

THE CUBAN ADJUSTMENT ACT: A LAW UNDER SIEGE?

*Javier Talamo**

I.	INTRODUCTION	707
II.	CUBAN ADJUSTMENT ACT OF 1966: CONGRESSIONAL INTENT	708
III.	APPLICATION AND USE IN SUBSEQUENT MIGRATION CRISIS: MARIEL-GUANTANAMO	711
IV.	ENFORCEMENT OR CIRCUMVENTION OF THE CUBAN ADJUSTMENT ACT?	716
V.	INS INTERPRETATION OF THE ILLEGAL IMMIGRATION AND IMMIGRANT RESPONSIBILITY OF 1996 (IIRIRA).	718
VI.	THE POLITICAL BATTLE OVER THE STATUTE.....	720
	A. <i>The Cuban Government's Effort to Repeal the "Killer Law"</i>	720
	B. <i>Opposition within the United States</i>	721
VII.	CONCLUSION	723

I. INTRODUCTION

United States foreign policy toward Cuba has to a great degree been based on the containment and management of Cuban nationals seeking to migrate to the United States. On both sides of the Florida Straits, policy makers balance domestic political interests with foreign policy objectives, while seeking to manage the ever-present threat of a massive migration crisis.

From the early days of the "freedom flights,"¹ the Mariel boatlift,² the Guantanamo Refugee³ crisis, The Cuban Refugee Adjustment Refugee Act

* J.D. Candidate, Class of 2003, Nova Southeastern University, Fort Lauderdale, Florida.

1. In November of 1966, following a massive sea exodus from the port of Camarioca in Cuba, the Johnson administration set up formal flights to bring Cubans seeking refuge to the United States. Those flights became informally known as the freedom flights.

2. In 1980, Cuban president Fidel Castro allowed Cubans, who wanted to leave to the United States to be picked by their relatives through the port of Mariel. It became known as the Mariel Boat Lift.

of 1966⁴ (CAA) has been at the center of the vortex. This United States law has been lauded as the proper vehicle to illustrate our “very strong desire that Cuba shall be freed from Communist domination and that the Cuban people will again, be able to enjoy the benefits of freedom”⁵ and it has been labeled as a “diabolical killing machine that claims lives and provokes tragedy.”⁶

During last few years efforts to repeal the CAA have intensified both in Cuba and in the United States. Several legislative efforts have been made to repeal it and immigration reform groups have joined the fight to have the CAA overturned. Refugee advocates have complained that the Immigration and Naturalization Service (INS) interpretation of new statutes affecting the CAA has caused a “de facto repeal of the Cuban Adjustment and circumvented congressional intent”⁷ and litigation over the application of the CAA has ensued.

This comment seeks to analyze the congressional intent for passing the CAA, the early application of the statute, its application in subsequent migratory crisis, INS interpretation of its application and validity, and the political battles that have ensued in an effort to repeal it.

II. CUBAN ADJUSTMENT ACT OF 1966: CONGRESSIONAL INTENT

During the period of 1902-1959 the United States did not have a separate policy to deal with Cuban migration.⁸ The migration of Cubans to the United States followed an orderly process and Cuba was not seen as migratory threat⁹. On January 1, 1959, Fidel Castro seized control of the Cuban government and shortly thereafter installed a communist dictatorship on the island. Cuban migration exploded following the Cuban revolution, and the number of Cubans entering the United States grew from 70,000¹⁰ prior to 1959 to over 1,053,000 in 1990.¹¹

3. In 1994 Fidel Castro allowed Cubans who wanted to leave the island to do by sea. That resulted in a large refugee exodus by Cubans using boats and rafts. The United States Coast intercepted the refugees and detained them at the US naval base in Guantanamo Bay, Cuba.

4. Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966); 8 U.S.C. § 1255 (1994 & Supp. II 1966) [hereinafter Cuban Refugee Adjustment Act of 1966].

5. H.R. REP. NO. 89-1978, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3792, 3794.

6. President Fidel Castro Ruz, Address at the 7th Congress of Federation of Cuban Women (Mar. 8, 2000).

7. Maria Dominguez, *Cuban Adjustment Act Survives*, C.A.B.A Briefs at 12 (1999).

8. Matias F. Travieso-Diaz, *Cuban Immigration: Challenges and Opportunities*, in CUBA IN TRANSITION-ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 65,66 (1998).

9. *Id.*

10. *Id.* at 66.

In January of 1961, the United States severed diplomatic relations with Cuba and launched an exile led invasion known as the “the bay of Pigs”¹² in an effort to overthrow the Cuban government¹³. In 1962, the United States banned commercial transportation to and from Cuba. Following the Castro revolution, political and economic conditions in Cuba deteriorated and the numbers of Cubans seeking to migrate to the United States increased dramatically.¹⁴ These early refugees were paroled into the United States and no interdiction and deportation efforts were made. These early refugees received public assistance by programs set up by the United States government for their benefit.¹⁵

In 1965, the Cuban government allowed all those who opposed the communist government to leave the island by sea through the port of Camarioca and thousands fled to United States by boat, many with the aid of the exile community in the United States.¹⁶ President Lyndon B. Johnson was faced with the first mass exodus of Cubans to the United States. On October 3, 1965, the President welcomed the Cubans fleeing the island, declaring in a speech “that those seeking refuge here in America will find it. We Americans will welcome these Cuban people.”¹⁷ The United States formalized the orderly departure of Cubans from the island by instituting the “freedom flights” on December 1, 1965.¹⁸

This migration crisis resulted in thousands of Cuban nationals being paroled into the United States for an indefinite period of time without the possibility of returning to their country of origin.¹⁹ Cuban refugees could only adjust their status to permanent resident by leaving the United States and seeking an immigrant visa at a United States consulate and returning to the United States as permanent residents.²⁰ This process proved difficult if not impossible for most refugees and the number of migrants paroled into

11. United States Census Bureau 1990, at <http://factfinder.census.gov/servlet/BasicFactsServlet> (last visited Feb. 20, 2002).

12. A group of Cuban American soldiers trained by the CIA invaded Cuba on April 17, 1961. The invasion took place on Bahia de Cochinos on the southern coast of Cuba. Bay of Pigs is the English translation of Bahia de Cochinos.

13. *Id.*

14. Travieso-Diaz, *supra* note 8, at 66.

15. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121.

16. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, 114 HARV. L. REV. 902, 904 (2001).

17. President Lyndon Johnson, Address to the People of Cuba (Oct. 3, 1965).

18. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, *supra* note 16, at 904.

19. Dominguez, *supra* note 7.

20. H.R. REP. NO. 89-1978.

the United States far outnumbered those able to obtain an immigrant visa. Congress reasoned that the process in place would create "great personal hardship to those already impoverished by force or circumstance."²¹ Congress intended to create legislation which would enhance the resettlement of Cuban refugees and to improve their opportunity to be gainfully employed and educated in the United States.²² It is against this backdrop that congress decided to expedite the adjustment of status for Cuban refugees by implementing the Cuban Refugee Adjustment Act of 1966.

On November 2, 1966, Congress passed the Cuban Adjustment Act. The act states:

That notwithstanding the provisions of section 245(c) of the Immigration and Naturalization Act the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present 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.²³

From the unambiguous language of the statute it would appear that the law could be easily applied to Cuban migrants as they entered the United States in succeeding years. However, the CAA has been a source of controversy and many attempts have been made to repeal it, restrict it or modify it. The maxim that "the function of a court in interpreting a statute is to determine the intent of Congress in enacting the statute and to give effect to that intent"²⁴ does not seem to apply to the various applications given to the Cuban Adjustment Act.

The Cuban adjustment act was the byproduct of an era when the United States had a "willingness to approve legislation to aid the persecuted peoples of the world."²⁵ Other legislation passed during that era suggests that protective immigration laws were used as a United States

21. *Id.* at 3794.

22. *Id.* at 3793.

23. Cuban Refugee Adjustment Act, *supra* note 4.

24. *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534 (1940).

25. H.R. REP. NO 89-1978.

policy statement against Communism.²⁶ The debate over the usefulness of the CAA took center stage after the end of the Cold War and it has now become the pivotal issue in United States-Cuba relations.

III. APPLICATION AND USE IN SUBSEQUENT MIGRATION CRISIS: MARIEL-GUANTANAMO

United States-Cuba migration policy was severely tested in the spring of 1980, when on April 19, Fidel Castro opened the port of Mariel and allowed Cubans to migrate. Within days, relatives from the United States flooded the Straits of Florida with vessels seeking to bring their relatives to the United States. Between April 1 and September 25, 1980, 124,776 Cuban nationals entered the United States by sea.²⁷

The United States government welcomed these refugees. Congress declared, "It is the historic policy of the United States to the respond to the urgent needs of person subject to persecution in their homeland."²⁸ The act defined a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or well-founded fear of persecution."²⁹

Analysis of the Acts' legislative history indicates that the statutory language indicating the United States "would provide aid for necessary transportation, to this country of refugees of special humanitarian concern to the United States" applies to Cubans.³⁰ The Refugee Act of 1980 reduced the physical presence requirement for Cubans seeking adjustment form two years to one.³¹ This reduction led some refugee advocates to infer that since the same period of adjustment applies to refugees as it does for Cubans seeking adjustment under the CAA, this signaled legislative intent to consider Cubans *de facto* refugees.³²

26. See Dominguez, *supra* note 7, (discussing Pub. L. No. 85-559 on behalf of Hungarian Refugees; Pub. L. No. 86-648 (on behalf of refugees within the mandate of the U.N. High Commissioner for Refugees) and Pub. L. No. 89-236 (on behalf of refugees from communist countries outside the Western Hemisphere)).

27. United States Coast Guard, *Mariel Boat Lift*, U.S. COAST GUARD ALIEN MIGRANT INTERDICTION, at <http://www.uscg.mil/hq/g-o/g-opl/mle/mariel.htm> (last visited Jan. 15, 2002).

28. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1521 (1980) [hereinafter Refugee Act of 1980].

29. *Id.*

30. *Id.* See also Michael W. Lind, *Cuban Refugees at Sea: A Legal Twilight Zone*, 24 CAP. U. L. REV. 789, 793 (1995) (discussing S. Rep. No. 256, 96th Cong., 1st Sess. (1979)).

31. Refugee Act of 1980, *supra* note 28. 94 Stat. 108 (B)(i) amended the first section of the Cuban Adjustment Act by striking out two years and inserting in lieu one year.

32. Dominguez, *supra* note 7.

In 1984, the office of special council instructed INS that the Cubans seeking adjustment under the CAA would not be dependent on the availability of an immigrant visa and therefore the numbers of those receiving permanent residence would not be limited by the number of visas available. The court in *Fair v. Meese*³³ held that nothing in the 1976 amendment to the CAA required that any applicants be charged against the collateral quotas, regardless of the entry dates.³⁴

In 1984, the United States and Cuba negotiated the return to Cuba of those persons who had arrived during Mariel and were ineligible to remain in the United States.³⁵ This agreement affected approximately 2700 Cubans who had committed serious crimes in Cuba or the United States or those psychiatric patients that Castro had forced to travel to the United States.³⁶

The combination of Castro's political oppression, Cuba's failed economic policies, and the beneficial treatment of the Cuban adjustment act resulted in the settlement of over 750,000 Cubans into the United States between 1959-1990.³⁷

Since 1960 Cuba's economy has been heavily dependent on Soviet aid.³⁸ When the Eastern communist block collapsed in the early 1990s, Cuba's primary source of income declined dramatically and this resulted in scarcity of consumer goods and additional burdens on the Cuban people.³⁹ As internal discontent grew, the number of people risking their life in the Florida Straits increased proportionally.⁴⁰ On July 13, 1994, a group of people seeking to leave the island hijacked a ferryboat in Havana Harbor.⁴¹ The boat was sunk by the Cuban border patrol resulting in the death of thirty-seven people.⁴² In the subsequent weeks three other passenger

33. *Fair v. Meese*, 643 F. Supp. 983 (S.D. Fla. 1986).

34. *Id.* at 988.

35. Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken From the Sea*, 8 J. TRANSNAT'L L. POL'Y 329, 330 (1999).

36. *Id.*

37. 1990 U.S. Census Bureau, reprinted in Silvia Pedraza, *Cuba's Refugees: Manifold Migrations*, in 5 CUBA IN TRANSITION: ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY 311, 315 (1995).

38. Travieso-Diaz, *supra* note 8, at 67.

39. *Id.*

40. *Id.*

41. *Id.*

42. See generally Geoffrey W. Hymans, *Outlawing the Use of Refugees as Tools in Foreign Policy*, 3 I.L.S.A. J. INT'L & COMP. L. 149, 152 (1996). The Cuban government claimed that the sinking was an accident. However, survivors claimed that the boat was rammed by water cannons from three government tugs and then rammed by one of the vessels.

ferries were hijacked, as well as a plane and a military vessel.⁴³ On August 5, 1994, rumors circulated in Havana that another ferry boat was going to be hijacked to the United States. More than 500 people gathered on the docks and the most serious anti-government riots occurred since Castro took power.⁴⁴

Castro responded to the crisis by removing exit restrictions for those seeking to flee to the United States by sea. In an article in *Prensa Latina*,⁴⁵ Castro stated that “we will stop blocking the departure of those who want to leave the country” and “we cannot continue to guard the coasts of the United States.”⁴⁶

Cubans were now free to flee the country without the threat of interdiction by Cuban patrol boats and without being subjected to the “illegal exit” penalties of Cuban law.⁴⁷ This resulted in the immediate departure of large numbers of migrants using home made rafts and taking the perilous journey to the United States.

The Clinton administration responded to the crisis by reversing the traditional policy of welcoming Cuban refugees to the United States. On August 19, 1994, President William Clinton announced that the United States would bar the “rafters” from entering the country. The United States Coast Guard was instructed to detain the migrants at sea at transport them to the Guantanamo Bay Naval Base as a precursor to repatriation.⁴⁸

The interdiction at sea of Cuban nationals in the high seas and the sudden reversal of the long held policy of protecting political refugees created a politically volatile situation for the Clinton administration and threatened to produce a *de facto* repeal of the Cuban Adjustment Act.

By preventing Cubans from reaching United States territory, the Clinton Administration prevented the first legal requirement of the CAA from being met. The first requirement is that the applicant be “inspected and admitted or paroled into the United States.”⁴⁹ Although the decision to

43. *Id.*

44. *Id.* at 153.

45. *Prensa Latina* is Cuba’s official news agency.

46. Hymans, *supra* note 42, at 153.

47. Cuba’s penal code provides for a penalty for illegal departure. See U.S. Dept. of State, Country Reports on Human Rights Practice (Feb. 23, 2001) available at <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/751.htm>.

48. Travieso-Diaz, *supra* note 8, at 67 (citing GAO, Cuba-U.S. Response to 1994 Cuban Migration Crisis, GAO/NSIAD 95-211(Sept. 1995)).

49. Cuban Refugee Adjustment Act of 1966, *supra* note 4.

prevent Cubans from entering the United States⁵⁰ while fleeing Communism was a new policy for the United States, detention of migrants seeking to reach United States territory was not.

Executive Order 12,807, issued by President Bush in 1992 as a response to the mass Haitian exodus of 1991,⁵¹ provided for the repatriation of undocumented aliens without the benefit of immigration proceedings. The order reads in part:

The president has the authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial seas of the United States.⁵²

Executive Order 12,807 prompted legal challenges that were resolved by the Supreme Court when it held that the repatriations of Haitians, without first determining whether they qualified as refugees⁵³, was not prohibited by section 243 of the INA or article 33 of the United Nations Convention Relating to the Status of Refugees.⁵⁴

Although Executive Order 12,807 was not directed at Cubans fleeing Communism, the order is not limited to specific nationality of aliens⁵⁵ and therefore Cubans can be repatriated under its authority.

President's Clinton's decision to prevent Cubans fleeing Communism from reaching the United States, and his reliance on President Bush's Executive Order 12,807 were in contraposition to his own Executive Order 12,854,⁵⁶ which implemented the Cuban Democracy Act (CDA).⁵⁷ His

50. The United States does not include waters or airspace subject to the jurisdiction of the United States. 8 U.S.C. § 1101(a)(38).

51. For a helpful analysis of Exec. Order No. 12,807, see Summer L. Hackley, *Sea Interdictions: Are Aliens Apprehended on the High Seas Entitled to Protections Afforded by the Immigration and Nationality Act*, 6 *ILSA J. INTL. & COMP. L.* 143 (1999).

52. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992).

53. Refugee is "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person has habitually resided, and who is unable or unwilling to return to, and is unable to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C.A. § 1101(a)(42)(A) (West 2001).

54. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, (1993).

55. Hackley, *supra* note 51, at 149.

56. Exec. Order No. 12,854, 58 Fed. Reg. 36,587 (July 4, 1993).

57. 22 U.S.C.A. § 6001 (West 2001).

order ratified, approved and affirmed the Congressional findings and its intent in passing the CDA. As it relates to the CDA Congress found that

[t]he government of Fidel Castro has demonstrated consistent disregard for internationally accepted standards of human rights and for democratic value. It restricts the Cuban people's exercise of freedom of speech, press assembly, and other rights recognized by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948.⁵⁸

The adoption of the CDA into United States law also codified the Congressional belief that fleeing persecution is legitimate methods of opposing a dictatorship. In its relevant part the CDA states: "The Cuban people have demonstrated their yearning for freedom and their increasing opposition to the Castro government by risking their lives in organizing independent democratic activities on the island and by undertaking hazardous flights for freedom to the United States and other Countries."⁵⁹

During the rafter crisis of 1994, the United States government appeared to have veered away for a policy of welcoming Cuban refugees to one of preventing their entrance into United States jurisdiction therefore preventing from becoming an "applicant for admission." The statutory definition of an applicant for admission is "an alien present in the United States or who has arrived in the United States."⁶⁰ Cubans housed at Guantanamo Naval base in Cuba were not given the benefit of the CAA when the courts ruled that the naval base was not "United States territory."⁶¹

The rafter crisis ended when the United States and Cuba began negotiations which would lead to an agreement on September 9, 1994 wherein the United States would Parole the Cubans detained in Guantanamo and Cuba would accept the repatriation of Cubans picked up at sea.⁶² The United States agreed to allow a minimum of 20,000 of Cubans to migrate legally to United States each year but only if they applied for immigrant or refugee visas at the United States Interest Section in Havana.⁶³ The refugees in Guantanamo were paroled⁶⁴ and the United States policy of welcoming Cubans fleeing from the island ended.

58. *Id.*

59. *Id.*

60. 8 U.S.C.A. § 1225(a)(1) (West 2001).

61. *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1424 (11th Cir. 1995).

62. *Id.* at 1418.

63. *Id.*

President Bill Clinton ignored congressional intent and his ratification of the Cuban Democracy Act⁶⁵ when he defended his policies in a speech on June 9, 1995 and declared:

We simply cannot admit all Cubans who seek to come here. We cannot let people risk their lives on open seas in unseaworthy rafts. . . Regularizing Cuba migration also helps our efforts to promote a peaceful transition to democracy on the island . . . For too long, Castro has used the threats of uncontrolled migration to distract us from this fundamental objective. With the steps we've taken, we will be able to devote ourselves fully to our real long term goals.⁶⁶

IV. ENFORCEMENT OR CIRCUMVENTION OF THE CUBAN ADJUSTMENT ACT?

The U.S.-Cuba migration accords created an apparent disparity between those who are interdicted at sea and almost certainly returned to Cuba, and those who manage to reach dry land. The race for the shore has become the prerequisite to receiving the benefits of the Cuban Adjustment Act. For Cubans, a United States vessel in international waters is not jurisdictionally sufficient, and a safe refuge under United States control does not suffice to trigger the "arrived in" the United States requirement of section 235 of the INA.⁶⁷

Cuban refugees are therefore required to avoid detection and to the head for United States shores. Even those who are apprehended in United States territorial waters still face deportation to Cuba. Courts have held that under the Immigration and Nationality Act of 1952, merely crossing into the territorial waters of the United States is insufficient to constitute physical presence for the purpose of determining whether an alien has entered the United States. The "physical presence" requirement of the entry test can be satisfied only when an alien reaches dry land.⁶⁸ Even

64. "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe . . . for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States . . ." 8 U.S.C.A. § 1182(d)(5)(A) (West 2001)

65. 22 U.S.C.A. § 6001 (West 2001).

66. Travieso-Diaz, *supra* note 8, at 69, citing President William Clinton, Speech directed to Cuban-Americans, in ASSOCIATED PRESS June 27, 1995.

67. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

68. *Yang v. Maugans* 68 F.3d 1540, 1549 (3d Cir. 1995).

when the alien has disembarked and is heading to shore, the courts have held that a person is not "physically present" in the United States. This position was upheld when Chinese migrants aboard the vessel *Golden Venture* jumped into the water and waded through the surf before being detained.⁶⁹ The court held that

United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds. We hold that an alien attempting to enter the United States by sea has not satisfied the physical presence element of Pierre at least until he has landed.⁷⁰

In 1999 a group of Cubans migrants tested the policy when they landed in Key Largo, Florida, and stood in water three feet deep: two were apprehended one hundred yards from shore and one made it ashore.⁷¹ Although their feet were on the same ground, only the one who came ashore was allowed to stay.⁷² An INS spokesman defended the policy stating "There are unique circumstances around every landing. The strict interpretation of the wet-foot policy is that the other alien was still in the water. The interpretation found that one had made landfall. Everybody knows you have to make landfall."⁷³

Has the wet-foot dry-foot policy deterred Cubans from leaving the island? The answer appears to be no. Just 1,400 Cuban migrants were intercepted at sea from 1995 to 1997.⁷⁴

The number of Cubans who reached United States shore totaled 2,048 in 1999—more than double 1998 total of 916.⁷⁵ An estimated eighty percent were believed to have been smuggled by professional smugglers who charge between \$1000 and \$5000 a head for the trip.⁷⁶

69. The *Golden Venture* was a merchant ship which left China on February 13, 1993 and transported Chinese migrants to the United States. The vessel ran aground on the morning of June 6, 1993, in New York.

70. *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995).

71. Yves Colon, *Touching Land Defines Who Stays, Goes*, MIA. HERALD, Jun. 30, 1999.

72. *Id.*

73. *Id.*

74. Jay Weaver, *U.S. Migration Policy Doesn't Deter Treacher Journeys, Cuban Smuggling on Rise*, MIA. HERALD, Dec. 12, 1999.

75. *Id.*

76. *Id.*

V. INS INTERPRETATION OF THE ILLEGAL IMMIGRATION AND IMMIGRANT RESPONSIBILITY OF 1996 (IIRIRA).

In effort to control illegal immigration Congress passed the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA).⁷⁷ The Act created confusion among the various districts as to what constitutes “admission,” “inspection,” and “parole,” and whether Cubans entering through irregular means could be paroled and eventually adjust under the CAA.⁷⁸ The INS determined that Cubans who arrived at a port other than a designated port of entry could no longer adjust to permanent resident status under the CAA.⁷⁹ Immigration advocates considered that the INS interpretation of IIRIRA resulted in *de facto* repeal of the Cuban Adjustment Act.⁸⁰ Community activists feared that if Cubans could not adjust their status and were “deported,” this would create a subclass of undocumented aliens who would be unable to earn a living and would linger indefinitely in immigration limbo.⁸¹

This confusion led INS Commissioner Dorris Meissner to issue a memorandum clarifying the legibility for permanent residence under the Cuban adjustment act.⁸² The memorandum specifically addressed the issue of Cubans arriving by sea. In its relevant parts it reads:

This policy clarification, effective immediately, helps define in specific terms those Cubans who are eligible for parole and adjustment of status under the Cuban Adjustment Act, regardless of how they arrived in the United States. Under the CAA, a Cuban national who is paroled may, one year after the grant of parole, apply for permanent residence in the United States. The fact that a Cuban national arrived in the United States at a place other than a designated port of entry will not make him or her

77. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

78. “Irregular means” refers those aliens who enter by sea without going through a port of entry. Cuban rafters who entered without being found did not enter through a “port of entry” a port of entry includes airports, seaports and land ports located at the border.

79. Cuban Refugee Adjustment Act of 1966, *supra* note 4.

80. Dominguez, *supra* note 7.

81. Although immigration could remove a Cuban national under I.N.A § 235, the government of Cuba generally does not accept the repatriation of Cubans from U.S. soil. *See* Cuban Refugee Adjustment Act of 1966, *supra* note 4.

82. Press Release, U.S. Department. of Justice, Clarification of Eligibility for Permanent Residence Under the Cuban Adjustment Act (April 26, 1999) *available at* <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/cubarel.htm> (last visited Feb. 3, 2002).

ineligible for permanent residence under the CAA (unless the individual is ineligible on other grounds such as having a criminal record). This action removes a significant bar if the Cubans are otherwise eligible for adjustment under the CAA. A Cuban national who is in the United States without having been admitted or paroled by the INS must first surrender into INS custody and receive a grant of parole and wait one year before applying for permanent residence under the CAA. With the grant of parole, the Cuban national will be able to apply for employment authorization.⁸³

Doris Meissner's memorandum and clarification led immigration advocates to declare that the CAA had "survive another blow."⁸⁴ Before the dust settled, the INS threw another roadblock to the implementation of Cuban Adjustment Act. It began to classify Cubans arriving at United States airports "arriving aliens."

Traditionally Cubans arriving through United States airports were placed in exclusion proceedings and the INS adjusted their status even after receiving final exclusion orders.⁸⁵ Subsequent to the passage of IIRIRA, the Immigration and Naturalization Service (INS) took the position that immigration judges lacked the authority to adjudicate the application for adjustment filed by arriving aliens⁸⁶ in removal proceedings. Attorneys for Cubans migrants argued that Cubans cannot be "arriving aliens" under the INA.⁸⁷

They argued that by statutory definition an "applicant for admission" is an alien present in the United States who has not been admitted or who has arrived in the United States.⁸⁸ They further argued that applicants for admission are subject to inspection and screening by INS, and officers

83. *Id.*

84. Dominguez, *supra* note 7.

85. Exclusion orders were given pursuant to 8 U.S.C. § 1182(a)(20) (2001) of the Immigration and Nationality Act.

86. 8 C.F.R. § 1.1(q) (2002). The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port of entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international waters or United States waters and brought into the United States by any means, whether or not to designated port of entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the act.

87. Brief for Appellee/Respondent Artigas, at 9, in *In re Artigas*, (U.S. Dep't of Justice Board of Immigration Appeals) (Case No. A 76 543 602).

88. *Id.* at 10, 8 U.S.C.A. § 1225(a)(1) (West 2001).

shall order the applicant removed unless the alien is a native or citizen of Cuba and said Cuban arrives by aircraft at a port of entry.⁸⁹

Respondents' attorneys argued that because all applicants for admission except for Cubans who arrive by aircraft at a port of entry, if not admissible, must be "expeditiously" removed and Cubans cannot be removed expeditiously, Cubans cannot fall under the INA's definition of arriving alien.⁹⁰

The issue of whether an immigration judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban adjustment act when the applicant is an arriving alien in removal proceedings was decided by the Board of Immigration Appeals (BIA) in *In re Ada Rosa Artigas*.⁹¹ In *Artigas*, the court held that an immigration judge has jurisdiction to adjudicate an application for adjustment of status under the Cuban refugee Adjustment Act of 1966.⁹²

In the 35 years since the passage of the Cuban Adjustment Act, the law has withstood a series of legal challenges. Pro-immigration advocates wonder why there is such a resistance to an act that benefits people a repressive dictatorship.⁹³ The answer appears to point to the political and ideological battles which have plagued the CAA since its inception.

VI. THE POLITICAL BATTLE OVER THE STATUTE

A. *The Cuban Government's Effort to Repeal the "Killer Law"*

If there was ever any doubt as to Cuba's position regarding the Cuban Adjustment act it was dispelled by Cuban president Fidel Castro's speech on March 8, 2000. Castro's key remarks included:

The United States does not have any right to promote the death of people from this country, whether they are criminals or not. The diabolical killing machine that claims lives and provokes tragedies is nothing other than the Cuban Adjustment Act. We will fight against this vicious law, this heinous and criminal law. We will keep fighting until it is repealed. Only then can we be certain that thousands of innocent children will not be illegally uprooted from their homeland, from their schools, from

89. Brief for Appellee/Respondent Artigas, *supra* note 87, at 9; 8 C.F.R. § 235.3(b)(1)(i) (2001).

90. Brief for Appellee/Respondent Artigas, *supra* note 87, at 9.

91. *In re Ada Rosa Artigas*, 23 I. & N. Dec. 99 (BIA 2001).

92. *Id.*

93. Dominguez, *supra* note 7.

their identities, and subjected to extreme dangers or even death.⁹⁴

On July 2, 2000 Ricardo Alarcon continued the verbal assault of the CAA in a television interview with Sam Donaldson.⁹⁵ When asked by Mr. Donaldson⁹⁶ why he referred to the Cuban Adjustment Act as a “killing machine”, Mr. Alarcon responded that the Cuban Adjustment act is a way to “distort reality” and that since the United States is not prepared to have a “Dominican, Mexican, Haitian or a Chinese adjustment act and it’s just for Cuba. It’s precisely Cold war politics.”⁹⁷

Cuba’s public repudiation of the CAA intensified when on July 12, 2000, the government of Cuba issued the “Proclamation by National Assembly of the People’s power of the Republic of Cuba on the Cuban Adjustment Act.”⁹⁸ The proclamation referred to the CAA as “the criminal, immoral and discriminatory immigration policy, deliberately conceived to destabilize and undermine Cuban society while shamefully manipulating the tragedies caused by this act.”⁹⁹ The Cuban government accused the United States of using the CAA to criminally incite Cubans to risk their lives in dangerous sea crossing for the sole purpose of embarrassing the Cuban government.¹⁰⁰ The proclamation called for the United States to “put an end to its criminal, irresponsible and demagogic policy, conceived and implemented against the Cubans, which is detrimental to other Latin Americans and harmful to the interests of the American people.”¹⁰¹

B. Opposition within the United States

The Cuban Adjustment Act has come under fire not only from the government of Cuba, but from political groups within the United States. The question has been asked: Why is it that United States Law reflects

94. Castro Ruz, *supra* note 6.

95. Mr. Alarcon is the president of the National Assembly of the People’s Power of the Republic of Cuba.

96. Sam Donaldson is a U.S television reporter host of the program “This Week.”

97. Interview by Sam Donaldson with Ricardo Alarcon, President of the Cuban National Assembly, This Week, ABC News (Jul. 2, 2000).

98. *Proclamation by the National Assembly of People’s Power of the Republic of Cuba on the Cuban Adjustment Act*, Digital Granma International, Jul. 12, 2000, at <http://www.granma.cu/documento/ingles00/026-i.html> (last visited Feb. 3, 2002).

99. *Id.*

100. *Id.*

101. *Id.*

favoritism for Cubans?¹⁰² The Federation for American Immigration Reform (FAIR) contends that the CAA provides disparate treatment under immigration law between Cuban and other groups.¹⁰³ FAIR has called the CAA “the most massively used exceptional provision in our law” and has publicly called for its repeal.¹⁰⁴

In 1996 Congress debated the repeal of the Cuban Adjustment Act.¹⁰⁵ Senator Bob Graham sought to condition the repeal of the CAA on a democratically elected government being in power in Cuba.¹⁰⁶ Those favoring the Graham amendment argued that repeal of the Act was entirely unjustified because Castro continues to be a brutal dictator who “suppresses all democratic and individual freedoms, and thousands of Cubans still risk their lives by trying to escape to America.”¹⁰⁷

Those opposing the amendment contended that the CAA is an anachronism.¹⁰⁸ While they agreed that Castro is “a ruthless communist dictator” they noted that China, North Korea, and Vietnam are also ruled by ruthless communist dictators and the United States does not give special treatment to those fleeing from those nations.¹⁰⁹ Those opposing the Graham amendment synthesized the belief of those who oppose the CAA when they stated in part:

It would be nice if the United States were able to afford to take in all the billions of people around the world who live under totalitarian rule, but it obviously cannot. We already have millions of people from around the world who have been cleared for legal entry into the United States, many of whom are the spouses or very young children of citizens, but will have to wait for years before their turn to enter comes up. Given this fact, we cannot support a continuation of the Cuba Adjustment Act before its application to the 20,000 parolees who will be let in

102. *Issue Brief, Favoritism for Cubans*, FEDERATION FOR AMER. IMMIG. REFORM, Jul. 1998, available at <http://www.fairus.org/html/04154806.htm> [hereinafter FAIR Brief].

103. FAIR argues that Haitians who arrive under similar circumstances as Cubans do not receive the same treatment under that law. See FAIR Brief, *supra* note 102.

104. FAIR Brief, *supra* note 102, at 4.

105. 104th CONG. REC. S-4397 (daily ed. Apr. 30, 1996) (Graham amendment No. 3760 to the Dole [for Simpson] amendment No. 3743) available at <http://www.senate.gov/~rpc/rva/1042/104291.htm>.

106. *Id.* at 2.

107. *Id.*

108. *Id.* at 3.

109. *Id.*

each year. Therefore we urge the rejection of the Graham Amendment.¹¹⁰

The Graham amendment passed 62 to 37, and the repeal of the Cuban Adjustment Act was averted.¹¹¹

The attacks on the Cubans Adjustment Act have gone beyond the legal and the political arena and have entered the realm of legal academia. Some in academia have argued that the social ills that are caused by the CAA are “too great for the CAA’s roots to remain unexamined.”¹¹² The authors of the Harvard note have put forth the notion that the justifications which created the CAA are outdated and that the CAA has inflicted “great harm on American Society.”¹¹³ They argue that the CAA has been accused of being a racist policy, which in turn has tarnished the legitimacy of United States immigration policy, fostering social apathy, dissatisfaction and resentment in immigrant communities.¹¹⁴

Furthermore, critics argue that in addition to fostering internal discontent the CAA has benefited Castro because the it “has been simultaneously a sword that cuts deep lines of division and resentment in the United States and shields and protects the island by enabling him to export undesirables and unify all Cubans.”¹¹⁵

VII. CONCLUSION

The Cuban Adjustment Act is the byproduct of an era when United States Immigration Policy was a testament of the ideals and values of the United States. In 1966, The United States government thought that the ideal of protecting those fleeing communism in the island of Cuba was worthy of special legislation. The legislative history suggests, and the statutory language indicates, that the intent and purpose of the Cuban Adjustment Act is to facilitate the integration of those fleeing Cuba into American society by granting them the right to become permanent United States residents. Congress has ratified its intent in subsequent years and the courts have validated the legality of the statute by upholding the right of Cubans in the United States to adjust their status using the CAA.

110. 104th CONG. REC. S-4397 (daily ed. Apr. 30, 1996) (Graham amendment No. 3760 to the Dole [for Simpson] amendment No. 3743) available at <http://www.senate.gov/~rpc/rva/1042/104291.htm> (last visited Feb. 2, 2002).

111. *Id.* at 4.

112. *The Cuban Adjustment Act of 1966: ?Mirando Por los Ojos de Don Quijote O Sancho Panza?*, *supra* note 16, at 904.

113. *Id.* at 914.

114. *Id.* at 916.

115. *Id.* at 917.

Those who oppose the CAA argue that its initial purpose is no longer valid, and that it gives Cubans an unfair advantage. However, Cubans continue to flee Cuba, and the Cuban government continues to violate human rights and other immigrant groups do not benefit by the repeal of the Cuban Adjustment Act.

Academics have wondered whether Americans will see the CAA through an idealistic lens or a realistic one.¹¹⁶ Human rights activists have asked why there is such resistance to an act that benefits victims of oppression. The CAA has been perpetually interwoven with politics and foreign policy and it will continue to be so. The CAA might be the law of the land, but it has been, and continues to be, a law under siege.

116. *Id.* at 924.