

David Abraham on

The Cuban Adjustment Act of 1966: Past and Future

2015 Emerging Issues 7331

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On November 2, 1966, President Lyndon B. Johnson signed into law what is usually called the Cuban Adjustment Act ("CAA").¹ The chief legislative sponsor of the Cuban Adjustment Act had been Senator Edward Kennedy, but the bill enjoyed wide bipartisan support, sailing through a liberal and Democratic Congress by a 300-25 margin in the House and an unchallenged voice vote in the Senate. In conjunction with an economic and trade embargo and other sanctions and covert projects of various unsavory sorts, the avowed purpose of the CAA was to weaken and, if possible, topple the communist government of Cuban President Fidel Castro while aiding his victims.

Although its numbers were still relatively small, far from today's one and a half million, a politically dedicated Cuban émigré community, led by committed and extraordinarily well-situated exile leaders, energized the issue. The escalation of warfare in Vietnam and rising tensions with the Soviet Union and China contributed further energy to the anti-Castro efforts. Few dissented from the U.S. commitment to undoing Castro's government and the alleged revolutionary mischief it was encouraging in Latin American and throughout the Third World. As such, the CAA can only be properly understood as a linchpin in the Cold War struggles of the United States *and* as a form of special relief for Cubans seeking to come to the United States.

The Cuban Adjustment Act promises work authorization and, after one year's presence in the United States, the right of permanent residency (a "green card") to any Cuban arriving² in the United States by any means, legal or illegal. By so doing, the CAA exempts Cubans from those aspects of the Immigration and Naturalization Act (INA)³ that render inadmissible and deportable all other aliens arriving in the United States illegally — surreptitiously, outside a designated port of entry, or without valid documentation such as a passport or entry visa — and who cannot sustain an individualized claim of asylum or well-founded fear of persecution. De facto, the CAA turns each and every Cuban reaching the U.S. shore into a meritorious asylee. This is treatment afforded people of absolutely no other nationality.

Although the INA has been revised several times since 1966, the CAA has remained in constant force since its passage. The CAA has also remained at the center of tensions between the United States and Cuba, and its continued validity has ranked among the singular achievements of Castro's

1 Pub. L. No. 89-732, 80 Stat. 1161 (1996), which is published as a note to [8 U.S.C. §1255](#).

2 For most of the last forty-eight years, "arrival" under the CAA was understood to mean reaching U.S. waters. Since a loose set of U.S.-Cuba Migration Accords was reached after 1994, "arrival" has meant arrival on shore. This move from a so-called "wet foot" to a "dry foot" requirement has led to violent encounters between U.S. Coast Guard boats attempting to rescue (and possibly repatriate) U.S.-bound Cubans floundering at sea and the Cuban "rafters" (often long-time professional smugglers) intent on reaching shore unintercepted.

3 INA §§212, 237, codified at [8 U.S.C. §§1182](#), 1227.

ancien regime adversaries, based in Miami. Like the trade embargo,⁴ the CAA has survived the fall of the Berlin Wall, the end of the Soviet Union, the normalization of relations with China and Vietnam, and the more than quadrupling of the per capita immigrant population of the United States over the past forty-eight years.

The specific goal of the CAA has been to facilitate departure, defection, and desertion of Cuban citizens to the United States. It has acted as a strong magnet for both humble fishermen and all-star baseball players.⁵ Indeed, since its inception, over 770,000 Cubans — 130,000 in the Mariel boatlifts of 1980 alone — have come to the United States under its provisions and outside of normal immigration opportunities, which do in fact exist.⁶ As we shall see, over time, the iconic rafter has been joined by Cubans travelling more comfortably, including legally to Mexico, who are then welcomed when they appear at the same U.S./Mexican border where Mexicans are turned back.

In its early years, CAA beneficiaries consisted mostly of convinced anti-communists, often people with educations and not without financial means. Most of that population had no intention of returning to a Communist Cuba. Its leaders created organizations that nurtured the identity of “exile,” vociferously disallowing the term “immigrant,” and also militated for (and sometimes attempted) regime change in Cuba. Later beneficiaries, Mariel and post-Mariel, have been far less ideological, acting much more like other immigrants from poor Latin countries: sending (much appreciated) remittances and travelling back and forth to rather than boycotting the island.

The initial theory of the CAA and its advocates was that anyone and everyone fleeing or otherwise leaving Cuba for the ninety-mile trip to the United States was an asylee, that is a victim of “persecution,”⁷ and one of whom a normal and orderly, documented, and legal exit from Cuba and entry into the United States could not be expected and should not be required. Further, under the CAA, no proof of personal persecution is required. For citizens of all other countries, the fact of arriving in the United States from an “unfree” country is distinctly and definitely not enough to gain

4 The trade embargo has been strengthened several times, most formally in the Helms-Burton Act (a/k/a Cuban Liberty and Democratic Solidarity (Libertad)) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, [22 U.S.C. §§6021–6091](#), which purports to punish foreign as well as domestic companies doing business with Cuba. Unlike the May 2015 lifting of Cuba by the State Department from the list of states supporting “terrorism,” the embargo will remain for Congress to address.

5 Soliciting a crime like smuggling is, ordinarily, a crime, but under the CAA the United States simply looks away. It is widely believed in Miami that smuggling profits are a key source of income for the lesser exile organizations. No U.S. Attorney in Miami has ever had the courage to open an inquiry into these criminal conspiracies.

6 Those coming since the CAA join about 200,000 Cubans who came to the United States under an assortment of ad hoc measures in place during the 1960s, including boatlifts, “freedom flights,” and Operation Pedro Pan.

Since 1994 U.S. law under the “Special Cuban Migration Lottery” has allowed for 20,000 immigrant visas to be issued annually in Cuba to Cubans seeking to immigrate to the United States. This is a very generous number for a country of about 11 million, roughly the size of Hungary and just smaller than Madagascar. Those 20,000 per annum are not reckoned beneficiaries of the CAA.

7 Consistently with international agreements, in particular Article 33 of the 1951 U.N. Convention relating to the Status of Refugees, U.S. law in INA §§101(a)(42) and 208, [8 U.S.C. §§1101\(a\)\(42\)](#), 1158, defines an asylee, a refugee landed in or at the border of the United States, as someone who can document *personally* entertaining a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

asylum and residency. An individual not from Cuba must be able to show that he or she *personally* is the sought-out, sought-after object of persecution.⁸

Since immigration laws, like foreign policy generally, have long been considered subject to the "plenary power" of the President and the Congress, Congress could, constitutionally and without interference by the courts, choose to discriminate in favor of Cubans over other foreigners — which is precisely what the Cuban Adjustment Act does. Thus, apart from for many years harming Cuba, the CAA has had material as well as symbolic value in holding well over a million Cuban-American immigrants together as an "exile" group focused on their old homeland (and its pre-revolutionary leadership) as much as on their new home. More practically, it has enabled well over three quarters of a million Cubans to immigrate to the United States without waiting and qualifying as others must do.

To be sure, some dissidents in Cuba, fearing persecution, have chosen to flee to the United States. Still, it seems simply illogical to believe that over the years *all* those seeking to leave a poor Cuba for a rich United States are political refugees, asylees. Yet this is precisely what the CAA has done since 1966 and still does. Whereas Haitians fleeing their miserable, dangerous, oppressive, and violent island are presumed to be economic migrants, Cubans fleeing their communist island — if not a "communist paradise" certainly a paradise compared to Haiti and many, perhaps most, of the countries of the world — are automatically declared refugees. The Haitians, Chinese, and all others, whether intercepted at sea or apprehended in the United States, are forcibly returned home. There, in the unlikely event they are fortunate enough to have relatives in the United States or needed job skills, they may join a queue. Current waits are often many years long (over a decade for most Filipinos, Mexicans, and Chinese), and this at a time when the United States is accepting an unusually high number of immigrants, over 900,000 annually.

It has been argued that the Cuban Adjustment Act has hurt the Castro regime, and that this important achievement is well worth the price paid in unfairness to other would-be immigrants, in deaths at sea, in the institutionalization of smuggling operations, and in the general legal and political cynicism the CAA has bred. By now, such assertions must seem empty. Not only have two Presidents Castro outlasted nine American presidents, but it seems quite plausible to suggest that, whatever the early impact on Cuban human capital resources, easy emigration has mostly stabilized the government in Cuba and made oppositional activities less appealing than simple exit to a relatively welcoming rich country nearby.

The Cuban ancien regime in Miami has, in the meantime, used the CAA and the boycott legislation to create a fortress in South Florida. It may never again gain power in Cuba. It will, in all likelihood, play absolutely no role in future democratic transitions on the island. But, the ancien regime certainly runs South Florida and its local, state, and national political representatives at every level. It has, at times, done so with a degree of corruption and intolerance that would make old Chicago's

⁸ In the meantime, the 1996 and 1998 revisions of the INA virtually preclude from full-fledged consideration for asylum those who arrive from anywhere else, including notorious dictatorships around the world, with no documents or with fraudulent documents, even if they might indeed have an asylum claim.

Richard Daley or New York's Tammany Hall blanch. Though taken for granted locally, many of these practices first garnered national attention during the turbulent Bush-Gore recount in 2000.⁹

Arguably the most famous CAA case was that of Elian Gonzalez,¹⁰ though it turned out that there is an unknown minimum age for eligibility, one that precluded his application. Elizabeth Gonzalez, Elian's mother, had taken her five-year-old son, without the knowledge of his father, her ex-husband, and joined her boyfriend, a professional smuggler, and eleven others for their now famous, unsuccessful voyage to Miami. Beckoned, like so many others before them, by the CAA, they took the risk that subsequently made Elian the most photographed child in decades. Elizabeth did not survive the trip, leaving Elian, who did, in the temporary custody of the U.S. Attorney General, Janet Reno, who unthinkingly placed him with local relatives. Elian was deemed too young to speak for himself, and contrary to the wishes of his relatives here and practically the entire city of Miami, he was ultimately rightfully returned to his father — but not until most of the United States had finally heard of the CAA and witnessed the community it helped to construct.¹¹

Although adjudged a defeat, or at least embarrassment, for Cuban exile organizations, the Elian events likely contributed to George W. Bush's election a few months later and immunized the CAA from any vulnerability in the highly contentious immigration reform debates of the past decade and a half. With these CAA and other special benefits in place, Cubans have come to represent one of the ten largest foreign-born groups in the United States, with now over 1.1 million accounting for 2.8% of the foreign-born population. Over the past decade, between 30,000 and 50,000 Cubans have gained permanent resident status annually. With their U.S.-born descendants included, the Cuban diaspora now totals nearly 2.2 million.

Suddenly, however, the CAA seems to have become a victim of its own success, and the political winds are changing rapidly. To their great annoyance, the Miami elites can no longer count on Cuban immigrants to be politically hostile to the Castro government. The reservoir of class or ideological opponents has long been tapped out, and today's immigrants are increasingly mestizo and at peace with their home country's politics. From the Cuban side, the people leaving no longer represent a hemorrhaging of human capital, but rather an exit of the unskilled whose remittances are as or more welcome than their presence.

In 2013 Cuba dropped an exit policy that required Cubans to obtain exit permits and letters of invitation from foreign hosts before travelling abroad. Trapped by its own ideological commitments, the United States could hardly make itself the barrier to Cubans travelling, and hence the State

9 See, e.g., Dana Canedy & Dexter Filkins, *A Wild Day in Miami, With an End to Recounting*, N.Y. Times, Nov. 23, 2000, at A31; Dexter Filkins & Dana Canedy, *Protest Influenced Miami-Dade's Decision to Stop Recount*, N.Y. Times, Nov. 24, 2000, at A41. That same year saw: stolen elections (sometimes overturned), indicted politicians and judges, endless airport and harbor patronage scams, repeated firings of non-political officials, the use of affirmative action set-asides to enrich friends of "the community," the banning from airport newsstands of a "pro-Cuban" cigar magazine, officially encouraged harassment of music goers who were so bold as to attend the concerts of Cuban musicians, themselves exiled from public venues that refused to rent space for explicitly political reasons, the denial of business licenses to galleries and vendors deemed pro-Castro by the exile organizations, the defense of an earlier refusal to grant Nelson Mandela an official reception because of his pro-Castro record, and on and on.

10 This case is discussed more extensively in Charles Gordon, et al., *Immigration Law and Procedure* §34.02.

11 For a discussion of the litigation, see David Abraham, *Gonzalez ex rel. Gonzalez v. Reno. Is a Communist Father Still a Worthy Father? INS Discretion and Asylum Politics*, 95 Am. J. Int'l L. 204 (2001).

Department rapidly increased the number of tourist visas available to Cubans from roughly 20,000 in 2012 to 37,000 in 2013 and over 40,000 in 2014—while also extending visa validity from one entry over a six-month period to multiple entries over a five-year period.¹² In addition to travel to the United States, Cubans can now travel cheaply to Mexico and Canada and present themselves at the U.S. border for immediate admission via the CAA, as about 20,000 did in 2014.¹³ This vast expansion in visa numbers combined with the CAA and relaxed Cuban travel policies has created the bizarre situation in which Cubans entering legally need only commit the illegal act of overstaying their visas in order to become immediate beneficiaries of the CAA and recipients of Permanent Resident (“green”) Cards within a year.

With politically unreliable, economically rational actors from apolitical poor and middling social strata now dominating the immigrant flow, the Cuban elite in Miami has suddenly lost its enthusiasm for the CAA. Rather than draining Cuba and weakening its political system, the migration regime was now supporting Cuba and weakening the elite’s hold on the community and political structures it had constructed. Perhaps the elite ought to have realized this sooner.¹⁴ Rising star Senator Marco Rubio was perhaps the first conservative Cuban politician to face the new facts, telling reporters in mid-2013, when comprehensive immigration reform was being debated in the U.S. Senate, that it was “very difficult to justify someone’s status as an exile and refugee when a year and a half after they get here they are flying back to that country over and over again.”¹⁵

As the normalization process begun by Presidents Obama and Castro in December 2014 moved toward the reestablishment of diplomatic relations sometime in 2015, this realization suddenly broke through and a full and seemingly odd *volte face* hit Miami. Republican Representatives Ileana Ros-Lehtinen and Mario Diaz-Balart of Miami, long-time spokesmen for the arriere guard of the Cuban ancien regime, hawkish Senator Robert Menendez of New Jersey, and other old timers also suddenly called for changes to the law. Even the Miami-Dade County Commission chimed in to call for a revision of the CAA.

They were all joined by the newest and youngest ultra-conservative on the block, a product of the community’s earlier cohesiveness, Representative Carlos Curbelo. Curbelo sought to obscure the fact that he and his allies were no longer being helped (and were possibly being hurt) by the CAA with an attack on President Obama, who, needless to say, was responsible for the law’s now helping rather than hurting Cuba. He claimed, “The president’s actions on Cuba have severely undermined the law because he has essentially recognized the Cuban government as legitimate.”¹⁶ Curbelo’s proposed cure, however, is to prohibit CAA beneficiaries from returning to Cuba at all until they become U.S. citizens.¹⁷

12 See <http://havana.usint.gov/niv-fqa.html>. Tourist visas for Cubans can even be processed partly through 7-Eleven and Dollar General stores anywhere in the United States.

13 See <http://www.theguardian.com/us-news/2014/oct/10/cuba-migrants-surge-us-mexico-border-sea-travel>.

14 Alejandro Portes & Aaron Puhrmann, *A Bifurcated Enclave: The Economic Evolution of the Cuban and Cuban American Population of Metropolitan Miami*, 43 *Cuban Studies* 1 (March 2015).

15 Alex Leary, *Sen. Marco Rubio says he wants to re-examine Cubans' fast-track status but immigration bill doesn't*, Tampa Bay Times, June 25, 2013, at 1.

16 As quoted by Lizette Alvarez, *Law Favoring Cuban Arrivals Is Challenged*, N.Y. Times, Feb. 2, 2015, at A1.

17 Megan O'Matz, *Cuban Refugees Could Be Blocked from Returning Home*, Ft. Lauderdale Sun Sentinel, May 10, 2015, <http://www.sun-sentinel.com/local/broward/fl-congress-cuban-adjustment-act-curbelo-20150510-story.html#page=1>, elaborates on the views and legislative proposals of Curbelo and others.

While one may wonder whether this “recognition,” fifty-five years in coming, is the efficient cause for the sudden disenchantment with the CAA by its erstwhile strongest advocates, there is no doubt that the CAA is one of the last fronts of a Cold War long over, and a front that is crumbling. Yet inertia is a strong factor in the law, and given the current immobilism of Congress on the broad immigration front, the CAA may still be around for a while.

For more on measures regarding Cuba, see [Charles Gordon et al., Immigration Law and Procedure § 33.01.](#)

For more on the CAA, see [Charles Gordon et al., Immigration Law and Procedure § 34.04.](#)

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