

MIGRATION POLICY REFORM: CUBA GETS STARTED, U.S. SHOULD FOLLOW

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INTRODUCTION

New laws and regulations promulgated in Havana in October 2012 have overhauled and liberalized Cuban policies governing emigration of Cuban citizens, their travel abroad, and their return. While falling short of granting unfettered freedom to travel, the measures promise to eliminate restrictions that affect the vast majority of the Cuban public. The tarjeta blanca, the exit permit that has been a hallmark of communist states' control over citizen movement, is being abolished, and foreign travel will be permitted for all passport holders. The new policies, effective next January 14, carry a risk of increasing the loss of trained and skilled personnel through emigration. But they also seem to bet on the idea that Cubans, given the freedom to travel and to return, will indeed return in large numbers and bring important benefits to Cuba's economy, not to mention to citizens who have long chafed at restrictions on the basic right of movement.

In United States immigration policy, Cubans receive unique and highly favorable treatment in terms of admission criteria, speed of admission, and government benefits extended even to Cubans who arrive with no visa and make no claim of persecution, and who would be treated as illegal immigrants if they came from any other place. Some elements of the policy fulfill U.S. commitments in bilateral agreements that Washington and Havana entered to prevent uncontrolled and dangerous migration. One element, the "wet foot-dry foot" policy, violates those same agreements. Others provide ample opportunity for Cubans to gain admission as refugees. Taken together, it is a patchwork policy that lacks a central organizing concept, and many of its elements are in conflict with U.S. policies governing migration, refugees, fiscal responsibility, and border security. A review and modernization is long overdue.

CUBA'S REFORM OF TRAVEL AND MIGRATION POLICIES

The Cuban daily newspaper *Granma*, the official organ of the Communist Party, was hard to come by in Cuba on October 16, 2012. The *Gaceta Oficial*, a dry Justice Ministry publication containing texts of new laws and regulations, also sold out in post offices across the country by mid-morning.

Both contained big news: a major liberalization of policies governing overseas travel by Cuban citizens.

Since assuming Cuba's presidency in 2008, Raul Castro has been eliminating what he calls "excessive prohibitions" in Cuban law. His actions include permitting Cubans to hold cellular phone accounts, to stay in Cuban hotels, and to buy and sell cars and residential real estate.

But the new travel policies were "the most anticipated change," a clergyman in Cienfuegos commented on that day. Interviews with citizens indicated why: even for those without a plan to travel or the necessary funds, a daunting barrier between them and their relatives overseas was being lifted.

The travel policy reform was contained in Decree-law No. 302, which amends and updates Cuba's 1976 law on migration. The reform takes effect January 14, 2013.

The new law's preamble says its purpose is "to guarantee that migratory movements continue to be carried out in a legal, orderly, and safe manner." It notes that it takes into account U.S. policies based on "hostility, subversion, and destabilization" that admit migrants who arrive in U.S. territory without a visa and that offer special immigration privileges to Cubans serving on medical missions in third countries;

therefore it provides, “along with measures that relax regulations, certain regulations to limit the effects of the [U.S.] policies, as well as to put in place norms that preserve the country’s skilled work force.”

The new law eliminates the requirement for Cuban citizens to obtain an exit permit, called the *tarjeta blanca*, for each and every departure from the country for any purpose and for any duration. It also does away with the requirement that Cubans traveling abroad present a letter of invitation from a person or institution that would be responsible for their visit.

In place of the old requirements, there is now only the requirement that a Cuban citizen obtain a passport. With a passport in hand – and a visa from destination countries that require them – a Cuban citizen may now travel abroad. Cubans now holding passports may update them free of charge so as to be able to take advantage of the new norms. Passports are valid for two years, and are renewable.

The new reform does not recognize an inherent right to travel, and it limits foreign travel privileges for some. A new Article 23 in the migration law lists categories of persons residing in Cuba who “may not obtain passports” for reasons that include:

- being subject to a criminal justice proceeding or serving a sentence;
- being subject to military service;
- “reasons of defense and national security; and”
- “other public interest reasons;”

- being deemed unfit for travel because of one’s work in the “economic, social, scientific, or technical development of the country, as well as for security and the protection of official information;”
- having “obligations with the Cuban state or civil responsibility;”
- in the case of minors, lack of full legal authorization from both parents.

It remains to be seen how broadly these exceptions will be invoked. One can speculate that they would be used to prevent travel by persons whose military or intelligence work is deemed sensitive, or by others whose political views or activities have put them in conflict with the government. Only experience will tell, once the law takes effect in January 2013.

A potentially substantial category of Cubans may have their ability to travel restricted because of their importance to the economy. The law describes those who are “involved in activities vital to the economic, social, scientific, and technical development of the country,” those involved in the health care system, athletes and trainers, and those who are in decisionmaking positions regarding Cuba’s financial and material resources. Within 60 days of the law’s enactment, the Labor Ministry is required to present the Council of Ministers a proposal including the personnel and positions subject to the requirement to seek prior authorization to travel, and the reasons for the inclusion of each. In a recent press conference, Minister of Justice Maria Esther Reus seemed to minimize the number that would be included in this category, saying that only those

Cuban Refugees And Asylees

	Cuban Refugees	Cubans’ Share of Total Refugee Admissions	Cuban Asylees	Cubans’ Share of Total Asylee Admissions
2011	2,920	5.19%	34	0.14%
2010	4,818	6.57 %	33	0.16%
2009	4,800	6.43%	42	0.19%
2008	4,177	6.94%	87	0.38%
2007	2,922	6.05%	69	0.27%

Fiscal year data from State Department and Department of Homeland Security.

professionals deemed by their institutions to be in “vital activities” will require a superior’s prior authorization to travel abroad. Again, experience will tell.

The new law also liberalizes the treatment of Cubans who wish to emigrate, who have emigrated and wish to return, or who wish to spend extended periods of time abroad.

- The status of Cubans with permission to reside abroad under current law is not affected by the new law.
- Citizens may depart Cuba for up to 24 months and can apply for a longer period or for an “indefinite” stay abroad for reasons of marriage (“formal or not”) to foreign citizens or for other “family and humanitarian reasons” or for other “justified reasons.”
- Cubans who have emigrated may return to Cuba for 90 days, and those with permission to reside abroad may return for 180 days; both limits may be extended with government permission.
- Cubans who have emigrated may apply to re-establish residency in Cuba. They must explain how they emigrated, why they wish to return, and who will be responsible for their lodging and support until they are self-sufficient. Applications may be submitted at immigration offices in Cuba or at Cuban consulates outside Cuba. Immigration authorities are required to respond within 90 days.
- The December 1961 law that allows the state “to nationalize through confiscation” the real property and other assets of Cubans who emigrate, is repealed. This was a key feature of the *salida definitiva* (“definitive departure”) designation for Cubans who departed Cuba and lost an ability to return without government permission.

Also, a further policy change was announced in an October 24 press conference by Homero Acosta, secretary of the Council of State. He explained that Cubans who emigrated illegally (e.g. those who left on boats to the United States or those who traveled with permission and did not return), and those athletes and medical personnel who went abroad for official reasons and did not return, will be permitted to return to Cuba if they wish after eight years have passed.

In the press conference, Acosta elaborated on the government’s reasons for enacting the reform. One reason, he said, was “to improve relations with Cuban emigrants, who with the passage of time have changed considerably from having eminently political motivations in the first years of the Revolution, to having economic motivations.”

Acosta noted that in 2011, 400,000 Cubans who reside abroad visited Cuba, including 300,000 from the United States.

He also noted that since 2001, 99.4 percent of applicants for the *tarjeta blanca*, the now-abolished exit permit, received a positive response. During that period 941,953 Cubans traveled abroad, of whom 120,275, or 13 percent, did not return to Cuba. Among the travelers were 156,068 university graduates, 11 percent of whom did not return.

These figures may explain why Cuba is taking the calculated risk of liberalizing travel policies, even though increased travel may add to the approximately 40,000 Cubans who are now emigrating annually, resulting in a loss of educated and trained personnel. It is notable that the liberalization was not postponed for a few years on the assumption that, if current and planned economic reforms take hold, the economy will be providing more opportunities for well-paying employment and hence reduced incentives for emigration.

Instead, the government’s bet seems to be that under policies that make travel easier and that include the possibility of extended stays abroad, fewer Cubans will opt to emigrate and some who have emigrated will return.

U.S. POLICY TOWARD LEGAL AND ILLEGAL IMMIGRATION FROM CUBA

U.S. policies that regulate travel and migration from Cuba have been adopted at different times and for different purposes over the past five decades. Before evaluating them in light of current conditions, it is first necessary to review their main elements.

The Cuban Adjustment Act of 1966

The vast majority of Cubans who came to the United States immediately after the downfall of the Batista government in 1959, and those who came in the

following years as the socialist government’s intentions and practices became clear, did not intend to remain in the United States permanently. As evidenced by their participation in efforts to depose the revolutionary government, by the “next Christmas in Havana” saying, and by countless family stories, there was a widespread expectation that Cuban socialism would be short-lived.

Cubans obtaining legal permanent resident status in the United States

Between 2002 and 2011, 327,008 Cubans have become legal permanent residents, more than in any previous decade.

1960-1969	202,030
1970-1979	256,497
1980-1989	132,552
1990-1999	159,037
2000	17,897
2001	25,832
2002	28,182
2003	9,262
2004	20,488
2005	36,261
2006	45,614
2007	29,104
2008	49,500
2009	38,954
2010	33,372
2011	36,261

Department of Homeland Security data.

By 1966, however, this belief was fading among Cuban expatriates and among U.S. officials whose myriad efforts to spark a change of government in Havana had failed. The U.S. government was operating “freedom flights” bringing more Cubans to the United States, even as some in Congress were questioning whether Cuban emigration was progressively reducing the chance that an opposition movement would form inside Cuba.

Moreover, the Cubans on American soil lacked permanent status under U.S. immigration law. They were

admitted under the Attorney General’s “parole” authority, a stopgap status that gave them no rights, privileges, or path to permanent residency or citizenship. Immigration parole does not constitute legal admission of an alien into the United States, so that in terms of immigration law parolees have no status greater than that enjoyed by an alien outside U.S. territory, even though they are on U.S. territory.

Worse still, U.S. laws then in force offered no practical option for regularizing the status of Cuban parolees. To adjust their status and become legal permanent residents, the law offered only one cumbersome procedure: to leave the United States, apply for admission at a U.S. consulate in a third country, wait for approval of the application, and then return. Today’s procedures for admitting refugees – persons who establish a well-founded fear of persecution if they were to return home – would come into effect with the Refugee Act of 1980.

The Cuban Refugee Adjustment Act, commonly known as the Cuban Adjustment Act today, was therefore proposed in 1966 to address this situation.

Under Secretary of State George Ball testified before Congress that for the 165,000 Cubans living in the United States with no immigration status and unable to work legally, the procedure of leaving the United States to initiate immigration proceedings in a U.S. consulate in a third country “has not proved satisfactory.” The costs were too much for the Cubans, they had difficulty traveling outside U.S. borders without proper travel documents, and nearby U.S. consulates were not equipped to handle the volume of potential Cuban applicants.

The Cuban Adjustment Act gave the Attorney General, the cabinet officer responsible for immigration matters, a special discretionary authority that applied to Cubans only. As Secretary Ball described it in his testimony, the bill then under consideration would (*italics added*):

“...permit natives and citizens of Cuba who were inspected and admitted or paroled into the United States subsequent to January 1, 1959, to apply for adjustment to permanent resident status and to have their status adjusted *in the discretion of the Attorney General* if they are otherwise eligible to receive an immigrant visa and admissible into the United States.”

The law itself provides that (*italics added*):

“...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 1st, 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.”

In December 1966, seven weeks after the law’s enactment, President Johnson noted that an estimated 123,000 Cubans were eligible to apply, and that the pool of applicants was growing by about 4,000 per month due to the freedom flights.

The italics are added above to highlight the fact that the authority is discretionary. In current discussions of the Act, even among members of Congress, it is very common to see incorrect citations of it. The Act gives Cubans no ironclad right to enter the United States or to remain and gain legal permanent residence if they have been here a year or more. It merely provides discretionary authority to the Executive to adjust the status of Cuban parolees after they have been present for one year.

In the Act’s legislative history, its authors and Johnson Administration officials described it as a response to the unique situation faced in the mid-1960s with regard to Cuban migrants. They did not contemplate that it would be in effect for decades to come, nor on the other hand did they include an expiration date in the law. The decision about how to use its discretionary authority, under whatever circumstances would surround Cuban migrants in the future, would remain with the Attorney General.

The U.S.-Cuba Migration Accords

In the summer of 1994, after the loss of Soviet aid precipitated two years of the worst economic conditions ever experienced in socialist Cuba, large numbers of Cubans took to the sea attempting to reach the United States. The U.S. Coast Guard intercepted 38,560 Cuban migrants that year and brought them to the U.S. naval

base at Guantanamo, Cuba. That summer also saw an exodus from Haiti, leading to what the Coast Guard describes on its website as “its largest peacetime operation since the Vietnam War,” with 38 cutters patrolling the Florida Straits and 17 deployed near Haiti.

In the face of so many travelers on rafts and other makeshift vessels risking their lives, and with some number certainly losing their lives, the Clinton Administration wanted to deter dangerous, illegal crossings by making it clear that they offered only a limited chance of getting travelers to the United States.

After negotiations conducted in secret, on September 9, 1994, the Cuban and U.S. governments announced an agreement “to ensure that migration between the two countries is safe, legal, and orderly,” based on their “common interest in preventing unsafe departures from Cuba.” The agreement:

- declares that pursuant to the U.S. interest in “discouraging unsafe voyages,” “migrants rescued at sea attempting to enter the United States will not be brought to the United States, but instead will be taken to safe haven facilities outside the United States;”
- in the same vein, declares that “the United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways;”
- declares that “Cuba will take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods;”
- pledges cooperation in combating alien smuggling;
- states: “The United States ensures that total legal migration [from Cuba] will be a minimum of 20,000 per year;” and
- provides that the two sides will meet to review implementation of the agreement; the meetings are to occur by mutual agreement with no prescribed schedule.

On May 2, 1995, a companion agreement was reached that:

- facilitated the entry into the United States of most of the 20,916 Cuban migrants then housed at the Guantanamo naval base;

- provides that Cubans picked up at sea may be returned promptly to Cuba; and
- contains a joint commitment “to ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally.”

In essence, the accords intended to change incentives, making illegal migration more difficult while opening greater opportunities for legal migration. The main disincentive is the repatriation of migrants picked up at sea. “The big difference is that in the past they may have presumed that they would wind up in Guantanamo [naval base],” White House press secretary Mike McCurry explained on May 2, 1995. “And now they know...they will be returned directly to Cuba.”

The United States adopted a series of measures to meet its commitment to award 20,000 immigrant visas per year. It expanded eligibility for a program that allows Cubans to be granted refugee status by applying at the U.S. consulate in Havana. It broadened the possibilities for family-based immigration.

The United States also instituted a lottery – Cubans call it *el bombo*, a term that refers to the spinning container of numbers used in televised lottery drawings – and 580,000 Cubans applied in 1998, about five percent of the Cuban population. It is open to Cubans age 18 to 55 who can show that they are likely to become self-sufficient. Their applications are selected at random, and winners are permitted to emigrate with their immediate family, again upon demonstrating that the family will not depend on public assistance. Initially, applications were made by letter, now they may be filed on the Internet.

Between 1995 and 2000, the first six years with the agreement in effect, the United States met the 20,000 target every year with an average of 21,915 immigrant visas granted annually.

How has the agreement worked in practice? First and foremost, there has been no repeat of the 1994 exodus or any event approaching that scale, and it is reasonable to attribute at least some of the credit for that development to the new policies created by the migration accords. Since 1995, the Coast Guard has inter-

cepted an annual average of 1,288 Cuban migrants at sea, with the largest number (2,810) in 2006.

A key element of the accord, repatriation of Cubans intercepted at sea by the U.S. Coast Guard, has functioned normally. U.S. diplomats’ monitoring of those returned migrants has not shown a pattern of adverse actions against them, except that those gone for an extended period have returned to find their jobs taken by someone else. The U.S. goal of issuing 20,000 immigrant visas per year has been met consistently. And the two sides have exchanged views about implementation of the accords, at times in high-level meetings convened for that purpose alone, at times in routine diplomatic discussions.

There have been differences, however. The United States has complained that after permitting the U.S. Interests Section in Havana to publicize and conduct a visa lottery shortly after the accords went into effect, Cuba has not permitted a second. It has also noted that Cuba has not issued exit permits (now abolished under the recent Cuban reform) to persons granted a U.S. visa. It has also sought Cuban assent to designate a second port for Coast Guard repatriations.

Cuba has complained about the Cuban Adjustment Act itself, calling it a “murderous law” in official rhetoric and claiming that its purpose, in the words of a statement from Cuba’s National Assembly in 2000, is “that of encouraging Cubans to attempt to migrate illegally by sea, with all the dangers involved.”

More specifically, the Cuban government complains that the United States violates the accords by granting parole and eventual residency to Cubans who reach U.S. territory without a visa. The commitment is stated as follows in the 1994 agreement: “The United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways.”

Wet Foot-Dry Foot Policy

Initially, it is clear that the U.S. government intended to fulfill that commitment. On May 2, 1995, explaining the migration accords at a White House press briefing, Attorney General Janet Reno said that migrants intercepted at sea would be returned to Cuba; that those fearing persecution would be able to apply for refugee status at the U.S. consulate in Havana, and

those who assert a need for protection would have the opportunity to present an asylum claim on the Coast Guard vessel. Regarding Cubans who reach U.S. territory, she said: “Cubans who reach the United States through irregular means will be placed in exclusion proceedings and treated as are all illegal migrants from other countries, including giving them the opportunity to apply for asylum.”

Emigration from Cuba

	Net emigration	Per thousand population
1970	56,404	6.6
1980	141,742	14.6
1990	5,352	0.5
2000	29,322	2.6
2005	33,348	3.0
2006	35,276	3.1
2007	32,811	2.9
2008	36,903	3.3
2009	36,564	3.3
2010	38,165	3.4
2011	39,263	3.5

Data from Cuba's National Office of Statistics describing net emigration (the annual excess of emigrants over immigrants) to all destinations, not only to the United States. The National Office of Statistics does not publish separate data series on emigration and immigration, nor does it divide emigration numbers by destination country.

However, press reports from as early as January 1995 report that the U.S. practice was to grant parole to Cubans who reached U.S. territory by raft or otherwise without a visa, contrary to the U.S. commitment to return those who arrived in “irregular ways.” This practice has continued ever since, directly contradicting the U.S. commitment in the accords.

On April 19, 1999 the Director of the Immigration and Naturalization Service issued a policy memorandum that ensured that absent a criminal record or other disqualifying factor, Cubans who arrive “by irregular means” were to be granted parole and allowed to enter the United States. It also provided that the fact of a migrant’s arrival at a place other than a port of entry, a factor that would

normally weigh against an application to adjust immigration status and move toward obtaining legal permanent residency, is not to count against Cuban migrants.

This memo provided formal justification to one of the most unusual aspects of U.S. policy toward Cubans who reach U.S. territory without a visa and who present no claim of persecution: the “wet foot-dry foot” policy. Under that policy, the U.S. Coast Guard returns to Cuba those migrants who are intercepted at sea (“wet foot”). Those who reach land, whether dropped off on a south Florida shore or appearing at a border station on the U.S.-Mexico border, are permitted to enter and later to adjust their status (“dry foot”) according to the discretionary authority of the Cuban Adjustment Act. No other class of illegal migrants are treated this way in U.S. immigration policy.

Other Special Provisions

Refugee program: The U.S. consulate in Havana allows Cuban citizens to present applications for admission to the United States as refugees. This is an exceptional arrangement, because a refugee is defined in U.S. law as a “person outside of his or her country” who cannot return “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.” In a typical year, about 3,000 Cubans are admitted with refugee status.

The **Family Reunification Parole Program** was created in 2007 to provide Cubans an additional avenue of legal migration to the United States. When announced in the Federal Register, it was described as a means of meeting U.S. commitments under migration accords (i.e. issuing 20,000 immigrant visas per year) and “reducing the perceived need for family members left behind in Cuba to make irregular and inherently dangerous attempts to arrive in the United States through unsafe maritime crossings, thereby discouraging alien smuggling as a means to enter the United States.” It expanded the pool of potential immigrants by reaching those who have relatives in the United States who could petition for their entry on family reunification grounds, and for these Cubans it eliminated the waiting period faced by immigrants from all other countries – about two years for spouses, ten

years or more for siblings. This preferential, fast-track treatment, the reasoning goes, removes the incentive many Cuban-American families have to hire a smuggler to bring relatives to the United States.

In 2006, the U.S. government instituted a **Cuban Medical Professional Parole Program** to allow, as explained by the State Department, “Cuban medical personnel conscripted to study or work in a third country under the direction of the Cuban government to enter the United States.” Application is open only to those “currently conscripted” in such functions, giving rise to the Cuban government’s complaint that the program’s purpose is to sap trained professionals from the Cuban healthcare system and to disrupt Cuban medical assistance programs that operate in dozens of countries in the Americas, Asia, and Africa.

Descendants of Cuban nationals who were born outside Cuba received a special status in U.S. immigration policy due to a Citizenship and Immigration Services (CIS) decision made on July 31, 2007. The case at issue involved a Venezuelan native who was in the United States on a work visa and sought to claim Cuban citizenship (and thereby adjust his status to that of legal permanent resident) because his parents were born in Cuba. The decision permits him to do so, and allows anyone born outside Cuba to satisfy the Cuban nationality requirement of the Cuban Adjustment Act by providing official Cuban documents proving that at least one parent is Cuban. This decision pleased Cuban expatriates in Venezuela and their descendants, who now have a fast track to immigrate to the United States.

Federal Benefits For Cuban Immigrants

In addition to receiving special, favorable treatment under U.S. immigration policies, Cuban immigrants also receive public assistance from the federal government for which nearly all other immigrant groups are ineligible.

The assistance is provided to Cuban and Haitian “entrants,” a term defined in the 1980 Refugee Assistance Act as persons of those nationalities who were paroled into the United States or were granted any other special status for Cuban or Haitian nationals. The package of benefits they receive are those provided to refugees and asylees.

According to an estimate by the University of Miami’s Institute for Cuban and Cuban-American Studies, the cost of public benefits provided to Cuban immigrants was \$322 million in 2008, counting federal, state, and local government contributions.

The Florida Department of Children and Families explains on its website that it receives federal money to provide benefits to “refugees and Cuban/Haitian entrants.” Benefits received by Cubans include:

- cash assistance (Supplemental Security Income, for those with low or no income) and medical assistance including free medical examinations and immunizations and eight months of Medicaid coverage free of charge;
- education benefits: English, vocational English, vocational training, and General Education Diploma preparation classes;
- child care: up to 24 months for those participating in employment and adult education programs;
- legal services: assistance with Employment Authorization Documents, applications for legal permanent residency, and “court representation and other immigration status issues;” and
- employment services: job counseling, job preparation and placement, on-the-job training, recertification of educational credits and degrees earned outside the United States.

A 2008 report by the Congressional Research Service notes the following benefits provided to Cuban immigrants:

- Supplemental Security Income for those qualified based on age or disability, up to \$637 per month for individuals, \$956 per couple, for up to seven years;
- Temporary Assistance for Needy Families for families with children under 18, a monthly payment that varies by state, averaging \$389 in 2008, for up to five years;
- Refugee Resettlement Assistance; social services and cash assistance to establish a residence and reach self-sufficiency;
- Refugee Cash Assistance; in Florida, up to \$180 per month for eight months; and

- Refugee Medical Assistance; for those not eligible for Medicaid, a medical benefit that is usually the equivalent of Medicaid coverage for eight months.

Those who were admitted under the Family Reunification Parole Program were not provided these benefits initially because the family members who petitioned for them provided affidavits during the application process whereby they committed themselves to support the new immigrants. The State of Florida and others objected, the federal government reversed its policy in December 2010, and these immigrants now receive the federal benefits.

WHO'S COMING NOW?

During the past decade, an average of nearly 33,000 Cubans have become U.S. legal permanent residents each year. This figure can be taken as a proxy for annual arrivals, given that all Cuban immigrants have a strong interest in getting a “green card,” which is required to work here and to travel abroad. Since 33,000 far exceeds the approximately 20,000 immigrants admitted each year through the U.S. consulate in Havana, one is led to ask which sources of immigration account for the difference.

During the past five years, an annual average of 8,295 Cubans present themselves at a U.S. border crossing, nearly all on the Mexican border, and are admitted to the United States even though they have no visa. The same applies to an average 1,000 per year arriving on South Florida shores. Both groups benefit from the “dry foot” policy to gain admission and they can apply for legal permanent residency a year later pursuant to the Cuban Adjustment Act.

Coast Guard maritime patrols in the Florida Straits and law enforcement efforts against alien smuggling seem to have had an impact, reducing the incidence of maritime crossings from Cuba. They have also had the result of diverting the flow of migrants to the west, to land routes that begin in South America, Central America, or Mexico and lead to the Mexico-U.S. border. There are ample press reports of smuggling operations that charge families in the United States a fee to carry relatives from Cuba to Mexico’s Yucatan peninsula by sea, then by land to the southern U.S. border. Increasingly, Cubans are traveling to Ecuador – a country that admits Cubans without a visa – and making their way by land to the United States from there, often with a smuggler’s assistance. In a reflection of the increasing popularity of this route, press reports indicate that

Illegal immigration from Cuba, successful and attempted			
	I. Arrivals By Sea, South Florida	II. Intercepted At Sea	III. Arrivals At Land Border
2000	1,820	1,000	
2001	2,406	777	
2002	1,335	666	
2003	1,072	1,555	
2004	995	1,225	
2005	2,530	2,712	11,524 (7,267 via Mexican border)
2006	3,075	2,810	13,405 (8,639)
2007	3,914	2,868	13,840 (9,566)
2008	2,915	2,216	11,146 (10,030)
2009	637	799	7,803 (5,893)
2010	409	422	6,286 (5,570)
2011	685	985	7,051 (5,937)
2012	354	1,261	9,191 (8,273)

Fiscal year data from Homeland Security agencies compiled by CafeFuerte.com; 2012 figures for 11 months only.

Panamanian authorities detained 800 Cubans in the first six months of 2012, as compared to 400 in all of 2011.

Those arriving at points of entry other than Mexico border crossings include Cubans who acquire Spanish citizenship, depart Cuba and enter the United States using a Spanish passport. (Spain is one of 37 countries whose citizens may enter the United States without a visa under the U.S. “visa waiver” program.) Upon entering the United States, a U.S. official explains, the Cuban/Spanish citizens often declare themselves to be Cuban, receive parole, and put themselves on the path to a green card. Others wait and approach authorities later, with the same result. Under a special Spanish law that gave descendants of Spanish citizens outside Spain the opportunity to acquire Spanish citizenship, nearly 200,000 Cubans have acquired Spanish citizenship – and passports – in recent years.

Cuba’s reformed travel policies and the likely increase in the number of Cubans traveling abroad may result in an increased number of Cubans seeking to immigrate to the United States, even if their travel begins in a third country. And whereas Cuban travelers were previously limited to 11 months outside Cuba, they may now remain abroad for 24 months. Eleven months was not long enough for a Cuban to obtain U.S. residency. Now, a Cuban can arrive in the United States on a visitor visa or otherwise, wait the requisite year to apply for legal permanent residency, and become a U.S. legal permanent resident well within the 24-month deadline for returning to Cuba.

RECONSTRUCTING AN ANACHRONISTIC U.S. POLICY

Current U.S. policy governing immigration from Cuba, based in large part on the authorities contained in the Cuban Adjustment Act of 1966, is out of date not because of the law’s age, but because it does not fit today’s realities.

In 1966, the law was passed to address a special circumstance: a growing community of Cubans was taking root in U.S. communities without regular immigration status or a practical way to achieve it, at a time when their desire and expectation of return to Cuba had faded. Moreover, these Cubans had no desire or intention to return to Cuba. Even though at that time

they were not subjected to the test of refugee status in modern law – establishing on an individual basis a well founded fear of persecution if one were to return home – a large number of these Cubans would have passed that test and as a community, they were tantamount to a refugee community in modern legal terms.

Those circumstances do not exist today. Cubans can apply for refugee status at the U.S. consulate in Havana. Persons who are on U.S. soil and fear returning home can apply for asylum status by establishing that such fear is well founded. The requirement imposed by U.S. law in 1966 – the need to travel to a U.S. consulate abroad to start the process of achieving regular immigration status – no longer exists.

Of greater salience is the change in the nature of Cuban immigrants. Those who have arrived in more recent decades can largely be characterized as immigrants rather than exiles or refugees. An unscientific survey of visa applicants conducted in 2009 by the U.S. Interests Section noted: “Overwhelmingly, applicants appear motivated to leave Cuba due to economic and family reasons.” Indeed, Cuban government data show that about 400,000 Cubans living abroad visited Cuba in 2011, 300,000 of which came from the United States. Such travel patterns are uncharacteristic of refugees and asylees and would in fact jeopardize an individual asylee’s status, because it undermines the basis on which asylum was granted. Year by year, actual refugees who have demonstrated a fear of persecution account for only about 10 percent of legal immigration from Cuba, and they are joined by only a handful of Cubans who receive asylum in the United States.

Policy Contradictions

Many of the unique aspects of current U.S. policy governing immigration from Cuba contradict other U.S. policies and objectives.

The granting of refugee benefits to Cuban parolees is at odds with the purpose of federal aid to refugees, which is to help people who flee persecution, live in refugee camps or other precarious circumstances, and arrive without resources to get on their feet and on the way to self-sufficiency. Cuban parolees hardly fit those criteria; many plan their trip to the United States,

many come after having lived for years outside Cuba, and many have family in the United States who can support them. Cuban parolees are a drain on refugee assistance funds that could either be saved or given to those who need and deserve them.

The wet foot-dry foot policy is detrimental to U.S. border security because it encourages alien smuggling. Former Secretary of Homeland Security Michael Chertoff described alien smuggling as an “obvious homeland security threat.” Many others reach a similar conclusion not necessarily because the people smuggled to U.S. shores pose a security risk, but because an illicit business skilled in smuggling people is equally capable of smuggling weapons or drugs. Typically, smugglers carrying human cargo from Cuba drop the migrants on a remote shoreline, then flee. The migrants, having achieved “dry-foot” status, are then processed and permitted to remain in the United States. In a 2006 case in Key West where a man was convicted of smuggling 24 Cubans, his defense attorney told the Associated Press that he expects “a lot more” cases of this type “until the executive decides to do away with the wet foot-dry foot policy.” The attorney is right: prosecutions raise the operational risk faced by smugglers, but since the smuggled migrants are permitted to remain, the smugglers have every reason to remain in business and Cuban-American families have incentive to seek their services. An end to the “dry foot” policy would cause the migrants to be returned. Fewer customers would then be interested in paying for the smugglers’ services, smugglers’ revenues would drop, and their business would be harmed severely.

The wet foot-dry foot policy also contradicts the security objective of fighting terrorism. To this writer, the U.S. government’s designation of Cuba as a “state sponsor of terrorism” is specious and politically motivated, and it diminishes U.S. credibility. Setting that opinion aside, it is hard to grasp how those who find that designation to be appropriate would also approve of allowing illegal Cuban immigrants routinely to be paroled into the United States. If the government of Cuba were interested in placing terrorists in the United States, this policy offers free entry to any Cuban it would deliver to a U.S. shore or border entry point. Interviews with U.S. Customs and Border Protection

officials and anecdotes related by Cuban immigrants indicate that Cubans who arrive illegally by sea and present themselves to authorities, as well as those who arrive by land at the Mexican border, are processed and released within a day. A typical story involves a group of 18 Cubans who came ashore on Singer Island in Florida’s Palm Beach County last August. *The Palm Beach Post* reported that they were in federal custody for less than 24 hours after officials verified that “their criminal backgrounds were clear and that they were in good health.” The U.S. government does not even pretend to connect the immigration policy with counter-terrorism policy, or to have a capability to screen Cuban migrants who might be part of terrorist operations. A similar immigration policy toward Iranians or the citizens of any other country named as a terrorism sponsor would be unimaginable.

Many parts of U.S. policy toward Cuba – economic sanctions, funding of political opposition activity – were designed to weaken or bring down the socialist government. Agree or not with the means or the objective, U.S. immigration policy is in conflict here too. The generous treatment of Cuban immigrants, both in terms of admission opportunities and public assistance benefits, surely contributes to the fact that Cuban opposition activists have not translated brave statements of dissent into the development of a genuine popular movement. A discontented and energetic Cuban who disagrees with the government and wants to fight for a better life might naturally think of engaging in anti-government political activism. But that same individual has another option, that of migrating to the United States under very generous policies. It is no mystery that so many Cubans choose to depart rather than engage in opposition politics, or that the ranks of the opposition are so regularly thinned by emigration.

The 2007 policy that extends the benefits of the Cuban Adjustment Act to persons who are not Cuban nationals but who can claim Cuban parentage is in conflict with the basic principles of the other immigration policies toward Cubans, which is that Cubans deserve special treatment because they live under communism, and that special measures are necessary to mitigate the risk of a new migration crisis. By any measure, it is absurd to extend special treatment to people who have never

lived in Cuba and are not Cuban nationals. The policy was instituted under the tenure of Emilio Gonzalez, a distinguished Cuban American who was director of Citizenship and Immigration Services. Its only plausible rationale is politically motivated favoritism.

Reform Ideas From Miami

In May 2010, Florida state Representative (and now U.S. Senator) Marco Rubio stated his opposition to President Obama's policy of allowing Cuban Americans to visit family in Cuba without restriction. One reason is that the visits, in his view, bring too much hard currency to Cuba. Another, having nothing to do with U.S. interests, is that the policy "threatens the exile status of the Cuban community." "How do you argue that you're an exile," he asked, "when exile is supposed to be people that can't return for political purposes?"

Representative David Rivera of Florida has similar sentiments and has addressed them in legislation. His bill, H.R. 2831, seeks to discourage Cuban Americans from traveling to Cuba from the time they arrive in the United States until they achieve citizenship, usually a six-year process. It does not prohibit travel; rather, it provides that any Cuban resident of the United States who travels to Cuba during that period will be barred from becoming a legal permanent resident, and those who have acquired that status will have it revoked.

As a practical matter, enactment of such legislation would create a strong incentive for Cuban Americans who have not yet achieved citizenship to travel to Cuba through third countries and to conceal that fact from U.S. authorities.

However, the vision of the bill is that those who do travel to Cuba would become a Cuban-American underclass of permanent parolees with no possibility of legal permanent residency or citizenship. The bill points out indirectly that those persons would be subject to deportation. They would be unable to vote in U.S. elections, and only with difficulty would they be able to acquire documents enabling them to travel to Cuba or any other place.

Representative Rivera argued in favor of his bill in a May 2012 hearing of the House Judiciary Committee's Subcommittee on Immigration Policy and Enforcement.

He alleged that Cubans who travel to Cuba engage in "abuse and manipulation" and he based his arguments on a set of falsehoods about the Cuban Adjustment Act and current procedures affecting Cuban immigrants.

"The fact that Cubans avail themselves of the Cuban Adjustment Act, citing political persecution, and then quickly travel back to the persecuting country, is a clear and blatant abuse of the law," he testified. Of course, Cubans do not need to "cite political persecution" to be admitted to the United States; they merely have to show that they are Cuban.

Rivera's confusion went deeper when he said that his bill applies to "any Cuban national who receives asylum and residency under the Cuban Adjustment Act." Very few Cubans are asylees – fewer than 100 per year in recent years – and those who achieve that status are admitted on that basis, without regard to the Cuban Adjustment Act. If Rivera meant "refugee" he would still be referring to a small class of Cuban immigrants, about one in ten in recent years.

Representative Rivera's proposal is based on a false reading of current law and immigration policy, it would create a punished class of Cuban American immigrants who lack immigration status, and it would add one more complication to an already byzantine policy. Moreover, it seems motivated by a desire to reduce Cuban-American travel to Cuba, a goal more sensibly tackled by amending law and regulation governing travel to Cuba.

A Reform To Simplify And Modernize The Policy

A better approach would be to examine today's conditions and current U.S. interests, and to build a policy that addresses those conditions and interests.

Such an approach would begin by setting aside myths and misconceptions about current law and policy. Two in particular are in very wide circulation in public and Congressional debate, and even in academic literature. First is the idea that the Cuban Adjustment Act requires the United States to admit all Cuban migrants who reach U.S. shores. This is not so; the admission of Cubans who arrive without a visa is accomplished by the Executive's use of its parole authority, which is discretionary, and the Act gives the Executive an addi-

tional authority, also discretionary, to adjust Cubans' status after one year. Second is the idea that Cubans are admitted to the United States after they state and U.S. authorities accept their claim of persecution. In fact, the vast majority of Cubans are admitted through the parole authority where a claim of persecution is neither stated nor judged.

On what basis, then, to reconstruct and simplify the policy?

- Immigration policy toward Cuba should be uniquely tailored to Cubans only when necessary to address challenges unique to Cuba. Absent unique circumstances, the United States should apply the same policies toward Cubans as are applied to other nationalities. Owing to Cuba's proximity and recent history, the possibility of mass migration is a challenge unique to Cuba. The presence of persons who claim fear of persecution is not.
- The policy should reflect the nature of immigration from Cuba, which is different today than 50 years ago. The Cuban-American community began as a nearly monolithic exile community composed of people who emigrated for political reasons in the early years of the socialist government, who often have few family ties in Cuba today, and who have no desire to travel to socialist Cuba. Today, the community is diverse. It includes many who are immigrants rather than exiles, who emigrated for economic reasons, making no claim to having been persecuted in Cuba, retaining ties to the island and their relatives there, traveling back and even investing in family businesses and homes there.
- Immigration policies toward Cuba should not undermine U.S. border security policies, particularly regarding illegal immigration and alien smuggling.
- The dispute among Cuban Americans about travel to Cuba can be addressed within that community and through public and Congressional debate over travel policy; immigration policy should not be used to weigh in on the side of those who want more limited travel.

What would a policy based on such principles include?

- Repeal the Cuban Adjustment Act. The special circumstances that gave rise to the Act in 1966 have long ago ceased to exist. Absent those circumstances, there is no reason to give special immigration privileges to immigrants from Cuba whose motives are mainly economic. Repeal of the Act would end the practice of effectively condoning illegal immigration through the "dry foot" policy, and it would undermine the business of alien smuggling from Cuba.
- Repeal the special provisions in the Refugee Assistance Act that provide refugee public assistance benefits to immigrants from Cuba who are not refugees. This will ensure that benefits intended for refugees are not extended to Cuban immigrants generally, who do not have refugee status. This will end an abuse of the U.S. taxpayer and an inappropriate use of the refugee resettlement program.
- Retain the policy of admitting 20,000 Cubans annually as immigrants, pursuant to the migration accords. This practice, combined with the return of migrants intercepted at sea, has coincided with a long period in which no mass migration events have occurred.
- Retain refugee processing at the U.S. Interests Section in Havana.
- Continue the family reunification parole program. This program has proven vital to reaching the figure of 20,000 immigrants per year. Since it connects Cuban immigrants with family members in the United States, those immigrants are less likely to require public assistance.

SOURCE MATERIAL AND FURTHER READING

The Cuban Triangle blog, written by the author, has monitored developments related to migration since 2007 and is searchable by word and by tag. For all posts on migration: <http://cubantriangle.blogspot.com/search?q=migration>.

The Spanish-language blog *Café Fuerte*, published by journalists Wilfredo Cancio and Ivette Leyva, also covers migration matters closely and regularly publishes U.S. government data on migration flows from Cuba: <http://cafefuerte.com>.

The text of the Cuban Adjustment Act and the texts of the 1994 and 1995 U.S.-Cuba migration accords are found in *U.S.-Cuban Relations: an Analytical Compendium of U.S. Policies, Laws, and Regulations* by Dianne E. Rennack and Mark P. Sullivan, published by the Atlantic Council of the United States, March 2005: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

Cuban Migration to the United States: Policy and Trends, by Ruth Ellen Wasem, Congressional Research Service, June 2009, concisely explains the history of U.S. policies, the benefits extended to Cuban immigrants, and current policy issues: <http://www.fas.org/sgp/crs/row/R40566.pdf>

Information on federal benefits provided to Cuban immigrants can be found at the website of the Office of Refugee Resettlement in the federal Department of Health and Human Services: <http://www.acf.hhs.gov/programs/orr/>

Cooperating with the Enemy? U.S. Immigration Policies toward Cuba, by Professor Jorge Dominguez, traces the history of U.S. policies and includes an interesting discussion of the debate over enactment of the Cuban Adjustment Act: http://www.people.fas.harvard.edu/~jidoming/images/jid_cooperating.pdf

A broad review of Cuban migration issues and U.S. policies by Professor Ted Henken of the City University of New York: *Balseros, Boteros, and El Bombo: Post-1994 Cuban Immigration to the United States and the Persistence of Special Treatment* (2005); at <http://www.palgrave-journals.com/1st/journal/v3/n3/pdf/8600159a.pdf>

The U.S. Coast Guard publishes constantly updated figures on “Maritime Migrant Interdictions” and describes the history of its operations on this website: <http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp>

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