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## Cuba Libre: A Verb? A Noun? Or A Cocktail?

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# Cuba Libre: A Verb? A Noun? Or A Cocktail?

BRIAN EISELMAN\*

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\* © 2017 Brian Eiselman. J.D. 2017, University of San Diego School of Law. B.A. 2014, Loyola Marymount University. This Article is dedicated to my father, Bob Eiselman, whose humanitarian efforts in Cuba, love for his family, and passion for helping others continue to inspire me. I would like to thank everyone who took the time to provide me with feedback throughout the editing process.

## I. BACKGROUND OF THE EMBARGO AND HELMS-BURTON

The Cuban Embargo, as we know it, was enacted as an executive order on February 7, 1962, at the direction of President Kennedy.<sup>1</sup> Despite significant popular pressure in the United States to terminate the Embargo, equally fervent pressure to strengthen its terms helped keep the Embargo in place for over 53 years, under nine different Administrations.<sup>2</sup> An embargo is a diplomatic trade ban that partially or completely prohibits commerce and trade with a particular target country.<sup>3</sup> The Trading with the Enemy Act, which provides the basis for the Cuban Embargo, effectively gives the President the power to put in place and maintain economic sanctions against hostile nations.<sup>4</sup> The objective of the Embargo, insofar as it concerned Cuba, was to undermine and oust the strict and oppressive control of the regime under Fidel Castro by denying the Castro regime the proceeds and profits from trade of its products with the United States and financial transactions with the international community at large.<sup>5</sup> Rather than act as a catalyst to accelerate the downfall of the Castro regime, the Embargo had the opposite effect: with the Embargo in place, Castro always had a viable scapegoat for any problem in Cuba. In fact, the irony of the Embargo

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1. See Proclamation 3447—Embargo on All Trade with Cuba, 76 Stat. 1446 (1962) (prohibiting the importation of all goods of Cuban origin, all goods imported from or through Cuba to the U.S., and all exports from the U.S. to Cuba with the right to modify or revoke exceptions reserved exclusively to President Kennedy).

2. Although, in 1977, President Jimmy Carter temporarily allowed U.S. citizens to travel to Cuba and chose not to renew the ban on travel to Cuba, which was renewable every six months. However, when President Ronald Reagan entered the White House in 1981, the Cuba travel ban was reinstated, economic pressure was tightened, and Cuba was placed on the U.S. list of state sponsors of terrorism. See Merrill Fabry, *The U.S. Trade Embargo on Cuba Just Hit 55 Years*, TIME MAGAZINE, Oct. 19, 2015, <http://time.com/4076438/us-cuba-embargo-1960/> [<https://perma.cc/9WWK-2T88>]. See also John Suarez, *President Obama's retreat of Jimmy Carter's 1970's U.S. Cuba Policy*, CUBAN EXILE QUARTER (Feb. 6, 2015, 6:59 PM), <http://cubanexilequarter.blogspot.com/2015/02/president-obamas-plagiarism-of-jimmy.html> [<https://perma.cc/K24J-5FLA>] (noting that while President Jimmy Carter chose not to renew the travel ban to Cuba, President Ronald Reagan reinstated the prohibition in 1981, among other stringent policies against Cuba).

3. See *Economic Embargo of Cuba Law and Legal Definition*, U.S. LEGAL, <http://definitions.uslegal.com/e/economic-embargo-of-cuba/> [<https://perma.cc/58AF-SARL>] (last visited Feb. 27, 2016).

4. See generally Trading With the Enemy Act of 1917, 50 U.S.C. § 5 (2006) (noting that a President in time of war may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise investigate, regulate, or prohibit any transactions in foreign exchange with an ally of an enemy).

5. See Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1997); see also United States Department of Treasury, Comment on the Cuban Assets Control Regulations Title 31 Part 515 of the U.S. Code of Federal Regulations (July 26, 2001), <https://www.treasury.gov/resource-center/sanctions/Documents/tab4.pdf> [<https://perma.cc/ES6Q-YBEH>].

is that, for all intents and purposes, Castro needed the Embargo in order to consolidate his influence and power.

By 1995, the general sentiment was that President Clinton would terminate the Embargo and reestablish diplomatic and trade relations with Cuba.<sup>6</sup> At that time, however, Senator Jesse Helms and Representative Dan Burton had proposed legislation that would strengthen the Embargo and, among other things, facilitate Cuban independence; however, the proposed legislation, known as the Helms-Burton Act, was losing momentum, and could not trump the ability of President Clinton to terminate the Embargo and render the legislation moot.<sup>7</sup>

On February 24, 1996, an international incident occurred that changed the complexion of the circumstances. On that day, the Cuban Air Force downed two American civilian airplanes in international waters, killing four people.<sup>8</sup> Members of a Florida-based group of Cuban exiles who called themselves “Brothers to the Rescue” operated the American airplanes to assist Cubans attempting to immigrate to the United States.<sup>9</sup> The group had been warned previously about the dangers of entering Cuban air space, as the missions they flew regularly violated Cuban air space.<sup>10</sup> The

6. See Peter Kombluh & William M. Leogrande, *The Real Reason It's Nearly Impossible to End the Cuba Embargo*, THE ATLANTIC, Oct. 5, 2014, <http://www.theatlantic.com/international/archive/2014/10/the-1996-incident-that-made-it-nearly-impossible-to-repeal-the-cuba-embargo/381107/> [<https://perma.cc/2A2V-3PJ5>].

7. See generally CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1995, H.R. REP. NO. 104-202, pt.1 (1st Sess. 1995).

8. Carl Nagin, *Backfire*, THE NEW YORKER, Jan. 26, 1998, at 30.

9. Brothers to the Rescue's humanitarian mission was aimed to provide assistance to emigrants from Cuba trying to use whatever means possible to escape the Castro regime and come to the United States. However, this group regularly exceeded the scope of their role, and often brazenly buzzed Cuban air space and even dropped pamphlets upon the streets of Havana. See Larry Rohter, *Exiles Say Cuba Downed 2 Planes and Clinton Expresses Outrage*, N.Y. TIMES, Feb. 25, 1996, <http://www.nytimes.com/1996/02/25/world/exiles-say-cuba-downed-2-planes-and-clinton-expresses-outrage.html?mtref=topics.nytimes.com&gwh=ACAB5ED398A823A271749CD1FA0290E0&gwt=pay> [<https://perma.cc/PQ5H-U337>]; see also BROTHERS TO THE RESCUE BACKGROUND INFORMATION, <http://www.hermanos.org/Background%20and%20Information.htm> [<https://perma.cc/JTH3-ZDC8>] (last visited Feb. 27, 2016).

10. Both planes had communicated with Cuban air traffic controllers via radio, identified themselves, and reported their intentions to search international waters for Cuban refugees who may be on rafts. *U.S. Civilian Planes Shot Down Near Cuba*, CNN (Feb. 24, 1996, 12:45 AM), [http://www.cnn.com/US/9602/cuba\\_shootdown/25/](http://www.cnn.com/US/9602/cuba_shootdown/25/) [<https://perma.cc/2P7H-VEWT>]; Alfonso Chardy, *Expert: Brothers has previously ignored warnings about airspace*, MIAMI HERALD, Mar. 1, 2001, <http://www.cubanet.org/htdocs//CNews/y01/mar01/01e4.htm> [<https://perma.cc/K3WD-S9LB>].

downing of these planes was apparently on the orders of Fidel Castro, who was outraged that these missions also involved dropping pamphlets and other propaganda in Cuba thereby violating Cuban airspace.<sup>11</sup>

All bets for an end to the Embargo were off. Outrage over the deaths of three American citizens and one permanent Florida resident increased antagonism toward the Castro regime and forced the Clinton Administration to alter its policy towards Cuba permanently.<sup>12</sup> The Embargo was more stringently enforced, and the Helms-Burton legislation that was seemingly dead in the water started to gain momentum, and once the death of these American pilots came to light, President Clinton was compelled to undertake some actions against the Castro regime and signed the Act into law on March 12, 1996.<sup>13</sup>

In response to the Brothers to the Rescue incident, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).<sup>14</sup> The Helms-Burton Act was created as a means to strengthen international sanctions against the Castro government in Cuba and to support a transition government leading to a democratically elected government in Cuba.<sup>15</sup> Congress determined “[t]he repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights, have isolated the Cuban regime as the only completely nondemocratic government in the Western Hemisphere.”<sup>16</sup> The Helms-Burton Act aimed to encourage the holding of free and fair democratic elections in Cuba by increasing economic pressure on the Castro regime; however, in strengthening the Embargo and ceasing trade and relief to a country in need, the Cuban regime was even further isolated. During his last days in office, President Clinton reflected on Cuban relations and expressed his thoughts on the Helms-Burton Act and how he believed it was a mistake attributed to a hasty emotional response to the Cuban attack on the Brothers to the Rescue airplanes.<sup>17</sup>

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11. See *Clinton Delays Implementation of Bill on Cuba Lawsuits: U.S. Moves to Ban Canadian Executives*, WORLD NEWS DIGEST, July 18, 1996, at A2.

12. Nagin, *supra* note 8; see Todd Purdum, *Clinton Seeking Wider Sanctions Against Cubans*, N.Y. TIMES, Feb. 27, 1996, <http://www.nytimes.com/1996/02/27/world/clinton-seeking-wider-sanctions-against-cubans.html?mtref=topics.nytimes.com&gwh=0E4237F879BD28B40EFAE21A9EAF4409&gwt=pay> [<https://perma.cc/83GF-M334>].

13. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C §§ 6021–6029 (2006).

14. *Id.* § 6046(b).

15. *Id.* § 6022.

16. *Id.* § 6021.

17. See Andrew Rosell, Comment, *The Future of U.S.-Cuba Relations, a Policy Shift from the Helms-Burton Act*, 7 L. & BUS. REV. AM. 235, 242 (2001).

Nevertheless, the Helms-Burton Act still governs U.S. relations with Cuba, and has had a notable impact upon the Cuban economy that has had the net effect of negatively impacting the people it was enacted to help, while assisting the elite dictators that it was enacted to overthrow.<sup>18</sup> For example, eighty percent of Cuban sugar was exported to the Soviet Union during the 1980s, and since its collapse, Cuba has been incapable of expanding its economy from being largely dependent on sugar production.<sup>19</sup> The impact of the Helms-Burton Act has rendered Cuba unable to stand on its own two feet economically, and has left the citizens of Cuba completely dependent upon a dictator whose position is actually secured by a more stringent economic embargo, rather than weakened by it in view of the fact that, with the Embargo, Castro has a continuous scapegoat for Cuba's plight.<sup>20</sup>

This Article examines the nature of the history and origins of hostilities between the United States and Cuba leading up to the Embargo, and the Constitutional issue regarding the possible termination of the Embargo in view of the Helms-Burton Act. While President Kennedy enacted the Embargo unilaterally, the Helms-Burton Act usurped the power to regulate and conduct international affairs from the President, requiring a two-thirds Senate majority in order to lift or modify the Embargo.<sup>21</sup> Arguably, this provision violates both the United States Constitution as well as International Law.<sup>22</sup> Under the Obama Administration there was a new attitude towards Cuba, but the Embargo remains in place.<sup>23</sup> This Article will address political and economic aspects of the Embargo and will examine the various interests in enforcing the Embargo on the part of both the United States and its

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18. With the termination of subsidies from Russia and the sharp decline in export trade resulting from the collapse of the Soviet Union in 1991, the Cuban economy has been unable to recover, and its population, not the Castro regime, ended up suffering the greater burden. *See U.S. Embargo Hurting Cuba's Health*, S.F. CHRON., Mar. 3, 1997, at A16.

19. Lucien Dhooge, *Fiddling With Fidel: An Analysis of the Cuban Liberty and Democratic Solidarity Act of 1996*, 14 ARIZ. J. INT'L & COMP. LAW 575, 588 (1997).

20. *See* Kornbluh and Leogrande, *supra* note 6.

21. Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 292 (1997).

22. *Id.*; *see* Jose Gablione, *Can Obama Unilaterally End the Cuba Embargo*, THE HUFFINGTON POST (Aug. 31, 2015, 1:34 PM), [http://www.huffingtonpost.com/jose-gabilondo/can-obama-end-longtime-cuba-embargo\\_b\\_8059762.html](http://www.huffingtonpost.com/jose-gabilondo/can-obama-end-longtime-cuba-embargo_b_8059762.html) [<https://perma.cc/2A67-7V83>].

23. *See* Scott Lincicome, *Yes, of Course We Should Lift the Cuban Embargo*, THE FEDERALIST (Dec. 23, 2014), <http://thefederalist.com/2014/12/23/yes-of-course-we-should-lift-the-cuban-embargo/> [<https://perma.cc/2XAZ-L8T3>].

impact upon Cuba. As a tool of United States foreign policy, the Embargo actually enhances the Castro government's authority by giving it a convenient justification for the economic failures of socialism under the Castro regime.<sup>24</sup> Since its inception, the Embargo has failed to influence any change on the structure of the Cuban Government. The Embargo that was designed to bring an end to the Castro regime is the very thing that has empowered it over the course of decades.

## II. FAILURE OF THE MAIN OBJECTIVES OF HELM-BURTON

The objective of the Helms-Burton Act was to increase the pressure on the Cuban government by restricting assistance from countries that would provide aid to Cuba, as well as forcing neutral foreign countries choose between trading with Cuba at the expense of doing any type of business with the United States.<sup>25</sup> Cuba has nonetheless remained connected to the rest of the world, as the Act has been ineffective in forcing countries to choose a side and alienating Cuba from all international commerce.<sup>26</sup> In 2013, Cuba exported \$2.3 billion to, and imported \$4.8 billion from, its top trading partner, Venezuela.<sup>27</sup> Any argument that the Embargo somehow isolates the Cuban regime from anyone other than American travelers, exporters, and consumers is contrary to the empirical data available about Cuban trade.<sup>28</sup>

Poorly designed legislative sanctions concerning the Cuban Embargo have been easily bypassed in recent years. Despite the Embargo, the United States has become Cuba's fifth-largest trading partner since 2007, increased in part by President George W. Bush's decision to reauthorize the export

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24. Daniel Griswold, *The US Embargo of Cuba is a Failure*, THE GUARDIAN (June 15, 2009), <http://www.theguardian.com/commentisfree/cifamerica/2009/jun/15/cuba-us-trade-embargo-obama> [<https://perma.cc/96US-9V96>].

25. "The Helms-Burton Act permits the exclusion of foreign persons from the United States and makes U.S. nationals and foreign persons liable in U.S. federal courts if they are knowingly and intentionally: (i) trafficking in property confiscated by the Cuban government; and (ii) the property belongs to a U.S. national who does not consent to the use of his or its property." See Saturnino E. Lucio, II, *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995: An Initial Analysis*, 27 U. MIAMI INTER-AM. L. REV. 325, 340–41 (1996).

26. See Jorge I. Dominguez, *What You Might Not Know About the Cuban Economy*, HARV. BUS. REV. (Aug. 17, 2015) <https://hbr.org/2015/08/what-you-might-not-know-about-the-cuban-economy> [<https://perma.cc/BS8X-B3W7>] (discussing how Cuba exported \$343 million in 2013 to China and imported \$1.5 billion from it, but, in contrast, exported \$81 million to and imported \$614 million from Brazil.").

27. *Id.*

28. See Lincicome, *supra* note 23, (discussing how Cuba has access to internationally traded currencies like Euros, Canadian Dollars, and Yen, and that Cuba is also a full member of the World Trade Organization).

of U.S. agricultural products to Cuba during 2003.<sup>29</sup> President Bush authorized U.S. agricultural exports to Cuba in late-2001 under presidential discretion, and sales of these exports have exceeded \$5 billion between 2002 and 2014.<sup>30</sup> In 2014, according to the Census Bureau, the U.S. exported nearly \$300 million worth of products to Cuba, and over \$700 million in 2007 alone.<sup>31</sup> The highest volume American exports have been concentrated in the agricultural and telecommunications industries.<sup>32</sup> Since the Obama Administration's attempts to encourage exports to Cuba, farmers in the southeastern United States have benefited the most, through export of poultry, fish, rice, and corn, and their strategically proximate distance to Cuban ports.<sup>33</sup> The exports are permitted under a 2000 law that modified, but did not repeal, the U.S. trade Embargo and subject to this law, Cuba is authorized to buy approved agricultural products, medicines, and medical devices from the U.S. and is required to pay in cash.<sup>34</sup> In 2015, the United States has exported over \$131 million of these trade goods to Cuba.<sup>35</sup>

The central underlying tenets of the Helms-Burton Act include a pledge by the United States (1) to pursue a "mandatory international embargo" (see above) and (2) to "make preparations for a peaceful transition government . . . [that] does not include Fidel Castro or Raul Castro."<sup>36</sup> However, as noted herein, those central tenets have failed. If the Helms-Burton Act succeeds, the Embargo will continue to isolate Cuba and further worsen economic conditions in Cuba to the point that the Castro regime is no longer sustainable, such that democratic reform would follow

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29. Jennifer M. Harris, *The Winners of Cuba's 'New' Economy*, FORTUNE (Jan. 14, 2015), <http://fortune.com/2015/01/14/the-winners-of-cubas-new-economy/> [<https://perma.cc/4KG8-2B9D>].

30. See Dominguez, *supra* note 26.

31. *Exports to Cuba by 5-digit End-Use Code*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/statistics/product/enduse/exports/c2390.html> [<https://perma.cc/Z8UW-LCZR>] (last visited Jan. 7, 2017).

32. See Harris, *supra* note 29.

33. *Id.*

34. Drew Desilver, *What We Know About Cuba's Economy*, PEW RES. CTR. (May 28, 2015), <http://www.pewresearch.org/fact-tank/2015/05/28/what-we-know-about-cubas-economy/> [<https://perma.cc/CG8A-VU6R>].

35. *U.S. Trade in Goods with Cuba*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c2390.html> [<https://perma.cc/2G34-4RC3>] (last visited Feb. 7, 2017).

36. See Helms-Burton Act, *supra* note 17; Eric Zolov, *Let's Revisit Helms-Burton*, THE WORLD POST (Jan. 16, 2015) [http://www.huffingtonpost.com/eric-zolov/lets-revisit-helmsburton\\_b\\_6488476.html](http://www.huffingtonpost.com/eric-zolov/lets-revisit-helmsburton_b_6488476.html) [<https://perma.cc/K52R-SV4N>].



to supplant the regime.<sup>37</sup> The question is whether Cubans, who are desperate for the necessities of modern life, from food and clothing, access to information and stability, to adequate transportation, and durable goods that are profoundly lacking in quality and quantity, are willing and able to rise up against the regime.

The decision to strengthen the Embargo has further isolated the Cuban people thus far, and left them without any option or recourse apart from complying with the demands of the dictator in power under the Castro regime. In that way, the Helms-Burton Act further isolated Cuba and has backfired as citizens have rallied behind the Castro regime that continues to vilify America.<sup>38</sup> Since its inception, the Helms-Burton Act has unified Cubans with the Castro regime, deepened the distrust of the United States within Cuban society, and revitalized Castro's failing oppressive regime.<sup>39</sup> Accordingly, the Helms-Burton Act has also increased the opposition of Castro and Cuban society towards U.S. backed reforms regarding human rights and democracy.<sup>40</sup> Cubans otherwise opposed to Castro and his policies have nevertheless remained unified with the Cuban government against a common enemy, the United States, by virtue of having been indoctrinated over decades with the proposition that the Embargo is the cause of all of the many problems that they face.<sup>41</sup>

Moreover, the Helms-Burton Legislation attempts to exert democratic influence in a restrictive, but misleading way. The Act buttresses an antiquated Embargo and purports to enforce economic sanctions and coerce Cuba into establishing a democratic form of government. In developing countries, such as Cuba, where an autocratic regime depends on support from a few elite individuals and thus are not responsive to the overall population, the regime can employ extensive protectionism in which they control all of the methods and resources of production.<sup>42</sup> In that way, the Embargo plays to the strengths of the Castro regime and enables an economic system in which the elite are justified in exerting power over an insulated market. Democratization, however, may break down the traditional structure supporting protectionism, and could thus lead to change in the status quo.<sup>43</sup> Yet, by

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37. See Dhooge, *supra* note 19, at 620.

38. Stringent economic policies have provided a mechanism for the Castro regime to rally nationalist support against, what is in their view, unduly oppressive economic sanctions imposed by the United States. See Zolov, *supra* note 36.

39. See Ana Julia Jatar, *Helms-Burton Backfire*, WASH. POST, July 22, 1996, at 3.

40. See Dhooge, *supra* note 19, at 624.

41. *Id.*

42. See Helen Milner, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, PRINCETON U. PRESS 17 (Feb. 12, 2004), [https://www.princeton.edu/~hmlner/forthcoming%20papers/LDCdem\\_IO.pdf](https://www.princeton.edu/~hmlner/forthcoming%20papers/LDCdem_IO.pdf) [<https://perma.cc/E2Q3-N226>].

43. *Id.*

way of completely isolating Cuba and discouraging other nations from engaging in any trade with the country, the Act restricts the flow of any relief, resources, or ideologies in a manner contrary to the characteristics of the type of government it aims to establish. The Helms-Burton Act continues to strengthen the Castro regime by presenting it with expanded opportunities to appeal to Cuban nationalism through renewed attacks upon the U.S. for being the cause of all problems facing Cuban society. The isolation of Cuba has done more harm to the reputation and international perception of the U.S. because the Castro regime has used the threat posed by the U.S. Government and the Embargo to justify the regulations and restraints imposed on the Cuban people.<sup>44</sup> In essence, rather than forcing the Castro regime into submission, the Embargo is the very thing that has enabled the Castro regime to stay in power all these years.<sup>45</sup>

### III. A DANGEROUS STANDARD FOR INTERNATIONAL LAW

The Helms-Burton Act also sets a dangerous precedent for international law and diminishes the effectiveness of American foreign policy. International opposition to the Helms-Burton Act primarily stems from the perceived far-reaching extraterritorial application of U.S. law that interferes with sovereign trade rights.<sup>46</sup> As noted previously, the Congressional decision to codify and strengthen the Embargo was designed to pressure the Cuban economy so that the Castro regime would no longer be viable.<sup>47</sup> However, the Helms-Burton Act also had far-reaching implications for the trading allies of the United States by limiting their ability to engage in commerce

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44. A way to reverse this train of thought is to allow Cubans to prosper and open trade to encourage an open privatized economy in which the government does not retain complete control. Instead of attempting to penalize the Castro regime and unite the Cuban people against their government, U.S. foreign policy ought to benefit the working class and make their lives easier through participation in the economy. *See generally* Lee H. Hamilton, *New Cuba Policy Will Bring the Benefits of Cooperation*, THE HUFFINGTON POST (Jan. 22, 2015), [http://www.huffingtonpost.com/lee-h-hamilton/new-cuba-policy-will-brin\\_b\\_6526110.html?utm\\_hp\\_ref=90-miles](http://www.huffingtonpost.com/lee-h-hamilton/new-cuba-policy-will-brin_b_6526110.html?utm_hp_ref=90-miles) [https://perma.cc/85R7-FEX4].

45. The author believes that Castro regime has survived in part by having used the Embargo to excuse shortcomings and deficiencies of their system. They have also soured the relationship between the two countries with their continuous anti-American propaganda. *Id.*

46. *See* Dhooze, *supra* note 19, at 619.

47. *Helms-Burton Act: Resurrecting the Iron Curtain*, COUNCIL ON HEMISPHERIC AFF. (June 10, 2011), <http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain/> [https://perma.cc/E4LH-54KD].

with Cuba, and unnecessarily restricting their autonomy in the process.<sup>48</sup> Foreign countries have steadily rejected the Helms-Burton Act and continue to undermine its influence as an international sanction.<sup>49</sup> Foreign countries' retaliation against such an intrusive piece of international legislation is warranted, given that the Helms-Burton Act essentially attempts to restrict their sovereignty and freedom to trade without limitation.<sup>50</sup>

Accordingly, the Helms-Burton Act is seen as another instrument the U.S. uses to meddle in foreign affairs and control all economic dealings involving American allies, while straining longstanding international alliances and relationships by mandating who may trade with whom.<sup>51</sup> The United States' authoritative stance in enacting legislation that attempts to control resources and the flow of goods is strikingly similar to the domineering control of the Castro regime that the Helms-Burton Act purports to eradicate in the first place. Consequently, even steadfast allies of the United States view the Helms-Burton Act as unnecessarily, straining the country's closest relationships and its reputation in the eyes of the international community at large.

Both Mexico and Canada have challenged the legality of Title IV of the Helms-Burton Act, claiming that it violates the North American Free Trade Agreement (NAFTA) because it restricts business persons from traveling freely throughout the NAFTA countries.<sup>52</sup> Both of America's bordering allies have called for meetings with NAFTA's Free Trade Commission in

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48. For those reasons, the European Union condemned the Helms-Burton Act as an attempt by the United States to "unilaterally determine or restrict the European Union's economic and commercial relations with any other state . . . [in violation of] general principles of international law and the sovereignty of independent states." John M. Goshko, *3 Allies Join Call Against Cuba Embargo*, WASH. POST, Nov. 13, 1996, at A19.

49. For example, "Canada has already passed legislation that would allow any person subjected to damage awards in American courts to countersue in Canadian courts for amounts equal to those damage awards." Dhooge, *supra* note 19, at 619.

50. See Armando Chaguaceda, *The Promise Besieged: Participation and Autonomy in Cuba*, THE NORTH AMERICAN CONGRESS ON LATIN AMERICA (July/August 2011), <https://nacla.org/article/promise-besieged-participation-and-autonomy-cuba> [<https://perma.cc/J7HP-MUQ7>].

51. Daniel Griswold, Dir., Cato Inst., *Four Decades of Failure: The U.S. Embargo Against Cuba* (Oct. 12, 2005).

52. NAFTA Article 1105.1 provides that each NAFTA party "shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Canadian officials contend that, "given the American prohibition on the investment of capital in Cuba as a result of the economic embargo, Title III amounts to de facto discrimination against Canadian and Mexican investors engaged in activities that are legal in their home states." Christine L. Quickenden, Comment, *Helms-Burton and Canadian-American Relations at the Crossroads: The Need for An Effective, Bilateral Cuban Policy*, 12 AM. U.J. INT'L L. & POL'Y 733, 758-59 (1997).

order to challenge the Helms-Burton Act as a NAFTA violation.<sup>53</sup> In addition to the NAFTA challenge, the European Union has challenged the Helms-Burton Act in the World Trade Organization.<sup>54</sup> This stalemate and mounting hostility between allies is an unwise foreign policy strategy that may divide international allies based on a stubborn desire to keep the Embargo intact.

Furthermore, only weeks after the bill was signed to law (as the Helms-Burton Act), 34 of the 35 members of the Organization of American States (OAS) passed a resolution declaring that the Helms-Burton Act did “not conform to international law.”<sup>55</sup> Article 18 of the OAS Charter provides that “no state . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>56</sup> The Embargo arguably violates this obligation as it functions to domineer other nations’ trade with Cuba.<sup>57</sup> The internationalization of the Embargo creates resistance from many international organizations, but equally significant, the legislation incites the Castro regime’s propaganda war against American imperialism in Cuba as well as in the international community.<sup>58</sup>

In June 2009, at the OAS’s 39th General Assembly, a vote passed to lift Cuba’s suspension from the OAS that was in place since 1962.<sup>59</sup> Article

53. See Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Towards Cuba*, 54 WASH. U. J. URB. & CONTEMP. L. 213, 229 (1998).

54. The United States then informed the World Trade Organization that it will not yield to any decision on the issue because it feels that the purpose of the World Trade Organization is not to review foreign policy or the national security interests of the United States. *Id.* at 230; Guy de Jonquieres & Lionel Barber, *EU Puts US “Bully” in the WTO Dock*, FIN. TIMES, Oct. 3, 1996, at 5a.

55. See OAS Annual Report of the Inter-American Juridical Committee to the General Assembly 39, Aug. 29, 1996, [http://www.oas.org/en/sla/iajc/annual\\_reports.asp](http://www.oas.org/en/sla/iajc/annual_reports.asp) [<https://perma.cc/4NAM-4V5M>]; see Free Trade and Investment in the Hemisphere, A.G. Res. 1364 (XXVI-O/96) (June 4, 1996).

56. Treaties and Agreements Organization of American States: Integrated Text of the Charter As Amended by the Protocols of Buenos Aires and Cartagena De Indias; The Protocol of Amendment of Washington; and the Protocol of Amendment of Managua art 18, Dec. 14, 1992, 33 I.L.M. 981 (1994) [hereinafter OAS Charter].

57. See Dunning, *supra* note 53, at 231.

58. See Rosell, *supra* note 17, at 239. The United Nations, Mexico, and Canada continue to encourage trade with Cuba, and Canada has alleged that the Helms-Burton Act violates international law and the North American Free Trade Agreement (NAFTA). *Id.*

59. Cuba was ousted from the OAS on January 21, 1962 by a vote of 14 to one (with Cuba as the only opposing nation), because Cuba did not abide by the Organization’s democratic principles stemming from the Cold War provisions. Nonetheless, Cuba was reinstated as a member to the OAS without any major political reform or meeting the conditions that were necessary for reinstatement. See Ginger Thompson, *Imposing Conditions*, O.A.S.

34 of the OAS Charter states, “Member States should refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States.”<sup>60</sup> The conclusion is that the Helms-Burton Act violates also Article 19 of the OAS Charter because it is a political measure enacted to coerce the sovereign will of another state (Cuba), and obtain advantages both economically and politically.<sup>61</sup> Ultimately, the Helms-Burton Act functions to isolate Cuba and deter any trade involving Cuban goods or services. The purpose and intended consequences of the Act directly conflict with this established provision of international law, yet the Embargo remains intact, and pressure from international authorities has done little to change the status quo.

In 2013, the UN General Assembly, for the twenty-second year in a row, condemned the U.S. Embargo through a resolution of 188 supporting member countries; all but two countries were opposed.<sup>62</sup> Additionally, by a vote of 188 to 2, the Assembly approved a Cuban resolution condemning the U.S. for causing over \$1.126 trillion in damages as a result of over 50 years of trade sanctions.<sup>63</sup> The overwhelming international support of these resolutions shows how international governing bodies view the underlying tenets of the Embargo with disdain. The international community has not approved of the Embargo and its codification as the Helms-Burton Act since its establishment and there is no reason to believe that things will change unless the Act is comprehensively reformed. These antiquated attempts to undermine the Cuban government have proven time and again to be ineffective and reduce the credibility and reputation of the United States as the progressive leader of the international community.

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*Lifts Its Suspension of Cuba*, N.Y. TIMES, June 3, 2009, [http://www.nytimes.com/2009/06/04/world/americas/04cuba.html?\\_r=0&mtref=undefined&gwh=8CDE08E85124A31CD98CBA6014827727&gwt=pay](http://www.nytimes.com/2009/06/04/world/americas/04cuba.html?_r=0&mtref=undefined&gwh=8CDE08E85124A31CD98CBA6014827727&gwt=pay) [<https://perma.cc/7TN5-8EJW>].

60. The Helms-Burton Act, by way of essentially destroying any possibility of economic development of Cuba (Member State to the OAS), violates Article 34 of the OAS Charter and violates governing international law. OAS Charter, art. 34.

61. Article 38 of the OAS Charter indicates that, “Member States should work to improve international trade agreements and eliminate trade barriers and other impediments that disrupt trade between the States.” OAS Charter, arts. 19, 38.

62. The two opposing nations were the United States and Israel. Danielle Renwick, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (Feb. 3, 2017), <http://www.cfr.org/cuba/us-cuba-relations/p111113> [<https://perma.cc/TEK8-ZQUK>].

63. Portia Siegelbaum, *U.N. General Assembly votes against U.S. Cuba embargo for the 22nd year in a row*, CBS NEWS (Oct. 29, 2013), <http://www.cbsnews.com/news/un-general-assembly-votes-against-us-cuba-embargo-for-the-22nd-year-in-a-row/> [<https://perma.cc/N9SE-NWF4>].

IV. RECENT DEVELOPMENTS: OBAMA LOSENS EMBARGO AND  
REOPENS EMBASSY

While the Helms-Burton Act vests the authority to terminate the Embargo with Congress, the Obama Administration, through Executive Action, has enacted several regulations aimed at normalizing American interaction with Cuba.<sup>64</sup> For example, changes under the Obama Administration have largely neutralized the tourism ban into an ineffective measure by allowing travelers to self-report the purported legal reason for their travel to Cuba through their individual airline or travel agent and refrain from engaging in “tourism” on the island.<sup>65</sup> Furthermore, while President Obama did not have the ability to lift the Embargo completely, he was likely justified, within his executive purview, to provide humanitarian aid that is aimed at improving healthcare, agriculture, and telecommunication.<sup>66</sup>

A symbolic recent development taken towards rebuilding the U.S-Cuba relationship occurred in August of 2015, when Secretary of State John Kerry traveled to Havana, and headed the official reopening of the U.S. Embassy in Cuba, ushering in a new, more cordial era between the countries.<sup>67</sup> This visit marked the first time in over 70 years that such a high-ranking U.S. official visited Cuba.<sup>68</sup> Among other issues addressed during the ceremony, Kerry focused on the need for political change in Cuba and warned that

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64. For instance, American can now use credit cards in Cuba and U.S. companies to export telephone, computer, and Internet technologies. General tourism is still technically prohibited; however, Americans are allowed to visit Cuba for other related reasons and can visit Cuba without obtaining special licenses. See Bradley Klapper and Michael Weissenstein, *United States Loosens embargo against Cuba*, PBS NEWSHOUR (Jan. 15, 2015), <http://www.pbs.org/newshour/rundown/united-states-loosens-embargo-cuba/> [<https://perma.cc/ZJ54-W7KC>].

65. Michael Weissenstein, *Obama Loosens Cuba Embargo*, U.S. NEWS (Jan. 26, 2016), <http://www.usnews.com/news/business/articles/2016-01-26/obama-administration-loosens-cuba-embargo-with-new-measures> [<https://perma.cc/QPG4-XDTU>].

66. Elise Labott, *John Kerry reopens embassy in Cuba, but tensions remain*, CNN (Aug. 14, 2015), <http://www.cnn.com/2015/08/14/politics/cuba-embassy-opening-john-kerry-visit/> [<https://perma.cc/Q5BK-6NGE>].

67. Karen DeYoung, *In historic Cuba visit, Kerry presides over raising of U.S. flag over embassy in Havana*, THE WASHINGTON POST (Aug. 15, 2015), [https://www.washingtonpost.com/world/national-security/us-flag-to-fly-again-over-newly-reopened-embassy-in-cuba/2015/08/14/a6797036-41cf-11e5-8e7d-9c033e6745d8\\_story.html](https://www.washingtonpost.com/world/national-security/us-flag-to-fly-again-over-newly-reopened-embassy-in-cuba/2015/08/14/a6797036-41cf-11e5-8e7d-9c033e6745d8_story.html) [<https://perma.cc/2EPL-CYQ8>].

68. Paul Richter, *John Kerry makes a historic visit to Cuba that will be more symbolism than substance*, L.A. TIMES (Aug. 13, 2015), <http://www.latimes.com/world/mexico-americas/la-fg-kerry-cuba-20150812-story.html> [<https://perma.cc/VHD8-FZJW>].

Congress would not lift the economic Embargo unless the Cuban government made sufficient progress regarding Cuban human rights and worked towards a democratic political structure.<sup>69</sup> This step toward the restoration of diplomatic relations will not in any way end the Helms-Burton Act, which will likely stay in effect as long as Cuba remains unable to choose their leaders as a genuine democracy.<sup>70</sup> At the same time, the Embargo may very well remain ineffective as the same trade between the countries continues and the dictatorship balks at the idea of relinquishing power.

Furthermore, during the last part of his presidency, President Obama announced his intention to close the U.S. military prison at Guantanamo Bay, Cuba, claiming that, “It is viewed as a stain on our broader record of upholding the highest standards of rule of law, and that the facility undermines, rather than advances our national security.”<sup>71</sup> However, such an ambitious plan to terminate the Guantanamo Bay facility once and for all was met with harsh opposition from Congress and local legislatures.<sup>72</sup> The stalemate perpetuated by the Embargo is only harming the citizens it was designed to benefit.

## V. POLITICAL GRIDLOCK ENCUMBERS CHANGE

When President Kennedy proclaimed a total embargo against Cuba in 1962, the vehicle he used was the Trading With the Enemy Act of 1917

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69. Sec. of State Kerry described the hoisting of the flag as a “historic moment” between the U.S. and Cuba, but the gesture is more symbolic in nature than anything because he reiterated that the U.S. would not relent in moving for political change in Cuba. *Id.*; John Sopol, *US flag raised over reopened Cuba embassy in Havana*, BRITISH BROADCAST CORPORATION (Aug. 15, 2015), <http://www.bbc.com/news/world-latin-america-33919484> [https://perma.cc/D4RG-VZB4].

70. See Sopol, *supra* note 69.

71. President Obama believes that, “Guantanamo Bay Prison reflects poor legal and detention practices while symbolizing crude antiterrorism tactics. Part of the strategy involves creating a prison for terrorist detainees on American soil that would house 30 to 60 detainees that are considered too dangerous to release. The remaining detainees would be transported to prisons in other countries.” Charlie Savage and Julie Hirschfeld Davis, *Obama Sends Plan to Close Guantanamo to Congress*, N.Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/2016/02/24/us/politics/obama-guantanamo-bay.html> [https://perma.cc/J2CU-MGER].

72. Congress has already enacted a law banning the military from transferring detainees from Guantanamo onto domestic soil, and lawmakers have shown little interest in lifting that restriction. The vote in the Senate was 91-3 in favor and this overwhelming majority has enough supporters to override a Presidential Veto. *Id.*; see also Ted Barrett, *Senate passes defense bill blocking Obama’s Guantanamo plan*, CNN (Nov. 10, 2015), <http://www.cnn.com/2015/11/10/politics/senate-passes-defense-bill/> [https://perma.cc/358W-49WV].

(TWEA).<sup>73</sup> Pursuant to the TWEA, the U.S. government issued the Cuban Assets Control Regulations on July 8, 1963.<sup>74</sup> Since Kennedy first implemented the Cuban Assets Control Regulations, each subsequent President has deliberately chosen to keep them intact.<sup>75</sup>

The Helms-Burton Act vested the power to enforce the Embargo with Congress itself. The Act states that, “[t]he President shall instruct the Secretary of the Treasury and the Attorney General to enforce fully the Cuban Assets Regulations set forth in part 515 of title 31, Code of Federal Regulations.”<sup>76</sup> It follows that, in order to dissolve the Embargo, Congress alone would have to repeal the Helms-Burton Act.<sup>77</sup> Since the Helms-Burton Act was passed, the Executive Branch no longer has the unilateral authority to end the Embargo, and that aspect may violate the Separation of Powers doctrine. The Embargo was enacted by a unilateral executive action; therefore, its dissolution, if and when that should occur, must be subject to the same discretion of the Executive Branch. The Helms-Burton Act takes this power to regulate and conduct international affairs away from the President and mandates that a two-thirds senate majority terminate the Embargo. The resulting issue is whether the shift of responsibility for the Embargo usurps an important Presidential Power under the Constitution vis-à-vis the Separation of Powers law upheld by the Supreme Court.<sup>78</sup>

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73. The Trading With the Enemy Act [hereinafter TWEA] prohibits trade or attempt to trade, directly or indirectly, with a nation that is considered an enemy. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917).

74. These regulations apply to all individuals and entities subject to U.S. jurisdiction, whether they are in the United States or abroad prohibiting “all dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person.” 22 U.S.C. § 6032 (1996).

75. Matt Peppe, *Repealing the US Embargo on Cuba: The Legislative Process in the US Congress*, <http://www.globalresearch.ca/repealing-the-us-embargo-on-cuba-the-legislative-process-in-the-us-congress/5424312> [<https://perma.cc/59CH-CLW8>] (last visited Feb. 10, 2017).

76. 22 U.S.C. § 6032 (1996).

77. See Peppe, *supra* note 75.

78. The Court held that Congress may not promulgate a statute granting to itself a legislative veto over actions of the Executive Branch which is inconsistent with the bicameralism principle and Presentment Clause of the United States Constitution. The Helms-Burton Act effectively is a statutory basis for Congress to veto and completely determine actions of the Executive Branch. Embargos are matters of international affairs that the Executive Branch predominately enters with wide discretion. The President’s power to conduct foreign affairs regarding the Cuban Embargo is virtually nullified by the Helms-Burton Act and this unjust usurping of authority violates Constitutional Law. See *INS v. Chada*, 462 U.S. 919, 957–59 (1983).



Under this analysis, the Helms-Burton Act is an unsupported creation of international law that usurps the authority of the Executive Branch and violates Supreme Court rulings.

The President should not be bound by such legislation in the first place because there is no legal justification for the regulations against Cuba, which were created under the Cold War assumption that Cuba was our enemy, which is no longer the case.<sup>79</sup> Congress has never declared war on Cuba; therefore, there is no legal justification for categorizing Cuba as an enemy of the U.S. under TWEA. Furthermore, the entire set of Cuban Asset Control Regulations in the Treasury Code is illegitimate because if Cuba is not an enemy, regulations that only apply to enemy nations cannot be used as the basis for promulgating the Embargo via authority from TWEA.<sup>80</sup>

What is the scope of Presidential authority, then? Is the authority part and parcel of the autonomy traditionally afforded a President insofar as international affairs are concerned (where the President must wait for Congress to lift the Embargo), or can the President enact agreements by way of unilateral action that brings change?<sup>81</sup> Congress should enact comprehensive legislation that would fundamentally alter relations with Cuba. However unlikely, unless true democratic progress is made in Cuba on par with Congressional satisfaction, the Legislative Branch should step in and adjudicate the separation of powers question and determine that the Executive Branch has the authority to settle this international disagreement that it had previously created. Then progress can be truly made, as the President would be able to repeal the Embargo in its entirety.

If this happens, business in the U.S. would have permission and an interest in entering the Cuban market and in competing with other foreign companies that continue to do business with the country despite the Helms-Burton provisions.<sup>82</sup> Cuba's standard of living and entirely outdated infrastructure would benefit immensely from the influence of American

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79. Cuba does not meet the definition of an enemy. According to the TWEA, an "enemy" is defined as "any individual" or "the government of any nation with which the United States is at war." The Act specifies that the "beginning of the war" is "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." See *Pepe*, *supra* note 75; TWEA, 50 U.S.C. § 4032 (2015).

80. The President is justified in using executive power to repeal provisions that have no legal force behind them. Therefore, the President is likely justified in terminating the Embargo that hinges on TWEA until Congress decides to amend the TWEA to modify the definition of an enemy, or pass a separate provision granting President power to enforce an embargo against a country when the United States is not at war with that country. The situation as it currently stands is not founded in valid law. See *Pepe*, *supra* note 75.

81. *Id.*

82. See *Dunning*, *supra* note 53, at 235–36.

investment.<sup>83</sup> As United States' trade and tourist dollars flood Cuba, Castro's power and influence in Cuba will shrink and the Cuban people will have leverage to bring about noticeable social and political reforms.<sup>84</sup> Consequently, the United States would finally possess the requisite support and influence to implement change in Cuba successfully and oust the Castro regime once and for all.

## VI. SOCIO-ECONOMIC IMPACT OF THE EMBARGO

The lack of economic freedom (in Cuba) has been as devastating to prosperity as the lack of political freedom to human dignity.<sup>85</sup> During the 1940s, the Cuban economy thrived as the nation had implemented a constitution that was highly progressive and democratic for that part of Latin America.<sup>86</sup> The economy boomed, especially for the wealthy and for foreigners, and Cuban health care was relatively advanced for a Latin American country, with infant mortality rates comparative to those of the United States and Canada.<sup>87</sup> It was the promise of Castro's Revolution that these aspects of life in Cuba would not be only for the wealthy and foreigners; rather, that all Cubans would have access to health care and education. Once the Castro regime took power, however, the dream of the society envisioned by Castro was dashed as the Cuban people had their political autonomy, independent economic activity, and media outlets suppressed as the Castro regime formed a military and economic alliance with the Soviet Union.<sup>88</sup>

As Castro developed an alliance with the Soviet Union, the United States saw Cuba as an even greater threat to democracy in the Americas, and ramped up economic sanctions on Cuba.<sup>89</sup> Yet as the threat of

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83. Due to the weak Cuban economy resulting from the Embargo, the Cuban economic climate is ripe for innovation and investments that would be mutually beneficial to both countries over time. *See id.*

84. *Id.*

85. *The Dream Deferred: Fear and Freedom in Fidel's Cuba*, U.S. DEP'T OF STATE 10 (Dec. 2003), <https://2001-2009.state.gov/g/drl/rls/27198.htm> [<https://perma.cc/WF7T-VMA8>].

86. Democratic voting for Presidential elections that was free and free of corruption occurred in 1940, 1944, and 1948. *See id.* at 1.

87. *Id.*

88. Cuba relied, and eventually became dependent upon the Soviet Union economically, militarily, and emulated their communist political structure. *Id.* at 2.

89. *Khrushchev and Eisenhower Trade Threats Over Cuba (2009)*, <http://www.history.com/this-day-in-history/khrushchev-and-eisenhower-trade-threats-over-cuba>.

Communism in Cuba and Cuba's alliance with the Soviet Union and the Soviet Union itself collapsed, the economic Embargo is still enforced and continues to restrict the Cuban people from realizing their economic and personal potential.<sup>90</sup> Presently, Cuba is among the poorest countries in the western hemisphere<sup>91</sup> and will continue to be as economic sanctions constrain any possibility of progression. The Embargo has stymied Cuban economic growth and when analyzed by practically any measure of economic performance, Cuba was progressing at faster level in 1958 than it is in the present day.<sup>92</sup> Agricultural resources were plentiful in Cuba before the Castro Regime seized power and during the period of the Soviet influence in Cuba, Cuba's resources were subsidized and were also abundant; however, during the 1990s when Soviet subsidies dissipated and the Helms-Burton Act was circulating, Cuba's food consumption declined strikingly.<sup>93</sup> Furthermore, the amount of automobiles per capita in Cuba has surprisingly declined since the 1950s, making it the only country in the western hemisphere for which there has not been an increase.<sup>94</sup>

The antiquated Embargo has also contributed to deficiencies in Cuban technology leading to the nation's outdated communication infrastructure.<sup>95</sup> Communication improvements are arguably the most powerful economic stimulus for long-term sustainability for investment in Cuba.<sup>96</sup> In lifting restrictions, the United States will be able to facilitate and integrate more contact and communication among all individuals and businesses through

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90. See U.S. DEP'T OF STATE, *Zenith And Eclipse: A Comparative Look at Socio-Economic Conditions in Pre-Castro and Present Day Cuba* (2002), <https://2009-2017.state.gov/p/wha/ci/cu/14776.htm> [<https://perma.cc/MC7P-GEMF>] [hereinafter *Zenith and Eclipse*].

91. Per capita consumption of cereals, tubers, and meat are today all below 1950's levels. Meat supplies have fallen from 33 kg per year to 23 kg per year on average. See *id.*

92. See *id.*

93. Cuba ranks last in per capita daily caloric consumption compared to other Latin American countries. *Id.*

94. *Id.*

95. For a point of reference, the amount of telephone lines in present day Cuba is roughly the same as there were in the 1950's. The Embargo has hindered communication advancement and stalled any new developments. *Id.*

96. Jack Leslie, *How U.S. Brands Can Engage The New Cuba*, THE WORLD POST (July 20, 2015), [http://www.huffingtonpost.com/jack-leslie/how-us-brands-can-engage-the-new-cuba\\_b\\_7833140.html?utm\\_hp\\_ref=90-miles](http://www.huffingtonpost.com/jack-leslie/how-us-brands-can-engage-the-new-cuba_b_7833140.html?utm_hp_ref=90-miles) [<https://perma.cc/Q9T3-QKNW>]; United Parcel Service (UPS) has indicated that it is willing to provide logistics services in connection with Cuban businesses and Verizon and Sprint aim to offer cell phone roaming on the island. Carnival Cruise Line, which already operates vacation cruises in much of the Caribbean plans to open up access to Cuba and has obtained approval from the U.S. and Cuba governments to sail to Cuba. Mark J. Miller, *Door Opens Slightly for US Brands in Cuba, But Plenty of Barriers Still Remain*, BRAND CHANNEL (Sept. 21, 2015), <http://brandchannel.com/2015/09/21/cuba-brands-092115/> [<https://perma.cc/MM6H-2P97>].

communications technology.<sup>97</sup> In Cuba, there are seven computers per 100 people and Internet access is expensive.<sup>98</sup> Approximately five percent of Cubans have consistent access to the Internet and broadband access is more expensive than in the United States.<sup>99</sup> These unique challenges present opportunities to connect an entire country that is largely offline and disconnected with the outside world. However, American companies eager to capitalize on the communications market must realize that, to succeed in Cuba, it will be imperative to earn the trust and respect of all members of the partnership as well as the Cuban government.<sup>100</sup>

In a best-case scenario, new mediums of communication, including broadcasting, television programs, and Internet access, will encourage the flow of information and economic activity while promoting free speech.<sup>101</sup> These democratic values will permeate Cuban culture over time and allow a natural, grass-roots transition to a free Cuba that has not been possible under the current regime. This reform will certainly not happen quickly, but it is anticipated that continued engagement will gradually produce positive change.<sup>102</sup>

Another contention between the two countries is the U.S. State Department's designation of Cuba as a "state sponsor of terrorism," a status labeled in the early 1980's in light of the Castro regime supporting and training rebels in Central America.<sup>103</sup> Castro announced in 1992 that Cuba would support neither insurgents abroad nor within the Soviet Union, and the State Department's annual reports since 2013 have stated there has been no evidence that Cuba provided training, weaponries, or other aid terrorist groups.<sup>104</sup> However, Cuba's uninterrupted placement on the list has been a major obstacle to talks about restoring diplomatic relations. Cuban officials

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97. Marketing communications pertaining to products and services may end up doing more to determine the shape of U.S.–Cuban relations in the decades to come than diplomatic dispatches pertaining to politics. *See* Hamilton, *supra* note 44.

98. *See* Dominguez, *supra* note 26.

99. Leslie, *supra* note 96.

100. *See id.*

101. *See* Hamilton, *supra* note 44.

102. This is in part due to Cuba's slow rate of electrical power development. Cuba ranks next to last in electrical power development among Latin American countries. *Id.*; *Zenith and Eclipse*, *supra* note 89.

103. *See* Renwick, *supra* note 62.

104. *See id.*

have previously taken the position that they would cease all discussions concerning diplomatic relations while Cuba remained on the list.<sup>105</sup>

On April 14, 2015, President Obama announced his intention to remove Cuba from the list of state sponsors of terrorism.<sup>106</sup> Such a step to remove Cuba from the list is a positive one taken with good will to put the Cold War-era hostility in the past and restructure the relationship between the United States and Cuba.<sup>107</sup> It is worth pointing out that once Cuba is removed from the list, the case for classifying the nation as an “enemy” under TWEA is less tenable, as they will not be seen as any tangible threat in that regard. Cuba’s removal from the list is far overdue and an updated list without Cuba reinforces the notion that change can be made with a nation that is not seen as an enemy. A determination by the State Department that Cuba had not engaged in terrorist activity in the past six months (a prerequisite for designating a country a state sponsor of terrorism), would be a key factor for the removal of Cuba from the list.<sup>108</sup> The Communist undertones and threats of terrorism in Cuba have all but evaporated, which is of great importance when considering the reasonableness of the Helms-Burton restrictions moving forward.

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105. This designation is wholly unsupported in modern day and is a constant a blemish to their nation’s image that has prevented Cuba from conducting business and led some members of the international community to shy away from communication and relationships with Cuba. Randal C. Archibold & Julie H. Davis, *Cuba to Be Removed From U.S. List of Nations That Sponsor Terrorism*, THE NEW YORK TIMES (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/world/americas/obama-cuba-remove-from-state-terror-list.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article> [https://perma.cc/4JUQ-JNPF].

106. The Obama administration justified this action via a State Department statement in May 2015: “The rescission of Cuba’s designation as a state sponsor of terrorism reflects our assessment that Cuba meets the statutory criteria for rescission. While the United States has significant concerns and disagreements with a wide range of Cuba’s policies and actions, these fall outside the criteria relevant to the rescission of a state sponsor of terrorism designation.” While the Obama administration and lawmakers are still against many Cuban policies, they felt these political differences were insufficient to justify continued inclusion on the list. See Nahal Toosi, *Cuba removed from U.S. list of state sponsors of terrorism*, POLITICO (May 29, 2015), <http://www.politico.com/story/2015/05/us-removes-cuba-state-sponsor-terrorism-118411> [https://perma.cc/C9JL-X6SL]; see also Julie H. Davis, *U.S. Removes Cuba From State-Sponsored Terrorism List*, N.Y. TIMES (May 29, 2015), <http://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html> [https://perma.cc/JQA6-7L5Y].

107. The list of state sponsors of terrorism now only includes Iran, Sudan, and Syria. While this gesture does not terminate the conditions of the Embargo, it certainly redefines the relationship between the two nations. See Archibold & Davis, *supra* note 105.

108. The removal of Cuba from this list of nations that the United States openly recognizes as sponsoring terrorism signals change and eliminates another impediment to restoring diplomatic and economic relations with Cuba. See Archibold & Davis, *supra* note 105.

### A. Phone Service, Communication, and Infrastructure

In 1994, the United States and Cuba agreed to restore direct phone links between their countries, which had been disconnected because of the Cold War conflict.<sup>109</sup> This undertaking renewed ties between thousands of families and friends divided by political disagreement.<sup>110</sup> However, in the middle of December 2000, Castro tried to impose a 10 percent tax on phone calls between Cuba and the United States.<sup>111</sup> Originally, the Clinton Administration prohibited the U.S. phone companies from complying with Castro and paying the tax because it was not part of the joint agreement between the countries and as such, the surcharge was unwarranted.<sup>112</sup> The tax was implemented after the U.S. Congress froze over \$120 million of Cuban assets that were generated by calls between the United States and Cuba.<sup>113</sup> The funds were used to pay compensation to the families of the three Cuban exile pilots, all U.S. citizens, who were killed in the Brothers to the Rescue incident.<sup>114</sup>

Shortly after the Obama Administration announced the opening of telecommunications with Cuba, New Jersey based company, IDT Corporation, became the first company to complete a deal with Cuba, and is currently

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109. *Ending Link No Solution*, THE SUN SENTINEL (Dec. 12, 2000), [http://articles.sun-sentinel.com/2000-12-12/news/0012110716\\_1\\_cuba-claims-florida-strait-cuban](http://articles.sun-sentinel.com/2000-12-12/news/0012110716_1_cuba-claims-florida-strait-cuban) [<https://perma.cc/KEF7-KMDP>].

110. *Id.*

111. Christopher Marquis, *Cuba Threatens to Cut Off Phone Service to the States*, N.Y. TIMES (Dec. 9, 2000), <http://www.nytimes.com/2000/12/09/us/cuba-threatens-to-cut-off-phone-service-to-the-states.html> [<https://perma.cc/WCF5-6XA7>]; See Patrick Oppmann, *Cuba cuts 10% tax on \$3-a-minute phone calls between island, U.S.*, CNN (Nov. 30 2012), <http://www.cnn.com/2012/11/30/world/americas/cuba-phone-call-tax-cut/index.html> [<https://perma.cc/9G9K-B2NH>].

112. See Rosell, *supra* note 17, at 246.

113. See *id.* Subject to this provision, calls originating in Cuba to U.S. phone numbers had to pass through a third country, making them much more expensive. Payton Guion, *Cuba and the US to establish direct phone links for the first time in 15 years*, INDEPENDENT (Mar. 12, 2015), <http://www.independent.co.uk/news/world/americas/cuba-and-the-us-to-establish-direct-phone-links-for-the-first-time-in-15-years-10103895.html> [<https://perma.cc/Q3AY-2EF3>]; see also *New Cuba US direct phone link established*, BRITISH BROADCASTING CORPORATION (Mar. 12, 2015), <http://www.bbc.com/news/world-latin-america-31844847> [<https://perma.cc/YNY7-75RX>].

114. The Cuban government argued that the tax was the only way for the country to raise the \$58 million to be paid to the families of the victims of the Brothers to the Rescue plane accident and only rescinded the tax after the full reparation amount was recovered. See Oppmann, *supra* note 111; see Rosell, *supra* note 17, at 246.

facilitating direct calls to and from Cuba.<sup>115</sup> The Federal Communications Commission authorized IDT to provide international long-distance support for telephone calls between the U.S. and Cuba, which is a huge step for connecting separated families as well as laying the foundation for investment opportunities for U.S. companies.<sup>116</sup> The opening of telecommunications has already created opportunities for companies like Netflix, which has started providing streaming services to Cuban citizens. In addition, the cooperation between Cuba and IDT Corporation is leading to normalized communications and Internet access between the U.S. and Cuba despite the restrictions of the Embargo.<sup>117</sup>

The possibility of building a digital business or any business relying on online sales is unlikely, because of the lack of internet availability in Cuba. According to an industry survey, Cuba's dial-up internet access is heavily censored and is the world's second slowest.<sup>118</sup> The National Registry of Serial Publications must first approve all material intended for publication on the internet, and individuals must request access to service providers from the Cuban government.<sup>119</sup> At present, about 5 percent of Cubans are able to get online, and can do so only through purchasing an access card sold by the state phone company, ETECSA, which costs about \$2 for an hour of internet use.<sup>120</sup> Cuban authorities point to the Embargo as the reason

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115. The restoration of a telecom agreement, announced in December 2014 as part of the Obama administration's framework for repairing diplomatic relations with Cuba has allowed U.S. companies to sell individual communications equipment in Cuba, and take on projects to improve Cuba's outdated Internet and telecom infrastructure. See Mimi Whitefield, *First U.S. telecom company connects directly with Cuba*, MIAMI HERALD (Mar. 6, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article12816176.html> [https://perma.cc/4NV2-EYUJ].

116. IDT Chief Executive Officer, Bill Pereira said, "This is an important first step in the liberalization of telecommunications between the U.S. and Cuba, ultimately, the agreement will make it easier and more affordable for our customers to call friends and family in Cuba." As of March 2015, IDT charges 76.8 cents per minute of call to a Cuban cell phone and 83.3 cents per minute for calls to a landline. *Id.*

117. In February 2015, Netflix announced that Cubans with access to Internet would be able to subscribe to the service and watch popular movies and TV shows for fees starting at \$7.99 per month via international payment methods; however, few Cubans have been able to afford this luxury, and many do not even have internet access regularly. So far, the Netflix venture has been only symbolic of free enterprise, as nearly all Internet service in Cuba is dial-up and too slow to support Netflix streaming. See *id.*

118. *Wired, at Last*, ECONOMIST (Mar. 3, 2011), <http://www.economist.com/node/18285798> [https://perma.cc/644Y-J5PJ].

119. José Azel, *Cuba's Internet repression equals groupthink*, CUBA DEMOCRACIA Y VIDA (Feb. 27, 2011), <http://www.cubademocraciayvida.org/web/article.asp?artID=13302> [https://perma.cc/8PQF-L9GE].

120. The average monthly income of Cubans (about 20 USD per month) makes Cuba an unattractive and unprofitable market for major U.S. companies. The purchasing power of the average Cuban household would not be able to afford residential Internet connection. The slow connections and outdated technology in Cuba makes it impossible for citizens to

internet access is so poor, citing the Bush Administration's decision to exclude Cuba from using readily available communication cables.<sup>121</sup> The censorship and control exerted by the Cuban government and the low earnings of Cuban citizens present serious challenges to establishing secure and obtainable internet access.

### B. Travel Restrictions and Tourism

American citizens enjoy the right to travel to all countries including those with radically different political systems such as China, Vietnam, and North Korea, but are precluded from a convenient venture to Cuba merely 90 miles off the coast of Florida.<sup>122</sup> Until very recently, Cuba was the only country in the world off-limits to U.S. tourists.<sup>123</sup> It has recently become easier for Americans to legally visit Cuba for reasons other than tourism. Under Helms-Burton, U.S. citizens are authorized to travel to Cuba for specific non-tourism purposes, including business trips, family visits, or "people-to-people exchanges."<sup>124</sup>

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load many websites. Rather than having complex filtering systems, the government relies on the high cost of getting online and the telecommunications infrastructure that is slow to restrict Internet access. See Carrie Kahn, *Internet Access Expands in Cuba – For Those Who Can Afford It*, NPR (Oct. 16, 2015, 4:48 AM), <http://www.npr.org/sections/parallels/2015/10/06/445998527/internet-access-expands-in-cuba-for-those-who-can-afford-it> [<https://perma.cc/ZYW3-287K>].

121. Although a fiber-optic cable, capable of carrying heavy data traffic, runs along the island's northern coast, George W. Bush's administration blocked a proposal by AT&T to grant Cubans access to the cable. *Wired, at last*, ECONOMIST (Mar. 3, 2011), <http://www.economist.com/node/18285798> [<https://perma.cc/T2TA-QSBM>].

122. One possibility to achieve reform in this area and mitigate the effects of the Helms-Burton Act would be to encourage recreational tourism to Cuba instead of criminalizing it. The travel businesses, airline companies, and constituents themselves would put pressure on their representatives in Congress, whose political careers depend on the private funding they receive from companies and individuals. See Salim Lamrani, *How Barack Obama Can End the Economic Sanctions Against Cuba*, THE HUFFINGTON POST (Jan. 15, 2015, 12:49 PM ET), [http://www.huffingtonpost.com/salim-lamrani/how-barack-obama-can-end-\\_b\\_6476458.html?utm\\_hp\\_ref=90-miles](http://www.huffingtonpost.com/salim-lamrani/how-barack-obama-can-end-_b_6476458.html?utm_hp_ref=90-miles) [<https://perma.cc/TS4J-6YJ2>].

123. Patrick Oppmann, *7 things Americans should know about travel to Cuba*, CNN (Sept. 22, 2015, 3:30 PM), <http://www.cnn.com/2015/07/17/travel/cuba-travel-feat/index.html> [<https://perma.cc/KQF4-4WDH>].

124. Previously, these purposes required applying for a specific license and finessing through a myriad of governmental agencies. Now, many U.S. citizens can essentially "self license" if their justification for travel to Cuba meets the new, more relaxed legal travel standards. See Oppman, *supra* note 123.



Only Congress can lift the U.S. travel ban imposed against Cuba as part of the provisions of the Embargo.<sup>125</sup> Nevertheless, in 2015, the Obama Administration further diminished the effects of the Helms-Burton restrictions by using Executive authority to grant exceptions to the travel ban.<sup>126</sup> For instance, in January 2015, President Obama authorized U.S. citizens to legally travel to Cuba if they are engaging in one of 12 separate categories of activities including “professional research, journalistic activity, participating in an athletic event, religious activities, working on a humanitarian project or taking part in educational activities.”<sup>127</sup> Previously, these activities required specific licenses that were difficult to obtain and subject to broad governmental discretion; however, American citizens can today obtain licenses easily if they meet relaxed legal requirements that are much more straightforward.<sup>128</sup>

In March 2015, U.S. officials met with Cuban diplomats in Washington, D.C., where they agreed that their countries’ 1953 “air transport agreement” was outdated, according to the State and Transportation Department officials.<sup>129</sup> Currently, American and Cuban travelers must fly on charter flights that are complicated to schedule and often force travelers to undergo a cumbersome process of emailing documents and payment information back and forth with an agent.<sup>130</sup> The U.S. officials proposed basic parameters for a new arrangement, including that any U.S. airline could serve Cuba

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125. Lamrani, *supra* note 122.

126. Until the Obama Administration’s recent modifications to the travel restrictions of the Helms-Burton Act, U.S. citizens with valid authority and even visiting Cuba illegally had first travel to another country and fly into Cuba via a third country. Accordingly, many individuals were subject to unsafe flight conditions and erratic scheduling of Cubana Airlines, the poorly funded state airliner. See Oppman, *supra* note 123.

127. Journalists, both full time and freelance, are allowed to engage in travel and travel-related transactions as well as their support and broadcast assistants. However, the journalist’s schedule of activities “must not include free time or recreation in excess of that consistent with a full-time schedule.” *Frequently Asked Questions Related to Cuba*, U.S. DEP’T OF THE TREASURY 2–3 (Jan. 6, 2017), [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_faqs\\_new.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf) [<https://perma.cc/7LWW-338D>] [hereinafter *U.S. Treasury FAQ*]; see also 31 CFR § 515.563 (2012).

128. Restrictions on bank accounts and currency flow have been loosened considerably. Currently, “[p]ersons subject to U.S. jurisdiction who are traveling to Cuba pursuant to one of the 12 authorized categories of travel may open and maintain bank accounts in order to access funds while located in Cuba for authorized transactions, and are authorized to close such accounts.” See *U.S. Treasury FAQ*, *supra* note 127, at 13.

129. Felicia Schwartz, Jack Nicas & Carol E. Lee, *Obama Administration Pushes for Deal to Start Flights to Cuba by Year’s End*, WALL ST. J. (Aug. 17, 2015, 9:13 PM), <http://www.wsj.com/articles/obama-administration-pushes-for-deal-to-start-flights-to-cuba-by-years-end-1439860422> [<https://perma.cc/M85A-PEQQ>].

130. Bradley Klapper, *US Cuba to Resume Mail Service this Year; Other Steps Near*, ASSOC. PRESS (Sept. 17, 2015, 7:10 PM), <http://m.uticaod.com/article/ZZ/20150917/NEWS/309179926/16910/NEWS/?Start=2> [<https://perma.cc/U2KF-ST4P>].

without any limitations.<sup>131</sup> American Airlines said it expects to operate 1,200 charter flights to Cuba this year, a 9% increase from 2014.<sup>132</sup>

Since Secretary Kerry attended the reopening of the U.S. Embassy in Cuba in August 2015, travel from the U.S. to Cuba has increased by 35% as of September 2015.<sup>133</sup> This is the sort of progress that is needed in order to ignite the Cuban economy and generate beneficial results for the U.S. and Cuba. An injection of American culture, ideas, and investment will help speed the process and transition to a democratic government in Cuba. President Obama has one form of recourse that would dampen the effects of the economic sanctions that affect all classes and sectors of Cuban society, and which remains the principal obstacle to development in Cuba.<sup>134</sup> While an influx of tourists would clearly benefit the Cuban economy, whose resources are largely dependent on this sector,<sup>135</sup> it would also benefit the U.S. economy.<sup>136</sup>

Beginning with transportation and tourism reform, the Executive Branch has sufficient flexibility to cause the U.S. Congress to end the economic sanctions that continue to isolate Cuba despite the stated purpose of the Helms-Burton Act. Cubans and Americans alike would be the major beneficiaries of a reestablishing normal economic, commercial, and financial relations between the two nations.

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131. According to the official, the United States and Cuba are beginning to form a stronger commercial partnership by way of with direct postal service and an agreement on regularly scheduled commercial flights between the two countries. *See id.*

132. *See* Schwartz, Nicas & Lee, *supra* note 129.

133. *Id.*

134. A huge market would open up for American airlines, the transportation industry, and travel agencies, not to mention other mass tourism-related sectors. To date, only 90,000 US citizens (other than Cuban-Americans), visit Cuba every year for business, academic, cultural, humanitarian or sporting reasons, under licenses granted by the State Department. *See* Lamrani, *supra* note 122; Matt Beardmore, *How Travel to Cuba May Change*, N.Y. TIMES (Dec. 18, 2014), [http://www.nytimes.com/2014/12/19/travel/how-travel-to-cuba-may-change.html?\\_r=0](http://www.nytimes.com/2014/12/19/travel/how-travel-to-cuba-may-change.html?_r=0) [<https://perma.cc/S8PX-6XJY>].

135. *See* TRAVEL & TOURISM, ECONOMIC IMPACT 2014, CUBA, WORLD TRAVEL & TOURISM COUNCIL (2014) <https://www.wttc.org/-/media/files/reports/economic-impact-research/country-reports-2014/cuba2014.pdf> [<https://perma.cc/KZ7L-LH3L>].

136. Cuba imports most of its food commodities, and U.S. agricultural producers would benefit greatly from the demand that more American tourists would create. Furthermore, President Obama could give directions to the Treasury Department not to prosecute US citizens who travel to Cuba outside of the administratively defined framework. This would allow more flexible tourist travel to Cuba and restore fundamental rights afforded to all citizens of the United States of America under the Constitution, which protects the right of its citizens to travel freely. *See* Lamrani, *supra* note 122.

C. Human Rights and Public Health in Cuba

One facet of the Helms-Burton legislation is that it was designed to bring about change by encouraging as many countries as possible to reduce their contact with Cuba and erode Cuba's government and society.<sup>137</sup> The expanded territorial reach of the Helms-Burton Act, which reaches far beyond trade between Cuba and the U.S., forbids not only all American investment, travel, and human contact with Cuba, but also isolated Cuba from any prospective international investors who were allied with the United States.<sup>138</sup> Such comprehensive sanctions deprive Cuba of access to basic provisions for everyday life.<sup>139</sup> The Helms-Burton Act codified the policy of preserving costly licensing requirements for trading health-related products with Cuba, which hikes up the prices for these essential goods and in turn harms the health of Cuban citizens.<sup>140</sup> Cubans' human rights are suffering because of the very Embargo that was intended to defend and improve those same human rights under the autocratic Castro regime.<sup>141</sup>

VII. FOREIGN POLICY ADJUSTMENTS STIMULATING ECONOMIC,  
POLITICAL BREAKTHROUGH

Cuban authorities have approved private enterprise in 181 designated activities (later expanded to 201 designated activities), and for tax purposes, have categorized these activities into seven groups aimed at creating a more

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137. Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOR. AFF. 199, 235 (2007).

138. Aside from economic impact, this chilling effect has had drastic ramifications for human rights in Cuba. The Helms-Burton Act has achieved its goal in exacerbating the central tenets of the Embargo and increased the widespread and indiscriminate effects on the economic and social conditions, as well as the overall wellbeing of the Cuban people. *Id.*

139. Restrictions of the Embargo make it difficult for Cubans to obtain access to important medicines, scientific and medical technology, food, chemical water treatment, and electricity. U.S. companies produce about half of all newly patented drugs in the world and the Cuban cost of obtaining licenses in order to purchase such drugs amounted to over \$75.7 million in 2005 alone. Licensing procedures mandate that healthcare drugs are exclusively available to Cubans through intermediaries at prices that much higher than they would be in the American market. *See id.* at 238, 241–42.

140. *Id.* at 236–37, 243; Gary Hart, *Fiction in Foreign Policy*, THE HUFFINGTON POST (Mar. 7, 2011, 12:12 PM), [http://www.huffingtonpost.com/gary-hart/fiction-in-foreign-policy\\_b\\_832321.html?view=print](http://www.huffingtonpost.com/gary-hart/fiction-in-foreign-policy_b_832321.html?view=print) [<https://perma.cc/3TG9-N4TW>].

141. The Embargo increases the cost of educational goods by requiring them to be purchased at additional cost from non-U.S. sources, while constraining the ability of private U.S. organizations and charity foundations to provide assistance to Cuban schools. *Id.* at 238, 245.

streamlined tax regime.<sup>142</sup> Cuban government authorities grant or deny these licenses and, in most cases, they are approved within one week from the date that the application is received.<sup>143</sup> Authorities have an interest in approving licenses as quickly as possible because they are a source of fiscal revenue and create community employment opportunities.<sup>144</sup> Private economic activity within Cuba is severely diminished compared to the State enterprise of the country as well as when compared with most other countries in the world (including countries in flux and those recovering from the loss of similar Communist regime subsidies).<sup>145</sup> In order to improve the GDP and overall economic conditions in Cuba, the private sector must be bolstered and stabilized. An economic change providing an influx to the private sector would be the catalyst needed to realize Cuban potential and bring about a political shift that favors capitalism and private sector competition, rather than total governmental domination.

It is in the best interest of large middle classes who perceive their opportunities to be hindered by dictatorial structures to advocate for democracy;<sup>146</sup> however, this has not yet occurred in Cuba. While the

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142. Group 1: The production and sale of food and beverages; Group 2: The production and sale of artisan and industrial products, for example artisan crafts, pottery, religious articles including animals for religious purposes; Group 3: Personal and technical services, for example repair of electrical and mechanical equipment, beauty salons, animal grooming, clothing rentals, event planners, photography; Group 4: Room rentals, for example bed and breakfasts; Group 5: Construction and remodeling, for example bricklayers, carpenters, electricians, plumbers; Group 6: Transportation of persons and materials, including trucks, boats and animal transport; Group 7: Other activities, for example music and other arts teachers, sports instructors, computer programming, flower sales, clowns and magicians; "Simple Activities"; A category that benefits from a simplified tax regime. Richard E. Feinberg, *Soft Landing in Cuba? Emerging Entrepreneurs and Middle Classes*, LATIN AMERICA INITIATIVE 12 (Nov. 2013), <http://www.brookings.edu/~media/research/files/reports/2013/11/cuba-emerging-entrepreneurs-middle-classes-feinberg/cuba-entrepreneurs-middle-classes-feinberg.pdf> [<https://perma.cc/KZ74-TT9B>].

143. The most popular licensing choices for entrepreneurs are restaurants and the food industry, followed by bed and breakfasts, transportation (taxis), construction, street vendors of agricultural products, music sales (CDs), recycling, and repair of household appliances (this has become increasingly popular for Cuban entrepreneurs because it is taxed more lightly as opposed to other groups). *Id.* at 13.

144. *Id.*

145. Ernesto Hernandez-Cata, *The Institutional Structure of Production in the Cuban Economy* 227 (Jan. 2014), <http://www.ascecuba.org/c/wp-content/uploads/2015/01/v24-herandezcata.pdf> [<https://perma.cc/RB7F-QPLH>].

146. "Middle classes in Latin America and globally are considered to have strong pro-democracy preferences. While there is no guarantee that an emerging middle class will result in pressure for greater democracy in Cuba, there is evidence that the trend could

Cuban middle class has been built by socialist structures, and many individuals continue to believe in ideology that provides universal access to social services and benefits, there is a paradigm shift in which these individuals aspire to be just that, individual. The Cuban government and foreign investors must anticipate their need for realistic economic opportunity, individual autonomy, and material prosperity. While it is too soon to suggest that the Cuban middle class will demand democratic capitalism, it is realistic to believe that they would benefit from a system in which they have equal opportunities to realize their individual talents and profit from careers independent of the government.

#### VIII. CHALLENGES FACING CUBAN-AMERICAN ECONOMIC PARTNERSHIPS

The Cuban government must drastically change its approach towards struggling entrepreneurs seeking to improve their stagnant economic position. A more open-minded government must foster creativity and support entrepreneurial endeavors that will benefit consumers and producers of goods alike. According to a leading article about the Cuban economy, the political viewpoints of the emerging Cuban middle classes will depend on the government being receptive to entrepreneurial private interests.<sup>147</sup> If the government continues supporting a closed system, unrest and conflict will continue to mount. On the other hand, an open willingness to share power and resources would foster a more level playing field in Cuba conducive to a more hopeful and encouraging economic future.<sup>148</sup>

A foreseeable problem facing American companies wishing to kick start commerce with Cuba is the stark contrast of the capitalistic foundations of these companies and the socialist framework of the country with which they wish to engage. Doing business in Cuba will involve significant challenges because the Cuban Government has control over virtually all

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certainly auger positive change in the years to come.” Johanna Mendelson Forman, *Cuba’s Emerging Middle Class and Growing Private Sector*, THE HUFFINGTON POST (2013), [http://www.huffingtonpost.com/2013/11/12/cuba-middle-class\\_n\\_4260021.html](http://www.huffingtonpost.com/2013/11/12/cuba-middle-class_n_4260021.html).

147. Feinberg, *supra* note 142.

148. *Id.* at 45.

To help promote private business in Cuba, the President should authorize U.S. firms and individuals to engage in commerce in goods and services with independent entrepreneurs in Cuba, and to provide financial and technical assistance to them. U.S. exports would enable Cuban entrepreneurs to access badly needed machinery and other supplies and U.S. creditors would fill the capital gap. U.S. importers would broaden the consumer base for Cuban producers.

*Id.* at 53.

business enterprises.<sup>149</sup> It is unlikely that the Government, under the Castro regime, would relinquish any control; if anything, the Government would be skeptical and overly involved in American intrusion into the Cuban economy.<sup>150</sup> The Cuban market remains controlled by international private ventures with the Cuban government in which the government seeks a 51 percent ownership stake.<sup>151</sup>

The notion that the Cuban government would act as a joint business partner may dissuade companies from engaging with Cuba at all. Since American companies will likely need to collaborate with the government, they must be cautious of heightened liability that looms large in conducting business with a corrupt government. American companies seeking contractual arrangements with Cuban officials must be aware of the possibility that illegal payments will be requested.<sup>152</sup>

A recent reminder of the corruption in Cuba is the anti-corruption bust that led to the arrest of a Canadian businessman in 2011, who was later sentenced to 15 years on bribery charges.<sup>153</sup> Cuban officials also arrested two other employees from the company and seized the company's Cuban assets, which were worth nearly \$100 million.<sup>154</sup> This ordeal serves as a

149. See Timothy Belevetz & Ronald Oleynik, *A Warning on Doing Business in Cuba*, CNBC (July 30, 2015, 11:09 A.M.), <http://www.cnbc.com/2015/07/30/a-warning-on-doing-business-in-cuba-commentary.html> [<https://perma.cc/Q6B5-UT6G>].

150. *Id.*

151. See Jason Ankeny, *The Challenges of Doing Business in Cuba*, ENTREPRENEUR (Dec. 16, 2015), <http://www.entrepreneur.com/article/252795> [<https://perma.cc/QL8C-B79D>]. “Cuban government is unwilling to bend its existing rules for conducting business. Under those rules, a foreign business must partner with the government and most likely agree to be represented by a state-owned law firm.” Mike Coates, *What You Need to Know if You're Considering Doing Business in Cuba*, FORBES (Nov. 19, 2015), <http://www.forbes.com/sites/forbesleadershipforum/2015/11/19/what-you-need-to-know-if-youre-considering-doing-business-in-cuba/#e477e1320e37>.

152. See U.S. DEP'T OF THE TREASURY, *WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO 2* (2001), <https://www.treasury.gov/resource-center/sanctions/Documents/tab4.pdf> [<https://perma.cc/3XAJ-YM2X>]. “In this type of environment, a bribe paid to an official to obtain commercial benefits may be less likely to be discovered and disclosed but is no less illegal, at least under U.S. law.” Belevetz & Oleynik, *supra* note 149.

153. Daniel Trotta, *Cuba frees Canadian businessman Tokmakjian after three years in jail*, REUTERS (Feb. 21, 2015, 8:53 PM), <http://www.reuters.com/article/us-cuba-corruption-canada-idUSKBN0LP0QA20150222> [<https://perma.cc/X8Z4-BZBA>]. Canadian transport executive, Cy Tokmakjian, was released after serving 3 years without any reason given by the Cuban government for his release. *Id.*

154. “Fourteen Cubans, including two high-ranking officials, were also convicted and sentenced in connection with the bribery charges.” Daniel Trotta, *Cuba sentences Canadian CEO to 15 years on financial charges*, REUTERS (Sept. 27, 2014, 9:15 PM),

cautionary reminder to American business owners seeking to venture into Cuba to expand their investments.

Since the state runs virtually all significant business enterprises, it raises the possibility that any payment of a bribe related to not only traditional government functions, such as permitting, licensing, and government contracting, but also to business deals that in other places would be wholly between private parties will be a violation of the Foreign Corrupt Practices Act (FCPA).<sup>155</sup>

The FCPA also requires U.S. companies adhere to precise book and record keeping provisions and adopt an adequate system of financial and accounting controls that are enforced subject to Department of Justice and Securities and Exchange Commission standards.<sup>156</sup> American companies that are engaged in trade with Cuba must maintain close supervision of interactions with Cuban officials, and employ compliance safeguards to regularly audit before, during, and after the execution of any contract or business transaction.<sup>157</sup> Opening the door to trade with Cuba should provide U.S. businesses with new and profitable opportunities, but it also presents significant risks and liabilities for corruption and bribery that can be at least partially curbed with attention to detail.

#### IX. RECONSIDERING EMBARGOES AS EFFECTIVE AMERICAN POLICY MEASURES

Economic sanctions, such as the calculated withdrawal of U.S. trade or financial relations regarding Cuba, exemplify the controversial foreign policy tool known as an embargo that governments utilize to change behaviors of the target country or punish them by damaging their economy.<sup>158</sup> Given the political landscape and current state of international affairs, economic sanctions are no longer effective tools that instigate change. According to a report by the Peterson Institute for Internal Economics, the success rate of such sanctions is dependent on the type of policy or governmental change sought.<sup>159</sup> Economic constraints sanctioned to effectuate relatively

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<http://www.reuters.com/article/us-cuba-corruption-idUSKCN0HM0PW20140928> [<https://perma.cc/R9WN-547Z>].

155. The FCPA makes it illegal to pay an official of a foreign government, or any “instrumentality” thereof, to obtain a business benefit. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

156. *See generally id.*

157. Companies cannot shield themselves by having third parties pay their bribes, therefore, businesses must implement compliance programs the tightly monitor all third-party intermediaries as well as payments made by all business partners in order to safeguard their investments in Cuba. *See id.* Feinberg, *supra* note 142.

158. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 1 (3d ed. 2007).

159. *Id.* at 158.

small and limited goals, such as the release of a political prisoner, succeed half the time.<sup>160</sup> When economic sanctions are used to accelerate entire political regime changes (e.g., by destabilizing a particular leader or by ousting a dictator), changing a country's policies in a major way, the sanctions succeed in roughly 30 percent of attempts.<sup>161</sup>

All economic sanctions and results of the Embargo are facing an uphill battle in which the Castro regime has undeniably become stronger and more assertive towards their people as the restrictions increase.<sup>162</sup> The Embargo and the Helms-Burton Act aim to provoke major change and political revolution in Cuba, but their means of achieving such a significant goal have been, and will continue to be, ineffective due to the unintended benefactors of more stringent sanctions—the leaders of the Castro regime.

There is a double standard in our government in which past administrations routinely opposed efforts in Congress to impose trade sanctions against countries like China because of its poor human rights record, yet renewed the sanctions against Cuba each year.<sup>163</sup> However, China has become one of the United States' largest and most trusted trade partners while the government has maintained a debilitating embargo on nearly all facets of the Cuban economy.<sup>164</sup> It has been widely accepted that maintaining an economic relationship with China offers the most realistic means for inspiring political and human rights reform, but this rationale has not been applied to Cuba.<sup>165</sup> In fact, the restrictions that were codified as the Helms-Burton Act will likely remain in effect as long as Congressional approval

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160. *Id.* at 141. "Sanctions now are often deployed in settings where central government authority is fragile or fragmented." The Embargo against Cuba was created to put pressure on the Castro regime and effectuate political change of an entire country, a huge goal. At the same time, the central government controls the means of production in every facet of the economy and is a strong autocratic dictatorship rather than a divided regime. It is no wonder that change is unlikely to occur after such a long period of the status quo under the Helms-Burton restrictions. *See id.* at 146–47.

161. *Id.*

162. *Id.*

163. Griswold, *supra* note 51. The Chinese government has jailed and killed far more political and religious dissenters than the Cuban government has. China's resources, communist history, and access to nuclear weapons make it a country of greater concern from a national security standpoint than Cuba. China's economic influence and power as a world leader with many alliances make it difficult to sanction without disrupting international allegiances and burning bridges along the way. *Id.*

164. *Id.*

165. *Id.*



is needed to repeal the Act.<sup>166</sup> Foreign policy in this area is disjointed, as highlighted by the fact that economic sanctions appear to be hindering the large regime overhaul needed in Cuba.

In a speech on trade early in his first term, President George W. Bush noted that,

Trade creates the habits of freedom, to create the expectations of democracy and demands for better democratic institutions. Societies that open to commerce across their borders are more open to democracy within their borders. And for those of us who care about values and believe in values—not just American values, but universal values that promote human dignity—trade is a good way to do that.<sup>167</sup>

Unrestricted trade and globalization foster democracy, and countries like Cuba, when exposed to a free market economy after years of being oppressed under an authoritarian system, are prime candidates to thrive under democratic conditions where they have greater opportunity and human rights protection.<sup>168</sup> Development may also help to solidify a larger middle class in Cuba that can support and influence their system of government, fulfilling the intended goals of the Cuban Embargo.

The Embargo has completely failed to achieve any of its main objectives. It has not changed the course or nature of the Cuban government, nor has it liberated a single Cuban citizen.<sup>169</sup> Director of the Center for Trade Policy Studies at the Cato Institute, Daniel Griswold has stated,

The Embargo has made the Cuban people a bit more impoverished, without making them one bit more free. At the same time, it has deprived Americans of their freedom to travel and has cost US farmers and other producers billions of dollars of potential exports.<sup>170</sup>

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166. Cuba is not the only example of American failures to implement economic sanctions. Sanctions against Burma, Iran, and North Korea have been largely ineffective at creating any change and the oppressive regimes in power have been largely unchanged. However, economic sanctions in these instances have had the side effect of injuring and impoverishing the destitute and contributing to the poverty rate in the target country. *See id.*

167. *Id.*

168. Furthermore, access to the free trade of goods speeds up development and gives citizens access to resources that encourage freethinking and the spread of information. Telephones, satellite television, fax machines, and Internet access undermine oppressive and authoritarian influence. *See generally id.*

169. The U.S. objective in Cuba was to eventually liberate the people of Cuba from the Castro regime and give them hope for a better, democratic future. This objective has undoubtedly failed in most aspects and the economic repercussions of the Embargo was to further deprive the Cuban people of low-cost, affordable food and commodities that but for the Embargo, could have been bought for cheaper and more competitive prices directly from the U.S. *See* Griswold, *supra* note 24.

170. *Id.*

The failure of the Embargo has been exacerbated by its accompanying legislation, the Helms-Burton Act. The Act presents an unworkable model that leaves no real opportunity to bring change to Cuba because it eliminates the Executive Branch's authority to end the Embargo.<sup>171</sup>

The President will likely not take action to subvert the Congressional approval needed to repeal the Helms-Burton Act. Things will stay as they are unless Congress decides to repeal the Act, which is unlikely considering the inadequate amount of bipartisan cooperation in the legislature. However, an additional solution remains, if the Constitutional separation of powers issue is raised before the Supreme Court of the United States. Considering that there is sufficient standing, and accompanying procedural guidelines are met, the Supreme Court would have the authority to decide this issue and potentially vest the power to terminate the Embargo with the President, not members of Congress.

A potential impediment to having the Supreme Court resolve the separation of powers issue is that the Court has the power to defer answering the question to another branch of government. The Court does this by determining that the issue is a political question, which is fundamentally non-justiciable as a legal issue.<sup>172</sup> The Court can essentially refuse to consider this question and would likely leave it for the Legislative Branch (Congress) to decide. At that point, Congress would be hesitant to relinquish their control over Cuba granted to them by the Helms-Burton Act, and consequently, the issue would not be resolved.

Unfortunately, the economic Embargo against Cuba has for decades been justified on thinly veiled policies and outdated legislation and is unlikely to be repealed.<sup>173</sup> The political barriers to terminating the Embargo need not completely stall relations and a symbiotic trading relationship. The Embargo costs the U.S. economy between \$1.2 and 4.84 billion annually

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171. 22 U.S.C. §§ 6021–6091 (2016).

172. The political question doctrine reflects the Supreme Court's decision to avoid inserting itself into conflicts between branches of government, which is precisely what needs to be done in order to resolve the separation of powers injustice resulting from the Helms-Burton transferring authority to terminate the Embargo to Congress. See John E. Finn, *The Court and Constitutional Interpretation*, lecture in *Civil Liberties and the Bill of Rights*, TEACHING CO. (2016), <http://www.thegreatcourses.com/courses/civil-liberties-and-the-bill-of-rights.html> [<https://perma.cc/Q9P3-WGKF>].

173. The Embargo is still justified by the TWEA, even though officials have stated that Cuba is no longer seen as a threat to national security and does not fall under the definition of an "enemy." See Harris, *supra* note 29.

in lost sales and exports, while Cuba has calculated the total costs throughout the entire Embargo at over \$1 trillion.<sup>174</sup>

The manner in which the Helms-Burton Act was drafted still allows for real change and progress to be made through Executive Action that is not specifically forbidden. The numerous sanctions against Cuba and laws that govern U.S.—Cuba relations can be somewhat neutralized in order to give Cubans the necessities of daily life and help provide them with resources they would otherwise be without. This kind of assistance would improve the image of the U.S. in the eyes of Cubans as well as the international community, which has routinely rejected the Embargo without enforcing any punishments on the U.S.<sup>175</sup> While the Helms-Burton Act is outdated and ineffective, American efforts to improve relations with Cuba need not be.

Generally, as a foreign policy measure, economic sanctions tend to damage American economic interests over time without improving or modifying the target country's behavior in any substantial manner.<sup>176</sup> Presently, with such a globalized world economy, unilateral sanctions harm American firms disproportionately compared to those of the target country, which can usually find substitute sources of supply and financing from other members of the international community.<sup>177</sup> This result is evident in Cuba, where other countries have continued to trade with Cuba to meet their demand for products.

While relatively few American agricultural producers have profited from exporting their goods to Cuba, there are many other industries and

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174. See Margot Pepper, *The Cost of the Embargo*, DOLLARS & SENSE (Feb. 28, 2016), <http://www.dollarsandsense.org/archives/2009/0309pepper.html> [<https://perma.cc/KMY6-N28Q>]; Portia Siegelbaum, *Cuba: U.S. Embargo Causes \$1 Trillion in Losses*, CBS NEWS (Sept. 14, 2011), <http://www.cbsnews.com/news/cuba-us-embargo-causes-1-trillion-in-losses/>.

175. In a speech given to the U.N. delegates before the annual vote on the Embargo, Cuban Foreign Minister Bruno Rodriguez Parrilla stated, "The blockade is a flagrant, massive and systematic violation of the human rights of all Cubans; it is contrary to International Law; it has been described as a crime of genocide." Still, there has not been any action to punish the U.S. or bring about any real change to lift the Embargo for good. Elise Labott & Richard Roth, *U.N. overwhelmingly rejects U.S. embargo of Cuba*, CNN (Oct. 27, 2015), <http://www.cnn.com/2015/10/27/politics/un-vote-cuba-embargo/> [<https://perma.cc/YWL3-YCXN>].

176. Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS INSTITUTION (June 1998), <http://www.brookings.edu/research/papers/1998/06/sanctions-haass> [<https://perma.cc/Y56C-LYLX>].

177. Furthermore, American interests are harmed indirectly because when discouraging other free countries to trade with the target country, U.S. foreign policy can be undermined if they decide to engage in trade despite sanctions, leading to even further conflict. Third-party countries that violate the terms of U.S. sanctions are unnecessarily labeled and treated unfavorably and even draw attention away from the original intent of the sanctions on the target. *See id.*

businesses that would likely thrive if given the opportunity to compete in Cuba. These areas, ranging from telecommunications, auto, and hospitality industries, would provide beneficial services to deprived Cubans, while making a profit. Free market proponents and the international community would have to acknowledge progress and the regression of the terms of the Embargo. Continued legislation and circumvention of the Helms-Burton Act through executive action may be the most effective solution to help both countries prosper and restoring an overdue sense of international tranquility.

