

# NOTES

## U.S.-CUBA IMMIGRATION THROUGH THE LENS OF EXECUTIVE REGULATORY POLICY: UNDERSTANDING THE RECENT END TO A HALF CENTURY OF SPECIAL IMMIGRATION REGULATIONS FOR CUBAN NATIONALS

LINDSEY MEYERS\*

### TABLE OF CONTENTS

|   |    |
|---|----|
| I. INTRODUCTION: REGULATING AND DEREGULATING SPECIAL IMMIGRATION RULES FOR CUBAN NATIONALS . . . . .  | 92 |
| II. PRESIDENTIAL DIRECTIVES AND THE REGULATORY PROCESS . . . . .  | 94 |
| III. COMMON DEREGULATORY PRINCIPLES UNDER PRESIDENTS OBAMA AND TRUMP . . . . .  | 97 |
| IV. SHARED DEREGULATORY PRINCIPLES EXPLAIN THE COMMON RATIONALE FOR THE DISSOLUTION OF THE LONGSTANDING REGULATORY REGIME GOVERNING THE IMMIGRATION OF CUBAN NATIONALS. . . . . | 99 |
| V. THE OBAMA ADMINISTRATION’S DISCONTINUANCE OF SPECIAL REGULATORY TREATMENT OF CUBAN NATIONALS IN THE  |    |

---

\* Lindsey B. Meyers, B.A., Brown University, 2009; MSt., University of Oxford, 2010; JD Candidate, Georgetown University Law Center, May 2019. Thank you to Professor Howard Shelanski for his guidance on this topic. © 2019, Lindsey Meyers.

|   |     |
|---|-----|
| IMMIGRATION CONTEXT MARKED A SIGNIFICANT DEPARTURE FROM AN OVER FIFTY-YEAR-OLD POLICY . . . . .   | 100 |
| A. <i>Congress authorized the Executive Branch to give Cuban Nationals a special parole status under U.S. immigration law with the Cuban Adjustment Act (CAA)</i> . . . . .   | 101 |
| B. <i>Clinton adjusted Cuban parole status under CAA with the “wet foot/dry foot” policy while maintaining the Johnson-era principle that Cuban Nationals deserved special immigration treatment</i> . . . . .                      | 102 |
| C. <i>During the Bush administration, special exceptions for Cuban Nationals to expedited removal proceeding rules were promulgated by the Executive pursuant to the CAA</i> . . . . .  | 103 |
| D. <i>Obama maintained the longstanding policy and Bush-Era regulations until repealing them in the final days of his administration</i> . . . . .  | 106 |
| VI. PRESIDENT OBAMA REPEALED THE FAVORED STATUS OF CUBAN NATIONALS AS PART OF HIS FOREIGN POLICY TO NORMALIZE DIPLOMATIC RELATIONS WITH CUBA AND REGULATORY POLICY TO REMOVE OUTDATED, INCONSISTENT, OR UNNECESSARY RULES . . . . . | 106 |
| VII. PRESIDENT TRUMP HAS LIKELY MAINTAINED OBAMA’S DECISION THAT CUBAN NATIONALS SHOULD NOT BE SUBJECT TO A SPECIAL REGULATORY REGIME BECAUSE OBAMA’S DECISION WAS PREMISED ON REGULATORY PRINCIPLES THAT TRUMP SUPPORTS . . . . .  | 111 |
| VIII. CONCLUSION: FROM BOTH A REGULATORY AND FOREIGN POLICY PERSPECTIVE, THE DEREGULATION TREND WILL LIKELY CONTINUE . . . . .  | 113 |
| I. INTRODUCTION: REGULATING AND DEREGULATING SPECIAL IMMIGRATION RULES FOR CUBAN NATIONALS  |     |

A strong belief that the regulatory system must remove outdated, inconsistent, or unnecessary rules informs the regulatory policy former President Barack Obama (Obama) adopted and identified in Executive Orders 13,563 (EO 13,563)<sup>1</sup> and 13,610 (EO 13,610).<sup>2</sup> President Donald Trump’s (Trump) regulatory policy in Executive Order 13,777 (EO 13,777)<sup>3</sup> shares this principle. While one can distinguish the regulatory policies of Obama and Trump on many grounds, this point of convergence sheds light on why President

1. Exec. Order No. 13,563, 76 Fed. Reg. 14 (Jan. 21, 2011) [hereinafter Obama EO 13,563].

2. Exec. Order No. 13,610, 77 Fed. Reg. 93 (May 10, 2012) [hereinafter Obama EO 13,610].

3. Exec. Order No. 13,777, 82 Fed. Reg. 39 (Mar. 1, 2017) [hereinafter Trump EO 13,777].

Trump has chosen to maintain an immigration directive President Obama announced during the final days of his administration.<sup>4</sup> President Obama ordered the Department of Homeland Security (DHS) to take two groundbreaking steps. The first was to abolish a fifty-year old statutory regime that granted special immigration status to Cuban citizens or nationals (Cuban Nationals) based upon humanitarian and Cold War national security concerns.<sup>5</sup> The second was to repeal rules exempting Cuban Nationals from expedited removal proceedings otherwise applicable under the general immigration law.<sup>6</sup> President Obama framed this directive as a necessary component of his normalization agenda for U.S.-Cuba relations.<sup>7</sup> While President Trump has reversed Obama's normalization of diplomatic relations with Cuba,<sup>8</sup> he has intriguingly maintained Obama's decision to end privileged immigration status for Cuban Nationals. This result likely follows from the fact that Trump shares Obama's belief that the Executive Branch should

---

4. See Exec. Statement, The White House Office of the Press Sec'y, *Statement by the President on Cuban Immigration Policy* (Jan. 12, 2017), available at <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy> [hereinafter Obama Jan. 2017 Statement]. See also News Archive, U.S. Dep. of Homeland Security, *Statement by Secretary Johnson on the Continued Normalization of our Migration Relationship with Cuba* (Jan. 12, 2017), available at <https://www.dhs.gov/news/2017/01/12/statement-secretary-johnson-continued-normalization-our-migration-relationship-cuba> [hereinafter DHS Jan. 2017 Statement]; Fact Sheet, Press Office of the U.S. Dep. of Homeland Security, *Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals* (January 12, 2017), available at <https://www.dhs.gov/news/2017/01/12/statement-secretary-johnson-continued-normalization-our-migration-relationship-cuba> [hereinafter *Fact Sheet*]; Joint Statement, Press Office of the U.S. Dep. of Homeland Security, *Joint Statement Between the Government of the United States and Cuba* (Jan. 12, 2017), available at <https://www.dhs.gov/sites/default/files/publications/Joint%20Statement%20FINAL%20-%20US%20alt.pdf> [hereinafter Jan. 12 Joint Statement]. In addition to repealing the "wet foot/dry foot" policy and certain expedited removal proceeding regulations, the Obama administration ended the Cuban Medical Professional Parole Program. See generally Obama Jan. 2017 Statement; DHS Jan. 2017 Statement; Fact Sheet.

5. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966) [hereinafter CAA]; RUTH ELLEN WASEM, CONG. RESEARCH SERV., R40566, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS, 1-2 (2009) available at <http://www.fas.org/sgp/crs/row/R40566.pdf> (discussing the creation of the "wet foot/dry foot" policy). See also Guidance, General Counsel's Office of the Immigration and Naturalization Service, *Cuban Adjustment Act of 1966 Brief history*, July 24, 1991 (memorandum outlining the history surrounding the CAA and discussing how the Act created "special" treatment for Cubans as compared with aliens of other nationalities).

6. See Fact Sheet, *supra* note 4 (noting that the "Department [of Homeland Security] is amending its regulations and issuing a notice in the Federal Register to remove such exemptions from policies governing the use of expedited removal for Cuban Nationals who arrive by air, land, and sea").

7. See Obama Jan. 2017 Statement, *supra* note 4 (indicating the U.S. was taking important steps forward to "normalize relations with Cuba"); Fact Sheet, *supra* note 4 (indicating DHS changes to policies and regulations affecting Cuban Nationals reflect the "reestablishment of full diplomatic relations with Cuba and other concrete steps toward the normalization of U.S.-Cuba relations, as well as Cuba's agreement to accept and facilitate the repatriation of Cuban Nationals who are ordered removed from the United States"). See also Presidential Memoranda, *The White House Office of the Press Sec'y, Presidential Policy Directive – United States-Cuba Normalization* (October 14, 2016), available at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/presidential-policy-directive-united-states-cuba-normalization> [hereinafter Obama Oct. 2016 Cuba Directive].

8. A week before the 2016 election, Trump declared, "we will cancel Obama's one-sided Cuban deal, made by executive order, if we do not get the deal that we want and the deal that people living in Cuba and here deserve, including protecting religious and political freedom." See Nora Gamez Torres, *Cloud of uncertainty hangs over U.S.-Cuba relations with a Trump Presidency*, MIAMI HERALD, Nov. 10, 2016, 8:49 pm, available at <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article113898263.html>.

repeal outdated, inconsistent, or unnecessary regulations.<sup>9</sup> Such an analogous regulatory philosophy has likely compelled Trump to continue Obama's Cuba immigration directive<sup>10</sup> despite opposing Obama's diplomatic policy for normalizing U.S.-Cuba relations.

The internal inconsistency between regulatory philosophy and foreign policy raises important questions about the future of America's Cuban immigration policy. Will President Trump continue to adhere to the Obama administration's decision to discontinue special immigration regulations relating to Cuban Nationals even as he reverses the normalization of diplomatic relations with Cuba that led Obama to make these regulatory changes? Or will President Trump reinstate immigration policies historically associated with the United States' opposition to the Castro regime?

This paper will explore these questions through a six-part analysis. First, it will provide a brief background about the role the President plays in the regulatory process, focusing on how U.S. law provides a means for policy-driven presidential directives to shape regulatory change. Second, it will engage in a comparative analysis of Obama and Trump's regulatory policies to highlight their respective similarities and explain how and why these commonalities underpin the discontinuance of the preferred immigration status of Cuban Nationals. Third, it will historically contextualize the groundbreaking nature of this shared approach as applied to U.S.-Cuba immigration policy by demonstrating how a succession of U.S. presidents, beginning with Lyndon Johnson, granted Cuban Nationals preferred immigration status for over fifty years. Fourth, it will explore how President Obama repealed the favored immigration status of Cuban Nationals. Fifth, it will analyze how and why President Trump adopted this Obama directive. Finally, it will evaluate the likelihood of President Trump modifying Obama's immigration policy regarding Cuban Nationals in the future and suggest that President Trump is unlikely to reinstate preferred immigration status for Cuban Nationals.

## II. PRESIDENTIAL DIRECTIVES AND THE REGULATORY PROCESS

Before closely examining how deregulatory principles shared by former President Obama and President Trump help explain the recent deregulatory trend for the specialized Cuban National's immigration rules, it is helpful to understand the President's relationship to the regulatory state. In particular, it is instructive to review what tools the president employs to direct agencies,

---

9. Compare Trump EO 13,777, *supra* note 3, at § (3)(d)(ii) (indicating that "outdated, unnecessary, or ineffective" regulations should be recommended for "repeal, replacement, or modification consistent with applicable law") with Obama EO 13,563, *supra* note 1 (indicating that agencies should consider "modify[ing], streamlin[ing], expand[ing], or repeal[ing]" regulations that are "outmoded, ineffective, insufficient, or excessively burdensome").

10. Exec. Statement, The White House Office of the Press Sec'y, *National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba* (June 16, 2017), available at <https://www.govinfo.gov/content/pkg/FR-2017-10-20/pdf/2017-22928.pdf> [hereinafter *Trump June 2017 Cuba Memo*].

which include executive branch agency officials, to implement regulations and shape policy in the process.

The key tool for our analysis is the executive order, one of the most formal and well-known forms for presidential directives.<sup>11</sup> Executive orders have possessed no force of law standing alone since the landmark Truman-era decision in *Youngstown Sheet & Tube Co. v. Sawyer*, which held that “[a] President’s power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.”<sup>12</sup>

Since the founding of our country, executive orders have been employed on a range of matters.<sup>13</sup> Yet, they only became an important policy-directing tool within the regulatory process in the last thirty years.<sup>14</sup> Indeed, the use of presidential directives—including executive orders and other instruments like presidential memoranda—in the regulatory process is “relatively new . . . [but] has [nevertheless] become a permanent part of the institutional design of American government.”<sup>15</sup>

Legal scholars and historians observe that the presidential oversight in the regulatory process shifted substantially, thanks to executive orders issued by President Ronald Reagan (Reagan) in the 1980s.<sup>16</sup> These Reagan executive orders asserted centralized control over the regulatory process by requiring agencies to follow a number of new procedures, including submitting a regulatory plan to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).<sup>17</sup>

At the time, critics of the emerging presidential oversight role argued that the President lacked legal or constitutional-based power to transfer authority from individual agencies to the OMB.<sup>18</sup> Some critics even claimed that some of the new policy changes set forth in the executive

11. See HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-611, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW (2008).

12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (establishing black letter law on executive orders).

13. See RELYEA, *supra* note 11, at 5 (describing an early use of the executive order by President Washington in 1789).

14. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 10 (1995).

15. *Id.*

16. See generally *id.* at 3-6 (discussing and describing two executive orders issued by former President Reagan in the 1980s). See also Exec. Order No 12,291 § 2, 3 CFR 128 (1981), reprinted in 5 USC § 601 note (1988); Exec Order No 12,498, 3 CFR 323 (1985), reprinted in 5 USC § 601 note (1988).

17. See Pildes & Sunstein, *supra* note 14, at 3 (noting Reagan’s Exec. Order 12,291 “laid out a set of substantive principles, most notably cost-benefit analysis, and said that these principles would be binding on executive agencies to the extent permitted by law. . . . [and] required all major regulations to be accompanied by a ‘regulatory impact analysis,’ which would be submitted for review and approval to the [OIRA] within the [OMB],” while Reagan’s Exec. Order 12,498 required “each agency to submit an ‘annual regulatory plan,’ consisting of proposed actions for the next year . . . to OIRA for review and approval . . . [which] placed OIRA in the center of regulatory planning”).

18. See *id.* at 4 (noting that some critics of Reagan’s executive orders claimed they involved an unlawful and counterproductive transfer of power from executive agencies to the OMB (and OIRA)) (citing to Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199 (1981)).

orders violated constitutional provisions, such as the Take Care Clause.<sup>19</sup> These legal objections have been discredited as the president's role in the regulatory process has been maintained since Reagan, under Democratic and Republican administrations alike. Indeed, with the exception of President George H.W. Bush, each U.S. President since Reagan has issued executive orders setting forth regulatory policy for the OIRA within the OMB to implement across all executive agencies.<sup>20</sup>

In addition to issuing executive orders broadly influencing regulatory policy through the OIRA's operations, U.S. Presidents set forth presidential directives related to specific policy goals requiring more particularized and agency-specific responses. From executive orders to presidential memoranda, presidential directives have been released establishing policy goals and indicating how particular agencies will implement them.<sup>21</sup> Again, as a matter of black letter law, these orders have no force standing alone. Only an agency, pursuant to its rulemaking authority, has the power to promulgate rules that give legal authority to those policies expressed in presidential orders.<sup>22</sup> The power dynamic between the U.S. President and executive officers often moots this well-established law. Thus, as the U.S. President has both appointment and removal power over the heads of executive agencies,<sup>23</sup> the Executive Branch agency heads often have a vested self-interest in implementing policies set forth in presidential orders to secure their appointment.

To recap the foregoing general overview, the U.S. President has a powerful role in shaping regulatory policy that has emerged in the past thirty-years. Policy-driven presidential orders typically set the OIRA's regulatory agenda, which is applicable to all executive agencies. Additionally, these orders may be used to direct particular agencies to promulgate rules under their rulemaking authority and are generally effective to the extent that the President can remove the heads of executive agencies.

---

19. See Pildes & Sunstein, *supra* note 14, at 6 (citing, as an example of a critic, to Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 178-200 (1991)).

20. See, e.g., Ted Gayer et. al, *Evaluating the Trump Administration's Regulatory Reform Program*, BROOKINGS INSTITUTION, Oct. 2017, available at [https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform\\_gayerlitanwallach\\_102017.pdf](https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf) (describing the executive orders issued by Presidents Reagan, Clinton, George W. Bush, Obama, and Trump that have shaped regulatory policy through the OMB's OIRA).

21. See, e.g., Obama Jan. 2017 Statement, *supra* note 4; DHS Jan. 2017 Statement, *supra* note 4 (Obama's January 2017 policy statement ending the special immigration rules for Cuban Nationals was immediately followed by a DHS statement announcing it was making regulatory and policy changes pursuant to Obama's directive is illustrative of this trend).

22. See, e.g., *Executive Power-Presidential Directives-in Tweets, President Purports to Ban Transgender Servicemembers.- Donald J. Trump (@realdonaldtrump), Twitter (July 26, 2017, 5:55-6:08 Am)*, <https://perma.cc/x7j4-Cud3>, 131 HARV. L. REV. 934, 938 (2018) (“[t]he legal validity of [presidential orders] requires public issuance and promulgation under legitimate statutory or constitutional authority”).

23. The President has the power to appoint and remove Executive officers in his discretion. See U.S. Const. art. II, § 2, cl. 2. This power cannot be altered without impairing the President's constitutional obligations to control the executive branch and faithfully execute the Nation's laws.



### III. COMMON DEREGULATORY PRINCIPLES UNDER PRESIDENTS OBAMA AND TRUMP

Notwithstanding notable distinctions on many other issues,<sup>24</sup> the regulatory policies of Presidents Obama and Trump place a common emphasis upon the removal of outdated, inconsistent, and unnecessary rules. This is clear from a close comparison of the Executive Orders, which outline the respective regulatory policies of Presidents Obama and Trump.

President Obama set forth his regulatory philosophy in two executive orders, namely: EO 13,563 (Improving Regulation and Regulatory Review)<sup>25</sup> and EO 13,610 (Identifying and Reducing Regulatory Burdens).<sup>26</sup> Pursuant to these orders, Obama enacted significant regulatory reform – including notable cost-saving deregulation. Specifically, the U.S. saved \$37 billion and repealed 70 major rules.<sup>27</sup> Under Obama’s scheme, deregulation was one of several results characterizing a good regulatory system. For Obama, a well-functioning regulatory system must “measure, and seek to improve, the actual results of regulatory requirements.”<sup>28</sup> To maintain such an effective system, “periodic review of existing significant regulations”<sup>29</sup> was required. Pursuant to that goal, Obama set forth a principle of retrospective review, which involved looking back at regulations to evaluate their utility. To guarantee compliance and transparency in this process, executive agencies are obligated to submit retrospective reports to the OIRA in the OMB. Through this “look back” process, executive agencies were encouraged to amend, rework, or repeal laws in order to ensure and promote the cost-efficiency and good rulemaking of the regulatory system.

A useful way to understand the basic tenets of Obama’s regulatory policy as well as his specific deregulation principles is to examine closely the two executive orders that establish his regulatory policy and principle of retrospective review. Obama’s first Executive Order on retrospective review, EO 13,563, set forth substantive requirements pursuant to retrospective review in Section Six.<sup>30</sup> Under that section, executive agencies were required to (1) “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome”; (2) “modify, streamline, expand, or repeal them in accordance with what has been learned”; (3) release retrospective analyses, including supporting data, online whenever possible; and (4) develop preliminary retrospective review plans

---

24. For example, as discussed in Section III, *infra*, where Trump’s policy pushes for deregulation, Obama’s policy supports amending or removing (i.e., deregulating) laws.

25. See Obama EO 13,563, *supra* note 1.

26. See Obama EO 13,610, *supra* note 2.

27. Howard Shelanski, Blog, The White House, *Retrospective Review, by the numbers*, August 31, 2016, 9:00 AM, available at <https://obamawhitehouse.archives.gov/blog/2016/08/31/retrospective-review-numbers-0>.

28. See Obama EO 13,563, *supra* note 1, at § 1.

29. See *id.* at § 6.

30. See *id.*

that “determin[e] [what] regulations should be modified, streamlined, expanded, or repealed.”<sup>31</sup> The purpose of the new retrospective review requirements is to “make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”<sup>32</sup> Outside of Section Six, the Order also highlights two important principles for Obama. First, the regulatory system “must take into account benefits and costs, both quantitative and qualitative.”<sup>33</sup> Second, the system “must ensure that regulations are . . . consistent.”<sup>34</sup>

Over a year later, President Obama issued his second Executive Order outlining his regulatory policy, specifically providing additional information about the retrospective review process. This Order, EO 13,610, was released on May 10, 2012 and focused on the importance of avoiding “unjustified regulatory requirements”<sup>35</sup> that impose unnecessary costs. This cost-saving objective stressed the “importan[ce] for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and if they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.”<sup>36</sup> To meet this end, the Order instructed agencies to “give priority, consistent with law, to those initiatives that w[ould] produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment.”<sup>37</sup> This Order also included an accountability provision that requires agencies to report on the status of their retrospective review efforts to OIRA and to make these reports publicly available.<sup>38</sup>

Collectively, these Executive Orders indicate that deregulation was one possible result of maintaining a good regulatory system under President Obama’s regulatory policy. They also show that Obama’s policy set forth at least three deregulatory principles as integral to his retrospective review process. Section Six of EO 13,563 highlights these principles, which include repealing rules that are (1) unnecessary, (2) inconsistent, and (3) outdated (i.e. no longer applicable considering changed circumstances).

Unlike Obama’s policy where deregulation was one of several options to ensure a good regulatory system, President Trump has overwhelmingly tailored his regulatory policy to encourage deregulation.<sup>39</sup> He set forth this

---

31. *See id.*

32. *See id.* at § 6(a)-(b).

33. *See id.* at § 1(a).

34. *See id.*

35. *See* Obama EO 13,610, *supra* note 2, at § 1.

36. *See id.*

37. *See id.* at § 3.

38. *See id.* at § 4.

39. “While not spelled out explicitly in the Order, the Administration has clarified in response to press questions that like the Reagan Executive Order, the new Executive Order applies only to Executive departments and agencies that are subject to Presidential direction. The Order does not apply to independent regulatory agencies (e.g., the SEC, FCC, and FTC).” *See* Jordon R. Bailey & John F. Cooney, Venable, LLP, *President Trump Signs Executive Order into the Federal Regulatory Process*, LEXOLOGY.



policy in two executive orders. His first Executive Order—13771 (Reducing Regulation and Controlling Regulatory Costs)—discussed deregulation but did not require the removal of rules that are unnecessary, inconsistent, or outdated.<sup>40</sup> Trump’s second Executive Order, however, did define deregulation in this context.<sup>41</sup> Notably, it indicated that Executive agencies should adhere to the principles set forth in Section Six of Obama’s EO 13,563. Pursuant to that command, it creates new positions to keep agencies accountable, and it directs these new officers to follow Section Six of Obama’s EO 13,563 in addition to other existing Executive initiatives and policies.<sup>42</sup> Specifically, Trump’s Order requires agency heads to designate an agency official as its Regulatory Reform Officer (RRO) to be (1) responsible for the implementation of regulatory reform initiatives and policies and (2) to ensure that agencies effectively carry out regulatory reforms consistent with applicable law.<sup>43</sup> Pursuant to this goal, Trump directs RROs to adhere to the principles of retrospective review set forth in Section Six of Obama’s 13,563 Executive Order. In addition to the RRO, the Order established “Regulatory Task Forces” that will consider “existing regulations [ . . . ] and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law.”<sup>44</sup> Interestingly, Trump included several categories identified in Obama’s Executive Orders. These categories include: (1) regulations that are outdated, unnecessary, or ineffective; (2) those imposing costs that exceed benefits; and (3) those that create inconsistency. In light of the foregoing, Trump’s regulatory policy clearly shares common deregulatory principles with Obama’s policy, including repealing rules that are outdated, unnecessary, or inconsistent.

#### IV. SHARED DEREGULATORY PRINCIPLES EXPLAIN THE COMMON RATIONALE FOR THE DISSOLUTION OF THE LONGSTANDING REGULATORY REGIME GOVERNING THE IMMIGRATION OF CUBAN NATIONALS

In a historic move, President Obama ended the preferred immigration status of Cuban Nationals as part of a larger effort to normalize relations with Cuba. This occurred when President Obama reversed the “wet foot/dry foot” policy<sup>45</sup> on January 12, 2017, a week before Trump’s inauguration. As

---

com, Feb. 2, 2017, *available at* <https://www.lexology.com/library/detail.aspx?g=c9cfe953-92cc-4dd5-9579-c2ec83d3114e>.

40. Trump’s first Executive Order set forth three main requirements to meet cost-saving objectives. First, it established a “two for one rule.” *See* Exec. Order 13,771, 82 Fed. Reg. 22 (Feb. 3, 2017). That is, agencies were charged with deregulating two significant rules for every significant rule it promulgates. *Id.* at §§ 1, 2(a). Second, the EO imposed a Regulatory Cap on an agency-by-agency basis related to the costs imposed on rules issued during Fiscal Year 2017. *Id.* at § 2. Third, it created a Regulatory Budget on an agency-by-agency basis, that would allow centralized White House control on the total incremental costs that a rulemaking agency may impose on the private sector. *Id.* at § 3.

41. *See id.*

42. *Id.* at § 2(a)(iii).

43. *Id.* at § 2(a).

44. *Id.*

45. *See* Obama Oct. 2016 Cuba Directive, *supra* note 7.

Trump rejected Obama's general policy to normalize diplomatic relations with Cuba during the 2016 presidential campaign,<sup>46</sup> some believed he would reverse Obama's January 12<sup>th</sup> directive upon assuming the presidency. President Trump did, indeed, author a directive superseding Obama's general efforts to normalize relations with Cuba.<sup>47</sup> Nevertheless, President Trump's directive did not repeal Obama's decision to end the privileged immigration status afforded to Cuban Nationals. Instead, Trump likely followed this Obama-era deregulation because he shares Obama's commitment to reevaluating and repealing outdated, inconsistent, or unnecessary regulations.

V. THE OBAMA ADMINISTRATION'S DISCONTINUANCE OF SPECIAL REGULATORY TREATMENT OF CUBAN NATIONALS IN THE IMMIGRATION CONTEXT MARKED A SIGNIFICANT DEPARTURE FROM AN OVER FIFTY-YEAR-OLD POLICY

Obama's decision to end the treatment of Cubans as a special class of immigrants under U.S. immigration law marked a major shift in U.S.-Cuba relations that overturned long-standing Executive-branch policy first implemented in 1966.<sup>48</sup> The special immigration regulations governing Cuban Nationals originated during the Johnson administration when Congress enacted the Cuba Adjustment Act ("CAA") in 1966,<sup>49</sup> which granted the executive branch the authority to adjust the parole status of Cuban Nationals. This policy notably evolved when the administration of President Bill Clinton (Clinton) adjusted the status for Cuban Nationals under the CAA with a "wet foot/dry foot" policy that only allowed Cuban Nationals who reached U.S. land to be "paroled" into the U.S.<sup>50</sup> President George W. Bush further expanded this policy by promulgating rules giving Cuban Nationals special treatment in expedited removal proceedings under U.S. immigration laws.<sup>51</sup> President Obama, in turn, maintained these longstanding executive policies until his final days in office. Given this history, the discontinuance of the special protections afforded Cuban Nationals by Obama and then Trump mark a significant departure from longstanding immigration policy.

---

46. See Torres, *supra* note 8.

47. See Trump June 2017 Cuba Memo, *supra* note 10.

48. See CAA, *supra* note 5.

49. See WASEM, *supra* note 5, at 1-2; Guidance, General Counsel's Office of the Immigration and Naturalization Service, *Cuban Adjustment Act of 1966 Brief history*, July 24, 1991 (memorandum outlining the history surrounding the CAA discussing how the Act created "special" treatment for Cubans, as compared with aliens of other nationalities).

50. See *id.*

51. See Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002) available at <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-79324/0-0-0-79342/0-0-0-80383.html> [hereinafter 2002 Cuba Expedited Removal Proceeding Rule Exception]; Designating Aliens For Expedited Removal, 69 FR 48877 (Aug. 11, 2004) available at <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html> [hereinafter 2004 Cuba Expedited Removal Proceeding Rule Exception].

A. *Congress authorized the Executive Branch to give Cuban Nationals a special parole status under U.S. immigration law with the Cuban Adjustment Act (CAA)*

A unique status for Cuban Nationals in the immigration law context began with the Cuban Adjustment Act (CAA) in 1966. The CAA operates in conjunction with the Immigration and Nationality Act (INA),<sup>52</sup> the legislation that sets forth U.S. immigration law for all nations. The CAA, however, differs from the INA by giving the executive branch discretionary authority to treat certain Cuban Nationals uniquely by adjusting their parole status to lawful permanent resident (“LPR”)<sup>53</sup> at any time after they have been physically present in the U.S. for one year.<sup>54</sup> Specifically, the CAA provides for the adjustment to LPR status of Cubans who, among other things, have been (1) “inspected and admitted”<sup>55</sup> into the United States as “nonimmigrants”<sup>56</sup> or (2) paroled into the country. The CAA is generally understood as a legislative response to the political and humanitarian concerns that arose from the global conflict between the U.S. and the former Soviet Union in the Cold War.<sup>57</sup> In fact, Congress appears to have adopted the CAA to address two Cold War policy goals that President Johnson identified. The first was to create an asylum for Cuban refugees who left their communist country for political reasons.<sup>58</sup> The second was to destabilize the new communist regime

---

52. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (June 27, 1952) (also known as the McCarran-Walter Act) [hereinafter INA]. See also Immigration Nationality Act, U.S. Citizenship and Immigration Services, Sep. 10, 2013, available at <https://www.uscis.gov/laws/immigration-and-nationality-act>) (“[INA] was created in 1952. Before the INA, a variety of statutes governed immigration law but were not organized in one location. The McCarran-Walter bill of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law”).

53. Compare CAA, *supra* note 5, at § 23.11(a)-(b) (requirements that allow the Executive to adjust parole status of Cuban Nationals) with INA, *supra* note 52, at § 212.5 (admissibility of aliens generally).

54. Note that the CAA as originally enacted had a two-year requirement. This was changed in 1980. See CAA, *supra* note 5, at § 23.11(b)(3) (indicating that the CAA’s one year policy was amended from two years by the Refugee Act of 1980).

55. See CAA, *supra* note 5, at § 23.11(h).

56. “As used here, the term ‘nonimmigrant’ generally encompasses aliens admitted to the United States pursuant to one of the various ‘lettered’ visas (e.g., F visas for students).” See CONG. RESEARCH SERV., LEGAL SIDEBAR: ALIEN REGISTRATION REQUIREMENTS: OBAMA ADMINISTRATION REMOVES CERTAIN REGULATIONS BUT UNDERLYING STATUTORY AUTHORITY REMAINS (2017) available at <https://fas.org/sgp/crs/homesecc/alienreg.pdf>.

57. See *The Cuban Adjustment Act of 1966: ¿Mirando por los ojos de don quijote o sancho panza?*, 114 HARV. LAW REVIEW 3, 902-25 (Jan. 2001) (noting that two additional reasons are generally cited: (1) to prevent Cuban refugees in the United States from having to leave the country to apply for permanent residency and (2) to create an expeditious method for Cuban refugees to join the American workforce).

58. President Johnson set forth his immigration policy and national security goals for U.S.-Cuban relations in an October 3, 1965 speech that responded to recent comments made by Fidel Castro. See Robert B. Semple Jr., *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. TIMES, Oct. 4, 1965, at 1. See also FELIX ROBERTO MASUD-PILOTO, FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS, 57-60 (Rowman & Littlefield Publishers, Inc., 1966) (discussing Johnson’s policy to provide refuge to “the people of Cuba . . . who seek [refuge] in America,” including his directive to the Department of Health, Education and Welfare “to make all necessary arrangements to permit those in Cuba who seek freedom to make an orderly entry into the United States” and request that Congress provide \$12.6 million in fiscal 1966 supplemental appropriations to aid Cuban refugees entering the United States.) (citation omitted).

under Fidel Castro that posed a national security threat to the U.S.<sup>59</sup> As these Congressional Hearings debated adjusting Cuban status and ultimately led to the enactment of the CAA, Congress seemingly crafted the CAA to serve President Johnson's two aforementioned goals.<sup>60</sup> To be sure, other factors influenced Congress' decision to create special rules for Cubans under the CAA, such as a desire to remove administrative burdens for the hundreds of thousands of Cubans who fled to the United States for asylum.<sup>61</sup> Nonetheless, Johnson's policy goals set the framework for the U.S.-Cuba immigration policy Congress enacted in the form of the CAA.

B. *Clinton adjusted Cuban parole status under CAA with the "wet foot/dry foot" policy while maintaining the Johnson-era principle that Cuban Nationals deserved special immigration treatment*

The preferential treatment Cuban Nationals received under the CAA set the framework for U.S.-Cuba immigration policy for over fifty years. While this policy originally arose from the fight against Soviet Communism during the Cold War, its framework lasted decades after the end of the Cold War. Notably, one significant change to it occurred in the 1990s under the Clinton administration. Political factors leading to a migration crisis prompted the change.<sup>62</sup> In the

---

59. *See id.*

60. Testimony from U.S. Attorney General Nicholas Katzenbach highlights how Johnson's policy was a strong rationale for enacting the law. *See* Adjustment of Status for Cuban Refugees: Hearings Before Subcommittee No. 1 of the Committee on the Judiciary House of Representatives, 89th Cong. 11-20 available at <https://babel.hathitrust.org/cgi/pt?id=pst.000045412318;view=1up;seq=34> (noting that adjusting Cuban Nationals' status under the CAA would be a "humane postscript to the message formulated by our Government and voiced by the President when he said to the people of Cuba that those who seek refuge here in America will find it").

61. While Johnson's policy welcomed Cuban refugees into the U.S., existing law made the procedure for Cuban refugees to obtain a permanent visa to stay in the states difficult. This is because Cuban refugees could not remain in the U.S. permanently under provisions set forth in a newly enacted law that forbade the adjustment of status for persons from the Western Hemisphere that had entered the U.S. as parolees or visitors to that of aliens lawfully admitted for immigration. Cuban refugees were left with one option to work around the restriction: leave the U.S. to visit a third-party country with a U.S. consular office and apply for readmission to the U.S. as regular immigrants from the Western Hemisphere. This process was as procedurally burdensome to Cuban refugees as it was to the U.S. government. U.S. consular offices, especially the offices in Canada and Mexico were most immigrants went to obtain visas, did not have the resources to handle the influx of applications. The hearings indicate that the CAA was as a practical means to remedy procedural issues arising in this system. Testimony from the Honorable George Ball, the under Secretary of State highlighted how adjusting Cuban status was a practical way to remedy these procedural burdens for Cuban Nationals and the U.S. government. Ball also indicated that it was legal to do so. That is, he highlighted legislative precedent to craft a law, like the CAA, allowing for the adjustment of immigration status without the burden of leaving and reentering the country. Congress had enacted similar laws in three instances: (1) Hungarian refugees in 1958, (2) refugee escapees within the mandate of the United Nations High Commissioner for Refugees in 1960, and (3) refugees from communism from outside the Western Hemisphere in 1965. *See id.*

62. *See Protesters Battle Police in Havana: Castro Warns U.S.*, N.Y. TIMES, Aug. 6, 1994 (noting that efforts to flee the island were "at their highest level in years, apparently because of an economic crisis caused by the loss of aid from the former Soviet Union and socialist backers in Europe as well as a United States trade embargo").

1990s, Castro threatened<sup>63</sup> and eventually announced a new policy allowing Cuban Nationals to temporarily leave Cuba without penalty.<sup>64</sup> In response, over thirty thousand Cubans fled Cuba by boat or raft, seeking asylum in the U.S.<sup>65</sup> The result was a “rafting crisis” that raised serious humanitarian concerns when Cuban refugees imperiled their lives by attempting to reach the U.S. by rafts.<sup>66</sup> In light of this crisis, President Clinton and his administration faced thorny questions regarding U.S.-Cuba immigration policy and national security. In an effort to normalize migration, Clinton negotiated two agreements with Cuba: The Cuban Migration Accord in September 1994 and The Cuban Migration Agreement in 1995.<sup>67</sup> The former sought to ensure “safe, legal, and orderly” immigration between the two countries;<sup>68</sup> the latter addressed special issues regarding the U.S. military base at Guantanamo Bay in Cuba.<sup>69</sup> These agreements resulted in a new “wet foot/dry foot” policy. Under this policy, Cuban Nationals seeking entrance into the United States who were interdicted at sea were generally returned to Cuba while those who had reached U.S. territory were “paroled” into the United States and generally became eligible to adjust to LPR status after one year pursuant to the CAA.<sup>70</sup> By thus granting preferred immigration status only to Cuban Nationals who reached U.S. land, Clinton limited the scope of the CAA but maintained the privileged status it afforded Cuban Nationals.<sup>71</sup>

C. *During the Bush administration, special exceptions for Cuban Nationals to expedited removal proceeding rules were promulgated by the Executive pursuant to the CAA*

The CAA continued to shape decision-making through the Executive Branch during the administration of George W. Bush. Where Clinton established the “wet foot/dry foot” policy, President Bush created Cuban National-specific exceptions to expedited removal proceeding rules under Section 235, which the Immigration and Naturalization Service (“INS”) and DHS respectively promulgated in 2002<sup>72</sup> and

63. *See id.* (reporting that following a period of attempts to hijack government-owned boats and riots, Castro “said that unless the United States stops encouraging people to flee Cuba by sea, ‘we will stop blocking the departure of those who want to leave the country’”).

64. *See* Alan Taylor, *20 Years After the 1994 Cuban Raft Exodus*, ATLANTIC, Nov. 12, 2014, available at <https://www.theatlantic.com/photo/2014/11/20-years-after-the-1994-cuban-raft-exodus/100852/> (“two decades ago, in the midst of rioting and anti-government protests in Cuba, Fidel Castro announced that ‘whoever wanted to leave, could go’—indicating that his forces would not prevent refugees from fleeing the country”).

65. *See id.*

66. *See id.*

67. WASEM, *supra* note 5, at 1-4 (discussing the creation of the “wet foot/dry foot” policy).

68. *See id.* at 2-4.

69. *See id.* at 2-3.

70. *See* CONG. RESEARCH SERV., LEGAL SIDEBAR: RESCISSION OF THE WET-FOOT/DRY-FOOD POLICY AS TO ALIENS FROM CUBA RAISES LEGAL QUESTIONS (2018) (available at: <https://fas.org/sgp/crs/row/wetfoot.pdf>).

71. *Id.*

72. *See* 2002 Cuba Expedited Removal Proceeding Rule Exception, *supra* note 51.

2004.<sup>73</sup> Both the 2002 and the 2004 rules expanded the categories of aliens subject to expedited removal proceedings under Section 235(b) of the INA. Under the Act, two categories of aliens are expressly subject to expedited removal proceedings, but the Secretary may modify such designations at any time.<sup>74</sup>

Pursuant to this authorization, the INS included additional categories of aliens to this section in its 2002 “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b) (1) (a) (iii) of the Immigration and Nationality Act.”<sup>75</sup> Specifically, the notice designated “all aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility”<sup>76</sup> as an additional category under the Act. This notice, however, expressly exempted Cuban Nationals who arrived by sea from expedited removal proceedings.<sup>77</sup> As previously indicated, the INS based this exception on “longstanding U.S. policy to treat Cubans differently from other aliens.”<sup>78</sup> It thus cited the CAA as the primary example of such treatment. In so doing, the INS highlighted that the Cuban-specific exception was created to serve the purpose of longstanding immigration policy.<sup>79</sup> The notice also cited section 235(b)(1)(F) of the Act as support. This section statutorily exempted Cuban Nationals who arrived by ship or aircraft at a U.S. port of entry from being placed into expedited removal proceedings because of the lack of diplomatic relations between the United States and Cuba.<sup>80</sup> Section 235(b)(1)(F) expressly provides that expedited removal “shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.”<sup>81</sup> Thus, the absence of diplomatic relations with Cuba provided an additional basis to justify the creation of special

---

73. See 2004 Cuba Expedited Removal Proceeding Rule Exception, *supra* note 51.

74. Under the INA, expedited removal proceedings may be used for aliens who are “arriving in the United States.” See INA, *supra* note 52, at § 235(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(i). However, the Secretary, in his or her sole and unreviewable discretion, may designate certain other aliens to whom the expedited removal provisions may be applied. See *id.* Specifically, and with a limited exception, the Act authorizes the Secretary to apply (by designation) expedited removal proceedings to all or any subset of aliens who (1) have not been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and (2) have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the two-year period immediately prior to the date of determination of inadmissibility. See *id.* Currently, the Secretary of the Department of Homeland Security is authorized to make this determination. Prior to the creation of the Department of Homeland Security, the INS interpreted the term “Secretary” under the INA to apply to the attorney general.

75. See 2002 Cuba Expedited Removal Proceeding Rule Exception, *supra* note 51.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*



exceptions to general expedited removal proceeding rules for Cuban Nationals.

In 2004, the Executive Branch again exercised its authority to add additional categories of aliens in its notice “Designating Aliens Subject to Expedited Removal.”<sup>82</sup> This time, however, different players were involved because the DHS was created during the intervening years as the Executive agency to oversee various immigration-related procedures.<sup>83</sup> Notably, the DHS assumed the responsibility of the INS. Pursuant to this change in 2004, the DHS—specifically the Secretary of Homeland Security—has the authority under the INA to create additional categories of aliens under Section 235 (b). In accordance with this authority, the DHS Secretary designated inadmissible aliens<sup>84</sup> subject to expedited removal proceedings under the Act as follows:

[Those] who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.<sup>85</sup>

Like the 2002 regulation, the 2004 regulation contained an exception for Cuban Nationals.<sup>86</sup> The rationale for this exception also echoed the 2002 notice.<sup>87</sup> The Secretary indicated that the exception was justified by long-standing U.S. immigration policies.<sup>88</sup> He also cited Section 235(b)(1)(F) of the Act as additional support for the same reasons expressed in the 2002 notice.<sup>89</sup> Thus, just like the 2002 regulation, the absence of diplomatic relations with Cuba acted as an important basis for creating the special exception for Cuban Nationals to the general rule governing expedited removal proceedings for all other immigrants. In this manner, these exemptions reveal how the policy encouraging special treatment of Cuban refugees influenced the Executive Branch’s regulation of Cuban immigration during the Bush administration just as it did under the Clinton and Johnson administrations.

---

82. See 2004 Cuba Expedited Removal Proceeding Rule Exception, *supra* note 51.

83. Exec. Order 13,228, 66 Fed. Reg. 196 (Oct. 10, 2001) available at <https://www.gpo.gov/fdsys/pkg/FR-2001-10-10/pdf/01-25677.pdf>.

84. INA, *supra* note 52, at § 212(a)(6)(C) or (7) (sections identifying inadmissible aliens).

85. See 2004 Cuba Expedited Removal Proceeding Rule Exception, *supra* note 51.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

D. *Obama maintained the longstanding policy and Bush-Era regulations until repealing them in the final days of his administration*

The Obama administration continued to support the long-standing immigration policy providing special treatment to Cuban immigrants. This became clear as late as August 2016. At that time, nine Latin American countries collectively sent a letter to the U.S. Department of State (DOS).<sup>90</sup> This letter requested the DOS to repeal what it called an “outdated” policy that was “contributing to an immigration crisis in the [Western] hemisphere” – one that, at the time, caused tens-of-thousands of Cuban Nationals to pass through Central American countries to reach the U.S.<sup>91</sup> DOS spokesperson, John Kirby, responded to this letter by saying that the U.S. had no plans to change its longstanding policy.<sup>92</sup> Kirby said, the U.S. “continue[s] to encourage all countries to respect the human rights of migrants and asylum seekers, and to ensure that they are treated humanely.”<sup>93</sup> He added, “the Cuban Adjustment Act remains in place and ‘wet foot/dry foot’ remains U.S. policy regarding Cuban migration.”<sup>94</sup> Given this regulatory background, President Obama’s eventual repeal of these long-standing rules constituted a major change in U.S. immigration policy.

VI. PRESIDENT OBAMA REPEALED THE FAVORED STATUS OF CUBAN NATIONALS AS PART OF HIS FOREIGN POLICY TO NORMALIZE DIPLOMATIC RELATIONS WITH CUBA AND REGULATORY POLICY TO REMOVE OUTDATED, INCONSISTENT, OR UNNECESSARY RULES

Despite the above-referenced statements from the DOS,<sup>95</sup> the Obama administration reversed the “wet foot/dry foot” policy on January 12, 2017.<sup>96</sup> Obama’s goal to normalize relations with Cuba influenced this dramatic policy change. Obama’s discontinuance of the “wet foot/dry foot” policy followed naturally from the normalization of relations with Cuba given the Obama administration’s regulatory emphasis on the removal of unnecessary, repetitive, or outdated rules. Thus, a close look at Obama’s immigration directive suggests that it was both a product of his normalization goals and regulatory policy.

Before examining Obama’s announcement, it is helpful to understand Obama’s normalization efforts. Obama opened a “new chapter” for U.S.-Cuba relations that marked a significant departure from past U.S.

---

90. See Ed. Bd., *Neighbors Question Cuba Migration Policy*, N.Y. TIMES, Aug. 31, 2015, <https://www.nytimes.com/2016/08/31/opinion/neighbors-question-cuba-migration-policy.html>; Franco Ordonez, *Nine Latin Nations Band Together to Plead with U.S. Over Cuba*, MIAMI HERALD, Aug. 29, 2015 7:51 pm, available at <http://www.miamiherald.com/news/nation-world/world/article98720042.html>.

91. See Ordonez, *supra* note 90.

92. See *id.*

93. See *id.*

94. See *id.*

95. See *id.*

96. See Obama Jan. 2017 Statement, *supra* note 4.

policy.<sup>97</sup> This “new chapter” was driven by an effort to normalize relations with Cuba.<sup>98</sup> Obama had indicated during the 2008 presidential campaign that he would seek to change U.S. policy by allowing unlimited family travel and remittances to Cuba.<sup>99</sup> Nonetheless, robust normalization efforts did not begin until Obama’s second term. The first major event occurred on December 17, 2014 when Obama and Castro announced they reached an agreement to begin normalizing relations between the U.S. and Cuba.<sup>100</sup> In the following twenty-two months, the U.S. and Cuba took measures to normalize relations.<sup>101</sup> These activities resulted in an October 2016 directive where Obama outlined his normalization policy and agenda. A path towards normalization for U.S.-Cuba immigration was not addressed. In fact, the directive avoided the major immigration question pertaining to normalization – namely, whether the Executive branch would abolish the “wet foot/dry foot” policy and encourage the Congressional repeal of the CAA. The directive merely instructed DHS to “safeguard the integrity of the U.S. immigration system, to include the facilitation of lawful immigration and ensure protection of refugees.”<sup>102</sup> It also indicated that the Secretary of Homeland Security, with support from the Secretaries of State and Defense, would “address maritime migration or mass migration” in a manner “consistent with applicable interagency guidance and strategy.”<sup>103</sup> Notwithstanding the broader normalization policy goals set forth in this directive, President Obama took his first step towards making historic changes to U.S.-Cuba immigration policy. In this manner, normalization was a strong policy factor that led to Obama’s historic removal of the “wet foot/dry foot” and related Executive agency regulations in the last days of his administration. Indeed, the language employed in Obama’s announcement of his decision indicated how his normalization goals motivated this repeal.

---

97. Exec. Statement, The White House Office of the Press Sec’y, *Statement by the Pres. on U.S. Cuba Policy Changes* (Dec. 17, 2014), <https://www.gpo.gov/fdsys/pkg/DCPD-201600700/pdf/DCPD-201600700.pdf> [hereinafter Obama Dec. 2014 Normalization Statement] (“Through 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”) (emphasis added).

98. *Id.*

99. See WASEM, *supra* note 5, at 19 fn. 74 (citing William E. Gibson, *President Barack Obama Seeks “a new beginning” with Cuba*, FORT LAUDERDALE SUN SENTINEL, Apr. 18, 2009).

100. See *No Time to Lose: Navigating the Shoals of the New U.S.-Cuba Relationship in CUBA-U.S. RELATIONS: NORMALIZATION AND ITS CHALLENGERS* 19-23 (William M. Leogrande 2016) [hereinafter Leogrande] available at <http://ilas.columbia.edu/wp-content/uploads/2017/03/CUBA-US-RELATIONS-NORMALIZATION-AND-ITS-CHALLENGES.pdf>.

101. See *id.* (noting (1) the efforts included the opening of embassies in the countries, encouraging travel between the countries by U.S. and Cuban officials, including President Obama, and the creation of a Bilateral Commission to “prioritize areas of engagement” and (2) conversations between officials led to non-binding agreements on a variety of topics).

102. See Obama Dec. 2014 Normalization Statement, *supra* note 97.

103. *Id.*

The first sentence of the January announcement stated Obama's foreign policy objective to normalize relations with Cuba. It reads, "the United States is taking important steps forward to normalize relations with Cuba."<sup>104</sup> Just as Obama's normalization agenda was an important factor in bringing about this decision, Obama's regulatory policy also significantly shaped it. Obama's regulatory policy predicated itself upon the need for regulations to be consistent, to conform to changed circumstances, and to be cost effective. Thus, Obama's statement ended the "wet foot/dry foot" exception for Cuban Nationals to "bring greater consistency" to U.S. immigration policy and rules. Specifically, it stated, "Cuban nationals who attempt to enter the United States illegally and do not qualify for humanitarian relief will be subject to removal, consistent with U.S. law and enforcement priorities."<sup>105</sup> In doing so, it created a new policy "treating Cuban migrants the same way we treat migrants from other countries."<sup>106</sup> Furthermore, it relied upon changed circumstances to support its repeal of long-standing U.S. immigration policies regarding Cuban Nationals by stating that the "wet foot/dry foot" policy "was designed for a different era."<sup>107</sup>

Looking beyond the text of the announcement, other factors also importantly supported the decision. Notably, the status quo under the "wet foot/dry foot" policy had become an increasingly unsustainable policy during the normalization of relations with Cuba. An immigration crisis started to emerge with normalization on the horizon.<sup>108</sup> After the December 17, 2014 announcement, the number of Cubans intercepted by the Coast Guard trying to reach the United States jumped sharply.<sup>109</sup> Reports suggest that this increase indicated that Cubans feared the U.S. would soon abolish "the wet foot/dry foot" policy as well as its related rules or repeal the CAA.<sup>110</sup> Cubans found a new path to the U.S. through Mexico thanks to the 2013 revocation of a Cuban law that formerly required Cuban citizens to obtain government permission to travel abroad.<sup>111</sup> Without the visa requirement, Cubans began to enter the U.S. by way of Mexico to claim a "dry foot status" at the Texas border.<sup>112</sup> More than 45,000 Cubans entered the U.S. through this path from

---

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See, e.g.*, Lisette Alvarez, *Law Favoring Cuban Arrivals is Challenged*, N.Y. TIMES, Feb. 15, 2015, available at <https://www.nytimes.com/2015/02/02/us/law-favoring-cuba-arrivals-is-challenged.html> [hereinafter Alvarez] ("Fear that the policy would change after President Obama's announcement led to a surge in Cubans jumping on boats and rafts headed for Florida in [January to February 2017]").

109. *See id.*

110. *See id.*

111. *See* Molly Hennessy-Fiske, *New Wave of Cuban Immigrants Reaches U.S., But Through Texas, Not Florida*, L.A. TIMES, Nov. 25, 2015, available at <http://www.latimes.com/nation/la-na-cuba-texas-migrants-20151124-story.html>.

112. *Id.*

September 2014 to September 2015.<sup>113</sup> Notably, that number was ten times more than the average number of Cubans who successfully reached Florida beaches to claim their “dry foot” status.<sup>114</sup> Cubans also started to use social media to find a path to the U.S. – a development that further exacerbated the possibility of an immigration crisis.<sup>115</sup>

Coupled with the increased migration of Cubans was a heightened concern about the substantial costs associated with the current policy. Under existing laws, for example, Cubans may obtain social security benefits for up to seven years after they arrive in the U.S. – longer if they become citizens.<sup>116</sup> Considering the increased number of Cubans entering the U.S. legally under the dry foot policy, the administrative costs associated with providing Cuban Nationals and noncitizens benefits, coupled with the budget deficit, arguably made the existing system unsustainable. In comments made to *Reuters* in August 2016, Senator Marco Rubio, who himself was a son of Cuban immigrants, observed that the current system imposes immense costs on the U.S.<sup>117</sup> He noted that Americans spent \$680 million in 2014 supporting migrants, a total that he assumed had grown since 2014.<sup>118</sup> Indeed, the costs seemed to outweigh the benefits.

---

113. See Jim Wyss and Mimi Whitefield, *Cuban Migrant Crisis in Central American Escalates*, MIAMI HERALD, Nov. 18, 2015, 9:47 pm, available at <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article45357492.html> (reporting that “more than 45,000 Cubans arrived at U.S. checkpoints along the Mexican border and presented themselves for admission to the United States in the fiscal year that ended September 2016”); William Leogrande, International Op-ed, *A New Crisis of Cuba Migration*, N.Y. TIMES, Dec. 5, 2015, available at <https://www.nytimes.com/2015/12/05/opinion/international/a-new-crisis-of-cuban-migration.html> (same); Harriet Alexander, *How More Cubans are fleeing to the U.S. than ever before*, TELEGRAPH, Dec. 28, 2015, available at <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/cuba/12062904/How-more-Cubans-are-fleeing-for-the-US-than-ever.html> (same). See also, *Surge in Cuban immigration to U.S. continued through 2016*, PEW RES. CENTER, Jan. 13, 2017, available at <http://www.pewresearch.org/fact-tank/2017/01/13/cuban-immigration-to-u-s-surges-as-relations-warm/> (reporting on data indicating that the number of Cubans entering the U.S. had spiked dramatically since President Barack Obama announced a renewal of ties with the island nation in late 2014).

114. Leogrande, *supra* note 100, at 25 (“by late 2015, however, a slow-motion crisis was already underway. Cubans had found a new land route to the United States whereby everyone was a ‘dry foot’ and no one was denied entry. From September 2014 to September 2015, more than 45,000 Cubans entered the United States from Mexico, more than ten times the number who annually have managed to elude the U.S. Coast Guard reach Florida beaches and claim their ‘dry foot’ status”).

115. See e.g. Michael Weissenstein, *Social Media Helps Drive Historic Cuban Exodus to US*, ASSOCIATED PRESS, Nov. 24, 2015 2:24 AM, available at <http://www.miamiherald.com/news/nation-world/world/article46175625.html> (discussing how Cubans traveling to the U.S. in response to normalization (especially a fear that the U.S. special immigration rules for Cuban nationals were coming to an end) were using social media tools like Facebook to get tips for their travels to the U.S.).

116. See SI 00502.106: Time-Limited Eligibility for Certain Aliens Supplemental Security Income for some noncitizens, SOCIAL SECURITY ADMIN., available at <https://secure.ssa.gov/poms.nsf/lnx/0500502106>. See also, Supplemental Security Income for Noncitizens, SOCIAL SECURITY ADMIN, available at <https://www.ssa.gov/pubs/EN-05-11051.pdf> (fact sheet outlining details of the seven-year program; Megan O’Matz, et. al, *Cubans Retire to Florida, With Help from U.S. Taxpayers*, SUN SENTINEL, Oct. 1, 2015, available at <http://www.sun-sentinel.com/us-cuba-welfare-benefits/sfl-us-cuba-welfare-benefits-part-2-htmlstory.html> (“Cubans are eligible for government assistance for up to seven years after they arrive in the U.S. and longer if they become citizens”).

117. See *U.S. Senator Rubio wants to end some benefits for Cuban immigrants*, REUTERS, Apr. 13, 2016, 3:58 pm, available at <https://www.reuters.com/article/us-usa-cuba-immigration/u-s-senator-rubio-wants-to-end-some-benefits-for-cuban-immigrants-idUSKCN0XA2CT>.

118. *Id.*

In light of these factors and Obama's instruction for agencies to engage in retrospective review, it may initially seem curious that these regulations escaped retrospective review scrutiny. That is, why would the DHS not include these regulations in one of its "look back" reports if the regulations were clearly inconsistent and outdated, not to mention costly. Closer analysis, however, suggests two likely explanations for this omission. First, as Obama reportedly feared his repeal of the "wet foot/dry foot" policy would trigger a migration crisis,<sup>119</sup> the DHS also had good reasons not to red flag the modification, amendment, or repeal of this policy. Pursuant to Obama's retrospective review policy, the DHS would have had to indicate it was considering repealing the Cuban exceptions to the expedited removal proceeding rules in a "look back" report. Since these reports were public, this could have caused a flurry of Cuban Nationals to try to flee Cuba for the U.S. to take advantage of the special immigration rules before they were repealed. Second, as an Executive agency, the DHS's rules are greatly influenced by Executive policy. As such, it would be very unlikely for the DHS to suggest repealing rules through the retrospective review process that served a long-standing policy without an explicit policy change announcement or directive from President Obama. Even with an explicit policy change, the DHS would not necessarily need to conduct a retrospective review if the policy change results in an obvious rule change. An illustrative example is the DHS repeal of Cuba-specific exceptions to regulations of flights between the U.S. and Cuba in April 2016. Pursuant to Obama's normalization policy and agreements to open travel between the U.S. and Cuba,<sup>120</sup> the U.S. Customs and Border Protection (CBP) of the DHS amended a regulation to remove rules that "were no longer needed."<sup>121</sup> Specifically, it abolished Cuban-specific exceptions to "make clear that flights to and from Cuba are subject to the same entry and clearance requirements as all other similarly situated international flights."<sup>122</sup> In light of this example, DHS likely would not identify Cuba-specific immigration rules as ripe for retrospective review without a change in the Executive policy and/or an explicit directive from the President to make rule changes. Therefore, there is good reason to believe retrospective review was directly, albeit discreetly, considered when drafting the announcement or alternatively that the spirit of the regulatory policy indirectly, but significantly, influenced the change. Accordingly, Obama's announcement served his normalization goals as well as his regulatory agenda.

---

119. See Alvarez, *supra* note 108

120. See Obama Dec. 2014 Normalization Statement, *supra* note 97 ("we are taking steps to increase travel, commerce, and the flow of information to and from Cuba").

121. See Customs Bulletin and Decisions, Vol. 50. O. 14, Apr. 6, 2016.

122. See *id.* (noting "as part of the President's new approach to Cuba policy, DHS and CBP examined their regulations and policies pertaining to Cuba, particularly as they relate to travel between the two countries" and that "the existing regulations pertaining to flights to and from Cuba (codified at 19 C.F.R. part 122, subpart O) [we]re no longer needed because they are either obsolete in light of intervening changes or substantively identical to the general CBP requirements applicable to aircraft seeking to fly into or out of the United States").



VII. PRESIDENT TRUMP HAS LIKELY MAINTAINED OBAMA'S DECISION THAT CUBAN NATIONALS SHOULD NOT BE SUBJECT TO A SPECIAL REGULATORY REGIME BECAUSE OBAMA'S DECISION WAS PREMISED ON REGULATORY PRINCIPLES THAT TRUMP SUPPORTS

Where President Obama supported normalizing diplomatic relations with Cuba, President Trump has not. Despite their opposing views regarding normalizing diplomatic relations with Cuba, the respective policies of Presidents Obama and Trump converge on the subject of U.S.-Cuban immigration. This intriguingly arises because Obama and Trump share the belief that rules should be removed if they are unnecessary, inconsistent, and outdated.

During his campaign for the presidency in 2016, Trump conditionally opposed Obama's general normalization efforts with Cuba.<sup>123</sup> With respect to the "wet foot/dry foot policy" and its related exemptions to expedited removal proceedings, Trump made two comments during his presidential campaign – one in February 2016<sup>124</sup> and another in August 2016<sup>125</sup> – that outlined his stance on this issue. In February 2016, Trump was asked whether "it was fair for Cubans who arrive in the U.S. to automatically get legal status, a path to citizenship and federal welfare benefits?" In response, he indicated that the policy was unfair. To wit, "it's very unfair when people who just walk across the border, and you have other people that do it legally."<sup>126</sup> Comments six-months later in August 2016 revealed Trump's position was less crystalized.<sup>127</sup> When asked by a reporter whether he would remove the "wet-foot dry-foot" policy, Trump deflected the question. Qualifying his earlier message that the policy was unfair, Trump declared he did not have a decision on the policy but was going to speak with Cuban-Americans about their feelings on the policy to help him decide what to do.<sup>128</sup> Yet, Trump never provided his stance on the longstanding policy, even after Obama's January 12 announcement that the Executive was authorizing the end of the

123. See Torres, *supra* note 8.

124. See Adam C. Smith, *Donald Trump Talks Cuba, Oil Drilling, and Marco Rubio*, TAMPA BAY TIMES, Feb. 13, 2016 7:30 pm, available at <http://www.miamiherald.com/news/politics-government/article60274061.html>.

125. See Patricia Mazzei, *Trump: Americans could be tried in Guantánamo*, MIAMI HERALD, Aug. 12, 2016 1:09 pm, available at <http://www.miamiherald.com/news/politics-government/election/donald-trump/article95144337.html>.

126. See Smith, *supra* note 124.

127. See Mazzei, *supra* note 125.

128. See *id.* (responding to the question "is it fair that Cubans who arrive in America automatically get legal status, a path to citizenship and benefits such as Social Security, when other foreign-born people don't?," Trump noted, "I don't think that's fair [. . .] You know we have a system now for bringing people into the country, and what we should be doing is we should be bringing people who are terrific people who have terrific records of achievement, accomplishment. . . . You have people that have been in the system for years [waiting to immigrate to America], and it's very unfair when people who just walk across the border, and you have other people that do it legally." See *id.* When asked about this thoughts on the wet-foot, dry-foot policy that has "growing skepticism now that the Obama administration is normalizing relations with Cuba," Trump noted that "he support[ed] those efforts, and expanding economic ties between the countries [. . .], but he doubts the current administration's ability to strike a good-enough deal").

“wet foot/dry foot” policy and the repeal of rules providing for special exceptions to U.S. immigration law for Cuban Nationals. This uncertainty made it unclear whether Trump would revoke, amend, or maintain Obama’s repeal of the long-standing unique immigration status Cuban Nationals received under both Democratic and Republican presidents.

Months after his inauguration and pursuant to his opposition to Obama’s efforts to normalize relations with Cuba, Trump reversed several of Obama’s initiatives in this regard with one notable exception: he let stand Obama’s decision to revoke the longstanding “wet foot/dry foot policy.”<sup>129</sup> As noted earlier, this result marks a rare instance where the policies of Obama and Trump find common ground. The best explanation for this seeming anomaly is Obama and Trump share a belief in emphasis on the removal of outdated regulations. As discussed in the previous section, Obama grounded his decision to end the regulatory regime that had provided Cuban National special status for over fifty-years on deregulatory principles – with a specific desire to remove rules that were no longer needed. It is also clear from our discussion in Section III, *supra*, that the Trump administration shares these Obama administration regulatory principles. Based on the foregoing, Trump’s decision to uphold Obama’s repeal of the special Cuban immigration rules seems to squarely fall in line with the deregulation principles that serve as the hallmark of Trump’s regulatory agenda, outlined in his EO 13,777.

The directive issued by President Trump outlining his Cuba policy indicates that his decision was premised on the reevaluation of the effectiveness of the prior “wet foot/dry foot” regulations. Specifically, Trump noted that terminating the “wet foot/dry foot” policy was necessary on humanitarian grounds<sup>130</sup> because that policy “encouraged untold thousands of Cuban Nationals to risk their lives to travel unlawfully to the United States.”<sup>131</sup> While Trump’s regulatory principles are not highlighted in this statement – as was the case in Obama’s announcement of the deregulatory decision<sup>132</sup> – Trump’s directive emphasizes an ongoing analysis of the effectiveness of regulatory policy. Indeed, the Trump administration determined that providing special immigration status to Cuban Nationals was no longer necessary to an anti-Castro diplomatic policy. Thus, shared regulatory principles once again provide a meaningful explanation for why Trump has chosen to

---

129. See Steve Holland, *Trump Rolls Back Parts of What He Calls ‘Terrible’ Obama Cuba Policy*, REUTERS, June 16, 2017, 1:06 AM, available at <https://www.reuters.com/article/us-usa-cuba/trump-rolls-back-parts-of-what-he-calls-terrible-obama-cuba-policy-idUSKBN1970EC> (reporting on Trump’s June 2017 Cuba Directive and noting that it “roll[ed] back parts of Obama’s [2014 normalization directive]” but left “in place many of Obama’s changes, including the reopen[ing] of the] U.S. embassy in Havana, even [though Trump] sought to show he was making good on a campaign promise to take a tougher line [than Obama] against Cuba, especially over its human rights record”).

130. See Trump June 2017 Cuba Memo, *supra* note 10. See also Exec. Statement, *Remarks by President Trump on the Policy of the United States Towards Cuba* (June 16, 2017), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-policy-united-states-towards-cuba/>.

131. See Trump June 2017 Cuba Memo, *supra* note 10.

132. See discussion in Section IV *supra*.

maintain Obama's immigration policy despite the Presidents' opposing policy goals regarding the normalization of U.S.-Cuba relations.

#### VIII. CONCLUSION: FROM BOTH A REGULATORY AND FOREIGN POLICY PERSPECTIVE, THE DEREGULATION TREND WILL LIKELY CONTINUE

The recent deregulation trend in the Cuban immigration law will likely continue, absent any serious changes in U.S.-Cuba diplomatic relations. From the perspective of both regulatory and foreign policy, Cuban Nationals should not expect President Trump to restore the special immigration status they previously enjoyed. From a regulatory perspective, it appears that this recent trend and major reversal of special immigration status for Cuban Nationals will continue in the near future. One reason why is the Trump administration's adoption of the retrospective review principles outlined in Section Six of Obama's EO 13,563.<sup>133</sup> This section affirms that agencies should amend or repeal rules that are inconsistent, outdated, or unnecessary. As such, it reveals how the principle of retrospective review has become increasingly ingrained in U.S. regulatory policy despite party affiliations. Thus, the fact that Obama and Trump may have different views about the normalization of relations with Cuba does not prevent them from both acknowledging the need to repeal the special immigration status for Cuban Nationals notwithstanding its time-honored status. Given this fact, it seems unlikely that the Trump administration will reinstate these inconsistent, expensive, and unnecessary immigration policies that were designed for a different era.

Changes in U.S.-Cuban diplomatic relations might, on first analysis, require modifying America's Cuban immigration policy in the context of expedited removal proceedings. As discussed in Section IV(C) *supra*, the Bush administration justified the special exceptions it issued in 2002 and 2004 for Cubans Nationals under general expedited removal proceedings rules based upon the CAA and Section 235(b)(1)(F) of the INA. This INA section expressly provides that expedited removal "shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry."<sup>134</sup> Pursuant to this regulation, a lack of "full diplomatic relations" between the U.S. and Cuba might thus arguably provide an opportunity for the Executive branch to reintroduce rules that give Cuban Nationals special treatment.<sup>135</sup> Nevertheless, President

133. See Obama EO 13,563 *supra* note 1, at § 6.

134. See INA, *supra* note 11, at § 235(b)(1)(F).

135. For example, one can point to President Trump's response to the recent revelations regarding the sonic attacks against the U.S. embassy in Cuba as evidence of deteriorating relations between the U.S. and Cuba. See Nora Gamez Torres, *U.S. Suspends All Visas for Cubans, Withdraws Most Staff from Embassy in Havana*, MIAMI HERALD, Oct. 2, 2016, 1:35 pm, available at <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article176086411.html>. After the sonic attacks, President Trump ordered all non-essential diplomatic personnel to return to the U.S. and the U.S. Department of the

Trump's clearly enunciated restrictionist approach to both legal and illegal immigration strongly indicates that he will not reinstate any policies and rules that formerly favored Cuban Nationals.<sup>136</sup> President Trump clarified his general immigration agenda in August 2017 when he publicly backed a bill to curb legal immigration.<sup>137</sup> More specifically, Trump "placed a decades-old idea—that until now had been largely sidelined—back into the mainstream"<sup>138</sup> when he announced his support for the Reforming American Immigration for a Strong Economy Act ("RAISE Act"), a measure that would – if enacted – cut legal immigration to the United States by 50 percent over a decade.<sup>139</sup>

Although Trump has rejected normalization with Cuba, his adherence to the repeal of the "wet foot/dry foot" policy suggests his overarching imperative to reduce immigration outweighs any foreign policy advantages of a special regulatory regime for Cuban immigrants. As such, there is greater likelihood of further sanctions against the Castro regime under the Trump administration than the return of the privileged immigration status of Cuban Nationals. In fact, the regulatory principle of retrospective review may require such a new approach. Changing circumstances may necessitate a further historical evolution of the nature and extent of executive actions taken to address any developing regulatory and foreign policy challenges Cuba poses to the United States. As a result, the privileged treatment of Cuban Nationals from the Johnson administration through the final days of the Obama administration is nearly certain to become a relic of the past.

---

Treasury on November 2017 rolled-back non-immigration related regulations, including travel between the two countries. See Roberta Rampton & Sarah Marsh, *New U.S. Government Rules Restrict Travel and Trade with Cuba*, REUTERS, Nov. 8, 2017 9:09 AM, available at <https://www.reuters.com/article/us-usa-cuba/new-u-s-government-rules-restrict-travel-and-trade-with-cuba-idUSKBN1D81XN>.

136. Fact Sheets, The White House, President Donald J. Trump backs Raise Act (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

137. See *id.*

138. See Priscilla Alvarez, *Can a Decades-Old Immigration Proposal Pass Under Trump?*, ATLANTIC, Aug. 21, 2017, available at <https://www.theatlantic.com/amp/article/537138/>.

139. See *id.*