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## No Way, Usa!: The Lack of a Repatriation Agreement with Cuba and Its Effects on U.S. Immigration Policies

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**NO WAY, USA!: THE LACK OF A REPATRIATION  
AGREEMENT WITH CUBA AND ITS EFFECTS ON U.S.  
IMMIGRATION POLICIES**

Annasofia A. Roig\*

**ABSTRACT**

Cuba and the United States have had a tumultuous relationship for over five decades now. Since the Revolution in Cuba, Cuban citizens have been immigrating to the United States in large numbers, including through two Cuban government-sponsored mass exoduses in 1980 and 1994. Throughout that time, the Cuban government refused to negotiate with the United States for the return of its citizens. Because of the lack of diplomatic relations, the two nations did not have a repatriation agreement in place and no agreed-upon mechanism existed by which the United States could return Cuban citizens to the island nation. As such, the United States was left with no alternative but to implement the wet foot-dry foot policy in 1995. Following the reestablishment of relations between Cuba and the United States, President Obama repealed wet foot-dry foot as a condition of the newly-established repatriation agreement. Finally, Cuba agreed to take back its citizens who either attempted to enter the United States illegally or were deportable from the United States for some other reason. After his election in 2016, President Trump took a harsh stance on Cuban policy and reversed some of President Obama’s changes. This led to a strong response from the Cuban government and created an uncertain future for the newly-established repatriation agreement.

I.	Introduction .....	876
II.	A Brief History of U.S.-Cuba Relations .....	878
III.	Background on U.S.-Cuba Immigration Policies.....	879
IV.	U.S. Immigration Laws and Policies with Respect to Cuba .....	882
	A. The Cuban Adjustment Act of 1966 and the Wet Foot-Dry Foot Policy .....	883

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B.	Exclusion from Expedited Removal .....	884
C.	The Cuban Family Reunification Parole Program.....	885
V.	Analysis.....	885
A.	Wet Foot-Dry Foot – A Legal Fiction and Temporary Solution .....	886
B.	Repatriation Agreements .....	887
1.	Agreements Between the United States and Cuba.....	888
2.	Agreements Between the United States and Haiti .....	893
3.	Agreements Between the United States and Other Countries .....	895
C.	Consequences of Having Had No Repatriation Agreement with Cuba.....	896
D.	Cuban Policy in the Post-Obama/Trump Era.....	897
VI.	Conclusion.....	900

## I. INTRODUCTION

Cuba is “the most recalcitrant country on repatriation of its nationals.”<sup>1</sup> For decades, Cubans were able to migrate to the United States and remain in the country for two main reasons. The first was the lack of a deportation mechanism, which would have permitted the United States to send many Cuban nationals back to the island upon commission of deportable offenses. The second reason, which resulted as a consequence of the first reason, was President Bill Clinton’s wet foot-dry foot policy implemented in 1995.

In 1980 and again in 1994, the government headed by Fidel Castro condoned two mass exoduses of Cubans to the United States.<sup>2</sup> Because of these government-sponsored evacuations, the United States was facing higher numbers of immigrants than it could handle and had no mechanism by which it could send these Cuban nationals back to their homeland.<sup>3</sup> As such, prior to the implementation of wet foot-dry foot in 1995, the United

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<sup>1</sup> *Hearing on Repatriation of Convicted Criminal Aliens Before the H. Comm. on Oversight and Government Reform*, 114th Cong. 4 (2016) (written statement of Michele Thoren Bond, Assistant Secretary for Consular Affairs, Department of State) [hereinafter *Written Statement of Michele Thoren Bond*].

<sup>2</sup> ALEJANDRO PORTES & ALEX STEPICK, *CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI* 103 (1993); Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 39–40 (1999).

<sup>3</sup> See Jefferson Morley, *Frequently Asked Questions: U.S.-Cuba Migration Policy*, WASH. POST (July 27, 2007, 3:02 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/27/AR2007072701493.html>.

States made several attempts to negotiate repatriation agreements with Cuba.<sup>4</sup> The Cuban government, however, repeatedly refused to take its citizens back, leaving the United States with no real choice but to keep these Cuban nationals.<sup>5</sup> Eventually, following further negotiations between the Clinton Administration and Castro, the Cuban government conceded that it would take back only *future* Cuban nationals who fled the island but were intercepted at sea by the United States Coast Guard.<sup>6</sup> Once again, Cuba refused to take back any other potentially deportable Cuban nationals.<sup>7</sup> As a result, the United States made a public announcement that any Cuban who arrived on American soil would be permitted to remain.<sup>8</sup> While this was a seemingly benevolent, altruistic policy, it was actually implemented by the Administration in light of the fact that it had no alternative course of action for removing the Cuban immigrants who arrived in the United States. Following President Barack Obama's reestablishment of diplomatic ties with Cuba and the repeal of wet foot-dry foot, the two nations were able to come to an agreement regarding the repatriation of Cuban citizens who fled the island.<sup>9</sup> This agreement has been beneficial to the United States inasmuch as it has alleviated the immigration influxes. However, given President Donald Trump's harsh stance on Cuba, it is unlikely that relations between the two countries will remain the same. This will likely lead to the return of the days where Cuba refused to accept its citizens back from the United States.

This article begins by briefly laying out the history of relations between the United States and Cuba, as well as a brief history of the immigration laws and policies that the United States has typically enforced against Cuban nationals. The article then discusses the two primary reasons why Cuban immigrants have been treated differently than immigrants from all other countries—(1) the lack of a deportation/repatriation agreement between the United States and Cuba, and (2) wet foot-dry foot. To that end, the article explores the reasoning behind the implementation of wet foot-dry foot and its effectiveness, as well as the explanations provided by the Cuban government in refusing to accept back its deportable nationals from the

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<sup>4</sup> See, e.g., Steven Greenhouse, *Flight from Cuba; Clinton Will Open Talks with Cuba on Refugee Crises*, N.Y. TIMES (Aug. 28, 1994), <https://www.nytimes.com/1994/08/28/world/flight-from-cuba-clinton-will-open-talks-with-cuba-on-refugee-crisis.html>.

<sup>5</sup> See *id.*

<sup>6</sup> *Joint Statement with the Republic of Cuba on Normalization of Migration*, AM. PRESIDENCY PROJECT (May 2, 1995), <https://www.presidency.ucsb.edu/documents/joint-statement-with-the-republic-cuba-normalization-migration>. **Error! Hyperlink reference not valid.**

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See U.S. DEP'T OF HOMELAND SEC., JOINT STATEMENT 1 (2017), <https://www.dhs.gov/sites/default/files/publications/Joint%20Statement%20FINAL%20-%20US%20alt.pdf>.

United States. In furtherance of those goals, the article will evaluate the wet foot-dry foot policy, both as it was written and as it was implemented. The article will also discuss President Obama's repeal of wet foot-dry foot and the implementation of a repatriation agreement that followed shortly thereafter. This agreement will be explored further and compared to repatriation agreements between the United States and other countries. Finally, the article will examine President Trump's possible changes to the United States' policies on Cuban deportation and the potential effects of his policies on Cubans currently in the United States as well as on the current repatriation agreement.

## II. A BRIEF HISTORY OF U.S.-CUBA RELATIONS

Prior to the Cuban Revolution and following the end of the Spanish-American War in 1898, the United States and Cuba had a more or less cooperative relationship.<sup>10</sup> The United States granted Cuba its independence and assisted Cuba by quashing rebellions and investing in the island's economy.<sup>11</sup>

In January of 1959, Fidel Castro staged a coup d'état and seized power from the Batista regime.<sup>12</sup> The United States initially supported this coup and placed an arms embargo against President General Batista, facilitating Castro's rise to power.<sup>13</sup> Shortly thereafter, Cuba aligned itself with the Soviet Union, which began to strain relations between the United States and Cuba.<sup>14</sup> By the following year, Castro had already "seized private land, nationalized hundreds of private companies—including several local subsidiaries of U.S. corporations—and taxed American products so heavily that U.S. exports were halved in just two years."<sup>15</sup>

Then, in October of 1960, nearly two years after Fidel Castro seized power in Cuba, President Eisenhower placed the first economic embargo on

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<sup>10</sup> Claire Suddath, *U.S.-Cuba Relations*, TIME (Apr. 15, 2009), <http://content.time.com/time/nation/article/0,8599,1891359,00.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Bryan Logan, *How Fidel Castro Rose to Power and Ruled Cuba for 5 Decades*, BUS. INSIDER (Jan. 13, 2015, 5:50 PM), <http://www.businessinsider.com/fidel-castros-life-and-rise-to-power-2015-1>.

<sup>13</sup> Suddath, *supra* note 10.

<sup>14</sup> *Castro and the Cold War*, PBS (2005), <http://www.pbs.org/wgbh/americanexperience/features/comandante-cold-war/>.

<sup>15</sup> Suddath, *supra* note 10; see Merrill Fabry, *The U.S. Trade Embargo on Cuba Just Hit 55 Years*, TIME (Oct. 19, 2015), <http://time.com/4076438/us-cuba-embargo-1960/>.

Cuba.<sup>16</sup> The following year, all diplomatic relations between the United States and Cuba were severed.<sup>17</sup> The break in diplomatic relations was followed by numerous attempts to oust Castro, including the Bay of Pigs and the Cuban missile crisis.<sup>18</sup> Since that time, the relationship between the two countries has been tenuous and strained. In 2013, President Obama and Raul Castro stunned the world when they shook hands, marking only the second time in fifty years that the leaders of the United States and Cuba had shaken hands.<sup>19</sup> A year later, there was a shift in the dealings between the two countries when President Obama and Raul Castro began working to normalize U.S.-Cuba relations.<sup>20</sup> In furtherance of that goal, in March of 2014, President Obama became the first sitting U.S. President to visit Cuba in eighty-eight years.<sup>21</sup>

### III. BACKGROUND ON U.S.-CUBA IMMIGRATION POLICIES

In October of 1965, with the Statue of Liberty beside him, then-President Lyndon B. Johnson addressed the nation to announce that the United States would accept Cubans fleeing the Castro regime in search of freedom.<sup>22</sup> President Johnson's priority was the reunification of families.<sup>23</sup> He made the announcement in response to several comments by then-Prime Minister Fidel Castro that Cubans seeking to leave the island for the United States would not suffer any consequences.<sup>24</sup> Following this announcement by the president, Congress decided that it was required to act or the rest of the world would come to believe that the United States does not mean what it says.<sup>25</sup> Congress then enacted the Cuban Adjustment Act of 1966 ("CAA").

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<sup>16</sup> Greg Myre, *The U.S. And Cuba: A Brief History of a Complicated Relationship*, NPR (Dec. 17, 2014, 2:09 PM), <https://www.npr.org/sections/parallels/2014/12/17/371405620/the-u-s-and-cuba-a-brief-history-of-a-tortured-relationship>.

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

<sup>18</sup> *Id.*; *Castro and the Cold War*, *supra* note 14; Logan, *supra* note 12.

<sup>19</sup> Myre, *supra* note 16.

<sup>20</sup> *Id.*

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

<sup>22</sup> Robert B. Semple, Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. TIMES, Oct. 4, 1965, at 1, available at <https://www.nytimes.com/1965/10/04/archives/us-to-admit-cubans-castro-frees-johnson-signs-new-immigration-bill.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Adjustment of Status for Cuban Refugees: Hearings Before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives*, 89th Cong. 11–12 (1966).

Until that point, in the mid-1960s, the majority of the immigrants from Cuba were well-educated, hard-working professionals.<sup>26</sup> This led Castro to cancel all flights from Cuba to the United States, in an effort to re-stabilize the island's social structure.<sup>27</sup> Then, in 1980, Fidel Castro opened up the port of Mariel, Cuba, in an effort to cause an exodus of Cuban people to come to the United States.<sup>28</sup> But this group of immigrants was different than the groups that had come to the United States in years prior. Castro sent over people that he considered "scum," including prisoners whom he released specifically to send to the United States.<sup>29</sup> These individuals were welcomed into the United States under President Jimmy Carter's "open hearts and open arms policy," based on the CAA, which allowed Cuban immigrants to find refuge from the political persecution they were facing in Cuba.<sup>30</sup>

Fourteen years after the Mariel exodus, Castro attempted to recreate the scenario.<sup>31</sup> In 1994, he once again permitted Cubans to leave for the United States.<sup>32</sup> However, these individuals made the journey to the United States on rafts created out of anything they could find that would float and support them.<sup>33</sup> President Bill Clinton realized how dangerous the journey these individuals were making truly was and wanted to send a message to the Cuban government to stop them from leaving in this fashion.<sup>34</sup> Tens of thousands of the refugees were stopped at sea by U.S. Coast Guard officials, banned from the United States by President Clinton, and taken to Guantanamo Bay.<sup>35</sup> Fidel Castro regularly spoke out against the CAA stating that it was deliberately formulated by the United States' government as an attack on the Cuban people and society designed to "provoke death and suffering."<sup>36</sup> The Cuban government highlighted the different treatment of Cubans as compared to Haitians and Dominicans in order to justify Castro's commentary.<sup>37</sup> In combination, these criticisms and the unsafe nature of the

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<sup>26</sup> Berta Esperanza Hernández-Truyol, *On Becoming the Other: Cubans, Castro, and Elian – A LatCritical Analysis*, 78 DENV. U. L. REV. 687, 689–90 (2001).

<sup>27</sup> Alberto J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 445 (2004).

<sup>28</sup> PORTES & STEPICK, *supra* note 2.

<sup>29</sup> *Id.* at 21.

<sup>30</sup> Perez, *supra* note 27.

<sup>31</sup> Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 58 (1999).

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

<sup>33</sup> *Id.*

<sup>34</sup> Greenhouse, *supra* note 4.

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

<sup>36</sup> Anita Snow, *Cuban Assembly Condemns Law*, MIAMI HERALD, Jul. 13, 2000, at A12.

<sup>37</sup> *Id.*

immigrants' travel methods brought about negotiations between Cuba and the United States to develop an immigration plan.<sup>38</sup>

These negotiations lead to the development and implementation of the unprecedented and unusual wet foot-dry foot policy in 1995.<sup>39</sup> When the United States announced the new policy, it also stated that the tens of thousands of Cubans that had been stopped at sea and taken to Guantanamo would be brought to the United States, but that the policy would change moving forward.<sup>40</sup> The policy was surprising to many because United States ships had never returned Cubans "to their communist homeland."<sup>41</sup> While in place, wet foot-dry foot was successful in preventing the "massive, uncontrolled migration that the United States fear[ed]" following the 1980 and 1994 exoduses.<sup>42</sup> Wet foot-dry foot remained in place for over two decades.<sup>43</sup>

On December 17, 2014, President Obama announced his changes to the policy toward Cuba.<sup>44</sup> He explained the reasoning behind the policy change stating, "[t]hrough these changes, we intend to create more opportunities for the American and Cuban people, and begin a new chapter among the nations of the Americas."<sup>45</sup> President Obama eased travel restrictions and the ability of American citizens to send remittances to their Cuban relatives.<sup>46</sup> The policy change also made it possible for American citizens visiting Cuba to utilize their debit and credit cards on the island.<sup>47</sup> Further, the Administration, in an effort to reestablish diplomatic relations, reopened the U.S. embassy in Havana and agreed to have high-ranking officials visit the island.<sup>48</sup>

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<sup>38</sup> Greenhouse, *supra* note 4.

<sup>39</sup> Javier Arteaga, Comment, *The Cuban Adjustment Act of 1966: More than Forty Years Later a Proposal for the Future*, 3 FIU L. REV. 509, 529 (2008); Perez, *supra* note 27.

<sup>40</sup> *The Day When 'Wet Foot, Dry Foot' Became Policy and Changed Immigration*, MIAMI HERALD (Jan. 12, 2017, 6:14 PM), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article126226584.html>.

<sup>41</sup> *Id.*

<sup>42</sup> Morley, *supra* note 3.

<sup>43</sup> Wet foot-dry foot was implemented, in its beginning stages, on May 2, 1995. Joint Statement with the Republic of Cuba on Normalization of Migration, 31 WEEKLY COMP. PRES. DOC. 752 (May 2, 1995). The policy was repealed on January 12, 2017. *Statement by the President on Cuban Immigration Policy*, WHITE HOUSE (Jan. 12, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy>.

<sup>44</sup> *Statement by the President on Cuba Policy Changes*, WHITE HOUSE (Dec. 17, 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



Because of the improved relations between the two nations that were fostered by his initial policy changes, in 2017 President Obama announced the repeal of the wet foot-dry foot policy.<sup>49</sup> In the statement announcing the end of the infamous policy, President Obama said, “the United States is taking important steps forward to normalize relations with Cuba and to bring greater consistency to our immigration policy.”<sup>50</sup> The very same day that he made the announcement, the Department of Homeland Security ended wet foot-dry foot and Cuban nationals who attempted to enter the United States illegally and did not qualify for humanitarian aid were subject to deportation.<sup>51</sup> As a result of the change in policy, the Cuban government “agreed to accept the return of Cuban nationals who ha[d] been ordered removed, just as it ha[d] been accepting the return of migrants interdicted at sea.”<sup>52</sup>

After taking office, President Trump quickly reversed many of the changes made by President Obama, taking a harsh and hostile stance toward Cuba once again.<sup>53</sup> These drastic changes in such a short period of time had a detrimental effect on the two countries’ diplomatic future. Cuba quickly responded, taking an equally harsh stance against the United States and emphasizing the magnitude of the mistake the United States was making.<sup>54</sup>

#### IV. U.S. IMMIGRATION LAWS AND POLICIES WITH RESPECT TO CUBA

For many decades, the United States has treated Cuban immigrants differently than immigrants from all other nations. Several of these differences were codified into law while others were implemented as policy. These parole laws and policies, which permitted unique treatment of Cuban immigrants include, among others, (1) the Cuban Adjustment Act of 1966 and the wet foot-dry foot policy, (2) exclusion from expedited removal, and (3) the Cuban family reunification parole program.

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<sup>49</sup> *Statement by the President on Cuba Policy Changes*, *supra* note 44.

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Dan Merica, *Trump Unveils New Restrictions on Travel, Business with Cuba*, CNN POLITICS (June 17, 2017, 2:00 PM), <http://www.cnn.com/2017/06/16/politics/trump-cuba-policy/index.html>.

<sup>54</sup> See *Statement by the Revolutionary Government*, REPRESENTACIONES DIPLOMÁTICAS DE CUBA EN EL EXTERIOR (June 16, 2017), <http://misiones.minrex.gob.cu/en/articulo/statement-revolutionary-government>.

A. *The Cuban Adjustment Act of 1966 and the Wet Foot-Dry Foot Policy*

Typically, individuals outside of the United States seeking refuge may request parole status from the United States “based on humanitarian or significant public benefit reasons.”<sup>55</sup> Parole is temporary and is granted on a case-by-case, discretionary basis.<sup>56</sup> Under the Cuban Adjustment Act (the “CAA”), which the United States’ Congress passed in 1966, the complex process of applying for parole no longer applied to Cuban immigrants in the same way.<sup>57</sup> The CAA gave Cubans a special status in the United States immigration process and incomparable access to the United States.<sup>58</sup> This law permitted Cuban nationals or citizens to apply for legal permanent resident status, a green card, after living in the United States for just one year.<sup>59</sup> This remains true even if the Cuban individual arrived without a visa.<sup>60</sup> At the time that the CAA was enacted, the Cubans who would be permitted to apply to adjust their status under this law did not have other means by which they could seek residence.<sup>61</sup>

Beginning in 1995, when wet foot-dry foot went into effect, through 2017, when wet foot-dry foot was repealed, the parole policy toward Cuban nationals was enforced even more differently than previously.<sup>62</sup> Wet foot-dry foot permitted Cuban immigrants who reached American soil (dry-foot) to apply for parole, and legal permanent resident status under the Cuban Adjustment Act of 1966, after having already arrived in the United States.<sup>63</sup>

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<sup>55</sup> *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 15, 2017), <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states>.

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

<sup>57</sup> See generally Pub. L. No. 89-732, 80 Stat. 1161 (1996), which is published as a note to 8 U.S.C. § 1255 (2012).

<sup>58</sup> See Hernández-Truyol, *supra* note 26.

<sup>59</sup> See *Green Card for a Cuban Native or Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 10, 2018), <https://www.uscis.gov/greencard/caa>, for information concerning acquisition of green cards for Cubans.

<sup>60</sup> Arteaga, *supra* note 39.

<sup>61</sup> *Cuban Adjustment Act*, CATH. LEGAL IMMIGR. NETWORK, INC. (Mar. 19, 2014), [https://cliniclegal.org/sites/default/files/cuban\\_adjustment\\_act.pdf](https://cliniclegal.org/sites/default/files/cuban_adjustment_act.pdf).

<sup>62</sup> *Fact Sheet: Changes to Parole and Expedite Removal Policies Affecting Cuban Nationals*, U.S. EMBASSY CUBA (Jan. 12, 2017), <https://cu.usembassy.gov/fact-sheet-changes-parole-expedite-removal-policies-affecting-cuban-nationals/>; *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 15, 2017), <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states>.

<sup>63</sup> *Fact Sheet: Changes to Parole and Expedite Removal Policies Affecting Cuban Nationals*, *supra* note 62.

Individuals who were intercepted at sea (wet-foot) were either returned to Cuba or taken to a third country.<sup>64</sup>

Some of the general impetuses for the wet foot-dry foot policy were “Cuba’s brutal Communist dictatorship, proximity to the United States, and history.”<sup>65</sup> The Department of Homeland Security justified the different treatment of Cubans as compared to other parole applicants because of “certain unique circumstances, including conditions in Cuba, the lack of diplomatic relations between our countries, and *the Cuban Government’s general refusal to accept the repatriation of its nationals.*”<sup>66</sup> The Obama Administration’s decision to appeal stemmed from the improvement of diplomatic relations between the countries, which began in December 2014.<sup>67</sup>

### B. *Exclusion from Expedited Removal*

Typically, the Department of Homeland Security “has the authority to effectuate the removal of certain categories of individuals, including those apprehended at ports of entry or near the border, through what is known as expedited removal.”<sup>68</sup> As a result of the other laws and policies in place with regard to Cuban immigrants, however, “Cuban nationals were exempt from being removed through expedited removal proceedings.”<sup>69</sup>

Given the improvements in relations between the two countries, then-Secretary of Homeland Security, Jeh Johnson, determined that this exemption for Cuban nationals was no longer necessary.<sup>70</sup> Thus, pursuant to the Joint Statement, Cubans were no longer exempt from expedited removal from the United States.<sup>71</sup> As of the date of the announcement, “Cuban nationals who are apprehended at ports of entry or near the border may be placed into expedited removal proceedings in the same manner as nationals of other countries.”<sup>72</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Alex Nowrasteh, *End to “Wet Feet, Dry Feet” is Good for Communist Cuba, Bad for Freedom.*, CATO INST. (Jan. 18, 2017), <https://www.cato.org/publications/commentary/end-wet-feet-dry-feet-good-communist-cuba-bad-freedom>.

<sup>66</sup> *Fact Sheet: Changes to Parole and Expedite Removal Policies Affecting Cuban Nationals*, *supra* note 62, at 2 (emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1.

<sup>72</sup> *Id.* at 3.

### C. *The Cuban Family Reunification Parole Program*

The Cuban family reunification parole program is the one program that still remains in full force and effect.<sup>73</sup> This program permits beneficiaries of certain family-sponsored visas to come to the United States while they await their visas, rather than having to wait in Cuba.<sup>74</sup> The purpose of this program is to discourage dangerous sea voyages and promote the safe reunification of families.<sup>75</sup> The Department of Homeland Security further stated that this program “will remain in place because it serves other national interests.”<sup>76</sup>

## V. ANALYSIS

In the wake of the Mariel exodus, it became apparent to the Carter Administration, and the United States as a whole, that while the general sentiments of the CAA, President Johnson’s speech, and the Congressional hearings during those time periods were valid, the United States could not continue to accept the volume of Cuban refugees that were making their way to the American borders.<sup>77</sup> In fact, despite his open arms open hearts policy, President Carter himself attempted to prevent the Mariel boatlifters from arriving in the United States.<sup>78</sup> Before welcoming the Cuban immigrants, President Carter ordered their ships stopped and seized.<sup>79</sup>

Prior to and at the time of the implementation of wet foot-dry foot, the United States did not have a mechanism or agreement under which it could deport Cuban nationals. This is apparent from the fact that rather than simply returning the roughly 12,000 people stopped in the 1994 exodus to Cuba, the Clinton Administration was forced to take them to Guantanamo Bay.<sup>80</sup> The individuals were transported to the Cuban island, but not permitted on Cuban territory. Instead, because of the broken relations between Cuba and the United States, Clinton had no choice but to come up with a creative solution to the growing problem. So, he elected to implement a policy of special treatment for Cubans arriving in the United States, when, in reality, he did so because he had no alternative for dealing with the Cuban nationals whom Cuba refused to reaccept.

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<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Arteaga, *supra* note 39; *see* PORTES & STEPICK, *supra* note 2, at 22.

<sup>78</sup> Arteaga, *supra* note 39; *see* PORTES & STEPICK, *supra* note 2, at 22.

<sup>79</sup> Arteaga, *supra* note 39; *see* PORTES & STEPICK, *supra* note 2, at 22.

<sup>80</sup> Greenhouse, *supra* note 4.

Throughout the entirety of the enforcement of wet foot-dry foot, it was highly criticized by many different groups, for many different reasons, not the least of which was the fact that Cuban immigrants were given preference over immigrants from every other nation. Second, the policy is nothing more than a legal fiction created as a temporary solution to a long-term problem.

The policy was not even uniformly reviewed by Cubans and those of Cuban descent.<sup>81</sup> When the wet foot-dry foot policy went into effect in 1995, Cubans and Cuban-Americans living in the United States had mixed emotions about the policy when it was first announced.<sup>82</sup> On the one hand, they were happy to welcome more Cubans to the United States.<sup>83</sup> On the other, they could not believe that the Clinton Administration was actually planning on sending Cubans back to the island if detained while at sea.<sup>84</sup>

#### A. *Wet Foot-Dry Foot—A Legal Fiction and Temporary Solution*

Just months before the announcement of wet foot-dry foot, the Clinton Administration announced a separate deal with the Cuban government.<sup>85</sup> At the press conference announcing that arrangement, Attorney General Janet Reno and Peter Tarnoff from the State Department made clear that at that time the Administration was already grasping at straws for a solution.<sup>86</sup> They stated that President Clinton was forced to take “quick and decisive action . . . in the hours and days following the outbreak of the crisis.”<sup>87</sup> Clinton “decided that all Cubans who entered this country illegally would no longer be paroled into the United States.”<sup>88</sup> He also decided to send the intercepted immigrants to Guantanamo or third countries, because Cuba, at that time, refused to accept them.<sup>89</sup> Then, a few months later, the Clinton Administration reneged on these statements and implemented wet foot-dry foot.<sup>90</sup> After continued negotiations, Cuba still refused to take back its

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<sup>81</sup> *The Day When ‘Wet Foot, Dry Foot’ Became Policy and Changed Immigration*, *supra* note 40.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See generally* Attorney General Janet Reno and Peter Tarnoff, Under Sec’y of State for Political Affairs, Press Conference on Cuban Migration (Sept. 9, 1994) (transcript available at <https://www.justice.gov/archive/ag/speeches/1994/09-09-1994-p.pdf>).

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

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.*

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

<sup>90</sup> *Joint Statement with the Republic of Cuba on Normalization of Migration*, *supra* note 6.

deportable citizens from the United States and agreed only to accepting those that were intercepted at sea while attempting to flee.<sup>91</sup>

In negotiating with the Cuban government, President Clinton and his administration could not get Castro to agree to a long-term solution to the immigration problem the United States was facing.<sup>92</sup> The most the Castro regime would agree to was taking back the citizens that were intercepted at sea prior to making it to the United States.<sup>93</sup> As part of the arrangement, the United States agreed to keep anyone who did in fact step foot on American soil.<sup>94</sup> This distinction was arbitrary and was merely part of a plan concocted by the Clinton Administration to turn a bad situation into a positive.

There is no difference, in a legal sense, between a Cuban immigrant that the U.S. Coast Guard stops out at sea or a Cuban immigrant whose body makes contact with the American shore. For the United States government under wet foot-dry foot, however, there was a big difference. The first immigrant could be taken back to Cuba on a boat while the latter would stay in the United States and more than likely would be applying for legal permanent resident status within the year.

The Clinton Administration was hard-pressed to find a better arrangement for the moment because the Cuban government had already refused, for decades, to take back its citizens who fled the island. Knowing this, the Clinton Administration surely performed a cost benefit analysis and decided to agree to the Cuban government's terms. This is likely the reason why the United States decided to permit the 20,000 plus Cubans housed in Guantanamo into the country despite President Clinton's many public statements to the contrary.<sup>95</sup> The Administration needed the Cuban government to agree to any arrangement that potentially meant not having to accept every Cuban that was and would be fleeing Cuba.

### B. Repatriation Agreements

To repatriate someone means “to restore or return [them] to the[ir] country of origin, allegiance, or citizenship.”<sup>96</sup> In order for countries to be able to deport someone to their country of origin, there must be a repatriation

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<sup>91</sup> *Id.*

<sup>92</sup> Greenhouse, *supra* note 4.

<sup>93</sup> *Joint Statement with the Republic of Cuba on Normalization of Migration, supra* note 6.

<sup>94</sup> *Id.*

<sup>95</sup> *See, e.g.*, Press Conference on Cuban Migration, *supra* note 85, at 3.

<sup>96</sup> *Repatriate*, MERRIAM-WEBSTER (2018).

agreement in place between the two nations.<sup>97</sup> Without any agreement of the kind, the repatriating country is not required to accept its citizen or national from the sending nation. It is commonplace for countries with good or neutral diplomatic relationships to have repatriation agreements with one another. Where no such agreement exists, deportation and repatriation are nearly impossible given the lack of a mechanism by which to do so.

### 1. Agreements Between the United States and Cuba

Prior to President Obama's changes in 2017, the deportation of Cubans from the United States and their repatriation in Cuba was sparse and grounded in specific, limited agreements between the two nations. One such example was the 1984 agreement in which Cuba affirmed that it would accept back "2,746 Cuban criminals and mental patients who came here in the 1980" Mariel boatlift.<sup>98</sup> At the time of the 1984 agreement, White House officials were hopeful that it would lead to the normalization of immigration from Cuba to the United States.<sup>99</sup> Just five months after the execution of the agreement, Cuba suspended it.<sup>100</sup> In 1986, the U.S. Government attempted, unsuccessfully, to reinstate the agreement.<sup>101</sup> Finally, the following year, in 1987, Cuba agreed to repatriate the remaining 2,500 deportation eligible immigrants from the Mariel boatlift.<sup>102</sup>

On September 9, 1994, Cuba and the United States came to a second migration agreement.<sup>103</sup> According to both countries, the agreement was necessary to "help to deter people from undertaking dangerous journeys on unsafe boats and help to ensure that the migration between our two countries is safe, legal, and orderly."<sup>104</sup> Under that agreement, the United States agreed to (1) continue issuing visas to immediate relatives of United States citizens; (2) continue issuing visas to 20,000 Cubans through visa and refugee procedures, as well as the attorney general's parole authority; and (3) for the first year following the agreement, the United States would "authorize the

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<sup>97</sup> See generally *Note on Voluntary Repatriation EC/SCP/13*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Aug. 27, 1980), <https://www.unhcr.org/excom/scip/3ae68cce8/note-voluntary-repatriation.html>.

<sup>98</sup> Bernard Weinraub, *U.S. and Cuba Gain an Accord on Repatriation*, N.Y. TIMES (Dec. 15, 1984), <https://nyti.ms/2H0ND10>.

<sup>99</sup> *Id.*

<sup>100</sup> Associated Press, *U.S., Cuba Agree to Revive Immigration Agreement*, L.A. TIMES (Nov. 22, 1987), [http://articles.latimes.com/1987-11-22/news/mn-23802\\_1\\_immigration-agreement](http://articles.latimes.com/1987-11-22/news/mn-23802_1_immigration-agreement).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Press Conference on Cuban Migration, *supra* note 85, at 1.

<sup>104</sup> *Id.* at 3.

legal migration of those Cubans currently on the immigrant visa waiting list.”<sup>105</sup> At the press conference announcing the agreement, a member of the press asked Mr. Peter Tarnoff of the State Department about Cuba’s willingness to repatriate its nationals at that time.<sup>106</sup> In response, Mr. Tarnoff stated merely that “Cuba ha[d] agreed to begin discussions about the manner in which they will be returned through consul channels.”<sup>107</sup> The remainder of his response addressed successful voluntary returns and the individual asking the question requested that he address the question in terms of “remittances [on] other points.”<sup>108</sup> Mr. Tarnoff then responded, “As you can see, that is not part of the agreement, and nothing of that sort is contemplated.”<sup>109</sup>

Just eight months later, on May 2, 1995, the United States and Cuba executed a new joint statement.<sup>110</sup> This statement became known as the birth of the wet foot-dry foot policy.<sup>111</sup> The new agreement modified the September 9, 1994, agreement, but did not replace it.<sup>112</sup> Now, Cuba agreed to take back all Cuban nationals intercepted at sea, as well as those who entered Guantanamo illegally.<sup>113</sup> Cuba further agreed that it would not retaliate against the individuals who were returned after having attempted to flee the country.<sup>114</sup> After this third agreement between the two nations, Cuba had still not agreed to repatriate all of the individuals that the United States sought to deport back to the island.<sup>115</sup>

President Obama’s steps toward normalization of diplomatic relations between the two countries facilitated the establishment of a fixed repatriation agreement between the United States and Cuba.<sup>116</sup> Today, the two nations have an agreement in place whereby Cuba agreed to “accept and facilitate the repatriation of Cuban nationals who are ordered removed from the United States.”<sup>117</sup> In their joint statement announcing the agreement, the two countries announced that they were “[aware] of the necessity to facilitate

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<sup>105</sup> *Id.* at 3–4.

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 11–12.

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Joint Statement with the Republic of Cuba on Normalization of Migration*, *supra* note 6.

<sup>111</sup> *The Day When ‘Wet Foot, Dry Foot’ Became Policy and Changed Immigration*, *supra* note 40; see *Joint Statement with the Republic of Cuba on Normalization of Migration*, *supra* note 6.

<sup>112</sup> *Joint Statement with the Republic of Cuba on Normalization of Migration*, *supra* note 6.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9.

<sup>117</sup> Fact Sheet: Changes to Parole and Expedite Removal Policies Affecting Cuban Nationals, *supra* note 62.



regular migration to the benefit of both countries, and to discourage irregular migration.”<sup>118</sup> The agreement laid out in the joint statement was not meant to alter any agreement set forth in the previous statements dated December 14, 1984, September 9, 1994, and May 2, 1995.<sup>119</sup> The terms of these agreements remain in place “with respect to the return of Cuban nationals intercepted at sea by the United States [and] the return of migrants found to have entered the Guantanamo Naval Base illegally.”<sup>120</sup>

As part of the 2017 agreement, the United States agreed to “apply to all Cuban nationals . . . the same migration procedures and standards that are applicable to nationals of other countries.”<sup>121</sup> This, of course, meant the end of the wet foot-dry foot policy.<sup>122</sup> In return, Cuba committed to “beginning the regular return of Cuban nationals” to the island of Cuba.<sup>123</sup> The specific terms of this unprecedented agreement are as follows:

1. From the date of this Joint Statement, the United States of America, consistent with its laws and international norms, shall return to the Republic of Cuba, and the Republic of Cuba, consistent with its laws and international norms, shall receive back all Cuban nationals who after the signing of this Joint Statement are found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law.

The United States of America and the Republic of Cuba state their intention to promote changes in their respective migration laws to enable fully normalized migration relations to occur between the two countries.

2. The United States of America and the Republic of Cuba shall apply their migration and asylum laws to nationals of the other Party avoiding selective (in other words, discriminatory) criteria and consistent with their international obligations.

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<sup>118</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9, at 1.

<sup>119</sup> *Id.* This point was important given the United States’ previous small victories in obtaining piecemeal agreements from the Cuban Government.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *See, e.g., id.*

<sup>123</sup> *Id.*

3. The United States of America shall continue ensuring legal migration from the Republic of Cuba with a minimum of 20,000 persons annually.
4. The United States of America and the Republic of Cuba, determined to strongly discourage unlawful actions related to irregular migration, shall promote effective bilateral cooperation to prevent and prosecute alien smuggling and other crimes related to migration movements that threaten their national security, including the hijacking of aircraft and vessels.
5. The Republic of Cuba shall accept that individuals included in the list of 2,746 to be returned in accordance with the Joint Communiqué of December 14, 1984, may be replaced by others and returned to Cuba, provided that they are Cuban nationals who departed for the United States of America via the Port of Mariel in 1980 and were found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The Parties shall agree on the specific list of these individuals and the procedure for their return.
6. The Republic of Cuba shall consider and decide on a case-by-case basis the return of other Cuban nationals presently in the United States of America who before the signing of this Joint Statement had been found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The competent authorities of the United States shall focus on individuals whom the competent authorities have determined to be priorities for return.

As from the date of signing of this Joint Statement, the Parties shall carry out the necessary procedures for its implementation. The Parties may meet and revise such procedures from time to time to ensure effective implementation.<sup>124</sup>

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<sup>124</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9, at 1–2.

Lastly, the countries agreed that officials from both the United States and Cuba would be meeting regularly to ensure continued cooperation between the nations and that the agreement is being properly carried out.<sup>125</sup> Even though the Cuban government did not agree outright to accept all deportable nationals, the agreement to consider each return on a case-by-case basis represents significant progress. Additionally, this individualized approach to repatriation cases is not uncommon.<sup>126</sup> Most importantly, however, a similar agreement has never before been executed between Cuba and the United States, which is why, until this point, many otherwise deportable Cuban nationals have remained in the United States. Today, those same individuals face deportation and repatriation at the hands of this Joint Statement.

As early as one month after the United States and Cuba came to an agreement, 680 Cubans were returned to the island.<sup>127</sup> The United States has many Cuban immigrants that it would like to repatriate, but it had been unable to do so until the culmination of its negotiations with Raul Castro.<sup>128</sup> In fact, over 28,400 Cubans were being held in the United States awaiting deportation because the United States could not actually go through the formal process of sending them back to the island.<sup>129</sup> Since the change in policy, Cubans have been turned away at the United States border, held in United States “detention facilities awaiting rulings in their removal proceedings,” and sent back to Cuba.<sup>130</sup> The number of Cubans deported from the United States in 2017, after the discontinuation of wet foot-dry foot and the establishment of a rough repatriation agreement, doubled from the previous year.<sup>131</sup>

While the agreement currently in place between Cuba and the United States is not comprehensive, it is “a major step toward the normalization of their migration relations.”<sup>132</sup> The Cuban government agreed to receive all

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<sup>125</sup> *Id.* at 1–3

<sup>126</sup> *See infra*, Part V.B.3.

<sup>127</sup> Associated Press, *supra* note 100.

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

<sup>129</sup> Roque Planas, *The U.S. May Soon Start Deporting More Cubans. Here's What's Waiting for Them.*, HUFFINGTON POST (Apr. 20, 2016, 11:19 AM), [https://www.huffingtonpost.com/entry/deported-back-to-cuba\\_us\\_571653a0e4b0018f9cbb2359](https://www.huffingtonpost.com/entry/deported-back-to-cuba_us_571653a0e4b0018f9cbb2359).

<sup>130</sup> Rick Jervis, *As Wet Foot/Dry Foot U.S. Policy Ends, Cuba Ponders What Trump May Do.*, USA TODAY (Feb. 13, 2017, 3:32 PM), <https://www.usatoday.com/story/news/2017/02/13/wet-foot-dry-foot-cuba-ponders-what-trump-may-do/97762314/>.

<sup>131</sup> Franco Ordoñez & Nora Gámez Torres, *U.S. Departs Twice as Many Cubans in 2017 vs 2016*, MIAMI HERALD (Dec. 15, 2017, 4:05 PM), <http://www.miamiherald.com/news/politics-government/article190041484.html>.

<sup>132</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9, at 1.

Cuban nationals who arrive in the United States after the execution of the agreement.<sup>133</sup> It also stated it would consider all other cases for deportation, focusing on those who have been deemed a “priority for return.”<sup>134</sup> Both of these terms were previously unimaginable from Cuba, which has repeatedly been “recalcitrant” to accepting its nationals.<sup>135</sup>

## 2. Agreements Between the United States and Haiti

The group amongst which wet foot-dry foot has been least popular is the Haitian population.<sup>136</sup> Haiti is a poverty-stricken nation riddled with “dangerous conditions caused by armed conflict, natural disasters or other extraordinary circumstances.”<sup>137</sup> Like the Cubans who make the voyage to the United States on unsafe rafts, countless Haitians risk their safety to come here in search of a better life. Because of the terrible living conditions in their home country, many Haitians have been fighting for decades to obtain, at minimum, temporary protected status.<sup>138</sup> The disparity in treatment between the Cubans and Haitians is particularly obvious in South Florida.<sup>139</sup> Contemporaneously with the Mariel exodus of 1980, many Haitians also fled their homeland in search of improved living conditions in the United States.<sup>140</sup> However, unlike their Cuban counterparts, the Haitian immigrants were not eligible for an adjustment of status to legal permanent resident.<sup>141</sup> Then, for some time in the 1990s, Haitians were being taken to Guantanamo Bay for asylum processing and possible parole screenings.<sup>142</sup> Shortly thereafter, upon realizing the volume of Haitian immigrants seeking refuge, President George H. W. Bush ordered all Haitian ships carrying immigrants to be stopped immediately by the United States Coast Guard.<sup>143</sup> Pursuant to

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<sup>133</sup> *Id.* at 2; see Nora Gámez Torres, *More Than 37,000 Cubans Face Deportation Orders*, MIAMI HERALD (Dec. 19, 2017, 2:39 PM), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article190571369.html>.

<sup>134</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9, at 2; see Gámez Torres, *supra* note 133.

<sup>135</sup> Gámez Torres, *supra* note 133; see Written Statement of Michele Thoren Bond, *supra* note 1.

<sup>136</sup> See, e.g., Carl Hiaasen, *Policy is ‘White-Foot, Black-Foot’*, INST. FOR JUST. & DEMOCRACY IN HAITI (Feb. 5, 2006), <http://www.ijdh.org/2006/02/archive/policy-is-white-foot-black-foot/>.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *id.*

<sup>139</sup> See, e.g., *id.*

<sup>140</sup> RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS RS21349, at 3 (Jan. 15, 2010), <http://trac.syr.edu/immigration/library/P4230.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.*

President Bush's announcement, all of these Haitians were to be returned to their country for repatriation.<sup>144</sup>

Under President Clinton, this policy changed, and Haitians who were intercepted by the United States Coast Guard were taken to other countries in the region while they were considered for refugee status.<sup>145</sup> A few weeks later, President Clinton rescinded this policy, citing the high number of Haitians attempting to come to the United States.<sup>146</sup> The policy for Haitian immigrants then became one of "safe havens" whereby they would be transported to nearby countries for refugee processing, only to be denied and never received by the United States.<sup>147</sup> Haitians that arrived successfully, albeit illegally, in the United States remained subject to expedited removal proceedings at all times, unlike their Cuban counterparts.<sup>148</sup>

Following the devastating 2010 earthquake in Haiti, the Department of Homeland Security granted Temporary Protected Status to the Haitian people.<sup>149</sup> There have been several extensions to the Haitian Temporary Protected Status since then in light of the continued hardships that the island nation has faced. The Trump Administration announced that the Haitian TPS status will end in July 2019.<sup>150</sup>

The United States' government historically explained the difference in treatment of the immigrant populations by explaining that "Cubans are political refugees while the Haitians are fleeing here purely for economic reasons."<sup>151</sup> But, that is simply untrue. Some Haitian immigrants certainly flee their country in search of economic opportunity, but many, especially in the early 1990s, fled following a military coup d'état that deposed the country's democratically elected government.<sup>152</sup>

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<sup>144</sup> *Id.*

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

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.* at 7.

<sup>150</sup> Ted Hesson, *Homeland Security Ends Protected Status for Haitians with an 18-Month Delay*, POLITICO (Nov. 20, 2017, 10:09 PM), <https://www.politico.com/story/2017/11/20/homeland-security-haitians-haiti-182901>.

<sup>151</sup> Hiaasen, *supra* note 136.

<sup>152</sup> WASEM, *supra* note 140.

### 3. Agreements Between the United States and Other Countries

Similar to Cuba, Vietnam did not have an agreement with the United States for many years.<sup>153</sup> Until January 22, 2008, Vietnam did not need to accept deportees from the United States.<sup>154</sup> Of note is the fact that the United States and Vietnam resumed diplomatic relations on July 12, 1995, but a comprehensive agreement was not executed between the two nations until January 22, 2008, almost thirteen years later. The agreement with Vietnam lays out the conditions for repatriation, the individuals who are eligible for repatriation, the acceptance of these individuals, and several logistical facts such as expenses and procedures.<sup>155</sup> The agreement provides that individuals who violate the laws of the United States will be considered for repatriation by the government of Vietnam.<sup>156</sup> The individual must (1) be a citizen of Vietnam, (2) have resided previously in Vietnam, (3) broken a U.S. law and ordered removed by a court of competent jurisdiction, and (4) complete any prison sentence prior to removal.<sup>157</sup>

Unlike Vietnam and Cuba, Mexico has had an agreement of some kind in place with the United States for a long time. The relationship between the United States and Mexico is far different from that between the United States and Cuba. Officials from the United States' and Mexican governments meet annually at what they call the Repatriation Strategy and Policy Executive Coordination Team ("RESPECT") meeting.<sup>158</sup> These two countries have a longstanding arrangement and their focus today is on streamlining and efficiency.<sup>159</sup> They have nine separate, localized agreements covering all parts of the U.S.-Mexico border, as well as a general agreement that covers blanket procedures that apply to all repatriation bases along the border.<sup>160</sup> The general agreement stipulates the rights of the individuals being repatriated,

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<sup>153</sup> See Julia Preston, *Vietnam Agrees to the Return of Deportees from the U.S.*, N.Y. TIMES (Jan. 23, 2008), <https://www.nytimes.com/2008/01/23/us/23immig.html>.

<sup>154</sup> See *Vietnam-US Agreement on the Acceptance of the Return of Vietnamese Citizens*, EMBASSY SOCIALIST REPUBLIC VIETNAM (Jan. 24, 2008), <http://vietnamembassy-usa.org/relations/vietnam-us-agreement-acceptance-return-vietnamese-citizens>.

<sup>155</sup> See *generally* Agreement on the Acceptance of the Return of Vietnamese Citizens, U.S.-Vietnam, Jan. 22, 2008, T.I.A.S. No. 08-322.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> *Id.* at 2.

<sup>158</sup> Press Release, U.S. Dep't of Homeland Sec., United States and Mexico Sign Updated Repatriation Agreements (Feb. 23, 2016), <https://www.dhs.gov/news/2016/02/23/united-states-and-mexico-sign-updated-repatriation-arrangements>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* See *Updated U.S.-Mexico Local Repatriation Arrangements*, U.S. DEP'T HOMELAND SECURITY (Feb. 26, 2016), <https://www.dhs.gov/publication/updated-us-mexico-local-repatriation-arrangements>, for copies of each of the repatriation agreements between the United States and Mexico.

the processes for coordination of both nations, and the procedures by which they will evaluate the effectiveness of the repatriation arrangement.<sup>161</sup> Each of the base-specific agreements addresses “location-specific information, and specific measures for vulnerable populations, such as unaccompanied minors and those with medical conditions.”<sup>162</sup>

C. *Consequences of Having Had No Repatriation Agreement with Cuba*

Certainly, there have been many consequences over the years of not having a repatriation agreement in place with Cuba, some more quantifiable than others. One often-referenced, measurable effect of the lack of a deportation mechanism is the number of Cubans with criminal convictions that the United States has been unable to remove.<sup>163</sup> Over 28,400 Cubans have been indefinitely awaiting deportation to Cuba.<sup>164</sup> The United States has expended many resources and funds in keeping these otherwise deportable Cubans for years, as many of them must be supervised by Immigration and Customs Enforcement and others are in prison.<sup>165</sup>

The lack of a repatriation agreement was beneficial to the Cuban government for several reasons. First, the wet foot-dry foot policy functioned as a “safety valve” for the government.<sup>166</sup> Many of the government’s strongest oppositionists left the island out of fear of persecution and in search of a better life.<sup>167</sup> This, in part, guaranteed the continued hold of the government over the people. Many were unclear why the Cuban government agreed to give up this release valve.<sup>168</sup> Perhaps, the government was concerned given that a large portion of those who fled were young and made up the workforce.<sup>169</sup> Regardless of the reasoning, the policy change means that the Cuban government will now be forced to face many critics who would otherwise have fled the island for the United States.<sup>170</sup>

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<sup>161</sup> See generally U.S. DEP’T OF HOMELAND SEC., LOCAL ARRANGEMENT FOR REPATRIATION OF MEXICAN NATIONALS (2016), <https://www.dhs.gov/sites/default/files/publications/LRA-Base.pdf>.

<sup>162</sup> Press Release, U.S. Dep’t of Homeland Sec., United States and Mexico Sign Updated Repatriation Agreements (Feb. 23, 2016), <https://www.dhs.gov/news/2016/02/23/united-states-and-mexico-sign-updated-repatriation-arrangements>.

<sup>163</sup> Planas, *supra* note 129.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Jervis, *supra* note 130.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

#### D. Cuban Policy in the Post-Obama/Trump Era

Following Obama's announcement of normalizing relations in 2014, "[r]umors that the [wet foot-dry foot] policy would end have been rampant in Cuba."<sup>171</sup> These rumors prompted a surge of Cuban immigrants to the United States.<sup>172</sup> Somewhat ironically, these immigrants used the policy that was implemented following fears of additional mass exoduses from the island. In 2014, 24,278 Cubans made it to the United States, in 2015, that number nearly doubled, and in 2016, it exceeded 54,000.<sup>173</sup> Despite these large numbers of individuals that made it to American soil, in 2014, the United States Coast Guard only stopped 2,059 people, and in 2015, that number was roughly equally as low.<sup>174</sup>

Many Cubans were glad to see the end of the wet foot-dry foot policy, including people who came to the United States from Cuba seeking refuge.<sup>175</sup> The Cuban immigrants agree with the other immigrant populations in that they state that the vast majority of immigrants are coming to the United States for economic reasons, rather than political reasons.<sup>176</sup> On those grounds, the immigrants say, they should be treated no differently than Mexicans or Central Americans attempting to come to the United States.<sup>177</sup>

The irony of the stated rationale for implementing the wet foot-dry foot policy—to reduce the unsafe immigration of Cubans to the United States—is that it was most successful after President Obama announced *the end* of the policy.<sup>178</sup> “The new policy has reduced by 64 percent the irregular immigration of Cubans arriving in the U.S., according to the State Department.”<sup>179</sup> It has also reduced the number of individuals arriving on the

<sup>171</sup> Alan Gomez, *Obama Ends ‘Wet Foot, Dry Foot’ Policy for Cubans*, USA TODAY (Jan. 12, 2017 4:31 PM), <https://www.usatoday.com/story/news/world/2017/01/12/obama-ends-wet-foot-dry-foot-policy-cubans/96505172/>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Alan Gomez, *Cubans Rush to U.S. Shores Before Easy Entry Ends*, USA TODAY (July 17, 2015 6:57 PM), <https://www.usatoday.com/story/news/world/2015/07/16/cuba-rafter-wet-foot-dry-foot-adjustment-act/29911763/>.

<sup>175</sup> *See All Things Considered: Cuban-Americans React to Obama Ending Long-Standing ‘Wet Foot, Dry Foot’ Policy*, NPR (Jan. 13, 2017, 4:30 PM), <https://www.npr.org/2017/01/13/509722747/cuban-americans-react-to-obama-ending-longstanding-wet-foot-dry-foot-policy>.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See, e.g.*, Ellen Mitchell, *Cuban Migration Drops After End of ‘Wet Foot, Dry Foot’ Policy*, HILL (Apr. 12, 2017, 5:58 PM), <http://thehill.com/homenews/administration/328585-cuban-migration-drops-after-end-of-wet-foot-dry-foot-policy>.

<sup>179</sup> Gámez Torres, *supra* note 133.



United States' shores by vessel.<sup>180</sup> "In fiscal year 2017, the Coast Guard intercepted 1,468 Cubans at sea, compared to 5,396 in fiscal year 2016."<sup>181</sup> And from October 1, 2017, through December 18, 2017, "the Coast Guard intercepted just 44 Cubans."<sup>182</sup>

Under President Trump, there has been an increase in the number of people that have been deported to Cuba.<sup>183</sup> As of December 9, 2017, "37,218 [Cubans were] facing final deportation orders."<sup>184</sup> This number will continue to increase, as the popular access for legal immigration to the United States was eliminated. Without wet foot-dry foot, Cubans have two available options to achieve legal immigration status in the United States: (1) come to the United States illegally, remain for over one year, and apply for adjustment of status under the Cuban Adjustment Act; or (2) apply for a visa, 20,000 of which are awarded annually, and enter the country legally.<sup>185</sup>

Just months after taking office, President Trump's team reviewed and reversed many of the policy changes implemented by the Obama Administration. President Trump, like with most other matters handled by President Obama, has taken a strong stance against President Obama's advances in normalizing U.S.-Cuba relations.<sup>186</sup> He stated that the deal was "one-sided" and ignored Cuba's numerous human rights violations, which he plans to work to expose.<sup>187</sup> One of the aspects of President Obama's changes that President Trump chose not to undo was the repeal of wet foot-dry foot.<sup>188</sup>

As a result of President Trump's harsh commentary on Cuba, many economists and businesspeople are advising potential investors to "hit pause" on planned ties with the island nation.<sup>189</sup> The Castro regime immediately fired back, in a very strongly-worded statement, that Trump's decisions were "ill-

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Ordoñez & Gámez Torres, *supra* note 131; *Morning Edition: Trump's ICE Deportations Are Up from Obama's Figures, Data Show*, NPR (Jan. 23, 2018, 5:03 AM), <https://www.npr.org/2018/01/23/579884642/trumps-ice-deportations-increase-from-obamas-figures-data-show>.

<sup>184</sup> Gámez Torres, *supra* note 133.

<sup>185</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9 at 1–2.

<sup>186</sup> *See Merica, supra* note 53.

<sup>187</sup> *Id.*

<sup>188</sup> Alicia Cohn, *Trump Will Not Bring Back 'Wet Foot, Dry Foot' Cuba Policy*, HILL (June 15, 2017, 9:00 PM), <http://thehill.com/homenews/administration/338050-trump-will-not-bring-back-wet-foot-dry-foot-cuba-policy>.

<sup>189</sup> *Should U.S. Companies Hit 'Pause' on Doing Business in Cuba?*, KNOWLEDGE@WHARTON (Apr. 20, 2017), <http://knowledge.wharton.upenn.edu/article/why-business-should-hit-pause-on-new-u-s-cuba-ties/>.

advised.”<sup>190</sup> The Cuban government went on to call the policy change a “backward step.”<sup>191</sup> As it has done historically, the Cuban government further stated that the U.S. has returned to its coercive practices, stagnated the Cuban economy, and provoked “international condemnation” of the Cuban nation.<sup>192</sup> Despite this blemish on a seemingly improving relationship, the repatriation of Cuban people from the United States has continued. Without the reinstatement of wet foot-dry foot, “[d]etention or deportation is the new reality for most Cubans who try to enter the United States without visas.”<sup>193</sup>

On November 8, 2017, some of President Trump’s policy changes were implemented.<sup>194</sup> He stated that his reasons for re-implementing the policies in place before President Obama’s changes were to support the freedom of the Cuban people, support those unfairly imprisoned, as well as to protect the United States’ national security and foreign policy interests.<sup>195</sup> A support of the Cuban people and United States policy interests could lead Cuba to return to its old ways and decline to continue honoring any repatriation agreements.

It is evident, given the Cuban government’s response to Trump’s changes, that the Trump Administration will have detrimental effects on the possibility of U.S.-Cuba diplomatic relations.<sup>196</sup> What remains to be seen, in concrete terms, is what effect, if any, the inevitable future deterioration in U.S.-Cuba relations will have on the deportation of Cuban nationals back to the island. It is certain, however, that President Trump’s stance on Cuba will have a negative impact on diplomatic relations. This will undoubtedly impact Cuba’s willingness to repatriate its citizens from the United States, as the Joint Statement makes clear, more than once, that the agreement reached between the two countries is founded on and encouraged by the renewed and “normalized” “bilateral relations.”<sup>197</sup>

Notably, the Trump Administration has not yet announced any plans to sever diplomatic ties with Cuba.<sup>198</sup> For now, diplomatic relations (and

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<sup>190</sup> *Statement by the Revolutionary Government, supra* note 54.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Gámez Torres, *supra* note 133.

<sup>194</sup> *See generally* U.S. DEP’T OF THE TREASURY OFFICE OF FOREIGN ASSETS CONTROL, FREQUENTLY ASKED QUESTIONS RELATED TO CUBA (2017), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_faqs\\_new.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf).

<sup>195</sup> National Security Presidential Memorandum NSPM–5, Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875–76 (June 16, 2017).

<sup>196</sup> *See, e.g.,* Gámez Torres, *supra* note 133.

<sup>197</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, *supra* note 9 at 1–2.

<sup>198</sup> Although the Trump Administration has yet to announce official plans to entirely sever diplomatic relations, as this paper approached publication, the Administration made numerous policy changes that have and will continue to affect the brief upward trend in relations between the two nations.

embassies) will remain open.<sup>199</sup> “Trump said he is keeping the embassy open ‘in the hope that our countries can forge a much stronger and better path.’”<sup>200</sup> So long as the Cuban government continues to see things the same way, this could mean the ongoing steady deportation of Cuban nationals. Alternatively, a decline in relations would likely mean a return of the days where the United States was unable, as a matter of procedure, to deport Cubans back to Cuba.

Because President Trump’s stated reasons for the reversions are namely a regime change and encouraging a democratic government in Cuba, his Administration’s policies and stance on the topic are unlikely to change over time. The Cuban Government indicated in its statement that it believed as much to be true.<sup>201</sup> While President Trump can make changes to the Cuban immigration policies at any time, he cannot repeal the Cuban Adjustment Act. Since the CAA is a law enacted by Congress, a complete change in the unique treatment of Cuban immigrants will require Congressional action.

## VI. CONCLUSION

While the wet foot-dry foot policy was enforced, it was highly controversial. The policy was merely a tool that the United States’ government implemented in light of the fact that it had no mechanism by

During a speech in November of 2018 at FIU, President Trump’s National Security Adviser, John Bolton, promised tougher sanctions on Cuba stating that the country represented “the perils of poisonous ideologies left unchecked.” Nicole Gaouette, *Bolton Praises Brazil’s Far-Right Leader, Slams Latin America’s ‘Troika of Tyranny’*, CNN (Nov. 1, 2018, 4:39 PM), <https://www.cnn.com/2018/11/01/politics/bolton-latam-troika-of-tyranny/index.html>.

The Administration followed through on that promise by announcing its unprecedented enforcement of a “controversial provision of the decades-old trade embargo on Cuba.” Zachary Cohen & Jennifer Hansler, *Trump Expected to Become First President to Target Cuban with this Controversial Policy*, CNN (Apr. 16, 2019, 8:52 PM), <https://www.cnn.com/2019/04/16/politics/us-cuba-title-iii-venezuela/index.html>. These plans have raised international concerns, especially from the European Union, as enforcement will result in issues for companies with investments in Cuba and could increase litigation against these companies. *Id.* During the announcement, Bolton also blamed the Cuban government for many of the problems that Venezuela is facing and stated that he hoped implementation of the controversial provision would help Cuban-Americans obtain justice at the expense of the Cuban government. Jennifer Hansler & Zachary Cohen, *Trump Administration Targets So-Called ‘Troika of Tyranny’ with Wave of New Sanctions*, CNN (Apr. 17, 2019, 4:30 PM), <https://www.cnn.com/2019/04/17/politics/pompeo-us-cuba-enforcement/index.html>.

Most recently, Bolton announced that travel to Cuba and investments in Cuba would be further restricted. Nora Gámez Torres, *U.S. Restricts Travel, Remittances to Cuba as Part of a New Policy Under Trump*, MIAMI HERALD (Apr. 17, 2019, 1:00 PM), <https://www.miamiherald.com/news/nation-world/americas/cuba/article229341009.html>. This policy change is intended to reverse “the disastrous Obama-era policies, and finally end the glamorization of socialism and communism.” *See id.*

<sup>199</sup> *See* Merica, *supra* note 53.

<sup>200</sup> *Id.*

<sup>201</sup> *Statement by the Revolutionary Government, supra* note 54.

which it could deport Cuban nationals. It was a legal fiction created by the Clinton Administration to deal with the reality that the United States was unable to send Cuban immigrants back to Cuba once they arrived here. Because of that, the United States turned a negative situation into a positive one by purporting that it was being generous to Cuban immigrants and choosing to let them stay. The truth of the matter is that the Clinton Administration had no choice because the Cuban government refused to cooperate and repatriate its own citizens. As such, the United States was left with no alternative but to implement the unprecedented policy of wet foot-dry foot.

Additionally, despite President Obama's hope that ending wet foot-dry foot would mean "treating Cuban migrants the same way we treat migrants from other countries,"<sup>202</sup> it still remains true today that Cuban immigrants are treated differently than immigrants from any other nation. Despite the repeal of the wet foot-dry foot policy and the establishment of a repatriation agreement between Cuba and the United States, the Cuban Adjustment Act is still in place. The CAA puts Cubans on a fast track to United States citizenship. So long as this is the case, relations between Cuba and the United States will remain strained, and the repatriation arrangement will be at risk.

Further adding to the strain in relations and endangering the repatriation agreement is President Trump's rhetoric and actions with regard to Cuban policy. The United States has already seen a reversion in some aspects of the policies toward Cuba. If these changes continue, the Cuban government will surely revert to the days of refusing anyone the United States seeks to repatriate. This could mean the return of wet foot-dry foot or some other similar program that the United States will be forced to institute to justify its inability to return Cuban citizens to the island nation.

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<sup>202</sup> *Statement by the President on Cuban Immigration Policy, supra* note 43.