

June 2001

The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should be Changed so that Cuban Immigrants are Treated Similarly to Other Immigrants

Read Sawczyn

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

Recommended Citation

Sawczyn, Read (2001) "The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should be Changed so that Cuban Immigrants are Treated Similarly to Other Immigrants," *Florida Journal of International Law*. Vol. 13: Iss. 3, Article 5. Available at: <https://scholarship.law.ufl.edu/fjil/vol13/iss3/5>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

**THE UNITED STATES IMMIGRATION POLICY TOWARD CUBA
VIOLATES ESTABLISHED MARITIME POLICY, IT DOES NOT
CURTAIL ILLEGAL IMMIGRATION, AND THUS SHOULD BE
CHANGED SO THAT CUBAN IMMIGRANTS ARE TREATED
SIMILARLY TO OTHER IMMIGRANTS**

*Read Sawczyn**

I.	INTRODUCTION	344
	A. <i>Cuban Plane Crash off of Key West</i>	344
	B. <i>Elian Gonzalez Rescue</i>	345
	C. <i>Issues Discussed</i>	346
II.	BACKGROUND	346
	A. <i>United States Immigration Policy Towards Cubans</i>	346
	B. <i>United States Policy Towards its Territorial Sea and the High Seas</i>	349
III.	ANALYSIS	350
	A. <i>Maritime Policies</i>	350
	1. Territorial Sea	350
	2. High Seas	352
	B. <i>Unnecessary Costs and Policy Problems Associated With Special Treatment of Cuban Refugees</i>	353
	1. Problems with Hijacking and Piracy	354
	2. United States Coast Guard's Problematic Enforcement of the New Policy	356
	3. Increased Immigration Costs	357
	4. Fading Foreign Policy Benefit	357
	C. <i>Similar Treatment Would Not Unduly Harm Cuban Immigrants</i>	358
	D. <i>Practical Problems</i>	358
IV.	CONCLUSION	360

* This Note shared the award for Best Note Fall 2001. I would like to thank Professor Berta Hernández-Truyol for all of her support and help in writing this Note, Christina Abraham for her motivation, and my parents, Ken and Marcia Sawczyn for all of their support in everything I do. I would also like to thank the members of FJIL for all of their hard work and dedication in preparing my Note for publication.

I. INTRODUCTION

A. Cuban Plane Crash off of Key West

Cuban-Americans characterize the recent use of a vintage crop duster to flee Cuba as a daring escape for freedom, while Cuban Authorities are calling it an act of "piracy".¹ The flight carrying ten passengers left Cuba bound for the United States on September 22, 2000.² Unfortunately, the pilot was unable to locate the United States, and air traffic controllers in Havana refused to provide a Key West or Miami radio frequency.³ Shortly before the plane ran out of fuel, the pilot spotted a Panamanian merchant ship.⁴ The pilot circled over the ship to get the crew's attention before crashing into the choppy Gulf of Mexico, 285 miles southwest of Key West.⁵

It took the ship forty-five minutes to rescue the nine survivors because of the rough seas caused by Tropical Storm Helene.⁶ Shortly after the rescue, one of the survivors was transferred to a hospital.⁷ The next day, the U.S. Coast Guard brought the other eight survivors to Key West.⁸ Normally, the U.S. Coast Guard is required to return Cuban refugees interdicted at sea to Cuba, but due to their injuries, the U.S. Coast Guard brought them to the United States for treatment.⁹

When the Cubans arrived in the United States, the Immigration and Naturalization Service interviewed them and announced that they would be allowed to apply for residency in a year.¹⁰ Cuban-Americans called the decision to allow the survivors to stay in the United States a victory against Fidel Castro and his regime in Cuba.¹¹ To the contrary, Cuban

1. David Cazares & Jose Dante Parra Herrera, *Exile Leaders Taking New Tack; Cuban Groups Turn to Lobbying in Refugee Case*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Sept. 24, 2000, at 1B.

2. *Survivors of Cuban Plane Crash Describe Harrowing Trip*, DESERET NEWS (Salt Lake City, Ut.), Sept. 24, 2000, at A15.

3. *Id.*

4. *Cubans Had Faith They'd Make It, All but 1 Survive Plane Crash in Gulf*, FLA. TIMES-UNION, Sept. 24, 2000, at A24.

5. *Survivors of Cuban Plane Crash*, *supra* note 2, at A15.

6. *Id.*

7. Tony Karon, *Crashed Cubans Have an Inalienable Right to Stay*, TIME (Sept. 25, 2000), available at <http://www.time.com/time/nation/article/0,8599,55500,00.html>.

8. *Id.*

9. Tony Karon, *From the Folks Who Brought You Elian, a Sequel*, TIME (Sept. 25, 2000), available at <http://www.time.com/time/nation/article/0,8599,55266,00.html>.

10. *See Cuba Rally Charges U.S. 'Complicity'; Immigration Policy Blamed for Air Crash*, CHI. TRI., Sept. 26, 2000, at 9.

11. *See Cazares & Herrera*, *supra* note 1, at 1B.

authorities raged over the United States immigration policy because it allowed persons they believed to be involved in air piracy to remain, without repercussions, in the United States.¹²

B. *Elian Gonzalez Rescue*

Elian Gonzalez was plucked from the Florida Straits on November 25, 1999 after clinging to an inner tube for two days.¹³ His mother, stepfather, and ten other people accompanied him in a seventeen-foot aluminum boat.¹⁴ Dreadfully, both his mother and stepfather died along with nine others.¹⁵ After being lashed onto an inner tube for two days, Elian and two others were spotted by an American fishing boat and later brought to the United States by the U.S. Coast Guard.¹⁶ Later, Elian was legally paroled into the custody of his great uncle, Lazaro, under the Cuban Adjustment Act of 1966.¹⁷ This would not pose a problem except his biological father, Juan Miguel, who resides in Cuba and works as a hotel doorman, demanded his son's return to Cuba, claiming that the boy's mother, Elizabet, kidnapped him.¹⁸

Attorney General Janet Reno determined that Elian's father should have custody of the boy.¹⁹ Upset with this decision, Lazaro filed a federal lawsuit challenging Reno's decision.²⁰ This action forced Juan Miguel to travel to the United States to exert custody over his son.²¹ Upon the exhaustion of legal appeals granted to Lazaro and the forcible removal of Elian from his care, Elian returned to Cuba with his father.²²

This incident highlights the same tensions between the United States and Cuba, as does the Plane Crash. These tensions involve Cuba's belief that the United States has contradictory policies. For example, in some cases the United States condones and rewards Cuban refugees' use of air piracy, while in other cases the Cuban refugees are returned to Cuba.

12. *See id.*; Karon, *supra* note 7.

13. David Gonzalez, *Cuban Government Enters Fight for Boy*, N.Y. TIMES, Nov. 30, 1999, at A16.

14. *Id.*

15. Joshua Cooper Ramo, Tim Padgett & Dolly Mascarenas, *A Big Battle for a Little Boy*, TIME (Jan. 17, 2000) at <http://www.britannica.com/bcom/magazine/article/0,5744,317609,00.html>.

16. *Id.*

17. Rick Bragg, *Cuban Boy Is Smiling, But No One Else Is*, N.Y. TIMES, Dec. 4, 1999, at A10.

18. Gonzalez, *supra* note 13, at A16.

19. Mike Dornig, *Elian Goes Home; High Court Rejects Appeal, Ends Custody Fight*, CHI. TRI., June 29, 2000, at 1.

20. *Id.*

21. *See id.*

22. *Id.*

Therefore, no clear stance exists as to what methods are acceptable means of immigration and which are not.

C. *Issues Discussed*

This note will explain the history of the United States' relationship with Cuba and the changes that have occurred beginning with the Cuban Adjustment Act of 1966. Next, it will show that these changes involve policies that violate established maritime laws.²³ Furthermore, it will demonstrate that there are better remedies for this situation that would have deterred more illegal immigrants than the present policy. The recommended course of action will also treat Cubans similarly to other United States asylum seekers. Finally, this note will show that treating Cubans like other immigrants will not unduly harm Cuban immigrants because the United States' relationship with Cuba has evolved due to changes in the international climate as a whole.

II. BACKGROUND

A. *United States Immigration Policy Towards Cubans*

Over the years, many Cubans have traveled to the United States on anything that floats for a chance at a better life.²⁴ One reason for these daring journeys is the United States' immigration policy directed specifically toward Cubans.²⁵ This policy, established in the Cuban Adjustment Act of 1966 (Cuban Adjustment Act), allows Cubans to declare asylum upon reaching American soil.²⁶ Mainly, the Act does not

23. This Note will not deal with the smuggling of Cubans to the United States.

24. Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329, 329 (1999); see also S.L. Price, *What Price Freedom?*, SPORTS ILLUSTRATED, Mar. 30, 1998, at 42 (explaining that Cuban baseball players are rafting to the United States for a chance to earn millions of dollars playing major league baseball).

25. See Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 239 (1998).

26. See Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 [codified as amended at 8 U.S.C.A. §1255 (West 1999)]:

That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act [subsec. (c) of this section], the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is

require Cubans to prove refugee status to remain in the United States.²⁷ The Act was created to further two United States foreign policy goals in dealing with Castro. Those objectives were “(a) to destabilize Castro’s government by draining it of vital human resources (such as physicians, teachers, and technicians); and (b) to discredit the regime through encouraging the flight of thousands from a ‘Communist’ to a ‘free’ country.”²⁸ Although many of the first refugees came for political reasons, those who emigrated from Cuba after 1980 did so for economic reasons.²⁹ Whereas the immigrants’ reasons for leaving Cuba changed, United States policy toward Cuban immigrants was not significantly altered until August 1994.³⁰

On August 8, 1994, Fidel Castro announced that the Cuban government would not forcibly prevent Cuban emigration by boat.³¹ Consequently, approximately 31,500 Cubans fled Cuba between August 7, 1994 and

admissible to the United States for permanent residence.

27. See Refugee Act of 1980, Pub. L. NO. 96-212, 94 Stat. 102 (1980):

The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 40-41 (1999). Cuban refugee is a legal fiction since Cubans are not required, under the Cuban Adjustment Act, to prove refugee status to remain in the United States. *Id.* Thus the term “Cuban refugee” will be used to refer to a Cuban who has left Cuba in hopes of obtaining asylum in the United States. *Id.*

28. FELIX ROBERTO MASUD-PILOTO, WITH OPEN ARMS 1 (1988); see also Matthew A. Pingeton, *supra* note 24, at 329.

29. See MASUD-PILOTO, *supra* note 28, at 2, 5; JESÚS ARBOLEYA, HAVANA-MIAMI THE US-CUBA MIGRATION CONFLICT 10 (Mary Todd trans., 1996).

30. See 140 CONG. REC. H8601-04 (1994); see also Arboleya, *supra* note 29, at 58; Cuban Am. Bar Ass’n, Inc. v. Christopher, 43 F.3d 1412, 1417 (11th Cir. 1995).

31. *Cuban Am. Bar Ass’n, Inc.*, 43 F.3d at 1417.

September 14, 1994.³² On August 11, 1994, President Clinton declared that Cubans interdicted at sea would be returned to the American naval base in Guantanamo Bay, Cuba, while those that made it to United States Soil would be granted asylum.³³

Shortly after sending the Cubans to Guantanamo, the United States announced that four categories of refugees at Guantanamo would be paroled into the United States.³⁴ Thereafter, the Attorney General allowed all Cubans remaining at Guantanamo, except criminals, to be paroled into the United States.³⁵ Due to the unique status Cuban refugees have received, those that make it to United States soil are allowed to remain in the United States, while those interdicted at sea are returned to Cuba. Thus, this policy has been coined "Wet Feet, Dry Feet."³⁶ Fortunately, the timing of this policy allowed the United States to prevent another exodus like that of Mariel in 1980.³⁷

Upset at the change in policy, Cubans at the American naval base sued the United States stating that the American naval base was a United States Territory for purposes of the Act.³⁸ It was determined that Cubans must

32. Carmelo Mesa-Lago, *Cuba's Raft Exodus of 1994: Causes, Settlement, Effects, and Future*, 12 THE NORTH-SOUTH AGENDA PAPERS, April 1995, at 9.

33. *Id.* at 1; 140 CONG. REC. H8601-04 (1994):

[T]here is nothing in the Cuban Adjustment act which prevents interdiction of Cubans as we do with Haitians. I think it also should be considered in interdicting Cubans that they be landed in places other than the United States to avoid triggering the Cuban Adjustment Act as we await other administration decisions on how to deal with this immigration emergency.

34. Cuba: U.S. Response to the 1994 Cuban Migration Crisis, United States General Accounting Office/National Security and International Affairs Division 95-211, at 4 (Sept. 1995).

On October 14, 1994, President Clinton announced that parole would be granted to those over age 70, unaccompanied minors, or those with serious medical conditions and their care givers. On December 2, 1994, the Attorney General announced that parole would be considered on a case-by-case basis for children and their immediate families who would be adversely affected by long-term presence in safe havens.

35. *See id.*

36. 140 CONG. REC. H8601-04 (1994); Tim Padgett, *War Over a Poster Boy*, TIME, Dec. 13, 1999, at 68.

37. Mesa-Lago, *supra* note 32, at 9.

38. *Cuban Am. Bar Ass'n, Inc.*, 43 F.3d at 1425-26.

actually be present in the United States, and thus their interdiction at sea and deliverance to another country does not trigger the Act.³⁹

The most recent agreement between the United States and Cuba continues the interdiction policy, but no longer takes those interdicted to Guantanamo, instead it returns them to Cuba.⁴⁰ This policy is designed to support a safe, legal migration from Cuba to the United States.⁴¹ Despite these changes, the Cuban government still blames the rafting deaths of Cubans on the semi-open door policy the United States extends to Cuban refugees. Consequently, this policy continues to fuel tensions between Cuba and the United States.⁴²

B. United States Policy Towards its Territorial Sea and the High Seas

Historically, a country's sovereignty does not end at its coastline.⁴³ A state's sovereignty was originally figured based on the distance that the state could defend from land, but later that distance was normalized to 3 nautical miles from shore.⁴⁴ This sovereignty shall be indistinguishable from that which a state has over its soil, except towards innocent passage.⁴⁵ In 1988, President Reagan increased the United States territorial sea from 3 nautical miles to 12 nautical miles.⁴⁶

Contrary to the territorial sea are the high seas.⁴⁷ This is because the high seas are free to be used by any person of any state even if that state is land locked.⁴⁸ Some of the freedoms involved are the freedom of navigation, freedom of overflight, freedom of fishing, and freedom of scientific research.⁴⁹ This doctrine of freedom of the high seas has been

39. *Id.*

40. J. Communiqué between U.S. and the Republic of Cuba, Sept. 9, 1994, 71 INTERP. REL. 1236 (Sept. 12, 1994), 1994 WL 621517 (treaty); see also J. Statement on Normalizing Migration between Cuba and the United States, May 2, 1995, 35 I.L.M. 328 (1996).

41. Mesa-Lago, *supra* note 32, at 13.

42. Gonzalez, *supra* note 13, at A16.

43. Snyder v. Motorist Mut. Ins. Co., 206 N.E.2d 227, 229 (Ohio Ct. App. 1965); THOMAS A. CLINGAN, JR., THE LAW OF THE SEA, OCEAN LAW AND POLICY 81-84 (1994).

44. Snyder, *supra* note 43, at 229 ("Grotius declared, in 'The Law of War and Peace,' Book II, Chapter 3, Sections 13-14, that territorial rights extended over as much of the sea as could be defended from the shore.")

45. CLINGAN, *supra* note 43, at 81-84.

46. Proclamation No. 5928, 54 Fed. Reg. 777 (1988).

47. CLINGAN, *supra* note 43, at 10-18, 81-84.

48. *Id.* at 10-18.

49. See RESTATEMENT (THIRD) OF THE LAW, The Foreign Relations Law of the United States, §521 (American Law Institute 1987).

recognized since Roman times.⁵⁰ Today, all countries in the world acknowledge this doctrine.⁵¹

III. ANALYSIS

A. Maritime Policies

The original writing of the Cuban Adjustment Act of 1966 did not violate maritime policy because it allowed Cubans who reached the United States to declare asylum without mentioning any type of interdiction policy.⁵² In 1994, President Clinton declared that Cubans interdicted at sea would be returned to Cuba.⁵³ The subsequent interdiction of Cubans by the U.S. Coast Guard violated established maritime policy.

1. Territorial Sea

The United States has recognized sovereignty over its territorial sea long before the enactment of the "Wet Feet, Dry Feet" policy.⁵⁴ Since sovereignty over the sea is the same as that over land, it would appear that the "Wet Feet, Dry Feet" policy would have to determine whether Cuban refugees were in the territorial sea or on the high seas. If the policy were to acknowledge the territorial sea, then Cuban refugees in the territorial sea would be treated as if they reached the United States because maritime policy acknowledges the same dominion over both the territorial sea and land, with the exception of innocent passage. Therefore the United States should change this policy so it no longer violates doctrines associated with the territorial sea.

In furtherance of this argument, the Eleventh Circuit has held that the territorial sea functions as a border for purposes of searches and seizures.⁵⁵ This recognition of the territorial sea goes so far as to implicate a person's Fourth Amendment rights.⁵⁶ Additionally, the Fourth Circuit Court held that entry into the port and harbor of Baltimore was sufficient to constitute entry into the United States.⁵⁷ Based on these cases, it would appear that

50. CLINGAN, *supra* note 43, at 10-11.

51. RESTATEMENT (THIRD) OF THE LAW, *supra* note 49, at 78-83.

52. Cuban Adjustment Act, *supra* note 26.

53. J. Communiqué between U.S. & the Republic of Cuba, *supra* note 40.

54. RESTATEMENT (THIRD) OF THE LAW, *supra* note 49, at 35-43; *see also* Cuban Adjustment Act, *supra* note 26.

55. *United States v. Hidalgo-Gato*, 703 F.2d 1267, 1273 (11th Cir. 1983) ("Given the practical difficulties in maritime law enforcement and other considerations, we think it is wise to consider the contiguous zone the functional equivalent of the border."). *Id.*

56. *Hidalgo-Gato*, 703 F.2d at 1273; *see also* *United States v. Ramsey*, 431 U.S. 606 (1977).

57. *Lazarescu v. United States*, 199 F.2d 898, 900-01 (4th Cir. 1952).

Cubans who reach the territorial sea have entered into the United States. Thus, the U.S. Coast Guard's interdiction of Cubans in the territorial sea violates these decisions.

Problematically, not all courts agree that the territorial sea should be considered a border for the purpose of immigration.⁵⁸ For instance, according to the Second Circuit in *Zhang v. Slattery*, an immigrant has not entered the United States until he has touched the soil.⁵⁹ Although this case involves immigration by sea, its precedent involves an airport as its boundary.⁶⁰ The precedent case of *Correa v. Thornburgh*, established three criteria to effectuate entry into the United States: "(1) a crossing into the territorial limits of the United States, i.e. physical presence; (2)(a) an inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint."⁶¹ More recently though, Congress passed a statute that supercedes the case law. Now, "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."⁶² Both cases are distinguishable from Cuban refugees in the territorial sea because the territorial sea is the territorial limit of the United States⁶³ and Cuban refugees within it should be entitled to remain in the United States because they are "present" in the United States based on maritime policies.⁶⁴ Their presence in the United States is all that is required to activate the Cuban Adjustment Act.⁶⁵

Furthermore, Cuban rafters in the territorial sea should not be interdicted by the U.S. Coast Guard because the United States has no right to restrict innocent passage unless it affects national security.⁶⁶ During the Cold War, it could have been argued that Cuba was a military threat, but

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

59. *Id.*

60. *Correa v. Thornburgh*, 901 F.2d 1166, 1168 (2d Cir. 1990).

61. *Id.* at 1171.

62. Immigration and Nationality Act §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i) (1999).

63. RESTATEMENT (THIRD) OF THE LAW, *supra* note 49, at 35-43.

64. *Id.*

65. Hughes, *supra* note 27, at 40-41.

66. RESTATEMENT (THIRD) OF THE LAW, *supra* note 49, at 44. "Passage Through Territorial Sea, Straits, and Archipelagic Waters.

(a) Ships of all states have the right of innocent passage through the territorial sea of any coastal state.

(b) Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state."

with the demise of the Soviet Union this threat dwindled.⁶⁷ Even if this threat remained, it would be difficult to argue that the Cubans who rafted to the United States were doing so for any reason other than to escape the reign of Castro. They certainly were not risking their lives on rafts to promote Castro's regime over Cuba in the United States.

The United Nations Security Council considers transborder refugee flow a threat international peace and security.⁶⁸ Conveniently, this policy was solely designed to warrant the United Nations humanitarian interventions since Chapter VII of the United Nations Charter states they may not intervene unless international peace and security are threatened.⁶⁹ For example, in 1994 the United States wanted to restore democracy to Haiti by ousting Raoul Cedras from power.⁷⁰ To do this the United States used the substantial refugee flow as reason to call on United Nations' military intervention.⁷¹ However, it was known that the majority of the refugee flow was to the United States and would not effect international peace and security.⁷²

Due to the Security Council's use of this doctrine for intervention purposes only, it would appear that neither the United States nor the United Nations believes Cuban rafters actually affect international peace and security.⁷³ In addition, the United States has weathered two major exoduses of Cuban refugees since the inception of the Act, both of which minutely affected international peace and security.⁷⁴ Therefore, Cuban refugees in the territorial sea are there for no other reason than innocent passage and thus cannot be interdicted by the U.S. Coast Guard.

2. High Seas

When discussing the law of the sea, the doctrine of freedom on the high seas is the most fundamental.⁷⁵ This doctrine specifically recognizes the freedom of navigation on the high seas.⁷⁶ Therefore, if Cuban refugees

67. C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception To The Gatt And The Political Question Doctrine*, 61 U. PITT. L. REV. 287, 312 (1999).

68. *Id.* at 313-15; see also S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d Mtg. at 32, U.N. Doc S/Res/688 (1991).

69. U.N. CHARTER art. 39; Felicia Swindells, Note, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 & 55 of the U.N. Charter*, 20 FORDHAM INT'L L.J. 1878, 1898-1900, 1916 (1997).

70. Piczak, *supra* note 67, at 314.

71. *Id.*; S.C. Res. 940, U.N. SCOR, 3413th Mtg. at 51, U.N. Doc. S/Res/50 (1994).

72. Piczak, *supra* note 67, at 314.

73. *Id.* at 315.

74. *Id.*

75. CLINGAN, *supra* note 43, at 10.

76. RESTATEMENTS (THIRD) OF THE LAW, *supra* note 49, at 78.

rafting on the high seas are found to be doing nothing other than navigating, they cannot be interdicted because they are only exercising their freedom of navigation.

This argument is difficult to support because Cuban rafters are not just navigating the high seas. They have a purpose, and that purpose is entry into the United States. Although they are on the high seas, the U.S. Coast Guard receives great deference from 14 U.S.C. § 89 to enforce United States laws.⁷⁷ Although navigation is legal, the United States and Cuba have agreed that the United States will not allow Cuban refugees, who pursue illegal means to get to the United States, to remain in the United States.⁷⁸ Therefore, unless the law is changed, it appears that Cubans shall be able to be interdicted on the high seas.

B. *Unnecessary Costs And Policy Problems Associated With Special Treatment Of Cuban Refugees*

The United States policy of allowing Cuban refugees that touch United States soil to receive asylum⁷⁹ will never be fully balanced by only allowing those Cubans that are interdicted at sea to be sent back to Cuba.⁸⁰ As long as the possibility remains for Cubans to be granted asylum just by touching United States soil, Cubans will continue to endeavor to elude the

'Freedom of High Seas':

- (1) The high seas are open and free to all states, whether coastal or land-locked.
- (2) Freedom of high seas comprises, *inter alia*:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom of fishing;
 - (d) freedom to lay submarine cables and pipelines;
 - (e) freedom to construct artificial islands, installations, and structures; and
 - (f) freedom of scientific research.
- (3) These freedoms must be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas.

77. 14 U.S.C. §89 (2000). "(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." *Id.*

78. J. Communiqué between U.S. & the Republic of Cuba, *supra* note 40.

79. See Cuban Adjustment Act, *supra* note 26.

80. J. Statement on Normalizing Migration between Cuba and the United States, *supra* note

U.S. Coast Guard in hopes of arriving on United States soil. Therefore the United States must change this policy so that it more resembles the immigration policies the United States has towards immigrants from other nations.

Fueling the arbitrariness of this policy is the possibility that even if the U.S. Coast Guard interdicts a Cuban asylum seeker he will still be brought to the United States instead of being returned to Cuba.⁸¹ In the recent case of a Cuban plane crash and in the Elian Gonzalez fiasco, the U.S. Coast Guard brought both groups of Cuban refugees to the United States.⁸² All nine survivors from the plane crash have been granted asylum. While, had it not been for the fact that Elian Gonzalez was a minor, he too would have been granted asylum.⁸³ These cases are not the only ones that illuminate this problem.⁸⁴ This policy creates confusion. Some even argue that it encourages hijacking and piracy.⁸⁵

1. Problems With Hijacking And Piracy

To explain, prior to 1994, the United States regularly granted refugee status to Cubans who hijacked airplanes and sea-going vessels. Some of these vessels included tugboats, military aircraft, crop-dusting planes, patrol boats and commercial aircraft.⁸⁶ Not only was this allowed, but in rare circumstances, it was even celebrated.⁸⁷ For example, the most unbelievable example involved a Cuban Air Force pilot, Orestes Lorenzo, who flew a MIG fighter plane to Florida and later returned to Cuba in a rented plane to retrieve his family.⁸⁸ Another example involves the United States granting asylum to a man accused of hijacking a Cuban government boat and killing a naval officer.⁸⁹

Since 1994, the United States and Cuba have agreed that they will prevent entry into the United States by anyone who uses violence or forcibly takes an airplane or vessel.⁹⁰ A notable case involves six Cubans

81. Karon, *supra* note 7; see also Ramo, Padgett & Mascarenas, *supra* note 15.

82. Karon, *supra* note 7; Ramo, Padgett & Mascarenas, *supra* note 15.

83. Gonzalez v. Reno, 212 F.3d 1338, 1347 (11th Cir. 2000); Karon, *supra* note 7.

84. *Refugees Return to Cuba After a Violent Standoff*, N.Y. TIMES, May 31, 2000, at A21; see also *14 Cubans Found Adrift After 10 Days at Sea*, N.Y. TIMES, May 6, 2000, at A16.

85. See Hughes, *supra* note 27, at 64-65.

86. Larry Rohter, *Cuba Gives Long Prison Terms to Six Who Tried to Flee to U.S.*, N.Y. TIMES, Feb. 13, 1997, at A10; Deborah Ramirez & Nancy San Martin, *Rules Require Return of Hijacking Suspects; White House: Cuban Pair Outside Of U.S. Jurisdiction*, SUN-SENTINEL (Ft. Lauderdale, Fla.), October 1, 1997, at 4B; Cazares & Herrera, *supra* note 1, at 1B.

87. See Peter Michelmores, *Rendezvous in Cuba*, READER'S DIG., May 1993, at 67-73.

88. See *id.*; Rohter, *supra* note 86, at A10.

89. *Cuban Hijacker Released*, N.Y. TIMES, April 20, 1995, at A20.

90. J. Communiqué between U.S. & the Republic of Cuba, *supra* note 40. "The two governments will take effective measures in every way they possibly can to oppose and prevent the

who forcibly hijacked a tugboat.⁹¹ This group was interdicted by the U.S. Coast Guard and returned to Cuba where they were tried and sentenced to prison terms ranging from 8 to 20 years.⁹² In a similar situation, two Cubans hijacked a Cuban patrol boat using AK-47 rifles and a knife.⁹³ Since they were later interdicted at sea by the U.S. Coast Guard they were returned to Cuba.⁹⁴ The United States claims that international rules require it to return the men to Cuba because they never entered the United States.⁹⁵ The United States government further defended this position by stating that entering the United States through the use of violence forfeits a person's right to asylum.⁹⁶

Beyond the agreements between the United States and Cuba to prevent forcible takings of airplanes or vessels, the United States has laws against providing asylum to those who were involved in "terrorist activities" before, or as a part of, gaining access to the United States.⁹⁷ Not only can an alien that was involved in "terrorist activities" not apply for asylum, but they are also deportable for that activity or for having "potentially serious adverse foreign policy consequences for the United States."⁹⁸

Although these bilateral treaties have been made, it appears that the United States complies only when it is convenient. Although the Cuban flight that crashed off of Key West had the makings of "terrorist activities", because it involved a hijacking, the surviving passengers were all granted asylum in the United States.⁹⁹ Even if this flight's hijacking was not a "terrorist activity", it appeared to have violated the United States air piracy statute.¹⁰⁰ Cuban authorities stated that "the act of 'piracy' would deprive the island's people of a plane that fumigated fields of rice, a basic staple."¹⁰¹ Thus, those involved should at least be sanctioned according to the statute if not excluded from the United States.¹⁰²

use of violence by any persons seeking to reach, or who arrive in, the United States from Cuba by forcible diversions of aircraft and vessels." *Id.*

91. Rohter, *supra* note 86, at A10.

92. *See id.*

93. Ramirez, *supra* note 86, at 4B.

94. *See id.*

95. *Id.*

96. Larry Dougherty, *Cubans Back In Court For Deportation Hearing*, ST. PETERSBURG TIMES, Oct. 20, 1998, at 3B.

97. 8 U.S.C. §1158(b)(2)(A)(v) (2000); 8 U.S.C. 1182(a)(3)(B)(i) (2000).

98. 8 U.S.C. §1227(a)(4) (2000).

99. 8 U.S.C. §1182(a)(3)(B)(i) (2000); Karon, *supra* note 7.

100. 49 U.S.C. § 46502 (2000).

101. Cazares & Herrera, *supra* note 1, at 1B.

102. 49 U.S.C. § 46502 (2000).

2. United States Coast Guard's Problematic Enforcement of the New Policy

Not only does the "Wet Feet, Dry Feet" policy ineffectively deter illegal Cuban refugees, it also places the U.S. Coast Guard in a conundrum. The U.S. Coast Guard has been burdened with the duty of interdicting Cubans before they touch American soil because, once a Cuban touches American soil, he can apply for asylum.¹⁰³ This policy has forced the U.S. Coast Guard into dangerous situations. To explain, earlier this year, the U.S. Coast Guard interdicted Cuban refugees, but not before the Cuban refugees threw rocks and tools at them.¹⁰⁴ Not only is this policy dangerous for the U.S. Coast Guard, but it also brings them unfair media coverage.

In the incident noted above, the U.S. Coast Guard only coerced the refugees to board the U.S. Coast Guard cutter after using pepper spray on them.¹⁰⁵ Surprisingly, one year prior when the U.S. Coast Guard attempted to prevent Cubans from reaching shore by using fire hoses and pepper spray they were reprimanded.¹⁰⁶ Ironically, this reprimand came from President Clinton, the same person that made the policy what it is today.¹⁰⁷ Thus, he is the reason the U.S. Coast Guard is in this unsavory position in the first place. Despite the U.S. Coast Guard's efforts to follow orders, all six refugees were granted asylum, due to the public outrage of the Miami exile community.¹⁰⁸

The use of the "Wet Feet, Dry Feet" policy would appear to benefit Cubans, but the fact that Cuban refugee cases are heard by Immigration Officers on U.S. Coast Guard cutters¹⁰⁹ instead of on United States soil actually prevents Cubans from receiving the fairest opportunity to plea their case. From a practical standpoint, it would seem that it would be easier to gain asylum from a country that one is physically in, instead of trying to gain asylum into a country while on the high seas. Not only does this policy restrict Cubans from entering the United States, but its automatic repatriation prevents Cubans from obtaining refuge in another country.¹¹⁰ Also, some argue that it will be impossible to prevent Castro from harassing those Cubans who are repatriated to Cuba.¹¹¹

103. Cuban Adjustment Act, *supra* note 26; 140 CONG. REC. H8601-04 (1994).

104. *Refugees Return to Cuba*, *supra* note 84, at A21.

105. *Id.*

106. *Clinton Condemns Coast Guard Action on Cubans*, N.Y. TIMES, July 14, 1999, at A20.

107. *Id.*; *Cuban Am. Bar Ass'n, Inc.*, 43 F.3d at 1417.

108. *Clinton Condemns Coast Guard*, *supra* note 106, at A20.

109. *Cubans Found at Sea May Test New U.S. Policy*, N.Y. TIMES, May 6, 1995, at 3(L).

110. Suzanne Gluck, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865, 886 (1993).

111. *The Clinton Administration's Reversal Of U.S. Immigration Policy Toward Cuba:*

The Cuban Adjustment Act is the sole reason why Cubans are not brought to the United States.¹¹² It appears that just being “present” in the United States allows Cubans to remain in the United States since they do not have to prove refugee status.¹¹³ For all other aliens, presence is just one of a list of criteria they must fulfill to be admitted into the United States.¹¹⁴ Because of this policy, the United States holds the refugee hearings on a U.S. Coast Guard cutter instead of in the United States.¹¹⁵ Thus, the United States policy toward Cuban asylum seekers must be changed to allow for a fairer hearing process.

3. Increased Immigration Costs

In addition to the reasons stated above, the special treatment afforded Cubans has a cost. Had the United States made the policy toward Cuban immigration the same as that toward immigrants from other countries, money could have been saved through the avoidance of exoduses. The 1994 exodus cost the United States in excess of \$497 million, which are incremental costs that would not have been incurred had it not been for the exodus.¹¹⁶ The Defense Department mainly incurred these costs because they were in charge of the safe haven program at Guantanamo.¹¹⁷ These costs would have been greater had the United States not permitted the remaining Cuban refugees at the safe haven to be paroled into the United States.¹¹⁸ The remaining costs were for the U.S. Coast Guard, the State Department, the Immigration and Naturalization Services, and the Community Relation Service.¹¹⁹

4. Fading Foreign Policy Benefit

Finally, the United States no longer has a concrete foreign policy benefit for allowing Cuban refugees to be treated differently than other immigrants, due to the fall of communism.¹²⁰ While the Soviet Union existed, the immigration of a Cuban refugee to the United States

Hearing before the Subcomm. on the W. Hemisphere of the Comm. on Int'l Relations, 104th Cong. 11 (1995) (statement of Benjamin Gilman, Chairman, International Relations Comm.).

112. Cuban Adjustment Act, *supra* note 26.

113. Hughes, *supra* note 27, at 40-41.

114. Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (1999); Refugee Act of 1980, Pub. L. NO. 96-212, 94 Stat. 102 (1980); 8 U.S.C. § 1158 (a).

115. *Cubans Found at Sea May Test New U.S. Policy*, *supra* note 109, at 3L.

116. U.S. Response to the 1994 Cuban Migration Crisis, *supra* note 34, at 6.

117. *Id.*

118. Travieso-Diaz, *supra* note 25, at 247.

119. U.S. Response to the 1994 Cuban Migration Crisis, *supra* note 34, at 5.

120. Travieso-Diaz, *supra* note 25, at 244-45.

highlighted the problems of communism and the benefits of democracy.¹²¹ Due to the fall of the Soviet Union, this is no longer an issue.¹²² It has also been stated that by not allowing Cubans the ability to escape to the United States they will form a coalition that can oust Castro and bring reforms.¹²³

Due to the fact that both Cubans and Americans view President Clinton's 1994 policy towards Cuba as shifting "180 degrees,"¹²⁴ he could have avoided more problems by repealing the Cuban Adjustment Act instead of taking measures to curtail its use. The measures used to circumvent the Act violated established maritime policy, created arbitrary enforcement of the new measures, condoned air piracy and hijacking, and also unnecessarily increased United States' immigration costs. Therefore, the United States should treat Cuban refugees similarly to refugees from other nations.

C. *Similar Treatment Would Not Unduly Harm Cuban Immigrants*

With the inception of 1994 Communiqué between Cuba and the United States, President Clinton agreed to issue 20,000 visas per year for Cubans to use to come to the United States.¹²⁵ Cubans are the only entrants to have a minimum number of visas guaranteed for their use.¹²⁶ This policy allows for the legal migration of Cubans into the United States while deterring those who try to enter illegally.¹²⁷ Finally, unlike any other interdicted asylum seekers who are returned to their country of origin, Congress requires reports to determine the treatment by the Cuban government of those returned to Cuba per the United States and Cuba's J. Statement.¹²⁸ Although, Cubans would no longer be granted asylum upon arrival to United States Soil, these programs would help to alleviate injustices toward Cubans while preventing illegal emigration.

D. *Practical Problems*

The largest obstacle to changing United States policy toward Cuba is the strength of the Cuban exile lobby in Congress. When attempts were made to repeal the Cuban Adjustment Act in 1996, the Senate voted to

121. *Id.* at 245.

122. *Id.*

123. *Id.*

124. Larry Rohter, *Many Cubans Don't Share Havana's Pride in Pact with U.S.*, *N.Y. Times*, May 7, 1995, at 20.

125. *See* J. Communiqué between U.S. & the Republic of Cuba, *supra* note 40.

126. *See* Hughes, *supra* note 27, at 61.

127. J. Communiqué between U.S. & the Republic of Cuba, *supra* note 40.

128. Omnibus Consolidated Emergency Supplemental Appropriations Act, Pub. L. 105-277, §2245 (Oct. 21, 1998).

keep it by a margin of 62-37.¹²⁹ Legislation has since been written that prevents the Cuban Adjustment Act from being repealed until a democratic government is in Havana.¹³⁰ Thus, this law prevents the United States from changing its policy toward Cuba at least until Castro is no longer in power.¹³¹

Even if the Cuban Adjustment Act could be altered so that Cuban refugees were not granted asylum just by being on United States Soil, the asylum process moves so slowly that they would have been here long enough to establish asylum by other means.¹³² Due to the number of appeals available, an immigrant could remain in the United States for a few years through the exercise of the appeals given.¹³³ Also, the difficulty of finding all illegal immigrants and the immigrants' difficulty in finding a job due to their illegal status, prompted the Government to pass the Immigration Reform and Control Act of 1986.¹³⁴ This Act allows all Cubans who resided in the United States prior to a specific date to become permanent residents.¹³⁵ This policy allows those who come and remain in the United States illegally to become residents while those that follow legal channels may never become United States residents. Therefore, this policy runs contrary to the United States preferred means of immigration.

Since the Cuban exile community is outreaching and in tune to the plight of the asylum seekers, they would make sure that Cuban immigrants would remain in the United States long enough to gain asylum.¹³⁶ Although this would happen when Cuban refugees reached the United States, the uncertainties of being treated like other immigrants might be enough to prevent more illegal Cuban immigrants than are presently discouraged from coming to the United States.

Finally, Castro and the Cuban government prevent Cubans from using legal means to emigrate from Cuba to other countries. One way the Cuban government prevented departure was to increase airfare.¹³⁷ In February 1995, the Cuban government raised the airfare from \$150 to \$990.¹³⁸ After the United States intervened, the Cuban government lowered airfares but

129. Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence, Pub. L. No. 104-208, Title VI, §606, 110 Stat. 3009-695, 8 USCA §1255 note (1996).

130. *Id.*

131. See Travieso-Diaz, *supra* note 25, at 249-250.

132. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 498-502 (1997).

133. U.S. COMM. FOR REFUGEES, DESPITE A GENEROUS SPIRIT, DENYING ASYLUM IN THE UNITED STATES (Comm. Print 1986).

134. See LEGOMSKY, *supra* note 132, at 498-502.

135. See *id.*

136. See Cazares & Herrera, *supra* note 1, at 1B.

137. U.S. Response to the 1994 Cuban Migration Crisis, *supra* note 34, at 13.

138. *Id.*

began to impose additional fees.¹³⁹ These fees were \$400 for the medical examination required for all people seeking entry into the United States, \$250 for an exit permit and related documents, and \$50 for a passport.¹⁴⁰ Although some of these fees may be necessary, they will impose obstacles to the Cuban emigrants.¹⁴¹ Some people feel that these problems will not end unless an independent agency supervises the implementation of the agreement in Cuba.¹⁴²

It is the persistence of these problems that prevent the United States from changing its policy toward Cuba. Although some changes would be beneficial, it will be difficult to convince enough people to allow for these changes to reach fruition.

IV. CONCLUSION

Despite the problems of changing United States policy toward Cuba, it would benefit the United States to change its policy towards illegal Cuban immigrants while pressuring the Cuban government to allow for a legal means of emigration from Cuba. These changes are necessary due to the ever evolving World climate. Once these changes are made, the use of interdiction in the territorial sea must be conformed to be in agreement with established maritime law. This conformance will allow for less confusion in dealing with Cuban refugees. Thus, through these new policies, the number of deaths from Cuban immigrants rafting or flying to the United States will decrease while relations between Cuba and the United States will improve.

139. *Id.*

140. *Id.*

141. *Id.*

142. Rohter, *supra* note 124, at 20.