration in original) (U.S. Rep. John Mica of Winter Park, Florida, a Republican on the House Transportation Committee, organized a closed-door meeting for discussion of this issue).

⁴⁰¹ See *id.*

⁴⁰² *Id.* (comment of Andy Gomez, assistant provost of the University of Miami and a scholar on Cuban issues).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* (referring to the affect caused by combining the CAA and the Wet Foot, Dry Foot Policy).

national debate” believe the special treatment of Cubans should change,⁴⁰⁵ and that the CAA is “toast once Castro dies.”⁴⁰⁶

Those who support the continued benefits of the CAA must act fast, before the “testy national debate” is inflamed by the next mass migration.⁴⁰⁷ Many of the concerns from 1966 remain true today and contemporary reasoning supports the continuation of the CAA. However, there is no good rationale for singling out Cubans over similarly situated persons such as Haitians. Cubans are not the only group risking their lives or living under oppressive governmental regimes.

The rationales from the 1966 Hearings that led to the enactment of the CAA are applicable to more than just one group. Extension of the CAA to Haitians does not create a slippery slope between the Cubans/Haitians and all other groups. The similarities between Cubans and Haitians mentioned throughout this comment indicate that Cubans and Haitians are inseparable for immigration purposes. Thus, adoption of the Cuban/Haitian Adjustment Act of 2007 (“CHAA”) grants access to persons who fall within the original intentions of the CAA and current hypothetical rationales, while eliminating the “preferential” from the exclusive treatment of Cubans. Haitians deserve the same attention as Cubans. Other groups are deserving of immigration access to the U.S., but not necessarily via the proposed CHAA. The one principle that has no justification is the categorical separation of Cubans and Haitians as a result of the CAA. The CHAA, applying equally and evenly to a group of similarly situated non-citizens, rather than Cubans alone, eliminates the “preferential” from the treatment. The best method for preventing a mass exodus and controlling U.S. borders is some form of preventative political measure and compromise between diplomatic states, but at this stage in U.S.-Cuban and U.S.-Haitian relations, we can either hope that there will never be another immigration situation like Cuba or Haiti, or take a corrective approach that simultaneously corrects the special one-sided treatment of one group and balances the access to the U.S. by providing similarly situated persons, Cubans and Haitian, fair and equal access to the U.S.

⁴⁰⁵*Id.* (Mark Krikorian, head of the Center of Immigration Studies, said “Cuban migrants are now treated differently—in winning legal status if they land on U.S. soil—than people from other countries. That should change.”).

⁴⁰⁶*Id.* (statement of Mark Krikorian).

⁴⁰⁷*Id.* (referring to the nature of the debate, and the less than favorable outlook on another immigrant exodus).