Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo

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HARMING HUMAN RIGHTS IN THE NAME OF PROMOTING THEM: THE CASE OF THE CUBAN EMBARGO

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This article details the history of the Cuban embargo, tracing its evolution as a tool of retaliation for the seizure of American property, as a weapon in the Cold War against the Soviet Union and its Cuban allies, and finally as an instrument of American policy for the promotion of democracy and human rights. The article then examines the actual impact of the embargo on human rights in Cuba today and highlights the contradiction between the embargo's avowed political purpose and legal rationale—the promotion of human rights—and its actual consequences, which are harmful to human rights generally. The article suggests that, by harming Cubans' economic, social, educational, cultural, and family rights, the embargo violates basic norms widely recognized by the civilized world. Furthermore, this article argues that when powerful countries impose economic sanctions in the name of promoting human rights, the sanctioning countries have a special legal and moral obligation to insure that such sanctions are discriminate, do not harm significant humanitarian interests, and do not cause extensive harm to the human rights of innocent people in the target country. Finally, this article details the results of a survey of a sample of Cubans, finding that the vast majority opposes the embargo. The conclusion argues that the U.S. should take the views of Cubans into account in designing its foreign policy toward the island in order to be truly democratic and protective of Cubans' human rights.

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INTRODUCTION

For almost half a century, the United States has maintained a comprehensive set of punitive sanctions against Cuba. Originally, the Cuban embargo developed as sanctions in retaliation for Fidel Castro’s expropriation of $1.6 billion to $2 billion worth of American property in 1960 to 1961. After the Bay of Pigs invasion in 1961 and the Cuban Missile Crisis of 1962, the embargo developed into a means to pressure Cuba into severing ties with the Soviet Union. Decades later, with the disappearance of the Soviet Union and Cuba’s abandonment of support for guerrilla groups in 1991, the U.S. government has justified the embargo exclusively in terms of promoting democracy and human rights. For the past 16 years, successive U.S. administrations have argued that the embargo must continue in order to pressure the Cuban government towards respecting its citizens’ human rights and undertaking democratic reforms. Indeed, long after Cuba has ceased to be a na-
tional security threat to the United States, the embargo is stricter today than it has been at any point in its 47-year history.

The purpose of this article is three-fold. First, it attempts to demonstrate that the Cuban embargo does not promote human rights but rather causes considerable harm to them, especially in the areas of economic, social, educational, cultural, and family rights. Second, by harming human rights and contributing little if anything to their promotion, the embargo violates basic legal and moral norms widely recognized by the international community. Third, the article argues that the unilateral, comprehensive, and indiscriminate nature of the embargo and its negative impact on humanitarian interests also violate the U.S.'s legal and moral obligation to ensure that sanctions imposed to promote human rights do not instead cause extensive harm to them.

I. LEGISLATIVE AND REGULATORY AUTHORITY FOR THE CUBAN EMBARGO


Following Fidel Castro's accession to power in January of 1959, U.S.-Cuban relations deteriorated rapidly.¹ President Eisenhower considered economic sanctions against Cuba as early as January 25, 1960, and approved plans involving covert actions to overthrow the Castro government just two months later.² In July of that year, the Administration successfully lobbied for an amendment to the Sugar Act of 1948, which had provided Cuba with a generous quota of the U.S. sugar market.³ The amendment authorized the president to change the quota for Cuban sugar imports;⁴ President Eisenhower promptly used this new authority by slashing the quota by 700,000

⁴ Id. The president's authority, however, extended only until Mar. 31, 1961.
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 tons—about 23 percent of the 1960 allotment. An internal debate existed though in regards to whether Cuba-specific sanctions should be imposed and, if so, to what extent.

When Cuba expropriated more and more American-owned property, debate subsided, and Eisenhower imposed the first official sanctions in October of 1960. Drawing upon the authority of the Export Control Act of 1949, the Commerce Department issued comprehensive regulations prohibiting nearly all exports of U.S.-produced goods—from simple fishing poles to machinery vitally important to the country’s sugar mills—to Cuba. The regulations also banned re-export of most items to Cuba via third countries; exporters could send only grains, vegetables, meats, and medicines. One of Eisenhower’s final public decisions concerning Cuba was to sever diplomatic ties with the island in December of 1960.

1. Foreign Assistance Act of 1961

When President John F. Kennedy assumed the presidency, he inherited and, in April of 1961, proceeded with Eisenhower’s full-blown plans for a CIA-sponsored invasion of Cuba. This resulted in the “Bay of Pigs” operation, and as a result of the defeat suffered by the anti-Castro forces, the Cuban leader consolidated his control over the island, strengthened ties with the Soviet Union, and openly proclaimed the “Marxist-Leninist” character of his revolution. In response to these events, Congress enacted the Foreign Assistance Act (FAA) of 1961, the first sanctions legislation directed at Cuba.

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5 Determination of Cuban Sugar Quota, 25 Fed. Reg. 6,414 (July 7, 1960). The United States imported roughly 80 percent of the sugar Cuba produced. The 700,000 ton cutback equated to a little less than 20 percent of all Cuban sugar.
6 MORLEY, IMPERIAL STATE AND REVOLUTION, supra note 2, at 120.
8 25 Fed. Reg. 10,006 (Oct. 20, 1960). In 1967, Commerce re-organized its classification system. As a result of these restrictions, Cuba was placed in “Z” category. A “Z” designation signified the most restrictive controls. Placing Cuba in Group Z did not substantively change the nature of the restrictions already in place up to that point.
9 25 Fed. Reg. 10,008 (Oct. 20, 1960). These medical supplies specifically included medicines, surgical and diagnostic equipment, dental, ophthalmic, and hearing aid equipment. Conspicuously absent was medical lab equipment for use in research; everything authorized for export was for direct medical treatment.
10 Statement by the President on Severing Diplomatic Ties with Cuba, PUB. PAPERS 891 (Jan. 3, 1961).
11 For an excellent account of the history of the operation, see, BAY OF PIGS DECLASSIFIED: THE SECRET CIA REPORT ON THE INVASION OF CUBA (Peter Kornbluh, ed. 1998).
The FAA authorized the president to impose a “total embargo upon all trade between the United States and Cuba.”\textsuperscript{13} The FAA also prohibited aid to countries that the president found were “dominated” by communists.\textsuperscript{14}

2. Proclamation 3447 and the Cuban Import Regulations (CIR)

Kennedy used his newfound authority in February of 1962 by issuing Proclamation 3447\textsuperscript{15}, which ordered the Treasury Department to ban imports of all goods that were of Cuban origin or passed through Cuba.\textsuperscript{16} Four days after Kennedy’s directive, the Treasury, under the authority of the FAA, issued the Cuban Import Regulations (CIR),\textsuperscript{17} which essentially tracked the language of Proclamation 3447\textsuperscript{18}. However, the Treasury’s preference was to invoke the Trading with the Enemy Act (TWEA) as this statute allowed robust penalty and enforcement mechanisms. Though the State Department feared that the United States would be committing itself to armed intervention by calling Cuba an “enemy,” by March of 1962, the Treasury had formally invoked the authority of the TWEA and thus signaled a methodical tightening of the embargo.\textsuperscript{19} The CIR was amended to prohibit the importation of goods containing Cuban components.\textsuperscript{20} Soon thereafter, the Treasury prohibited U.S. citizens from bringing non-commercial quantities of Cuban goods back to the United States as baggage.\textsuperscript{21} Congress also amended the FAA to deny foreign assistance—loans for development, technical and mili-
3. The Cuban Assets Control Regulations (CACR)

In July of 1963, the Treasury replaced the CIR with the "Cuban Assets Control Regulations" (CACR). Promulgated under the expansive authority of the TWEA as well as the FAA, the CACR had two main purposes: (1) to shore up the domestic (bi-lateral) embargo and (2) to expand the embargo's extraterritorial reach by shutting off trade between Cuba and other countries. The new regulations prohibited—absent the proper license—any and all transactions between Cuba or Cuban nationals and persons subject to the jurisdiction of the United States. Transactions involving property in which Cuban nationals had an interest, however indirect, were also barred. These regulations effectively prohibited foreign subsidiaries of U.S. companies from doing business with Cuba and froze all Cuban assets located in the United States. In addition, the CACR retained CIR provisions that prohibited the import of merchandise made in Cuba or with Cuban materials. Finally, in what would become the quintessential symbol of the embargo, the CACR illegalized travel to Cuba. The CACR, however, did allow indi-

22 Foreign Assistance Act Amendments of 1962, Pub. L. No. 87-565, 76 Stat. 255 (1963). This was the first of many subsequent efforts to extend the embargo beyond the boundaries of the United States, thereby expanding its extraterritorial reach.
24 Id.
25 Id. at 6,975-76. In layman's terms, this is how the CACR operate: The prohibitions listed in sections 201-204 cover practically all transactions that could occur involving a United States person or property and a Cuban person or property. They are all strictly barred unless one obtains a proper license. Licenses come in two flavors: general and specific. The general licenses are listed in section 501 et. seq. No special procedures need to be followed beyond those listed in the general license. All other transactions can only be made pursuant to a specific license. Those interested in a specific license must fill out an application stating detailed information about the nature of the transaction. The application may then be granted or denied by the Treasury Department.
26 Id. at 6,975.
27 Id. at 6,975. In fact, many of the prohibitions listed in the CACR were simple reiterations of the language contained in the TWEA. Compare Section 515.201-202 with Section 5(b) of the TWEA. Id. at 6,981; 50 U.S.C.A. app. § 5(b) (1990).
29 Id. at 6,975-76. It is worth noting that "travel to Cuba" is not mentioned in the original CACR. Travel was barred because it was impossible to spend money en route, or in Cuba without violating the prohibitions in sections 201-204. For example, if a U.S. citizen bought a plane ticket on a Canadian jet, Cuba would have an indirect interest in that transaction be-
viduals to remit up to $100 per month to Cuban households or individuals for living expenses\textsuperscript{30} and up to $1,000 per month to U.S. citizens residing in Cuba as of the date of the CACR.\textsuperscript{31} Buoyed by the broad authority of the TWEA, the CACR became the backbone of the Cuban embargo.

4. Closing of Remaining Loopholes under Johnson

President Johnson entered office in 1963 with most aspects of the embargo already in place, but the administration did close some important loopholes. The State Department had been unsuccessful in using diplomatic pressure to cut off third-country trade with Cuba,\textsuperscript{32} and Congress thus amended the FAA to deny U.S. foreign assistance to countries that “failed to take appropriate steps” to prevent their ships and planes from trading with Cuba.\textsuperscript{33} In May of 1964, the Commerce Department revoked the general license—reserved by the Eisenhower administration when imposing the first sanctions\textsuperscript{34}—that had authorized U.S. firms to export grains, vegetables, meats, and medicines to Cuba.\textsuperscript{35} Moreover, in response to the discovery of a cache of arms with Cuban origins on a Venezuelan beach, the Organization of American States (OAS), under heavy U.S. pressure, called a “Meeting of Consultation” to discuss retaliation against Castro.\textsuperscript{36} The OAS voted to break off diplomatic ties with Cuba; to suspend all trade that was not motivated by food, medicine, or other humanitarian reasons; and to restrict sea transportation to Cuba.\textsuperscript{37}

cause Cuba could charge the airline for refueling, terminal fees, or have any manner of interest in the plane whose trip was funded in part by that citizen's purchase.

\textsuperscript{30} Id. at 6,974, 6,981, § 515.521.

\textsuperscript{31} Id.

\textsuperscript{32} MORLEY, IMPERIAL STATE AND REVOLUTION, supra note 2, at 191-203.


\textsuperscript{34} See supra note 9 and accompanying text.


\textsuperscript{36} GLEIJESE S supra note 1, at 23; R. St. J. MacDonald, The Resort to Economic Coercion By International Political Organizations, 17 U. TORONTO L.J. 86, 164 (1967). The Venezuelan incident was—like many of the changes in the U.S. embargo on Cuba—a factual impetus used to justify economic and political coercion that had been planned long before. In this case, the United States had been pressing for OAS action against Cuba since 1962, when it successfully prevented Cuba’s inclusion in the OAS. MacDonald, at 157, 164.

\textsuperscript{37} 51 DEP’T ST. BULL. July 6, 1964, 179-182.
The remainder of Johnson’s term in office involved only minor changes to the embargo. Significantly though, an amendment prohibited U.S. importers from shipping nickel-bearing goods unless accompanied by a certificate of origin indicating that the nickel did not come from Cuba. With Cuba holding the world’s fourth largest nickel reserves, this would be the first of many U.S. efforts to obstruct the entry of Cuban nickel into world markets.


President Nixon asserted that there would be “no change toward that bastard [Castro] while I’m President,” and this was essentially true of his first term, during which no noteworthy regulatory changes were made. However, Nixon’s second term saw relations begin to thaw and the embargo begin to soften.

1. Relaxation of the CACR and Lifting of the OAS Embargo in Nixon’s Second Term

Before Nixon’s second term came to an abrupt end, the Office of Foreign Asset Controls (OFAC) issued amendments to the CACR in July of 1974 that clarified and relaxed the Office’s policies toward granting certain specific licenses. "Bona fide," small-value gifts could now be imported directly from Cuba, and books, films, and other publications could be imported for educational purposes. The policies also authorized scholars and

40 39 Fed. Reg. 25,317 (July 10, 1974). The Office of Foreign Asset Controls (OFAC) is the Treasury Department subdivision responsible for administering the CACR (as well as all other foreign asset control regulations).
41 Id. Recall that specific licenses required the requestor to fill out an application, whereas general licenses did not. By publishing these statements of licensing policy OFAC was informing the public of the type of specific license applications that it would grant and under what conditions. Thus, the statements could be viewed as a liberalization of the CACR because publicizing the policy made more people aware of opportunities to transact with Cuba.
42 Id. at 25,318.
43 Id. Books and other publications could be imported commercially, provided that payment for the items was deposited into a blocked account.
journalists to pay for travel- and work-related expenses while in Cuba. These changes were part of a broad effort during 1974-1975 by Assistant Secretary of State for Western Hemisphere Affairs, William D. Rogers, with the full support of Secretary of State Henry Kissinger, to explore a rapprochement with Cuba that might lead to the normalization of relations.

In July of 1975 the OAS convened to discuss lifting its embargo on Cuba, and, in order to appease embargo opposition, the United States voted to lift the OAS embargo. As a logical consequence of the OAS decision, OFAC further amended the CACR to lift its ban on subsidiary trade. In addition, the Commerce Department modified the Export Administration Regulations (EAR) to permit third-country vessels that traded with Cuba to bunker at U.S. ports.

2. Carter’s Attempt to Dismantle the Embargo

Among the ten presidents who have been in office since 1959, President Carter has been the closest to dismantling the U.S. Cuban embargo. Just a little over a month into his term in 1977, Carter authorized all transactions related to travel to, from, and within Cuba by U.S. citizens. Soon thereafter, OFAC issued regulations that authorized travel agents to assist Americans who were planning to travel to Cuba. OFAC added a general license allowing foreign, U.S.-owned firms to bunker Cuban vessels. In 1978, the administration moved to allow people residing in the United States to remit up to $500 every three months (up from only $100 per month) to close rela-

44 Id.
49 Certain Transactions Incidental to Travel to and in Cuba, 42 Fed. Reg. 16,621 (Mar. 21, 1977). Travelers could also import, as baggage, $100 worth of Cuban merchandise once every six months.
50 Transactions Incidental to Authorized Travel to Cuba, 42 Fed. Reg. 25,499 (May 12, 1977).
51 Bunkering of Cuban Vessels and Fueling of Cuban Aircraft by American-owned or Controlled Foreign Firms, 42 Fed. Reg. 58,518 (Nov. 9, 1977).
tives in Cuba.\textsuperscript{52} Later in the year, authorization for these larger remittances was extended to Cuban nationals living in third countries.\textsuperscript{53} Seeking to promote the "good management of property," OFAC ordered in March of 1979 that all blocked Cuban assets be placed in interest-bearing accounts.\textsuperscript{54}

In addition, Congress enacted several laws that affected the embargo either directly or indirectly but which are important largely for procedural reasons. First, in 1977, Congress passed the International Emergency Economic Powers Act (IEEPA),\textsuperscript{55} which limited the president's powers under TWEA to times of declared war.\textsuperscript{56} The law, however, grandfathered in authorities that the president had been exercising prior to July 1, 1977,\textsuperscript{57} by allowing the president to renew these authorities each year. Every president, including Carter, has done so. More substantively, Congress repealed the food aid restrictions against Cuba contained in the "Food for Peace Act" of 1966.\textsuperscript{58} However, commerce regulations barring virtually all commodity exports to Cuba remained effective.\textsuperscript{59}

The Carter administration took another step toward reestablishing normal diplomatic and commercial relations in 1977 as part of its negotiation for the opening of "Interest Sections" in Havana and Washington, D.C.\textsuperscript{60} These "Interest Sections" were embassies in all but name, and their senior diplomats served as ambassadors, though the term was avoided in favor of the official title "Head of the Interest Section." Carter ended his term in office seeking more relations with Cuba and authorizing satellite communica-

\textsuperscript{54} Holding of Blocked Funds in Interest-Bearing Accounts, 44 Fed. Reg. 11,768 (Mar. 2, 1979).
\textsuperscript{56} Id. § 101(a), 91 Stat. at 1625.
\textsuperscript{57} Id. § 101(b), 91 Stat. at 1625. The continuation of the Cuban embargo under the IEEPA has been approved by the Supreme Court. See Regan v. Wald, 104 S. Ct. 3026.
\textsuperscript{60} See generally WAYNE S. SMITH, THE CLOSEST OF ENEMIES: A PERSONAL AND DIPLOMATIC ACCOUNT OF U.S. – CUBAN RELATIONS SINCE 1957 (W.W. Norton & Co. 1988). The newly opened U.S. Interest Section in Havana was housed in the same building on the Malecon that had served as the U.S. Embassy until the rupture of diplomatic relations in January of 1961, and the senior U.S. diplomat assigned as Head of the Interest Section in Havana had as his home the elegant residence which, built initially as a winter home for President Franklin Roosevelt, had served since the mid-1940s as the home of successive U.S. ambassadors to Cuba.
tions between the United States and the island in September of 1980.  

C. The Reagan Revolution v. The Castro Revolution

The election of Ronald Reagan in 1980 effectively closed the opening of U.S.-Cuban relations that had been initiated by Carter. Reagan built his campaign on the dual pillars of maligning Carter’s foreign policy and taking a hard stance against the Soviet Union and its allies. These two goals paved the way for the halting of rapprochement with Cuba and stiffening of the embargo. This policy earned him and the Republican Party the strong support of the South Florida Cuban-American lobby, which was then beginning to gain considerable financial and political clout. The Reagan administration’s embargo policy was also strongly influenced by a foreign policy paper prepared by the Committee of Santa Fe—an anti-communist think tank which recommended harsh measures against Castro and even advocated a U.S. military invasion.

In Reagan’s first term, the administration revoked the general travel license Carter had issued, thereby making it impossible for most Americans to travel to Cuba and thus strengthening the embargo considerably. OFAC also once again targeted Cuban nickel. In Reagan’s second term, the administration cracked down on Cuban “front-companies,” set up by the Cuban government in third countries in order to import otherwise unavailable resources.

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64 Committee of Santa Fe, A New Inter-American Policy for the Eighties, 46 (Lewis Tambs, ed., 1980) (hereinafter Santa Fe Paper) (“Havana must be held to account for its policies of aggression against its sister states in the Americas. Among those steps will be the establishment of a Radio Free Cuba, under open U.S. government sponsorship, which will beam objective information to the Cuban people that, among other things, details the costs [sic] of Havana’s unholy alliance with Moscow. If propaganda fails, a war of national liberation against Castro must be launched.”) (Emphasis added).
65 47 Fed. Reg. 17,030 (Apr. 20, 1982). Travel was limited to specified purposes: visiting close relatives, research, and newsgathering.
66 Certificates of origin regarding Cuban nickel had been required since 1965. See 30 Fed. Reg., supra note 39, at 15,371. Some writers have erroneously stated that this certification process was instituted by Reagan. See e.g., Kaplowitz, supra note 18, at 126. Perhaps it is more accurate to say that under Reagan, OFAC ramped up enforcement of existing rules—a tactic Reagan claimed to be taking. The sudden influx of certificates issued by various countries during the early 1980s is consistent with this analysis.
67 Skoug, supra note 63, at 26-27.
U.S. goods into Cuba. Reagan's administration also vigorously enforced existing regulations related to trade.

Movements related to the embargo were coupled with a political offensive that included a threat by Secretary of State Alexander Haig during Reagan's first term to invade the island, as well as the establishment in 1984 of Radio Marti, a U.S. government radio station targeted exclusively toward Cuba. Equally important for the embargo's future, the Reagan administration began the nefarious political marriage of embargo policy with electoral politics in South Florida by vigorously courting the vote of hard-line Cuban-American exiles in exchange for an outright veto over any future Cuban policy initiatives.

D. George H.W. Bush, the End of the Cold War, and the Change in the Rationale for Sanctions

George H. W. Bush had a long record of dislike for the Cuban revolution as well as close ties to prominent anti-Castro exiles; thus, his accession to the presidency promised to continue Reagan-era embargo policies. Bush began by taking steps to frustrate authorized charter trips to Cuba. In the first year of the new administration, the CACR were amended to limit the amount travelers could spend per day on food, lodging, and transportation while in Cuba to $100, and later amendments would require that all flights to and from Cuba land and depart during U.S. Customs' normal business

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68 51 Fed. Reg. 44,459 (Dec. 10, 1986). Since the CACR were implemented, American trading with these “front-companies” was illegal. Again, the prohibition was not new, but the list of persons involved in service transactions related to travel and sending remittances to Cuba was modified to reduce the flow of hard currency to Cuba.

69 Alexander Haig had a long history of antipathy toward Cuba. In the 1960s he worked in the Kennedy and Johnson Administrations as part of covert efforts to overthrow Castro. Bohning, supra note 1, at 85-86, 155-56, 244-45 (2005). Haig viewed Cuba as the “source and...catalyst” of insurgency in Central America. Soon after Reagan’s inauguration in 1981, Haig advocated “going to the source” and “turn... [Cuba] into a parking lot.” LeoGrande, supra note 62, at 82.


71 See Skoug, supra note 63.

hours. The fall of the Soviet Union did not relax U.S. policy toward Cuba but instead had the opposite effect. In 1991, the Soviet Union cut off all remaining subsidies to Cuba, precipitating a descent by the Cuban economy into a severe depression that would eventually shrink Cuba’s GDP by 35%. Believing that the Castro regime was on its last legs, OFAC reduced the maximum allowable quarterly remittances from $500 to only $300. The Soviet Union’s fall had provided sanctions advocates with a new and seemingly powerful argument: whereas support from the Soviets had undermined the success of the sanctions up to that point, the Soviets’ demise meant that sanctions would finally achieve the desired objective of forcing Castro from power. There is no record as to whether humanitarian implications were considered in a decision that most drastically affected ordinary families that depended on remittances for their livelihood.

E. The Cuban Democracy Act of 1992

The passage of the Cuban Democracy Act (CDA) of 1992 is a case study in domestic election-year politics. Opposition by the Bush administration had killed similar legislation for the previous three years. As the

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73 55 Fed. Reg. 32,075 (Aug. 7, 1990) (to be codified at 31 C.F.R. pt. 515). Customs hours were typically 8:30 a.m. to 5 p.m. This had the effect of raising the cost of flights, and consequently, travel to and from Cuba.


75 MORLEY & McGILLION, UNFINISHED BUSINESS infra note 80, at 25.

76 Somewhat disingenuously, OFAC stated that the purpose of the amendment was to make remittances to Cuba consistent with remittances to Vietnam and Cambodia. News reports from that time indicate that the purpose of the amendment was to curtail “profiteering” by the Cuban government. After the Soviet collapse, Castro apparently lowered the minimum travel age from 65 to 20, allegedly in order to increase the amount of currency sent to Cuba from the United States. See, e.g., Mimi Whitefield, New Restriction on Travel to Cuba Imposed by U.S., MIAMI HERALD, Sept. 28, 1991, at A1; Warren Strobel, U.S. Limits Financing of Cubans’ Travel Here, WASH. TIMES, Sept. 28, 1991, at A1. In fact, humanitarian concerns arose only in context with charges that Castro was using “humanitarian” remittances to circumvent the embargo. By dearth of logic, Castro’s moves to alleviate the effects of the embargo were thus equated with abuses of human rights. Associated Press, Big increase in Shipments Going to Cuba ‘Humanitarian’ Funds Circumvent Embargo, S.F. CHRON., Sept. 9, 1991, at D6. In a perverse twist, the administration would be able to claim a human rights purpose for a regulation that denigrated human rights.

77 Connie Mack (R-FL) had offered a bill similar to the CDA that would have banned subsidi-
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The campaign season warmed up, however, Bush boosted his anti-Castro rhetoric, issuing an order in April that banned Cuban vessels from entering U.S. ports. Still, Cuban-American anti-Castro leaders—especially Cuban American National Foundation (CANF) President Jorge Mas Canosa—were not mollified. Using this as an opportunity to put pressure on Bush in Florida's Republican stronghold, Democratic presidential candidate Bill Clinton met with Cuban exile community leaders in late April and voiced support for the CDA, proposed by Democrat Robert Torricelli of New Jersey, who himself had a large Cuban-American constituency to please. In exchange for supporting the Torricelli bill, Clinton received large campaign contributions from the exile community and a tacit endorsement from Mas Canosa.

With Clinton's support of the CDA, Bush suddenly found the Cuban-American vote conditioned on which candidate would be harshest towards Castro. Directed by Bush's statement that "I will not be upstaged by Clinton on Cuba," the administration reversed course. Thanks to this reversal, the CDA faced little opposition in the House and eventually made it through the Senate to be signed into law a few days before the election on October 23, 1992.

1. Carrots and Sticks

The CDA essentially utilized a bisected approach, at times referred to as a "carrots and sticks" approach. Track I of the Act is the "stick," and initial trade with Cuba. He presented the bill three times: in 1989, 1990, and 1991. Haney & Vanderbush, supra note 1, at 86. As an interesting side-note, Mack's great-grandfather, also named Connie Mack, was the Hall of Fame manager of the Philadelphia Athletics, which played several exhibition baseball games in Cuba between 1910 and 1920. See infra note 103, and accompanying text.

78 In fact, Mas Canosa had been playing the candidates against each other in order to get the CDA passed. Tom Fielder, How Candidates Were Squeezed on Castro Policy, Miami Herald, Apr. 26, 1992 at 1C. Mas Canosa's CANF had risen to power during the Reagan Administration and wielded considerable influence over U.S.-Cuban relations. See, e.g., Morris Morley & Chris McGillion, Unfinished Business: American and Cuba After the Cold War, 1989-2001, at 10-21 (Cambridge University Press 2002) (hereinafter Morley & McGillion, Unfinished Business).

79 Christopher Marquis & Paul Anderson, Bush to Sign Cuba Bill in Miami, Miami Herald, Oct. 23, 1992, at 1A.

80 Tom Fiedler, Clinton Backs Torricelli Bill: "I Like It," He Tells Cuban Exiles, Miami Herald, Apr. 24, 1992, at 1A; Tom Fiedler, Mas' Statement, Miami Herald, Oct. 28, 1992, at 1A.

81 Tom Fiedler, How Candidates Were Squeezed on Castro Policy, Miami Herald, Apr. 26, 1992, at 1C.

82 Haney & Vanderbush, supra note 1, at 87.
cludes provisions that prohibit subsidiary trade and restrict ship movements and family remittances. Track II is the carrot and offers a lifting of sanctions and the provision of aid should Cuba abandon communism and become democratic. The Act also authorized support for Cuban citizens by allowing some food and medical aid and by establishing improved telecommunication links between the United States and Cuba.

2. Reestablishing and Stiffening Extraterritorial Aspects of the Embargo

The CDA marked the figurative reincarnation of the draconian extraterritorial aspects of the Cuban embargo, despite the end of the Cold War and despite the nonexistence of a security threat posed by Cuba. Under the heading of “international cooperation,” the CDA once again authorized the president to withhold aid from countries that provided assistance to Cuba. “Assistance” was defined broadly and encompassed nearly any transaction conducted on terms more favorable to Cuba than the third country’s other trading partners.

In an even more drastic step, the CDA prohibited foreign subsidiaries of U.S. companies from conducting any business with Cuba. Subsidiary trade had been allowed since 1975, when the Ford administration relaxed the embargo. The CDA also placed restrictions on the movement of vessels with Cuban destinations or origins. Vessels engaging in trade with Cuba could not load or unload at any U.S. port for six months from the date the vessel departed Cuba. Moreover, vessels that carried goods or passengers to or

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84 See infra notes 88-93, 101-105 and accompanying text.
85 See infra notes 106-114 and accompanying text.
86 See infra notes 95-100 and accompanying text.
87 MORLEY & MCGLYNN, UNFINISHED BUSINESS supra note 80, at 33-34.
89 22 U.S.C. § 6003(b)(2)(A-B) (2000). Assistance here does not include food donations to NGO’s or individuals and in some cases medicine.
90 22 U.S.C. § 6005(a)(1) (2000). This section of the act actually reads: “…no license may be issued for any transaction described in section 515.559 of title 31, Code of Federal Regulations [ ]” 15 C.F.R. 515.559 is the part of the Cuban Assets Control Regulations concerning foreign subsidiaries of U.S. firms.
from Cuba and vessels that simply carried goods in which a Cuban national had an interest were barred from using U.S. ports. Thus, the CDA reestablished and solidified many of the extraterritorial features of the embargo that had been dismantled during the Ford-Carter era.

3. Support Through Exports

During the first Bush administration, the justifications underlying the embargo necessarily shifted from Cold War anti-communism to an avowed concern for human rights. Thus, embargo legislation required amending, and the CDA enacted several provisions that ostensibly extended support to the Cuban people. First, the Act allowed the export of certain goods for humanitarian purposes, such as donations of food (to individuals and non-governmental organizations) and of medicines and medical supplies with certain exceptions. Still, the practical impact of the CDA and subsequent rules regarding exporting medications to Cuba was to discourage the practice.

Second, the CDA allowed for improved communication between Cubans and U.S. residents by permitting U.S. telecommunication companies to establish services between the two countries. These provisions were strictly limited to U.S.-Cuban communications, and no investment in the domestic Cuban network was allowed. In addition, the U.S. Postal Service was directed to establish direct mail service to Cuba, although this provision

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94 This shift can also be described as the U.S. shifting conditions of normal relations with Cuba from Cuba’s foreign policy to Cuba’s domestic policies. See, e.g., MORLEY & McGILLION, UNFINISHED BUSINESS supra note 80, at 25.
95 22 U.S.C § 6004(b) (1992).
96 22 U.S.C. § 6004(c).
97 Even if no exception applied, medical exports could be made only after the president was able to verify-by onsite inspection-that the exported items were being used for their intended purpose. Additionally, medical exports required a specific license. As implemented by the Commerce Department, this section of the CDA requires potential exporters to apply for a license to send medicines or medical supplies to Cuba. Commerce Department policy has been to review these applications on a case by case basis and approve them unless one of the aforementioned restrictions applies. Nonetheless, the process of requesting a license for exporting medical products to Cuba is cumbersome, and the rules that pharmaceutical companies must comply with are complicated.
had not been implemented as of 2007.°

4. Restrictions and Penalties on Remittances

Although the CDA facilitated the flow of ideas and information between the U.S. and Cuba, it restricted the flow of hard currency. Remittances—subject to incessant tinkering over the life of the embargo—were restricted to the “reasonable costs associated” with “financing the travel of Cubans to the United States.” This restriction was designed to prevent the Cuban government from using remittances as a means of gaining access to U.S. currency.

The CDA also amended and incorporated the penalty scheme used in the TWEA to enforce these remittance restrictions as well as all other restrictions under the Act. Violators of the remittance provisions could be held criminally liable for up to $1 million in fines and ten years in prison and faced civil penalties of up to $50,000 as well.

5. Conditioning Normalization on Cuba’s Internal Politics

Perhaps the most striking aspect of the CDA was the restrictions it put on the president’s ability to conduct policy toward Cuba. The goal of the CDA, by its own terms, was to undermine the Castro government and facilitate transition to democracy. With the CDA, Congress prohibited the president from lifting the embargo until a democratic government was in place in Cuba.

All previous legislation directed at Cuba had placed conditions on the president’s ability to suspend provisions. However, the CDA went several steps further, by imposing a comprehensive set of pre-conditions that must occur before sanctions could be lifted or relaxed. Essentially, a waiver of sanctions required the president to determine that Cuba was holding free elections in which opposition parties had been allowed to participate;

100 22 U.S.C. § 6004(f).
101 22 U.S.C. § 6005(c).
102 Id.
104 50 U.S.C. app. § 16(a) (West 2007).
105 Id. app. § 16(b)(1). The distinction between criminal and civil penalties is one of intent. “Willful” violators are subject to criminal sanctions.
107 Id. § 6007(a)(1) (2000).
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respecting human rights;\textsuperscript{109} moving toward a “free market economic system;\textsuperscript{110} and preparing to amend its constitution to ensure free elections in the future.\textsuperscript{111} As additional incentives for Cuba to reform its government, once the president made these five determinations, he or she was encouraged to push for Cuban admittance to international organizations,\textsuperscript{112} provide emergency relief,\textsuperscript{113} and “take steps” to dismantle the embargo.\textsuperscript{114}

6. The Effect of the CDA

Much of the language in the CDA was non-mandatory,\textsuperscript{115} thus raising questions about how much of the embargo was codified by the Act. However, regardless of how much of the embargo was fixed in place, the CDA signaled a shift of power from the president to Congress. Thus, Congress took for itself a role in determining U.S. policy toward Cuba, including the terms of the embargo.\textsuperscript{116}

F. Helms-Burton: Congress Takes Control

The Helms-Burton bill passed the Republican-controlled House in 1995 but had become stalled in the Senate as a result of concerns that it improperly restricted the executive branch’s freedom to conduct foreign policy. The issue of debate was related to concerns regarding the CDA and whether it would be appropriate to give Congress the authority to determine the conditions under which the Cuban sanctions could be ended. However, these concerns were quickly swept aside in the aftermath of a major incident on February 24, 1996, in which Cuban Air Force jets shot down two unarmed civilian planes that belonged to the anti-Castro organization “Brothers to the Rescue”.\textsuperscript{117} The resulting political fallout pressed President Clinton—then

\textsuperscript{108} Id. § 6007(a)(2).
\textsuperscript{109} Id. § 6007(a)(3).
\textsuperscript{110} Id. § 6007(a)(4).
\textsuperscript{111} Id. § 6007(a)(5).
\textsuperscript{112} Id. § 6007(b)(1).
\textsuperscript{113} Id. § 6007(b)(2).
\textsuperscript{114} Id. § 6007(b)(3).
\textsuperscript{115} For example, the president “may” impose sanctions on countries providing assistance to Cuba. Id. § 6003(b)(1).
\textsuperscript{116} Unless, otherwise noted in the text or a footnote, the rules and restrictions of the CDA remain in effect today, even if technically irrelevant in light of Helms-Burton.
\textsuperscript{117} Tribune Wires, Cuba Shoots Down 2 Planes of Exile Group, Clinton Condemns Action Launches Rescue Operation, CHI. TRIB., Feb. 25, 1996, at 3; Wires, Cuban Military Jets
preparing for reelection and eager to win Florida— to alter course and support the bill. Congress passed Helms-Burton on March 6, 1996, and Clinton signed it into law on March 12, 1996.\footnote{A discussion of each of the four titles of the Act follows.}

1. **Title I: Strengthening Sanctions**

Title I included both domestic and international approaches to strengthening the embargo against Cuba.\footnote{Domestically, Title I called for full enforcement of the CACR. More dramatically, it explicitly codified the embargo and stripped the president of his ability to lift or modify it by mandating that the CACR would remain in effect.}

Other provisions tightened the embargo in the domestic realm and similarly reduced the president’s power to modify the embargo. Title I added a new prohibition against indirect financing to the CACR,\footnote{U.S. nationals were barred from financing other persons for the purpose of transacting in confiscated property. Section 112 gave the president slight discretion in Shoot Down Planes Belonging to Exiles, ST. LOUIS POST-DISPATCH, Feb. 25, 1996, at 1A; See generally, Reuters, Cuban Fighter Jets Down 2 Exile Planes, NEWSDAY (Melville, N.Y), Feb. 25, 1996, at A3. (Describing “Brothers to the Rescue” who flew missions over the Florida Straights looking for immigrant boats from Cuba, and in the months previous to the shoot down, had dropped anti-Castro leaflets on Havana. The U.S. Claimed that the planes were in international airspace and that the Cuban MiGs never warned the BTTR pilots. Cuba Claimed that the planes were within its airspace and that the MiGs had warned the BTTR pilots); Associated Press, Cuba Shows Evidence that Plane Was Warned, THE COM. APPEAL (Memphis), Mar. 4, 1996, at A2; Miami Herald, U.S. Debates Options on Cuba: May end Flights, Phone Service, THE RECORD (N.J), Feb. 26, 1996, at A1.} and U.S. nationals were barred from financing other persons for the purpose of transacting in confiscated property.\footnote{The owner of a claim to confiscated property, however, is not prohibited from financ-}
modifying the CACR with respect to family remittances and travel restrictions.\textsuperscript{125} With respect to travel restrictions under Helms-Burton, the president cannot completely deregulate travel to Cuba until a transitional government is in power.\textsuperscript{126} Thus, the Act denied future presidents the authority enjoyed by President Carter 20 years earlier to allow unrestricted travel to Cuba by U.S. citizens via executive order.

Title I’s international aspects built on the CDA’s efforts to expand the embargo’s extraterritorial effects.\textsuperscript{127} Provisions of the Act restricted donations to international financial institutions that extended loans to Cuba,\textsuperscript{128} withheld assistance to countries that supported construction of the Juragua nuclear power plant in Cuba,\textsuperscript{129} and conditioned assistance to Soviet successor states on their withdrawal of all military aid to Cuba.\textsuperscript{130}

2. Title II: Regime Change by Legislation

The unabashed goal of Helms-Burton was to establish a democratic government in Cuba that did not include the Castro brothers.\textsuperscript{131} Much like the CDA, Title II of the Helms-Burton Act specifically spelled out the necessary characteristics of a democratic government in Cuba\textsuperscript{132} as well as the forthcoming U.S. policy responses if such a government was formed.\textsuperscript{133} Thus, the definitions of “transitional government” and “democratically elected government” are Title II’s key provisions. The requirements for a transitional government include the legalization of multi-party political activity, the release of political prisoners, and the dissolution of the Department of State Security.\textsuperscript{134} Once the U.S. president determines and informs

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{125} Id § 112(1)(A-B), 110 Stat. at 802 (remittances), and id. at § 112(2), 110 Stat. at 802-03 (travel). Subsequent amendments to the CACR show that this is a limited exception to § 102(h) of the Act rather than an implicit recognition that the President can modify the CACR to some extent.
\item \textsuperscript{126} Id. § 202(a)(2)(A)(iii), 110 Stat. at 807.
\item \textsuperscript{127} See supra notes 89-94, and accompanying text.
\item \textsuperscript{128} LIBERTAD, supra note 119, at § 104(b), 110 Stat. at 795. Congress took a similar step thirty years earlier when it amended the Foreign Assistance Act to command that the president deposit no money into the U.N. Development Fund if money were used to assist Cuba. Act of September 19, 1966, Pub. L. No. 89-583 § 301(b), 80 Stat. 795, 805 (1966).
\item \textsuperscript{129} LIBERTAD, supra note 118, at § 111, 110 Stat. at 800-01.
\item \textsuperscript{130} Id. § 106, 110 Stat. at 795-98, amending 22 U.S.C. § 2295a(b) (2000).
\item \textsuperscript{131} Id. § 3(1), 110 Stat at 788, and Id. at § 201, 110 Stat. at 805.
\item \textsuperscript{132} Id. §§ 205, 206, 110 Stat at 811-13.
\item \textsuperscript{133} Id. §§ 202-204, 110 Stat at 806-11.
\item \textsuperscript{134} Id. § 205(a)(1-8), 110 Stat. at 811-12. Other factors include: public commitment to free
\end{enumerate}
\end{footnotesize}
Congress that a transitional government is in place, he or she shall execute a “plan for assistance.” The president is also authorized to provide some assistance to Cuba in the meantime, such as food, medicine, and other items that constitute “basic human needs.”

In addition, a “democratically elected” government must result from free elections, respect civil liberties, transition “toward a market-oriented” economy, commit to constitutional reforms, and compensate U.S. citizens whose property was expropriated by the Revolution. Title II authorizes the president’s assistance plan to include a full range of economic assistance upon the installment of a democratically elected government in Cuba.

Finally, Title II details the procedure for suspending or lifting the embargo. Upon determining that a transitional government is in place, the president may suspend enforcement. The president shall only proceed to terminate the embargo once he determines that Cuba has a democratic government. Provisions of the CDA would thus be repealed by operation of law pursuant to this determination. Congress, however, is entitled to review the suspension of the embargo and nullify the president’s decision by joint resolution.

3. Title III: Expanding Extraterritorial Reach

Title III of the Helms-Burton Act is the most controversial section of the
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Act.\textsuperscript{144} Under Title III, anyone who traffics property confiscated during the Cuban Revolution may be sued in U.S. courts.\textsuperscript{145} The remedial scheme compensates individual U.S. nationals who hold claims to confiscated property. Remarkably, the Helms-Burton law not only covers property owned by individuals who, at the time of the taking, were U.S. nationals but also property that belonged to non-U.S. nationals (primarily Cubans) who have subsequently become citizens.\textsuperscript{146} Although the U.S.' right to claim compensation for persons who were its nationals at the time their property was taken is beyond dispute, it is dubious under international law whether the United States can exercise a similar right on behalf of persons who at the time of the taking had no jurisdictional connection to the United States.

Aside from the legal issues, the provision is also economically and politically significant. Property confiscated during the Cuban Revolution that belonged to persons who were U.S. nationals at the time is valued at $6 billion in 2007 dollars. Although substantial, the sum is not so large as to preclude reasonable compromise and resolution.\textsuperscript{147} However, by adding the claims of all Cuban exiles who have become U.S. citizens subsequent to the takings, the property issue cannot be resolved practically and has created intense friction between the United States and Cuba. Although no exact figures have been produced, the amount in dispute easily exceeds $50 billion.\textsuperscript{148} No Cuban government could agree to this demand, nor could the Cuban

\textsuperscript{144} See, e.g., Dhooge, infra note 171, at 575; Arendt, supra note 122, at 251; Klinton W. Alexander, The Helms-Burton Act and the WTO Challenge: Making a Case for the United States Under the GATT National Security Exemption, 11 Fla. J. Int'l L. 559 (1997); August Reinisch, Widening the U.S. Embargo Against Cuba Extraterritorially: A Few Public International Law Comments on the 'Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996' 7 EUR. J. INT'L L. 545 (1996); Digna B. French Economic Sanctions Imposed by the United States Against Cuba: The Thirty-nine Year Old Embargo Culminating with the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 7 U. MIAMI INT'L & COMP. L. REV. 1 (1998-1999); Stephen A. Lisio, Helms-Burton and the Point of Diminishing Returns, 72 INT'L AFF. 691, 708 (1996); Much of the controversy in the literature centers on whether or not it is legal to subject foreigners to suit in a United States forum for "trafficking" in confiscated property. That discussion is beyond the scope of this section, which will focus on Title III's relationship to the economic embargo.

\textsuperscript{145} LIBERTAD, supra note 118, at § 302(a)(1), 110 Stat. at 815.

\textsuperscript{146} Arendt, supra note 122, at 261.

\textsuperscript{147} JayEtta Z. Hecker to Representative Charles B. Rangel, Correspondence Regarding U.S. economic relations with Cuba, Mar. 15, 1994, 2; Pete Kasperowicz, Eizenstat Says Misuse of Cuban Funds Threatens U.S.-Cuba Reconciliation, 25 INSIDE U.S. TRADE 1, 15-16 (2007).

economy, under any conceivable scenario, satisfy compensation claims on this scale. Politically, the inclusion of the exile property claims has had the poisonous effect of involving the United States in the complex dynamics of the Cuban Revolution, placing the United States squarely on one side of the conflict and allowing the economic interests of a special interest group to control American foreign policy.

In addition, the punitive purpose of Title III is also clear, to tighten the embargo by deterring foreign investment in Cuba. To "traffic" in confiscated property means to engage in practically any business transaction involving that property. Thus, Title III's opening of U.S. courts' claims involving "trafficking" in confiscated property adversely affects investors in Cuba from third-party countries. Transactions made by resident Cuban citizens, however, are specifically excluded from Title III's ambit.

Despite the strength of the controversial "trafficking" provision, Title III does include a suspension or waiver provision that has been invoked successively since the Act's passage. The suspension provision permits the president to suspend the right of action in Section 302 for six months; the suspension is also renewable if it is in the national interest and if it will "expedite a transition to democracy in Cuba." Cautious of triggering a trade war with the European Union over Helms-Burton's extraterritorial provisions, President Clinton exercised this waiver authority until the end of his term; President Bush has similarly renewed the suspension every six months since entering office.

4. Title IV: Deterring Investment by Denying Visas

Title IV presents a more immediate deterrent to foreign investment in Cuba by instructing the Secretary of State to deny U.S. visas to individuals...
who traffic in confiscated property. The ban extends to corporate officers of businesses, as well as to the spouses and children of “excludable” persons. There is a limited exception for medical necessity. Unlike Title III, however, there is no waiver or suspension provision.

5. International Backlash against Helms-Burton

Despite the existence and exercise of the Title III waiver provisions, the international community universally condemned Helms-Burton and its extraterritorial aspects. The 14-member Rio Group was among the first international groups to formally criticize Helms-Burton. Shortly thereafter, the OAS passed a resolution instructing the Inter-American Juridical Committee to determine the validity of Helms-Burton under international law. In November 1996, the United Nations, citing the Helms-Burton Act, overwhelmingly passed a nonbinding resolution calling for the end of the U.S. embargo. Although the United Nations had previously passed similar resolutions denouncing the embargo, the 1996 version marked the first time that all 15 members of the European Union voted against it. The European Union also registered its strong opposition to the law by filing a complaint against the United States with the fledgling World Trade Organization (WTO). The European Union, Canada, and Mexico also passed “claw-
back” legislation that—in the cases of the European Union and Canada—authorized national corporations to counter-sue U.S. companies that won damages in U.S. courts under Helms-Burton. By the close of 1996, leaders from India to Switzerland had expressed strong opposition to the law.

G. After Helms-Burton

Although strong international backlash to Helms-Burton was inevitable, President Clinton was not politically in a position to veto it in 1996. The result was a severe reduction in U.S. presidential power to conduct foreign affairs. Almost immediately, however, Clinton began pulling Cuban policy back into the executive realm. Perceiving that it could not defeat the newly enacted Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), the administration fought for—and won—the Title III waiver, which Clinton exercised.

1. Clinton Expands Licensing Power, Pope Visits Cuba

Clinton also seized a limited “exception” in the Helms-Burton Act that allowed him to regulate remittances and travel to Cuba. Following Pope John Paul II’s historic visit to Cuba in 1998, Clinton announced three changes to “build further on the impact of the Pope’s visit.” Clinton resumed direct humanitarian flights from the United States, again allowed

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171 HANEY & VANDERBUSH, supra note 2, at 110.

172 HANEY & VANDERBUSH, supra note 2, at 112.

173 LIBERTAD supra note 119, at § 112, 110 Stat. at 802-03.

174 Statement by the President on Cuba, 1 PUB. PAPERS 412 (Mar. 20, 1998).
families to send up to $300 quarterly to Cuban relatives, and streamlined the sale of medical supplies to Cuba.\footnote{Id. Direct charter flights to Cuba had been suspended since February of 1996 when Clinton stopped flights to Cuba in the aftermath of the Brothers to the Rescue shoot down. \textit{See President's Remarks Announcing Sanctions Against Cuba Following the Downing of Brothers to the Rescue Airplanes, 32 WKLY. COMP. PRES. DOC. 381 (Feb. 26, 1996).}}

In early 1999, Clinton promulgated several more unilateral actions easing remittance and travel restrictions.\footnote{President's Statement on U.S. Policy Towards Cuba, 35 WKLY. COMP. PRES. DOCS. 7 (Jan. 5, 1999).} Following the President's direction, OFAC allowed any individual—not just family members—to make remittances to Cuban households.\footnote{15 C.F.R. §746 (2007).} The reforms also facilitated "people-to-people contact" by streamlining travel licensing for academics, athletes, and scientists.\footnote{31 C.F.R. §515.560 (2007).} In addition, OFAC authorized sales of agricultural products and food to non-governmental entities, such as religious groups, family restaurants, and private farms.\footnote{Id. § 515.560. By allowing sales of food, OFAC also had to suspend the prohibition on vessel traffic between Cuba and the United States. Suspending the vessel prohibition was technically lawful since the Cuban Democracy Act of 1992 allowed trading vessels to dock if it was authorized by a Treasury license. \textit{See 22 U.S.C. § 6005(b)(1) (2000).} One could make a plausible argument, however, that these actions violated the Helms-Burton codification of the embargo.}

2. Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA)

While President Clinton was trying to regain executive control over Cuban policy, Congress was also busy strengthening its grip on the embargo. The result of Congress' efforts was the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA). Passed as part of a broader agricultural spending bill,\footnote{Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (hereinafter TSRA).} the TSRA was intended to increase the sale of food to and facilitate trade with countries that had been under U.S. sanctions, such as North Korea, Libya, Iran, Sudan, and Cuba.\footnote{Phillip Brasher, \textit{Bill on Cuban Sanctions Clears Final Congressional Hurdle, PHILA. INQUIRER, Oct. 19, 2000, at A6; Richard Lawrence, \textit{Trading with Friendlier Enemies, J. COM., June 29, 2000, at}}
bargo on Cuba. On the one hand, the TSRA prohibited the president from imposing any new unilateral agricultural or medical sanctions unless approved by Congressional joint resolution.\(^{182}\) The Act also mandated that the president terminate any agricultural and medical sanctions that were in effect before the TSRA was enacted.\(^{183}\) Most significantly, the Act allowed U.S. entities to sell agricultural products directly to the Cuban government, as long as it paid for these products in cash.\(^{184}\) On the other hand, the TSRA banned all tourism-related travel to Cuba.\(^{185}\) "Tourist activities" included everything not expressly authorized prior to the enactment of the TSRA.\(^{186}\) OFAC had earlier authorized twelve categories of travel including professional, family, humanitarian, and educational visits.\(^{187}\) Thus, the TSRA limited the President’s ability to regulate travel to Cuba by barring expansion beyond those twelve categories.


President George W. Bush entered office in 2001 with the promise of a hard-line stance against Cuba. This Bush administration’s first major change to the embargo was not made until May of 2002, when President Bush announced his “Initiative for a New Cuba.”\(^{188}\) The Initiative called upon Cuba to reform its economic and political systems\(^{189}\) but stressed that the United States did not pose a threat to Cuba’s sovereignty and emphasized the administration’s support for the Cuban people.

It was not until almost a year later, that OFAC amended the CACR to implement the President’s initiative.\(^{190}\) Surprisingly, the changes expanded the general license to visit close relatives in Cuba slightly by broadening the definition of “close relative” to include anyone within three degrees of rela-

\(^{182}\) TSRA, supra note 180, at § 903(a), 114 Stat. at 1549A-68.

\(^{183}\) \textit{Id.} § 903(b), 114 Stat. at 1549A-68. Section 904 provided exceptions to sections 903(a) and (b). The president could unilaterally impose otherwise barred sanctions pursuant to a declaration of war or against a country where U.S. troops were stationed. \textit{Id.} § 904(1), 114 Stat. at 1549A-68 - 69.

\(^{184}\) \textit{Id.} § 908(b), 114 Stat. at 1549A-71.


\(^{186}\) TSRA, supra note 180, at § 910(b)(2).


\(^{189}\) \textit{Id.}

\(^{190}\) 31 C.F.R. § 515 (2007).
tion. The changes also included authorization for travelers to carry up to $3,000 in remittances—$300 for each individual eligible to receive remittances. In addition, the amendments outwardly appeared to facilitate “humanitarian” transactions with independent groups in Cuba dedicated to a “rapid, peaceful transition to democracy.” These transactions included construction contracts to erect buildings for such groups, and the provision of “civic education” and training in community organizing. In reality, these were purely political gestures intended not so much to help the Cuban people as to win political points in Miami and to embarrass the Castro government since the Bush administration knew that the Cuban government would not permit humanitarian assistance programs geared only at helping elements of the opposition.

4. The 2004 “Commission for Assistance to a Free Cuba” Report and Regulatory Amendments to the Embargo

President Bush’s second major action in relation to the embargo came in October of 2003 when he unveiled plans for creating a “Commission for Assistance to a Free Cuba” (CAFC). The Commission, at the behest of the Cuban-American congressional delegation from South Florida, eventually recommended several harsh amendments to the embargo. Bush, busily courting these Miami elements as the presidential election approached, approved and implemented these amendments in the summer of 2004.

Of greater significance than these specific amendments, however, the Commission drafted a remarkably interventionist report (hereinafter “CAFC I”) that is important for the fact that it moves beyond a “passive” embargo to proactive interference in Cuba’s internal affairs. The nearly 500 pages of recommendations can be broken into two distinct parts. First, the report outlined recommendations for accelerating the ouster of Fidel Castro and like-minded successors. Second, the report set out a detailed blueprint for future

191 Id.
192 Id.
193 Id.
194 Id.
197 Colin Powell, Commission for Assistance to a Free Cuba, Report to the President (May 2004) (hereinafter “CAFC I”).
198 George W. Bush, “Remarks by the President on Cuba,” supra note 197.
199 CAFC I, supra note 197.
U.S. involvement in a post-Castro Cuba.

The CAFC I report made no secret of the fact that it was trying to topple the Castro government, and it identified six “tasks” that it considered vital to accomplishing this goal. First, the United States would “empower civil society,” a phrase that allows for outright U.S. government funding of opposition groups and projects inside Cuba.\(^{200}\) Second, to counteract the state-controlled media in Cuba, CAFC I recommended deployment of an EC-130 COMMAND SOLO airborne communications aircraft to extend the range and quality of TV and Radio Marti transmissions.\(^{201}\) The subsequent use of highly sophisticated military aircraft to send propaganda to Cuba has constituted a remarkable escalation of the U.S. government’s political offensive against Cuba.

Third, CAFC I recommended closing off, to the extent possible, all potential sources of revenue for the Cuban government,\(^{202}\) a recommendation which amounted to strengthening perceived weaknesses in the existing embargo.\(^{203}\) One of the harshest amendments stemming from this recommendation limited family visits to once every three years, regardless of intervening medical emergencies or other special circumstances.\(^{204}\) Remittances were also restricted to immediate family members, and authorized travelers could once again bring only $300 in remittance money.\(^{205}\) By bureaucratic fiat, the changes redefined “family” to include only parents, spouses, grandparents, children, and siblings.\(^{206}\) Additionally, CAFC I advised other revenue-blocking policies such as the search-and-destroy “Cuban Asset Targeting Group,” which hunts Cuban business fronts; rigorous Helms-Burton Title III suspension review; and aggressive Title IV sanctioning efforts.\(^{207}\)

The fourth task focused on U.S. diplomatic and public relations efforts, some of which would be covert, to blacken Cuba’s international image and disrupt its tourism industry, which by 2004 had become the island’s princi-

\(^{200}\) *Id.* at 15-25.

\(^{201}\) *Id.* at 27-28. The COMMAND SOLO is a modified military transport aircraft bristling with broadcasting technology used militarily for psychological campaigns. SOLO is capable of simultaneously broadcasting AM and FM radio, TV and HF.

\(^{202}\) *Id.* at 29-44.

\(^{203}\) See supra note 1987.

\(^{204}\) CAFC I, supra note 197, at 41 (recommended); Implemented in 31 C.F.R. § 515.561(a) (2007).

\(^{205}\) CAFC I, supra note 197, at 39-40 (recommended); Implemented in 31 C.F.R. § 515.570(a) (2007).

\(^{206}\) CAFC I, supra note 197, at 39 (recommended); Implemented in 31 C.F.R. § 515.561(c) (2007).

\(^{207}\) CAFC I, supra note 197, at 44.
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pal source of foreign exchange earnings. A fifth task, supported by millions of dollars from the United States Agency for International Development (USAID) and the National Endowment for Democracy (NED), consisted of efforts to pressure third countries to support Cuban opposition groups on and off the island. Finally, the U.S. government formally committed itself to disrupting Castro’s succession strategy and preventing any chosen successor, such as his brother Raul, from consolidating his power. In this area, the most significant recommendation was to create the “Transition Coordinator,” a government office charged with overseeing all aspects of Cuba’s transition. In 2007, the Coordinator had a budget of $59 million with which to carry out opposition group funding, public diplomacy efforts, embargo enforcement, and other programs and policies aimed at regime change in Cuba.

The remainder of the CAFC I Report delineated U.S. responses to a transitioning, post-Castro Cuba. Resurrecting the ghosts of the Platt Amendment, this part of the report can be read as a script for future Cuban governments that wish to normalize relations with the United States. CAFC I focused U.S. assistance on humanitarian aid and nation building.

CAFC I’s humanitarian recommendations are a collection of “action plans” aimed at meeting Cuba’s short- to long-term food, health, educa-

208 Id. at 44-50.
209 Id. at 51-52.
210 Id. at 52. Other than acting as a focusing lens and a spokesperson for anti-Castro policies, the creation of the office of the transition coordinator appears to be largely a symbolic gesture. It is unclear how this government functionary actually will succeed in disrupting Fidel Castro’s succession plan. The current Transition Coordinator is Caleb McCarry, a former staffer for former North Carolina Senator Jesse Helms (R.), and Illinois Rep. Henry Hyde (R.).

31 Stat. 897 (1901). The infamous Platt Amendment, which also promised to “leave the government and control of Cuba to its people,” was passed at the conclusion of the Spanish-American War. It dictated several provisions that the new Cuban government had to include in its constitution in order to gain recognition from the United States and secure the removal of U.S. troops from the island. Cuba could not sign treaties with foreign powers and could not punish U.S. military personnel for actions taken during the war. In addition, Cuba also “gave” the United States the right to intervene militarily in Cuba at any time the United States deemed it necessary for the protection of the property and lives of its citizens. It is difficult to ignore the parallels to CAFC I.

211 Although CAFC I emphasized “empowering the Cuban people” and that the recommendations “are not intended to be prescriptive,” the Helms-Burton act still constrains Cuba’s ability to freely choose a new course. Recall Helms-Burton’s requirement that, before the embargo can be lifted, Cuba transition to democracy and the free market. It is the United States government that decides if Cuba’s transitional government is sufficiently democratic and economy sufficiently free. Thus, CAFC I’s “encouragements” and “offers” can be read as instructions for meeting the demands of Helms-Burton.
tional, and housing needs. CAFC I envisioned a coordinated network of NGOs, “faith-based” groups, Cuban-Americans, and intergovernmental agencies that would not only distribute various types of aid, but also help “depoliticize [Cuba’s] institutions” and seed a democratic civil culture. CAFC I, however, did not recommend many tangible plans for infusing Cuba with real food, medicine, or housing materials.

The “action plans”—many contributed by specific U.S. government agencies—focus almost entirely on aid-as-institution-building. The role of the Department of Education is illustrative. Listed 19 times in the report, the Department of Education is to assist Cuba’s educators with incorporating a new, non-communist, civics curriculum, establishing private schools, and developing teacher training programs. The Departments of State, Health and Human Services, Housing and Urban Development, and the Social Security Administration are to offer similar assistance to their Cuban counterparts.

CAFC I’s assistance for nation building included plans for establishing democratic institutions and promoting the rule of law. The rhetoric of the human rights purpose of the Commission’s report (and U.S. policy in general) features prominently in this section. One of the more startling assertions is that “initially, Cubans may not be ideally positioned to govern themselves.” To facilitate their readiness, however, CAFC I proposed that the U.S. assist in drafting a new constitution—one with tripartite government, reformed executive and legislative branches, and reformed labor and other laws. After helping to create a political party structure, the U.S. will act as an election observer to ensure fair procedures. The report also contemplated restructuring the armed forces and internal security

214 Id. at 59-67.
215 Id. at 57 n.1.
216 Id. at 93, 102.
217 Id. at 97-98.
218 Id. at 103.
219 Id. at 57 n.1.
220 Id. at 161-71.
221 Id. at 175.
222 Id. at 190-92.
223 Id. at 176-77.
224 Id. at 178.
225 Id. at 179-81.
226 Id. at 192.
agencies. Assuming that neither Castro, nor his successors would go away quietly, CAFC I also recommended that the U.S. assist with domestic security.

Converting Cuba to a free-market economy—another Helms-Burton prerequisite—occupied another set of recommendations related to nation building. Basic reforms included decentralization, deregulation, and privatization of state-run industries. Consistent with the neoliberal model at the heart of the U.S.' economic vision for Latin America, CAFC I proposed negotiating a U.S.-Cuba Free Trade Agreement. More specifically, the report leaned heavily on the Cuban-American community to "rekindle" private enterprise by establishing business partnerships on the island. The Report also considered essential the reform of property law to reintroduce private property rights. Furthermore, the Report insisted that all outstanding compensation claims based on land expropriations must be settled as incident to creating a stable economy.

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227 Id. at 196-98.
228 Id. at 192.
229 Id. at 214. The report also claimed to draw on the knowledge and experience gained from other transitioning economies, specifically the experiences of post-communist Eastern Europe. This was presumably intended to give the report an air of credibility. That applying the successes, and learning from the mistakes, of Eastern Europe would translate seamlessly into appropriate policy prescriptions for Cuba, however, is a specious argument. Such one-to-one correlations ignore vast cultural, geographical, and legal differences between Cuba and Eastern Europe, as well as the changed global economy. It also ignores the significant ambiguities implicit in evaluating the sum total of the successes and failures of the so-called "Eastern European" model of transition from communism to free markets and democratic government, as well as the extensive variations found when comparing the particular experiences of individual Eastern European countries.
230 Id. at 217.
231 Id. at 229-234.
232 Id. at 243. In conjunction with Miami business partnerships, these types of recommendations may give credence to fears that, if Cuba converted to capitalism, Americans would quickly seize control of the nascent market. The experience in Russia and Eastern Europe is illustrative. The United States' own experience shows that granting private property rights to economically poor people with little knowledge of the market—attributes CAFC I readily assigns to the majority of Cubans—is the quickest way to legally divest land from those people. The Dawes Act of 1887 converted American Indian lands—guaranteed by treaties—in to private allotments. As a result, American Indians lost over 90 million acres of land. See S. Lyman Tyler, A HISTORY OF INDIAN POLICY 71-88 (1973). This is not to say that Cubans do not want or should not have property rights. In its zeal to transform Cuba immediately, however, CAFC I failed to build in safeguards against economic trauma that could reverberate for generations after such a transition.
233 CAFC I, supra note 198, at 224.
The Report also maintained that Cuba’s infrastructure would have to modernize as its economy liberalized. Proposals for Cuba’s airports, seaports, railroads, and highways followed a familiar pattern: privatization and U.S. technical assistance. Cuba’s energy infrastructure would be improved in part by developing its oil and gas resources. With U.S. advisory assistance, Cuba would create governmental agencies to oversee the energy infrastructure. The telecommunications infrastructure would also be updated mainly through the forces of the free market, although it would be managed by legislation drafted with assistance from the Federal Communications Commission.

5. The 2006 Transition Commission Report (CAFC II)

In July of 2006, shortly before Fidel Castro transferred power to his brother Raul on the 31st, and only months before major national elections in the United States, CAFC issued its second report (hereinafter “CAFC II”) . As with CAFC I, CAFC II’s recommendations are divided between transition stimuli and U.S. support for a democratic transition in Cuba.

CAFC II made several additional recommendations to hasten Castro’s demise. The Report proposed that a “Cuban Fund for a Democratic Future” be created and given an $80 million budget to support Cuban opposition groups, counter-propaganda on television and Radio Marti, and other projects. Interestingly, the funds’ purpose included a “new” program of educational exchange programs between Cuba and the United States—one that was strikingly similar to the program instituted by Clinton and abolished by Bush early in his presidency.

234 Id. at 273-315.
235 Id. at 317. It is interesting, although perhaps inconsequential, that this part of the report uses oil industry jargon in describing Cuba’s natural gas and oil resources. For example, Cuban natural gas is called “sour,” meaning it requires more refining. It is as though the report’s audience is the oil industry private sector.
236 Id. at 331.
237 Id. at 344-45.
240 Id. at 15-17.
241 Id. at 20.
242 Id. at 20. See supra note 239 and accompanying text.
Clinging to the decades-old rationale that the embargo will drive Castro from power, CAFC II proposed further tightening the embargo and obliterating the line between realistic policy and political ideology. Included in this category of recommendations were measures similar in substance and intent to many that had been tried—and had failed—throughout the embargo's 47-year history, such as prohibiting the use of cash-cards for licensed travel, expanding the list of "specially designated nationals," and devising various means of disrupting the flow of currency to Cuba from foreign sources. In addition to failed embargo practices that dated back to the early 1960s, the Commission also announced new measures to trace Cuban nickel and prevent its importation into the United States.

CAFC II differed slightly from CAFC I on the prerequisites for U.S. assistance to a transitioning Cuba. Whereas CAFC I merely implied that certain political and economic changes within Cuba would serve as the prerequisites for assistance, CAFC II explicitly listed the release of political prisoners and extensive legal reform as the "sine qua non" for assistance. Consistent with CAFC I though, CAFC II reserved a prominent role for U.S. supervision both in the release of prisoners and in legal reform. CAFC II made clear that the U.S. government would not support "a government that adopts economic or other policies that suggest change but which do not actually achieve the goal of dismantling the repressive regime and making a full transition to democracy." In other words, only a rapid and thorough conversion would qualify Cuba for support.

As for specific assistance recommendations, CAFC II is far less detailed than its predecessor. Nevertheless, CAFC II suggested important new initiatives. New economic initiatives included technical assistance in agricultural reform and small business development. Politically, CAFC II discussed

\[243\] Id. at 30.
\[244\] Id at 31. The expanded list would include any company that simply promoted trade with Cuba. In essence, OFAC could blacklist any company that vocally disagreed with the administration's Cuba policy.
\[245\] Id. at 32-33.
\[246\] Id. at 32-33
\[247\] Id. at 53-55. There is nothing to imply, however, that these are the only conditions for assistance.
\[248\] As proof of this, CAFC II stated that American officials should compile and maintain a list of nettlesome laws, not Cubans. Id. at 55. Over and over, in fact, these reports task American officials with assessing the problems and then advising the hypothetical transition government, rather than requesting the same type of action from Cubans.
\[249\] Id. at 52.
\[250\] Id. at 69 (agriculture), 66 (small business).
ways of helping the “Cuban Transition Government” to hold free elections. Among the Report’s priorities are the development of multiple political parties and the provision of “training that would help nascent parties develop platforms [and] field candidates.” Perhaps betraying the Report’s true audience, CAFC II gave a prominent role to Cuban-Americans in a newly free Cuba. Warning the transition government not to impede exiles from returning to Cuba, the Report stated that Cuban-American entrepreneurs will be vital for accelerating economic reform.

Thus, as of the Commission’s second report in 2006, embargo policy had returned, in part, to its origins. Expropriated property precipitated the first sanctions against Cuba in 1960 and remains a major catalyst for their continuation today, although the principal parties to the conflict have shifted to include Cuban-Americans who had no legal links to the U.S. at the time. Since President Kennedy first expanded the embargo, it has been subject to much regulatory tinkering, two legislative usurpations, and two major changes in rationale. In the hands of President Bush’s Commission for a Free Cuba and its Miami backers, the embargo is more severe now than it was in the 1960s, when Soviet missiles took aim at the U.S. from Cuban soil, and the late 1970s, when some U.S. military analysts feared that the U.S.S.R. would use Cuba to disrupt American efforts to supply NATO during a Soviet invasion of Central Europe.

However, despite the Commission’s sincere efforts, its copious recommendations, and Fidel Castro’s failing health, it is questionable whether these new policies—like the 47-year old embargo itself—will nudge Cuba toward a democratic transition. What are certain are the high costs of the embargo to both the United States and Cuba. In 1999 alone, despite softening of the sanctions by the Clinton administration, U.S. sanctions cost an estimated $3 billion in bilateral trade between the countries. However, the

251 Id. at 52-60.
252 Id. at 56.
253 Id. at 86.
254 Id. at 86.
255 These are the Cuban Democracy Act, see Section II(E) supra, and the Helms-Burton Act, see Section II(F) supra.
256 See supra notes 73-77 and accompanying text.
257 There is good evidence that, against Washington’s expectations, Fidel Castro’s transfer of power is going smoothly. After Fidel handed power over to his brother Raul, the only apparent jubilation was in Miami. See Julia E. Sweig, Fidel’s Final Victory, Foreign Aff., Jan./Feb. 2007 at 39.
enormous human costs imposed on the Cuban people have been equally im-
portant.

III. THE EMBARGO'S EFFECTS ON HUMAN RIGHTS IN CUBA

The Cuban embargo is not a limited set of economic sanctions affect-
ing a few carefully targeted areas of Cuba's government and society. In-
stead, it is a comprehensive program that prohibits virtually all American
trade, investment, travel, cultural and human contact with Cuba outside of a
few narrow exceptions. Moreover, throughout the embargo's 47-year his-
tory, different U.S. administrations have worked aggressively to expand the
embargo's extraterritorial reach in order to pressure as many countries as
possible to reduce their contacts with Cuba. The embargo's extensive extra-
territorial reach and power as well as its disproportionate nature are magni-
fied by Cuba's weakness as a small Caribbean island of 11 million people,
its peculiar geographical location only 90 miles from the United States, and
the U.S.'s own international economic and financial preeminence. As cur-
cently structured, the embargo has comprehensive, widespread, and indis-
criminate effects on the economic, social, and family conditions of the Cu-
ban people that cause it to violate widely recognized human rights norms as
well as the basic obligation of states to ensure that sanctions imposed for the
sake of promoting human rights do not have the opposite effect of harming
the human rights of innocent people.259

Apologists for the embargo point out that the embargo has only a lim-
ited impact on the Cuban economy because Cuba is free to trade with virtu-
ally every other country in the world.260 This argument overlooks two key


259 Although the U.S. government no longer acknowledges it officially, one of the embargo's
key rationales since its earliest times has been to generate sufficient internal pain and discom-
fort in Cuba to provoke a violent uprising against the Castro government. This certainly was
the rationale among U.S. policymakers in the early 1960s, and it continues to be so for many
of the hard line supporters of the embargo in South Florida and Washington to this day. See
Andrew Zimbalist, Dateline Cuba: Hanging on in Havana, 92 FOREIGN POL'Y 151, 154
(1993) (stating that since the start of the embargo in 1960, "the United States has sought to
depose the Castro government by imposing heavy economic costs on the Cuban people").

260 See Cassandra LaRae-Perez, Economic Sanctions as a Use of Force: Re-Evaluating the
Legality of Sanctions from an Effects-Based Perspective, 20 B.U. INT'L L.J. 161, 168-69
(2002) (discussing the fact that the United States policy towards Cuba, in effect, is more than
a unilateral action as it prevents Western European and Canadian financial institutions from
providing loans and credit to Cuba and "effectively eliminated most of Cuba's trade relation-
issues. First, the U.S. government has not contented itself with denying the benefits of trade and investment to Cuba. Instead, throughout most of the embargo’s history, U.S. administrations have exerted enormous pressures on foreign governments and companies to discourage all economic contact with Cuba. A typical example occurred in the early 1990s when Cuba, then in the midst of a severe economic depression caused by the collapse of its ally, the Soviet Union, attempted to modernize its antiquated 40-year old telephone network. Grupos Domo, a Mexican-based conglomerate with substantial economic ties to the United States, began negotiations with Cuba over what would have been a multi-billion dollar deal but eventually withdrew from negotiations as a result of enormous pressure by the U.S. government. Ultimately, Cuba found a group of willing international investor partners, most of whom insisted on anonymity in order to avoid possible American retaliation. Thus, the reach of the U.S. embargo extends significantly beyond U.S.-Cuba trade relations, and negatively impacts Cuba’s relations with other countries as well.

Second, since Congress passed the Cuban Democracy Act in 1992 and the subsequent Helms-Burton Act of 1996, the embargo has sharply increased its extraterritorial reach. Thousands of foreign companies that could trade with Cuba before 1992 are no longer allowed to do so by virtue of being subsidiaries of U.S. corporations. Although the European Union and other U.S. allies responded to the Helms-Burton Act by enacting “blocking statutes” and “claw-back” provisions, Helms-Burton has nonetheless had a
chilling effect on trade and investment with Cuba. Thus, the embargo’s economic impact must be measured not only in terms of the way it has isolated Cuba from U.S. markets but also by its effect on the willingness of many private international entities to do business with Cuba.

Because the embargo has such far-reaching effects on foreign trade and investment with Cuba, its effects on human rights are similarly far-reaching, encompassing such areas as public health, nutrition, education, culture, and even fundamental family rights. In general, economic sanctions affect education in the sanctioned country by decreasing access to supplies, which ultimately leads to the deterioration of infrastructure. The Cuban government estimates that the embargo has cost Cuba an estimated average of $2.19 billion a year since 1959, a figure that may be quite conservative in light of several factors. First, the embargo is unusually comprehensive and affects every area of Cuba’s economic life. Second, it deprives Cuba of the benefits from economies of scale and geographical advantages associated with the U.S. market. Third, the dollar’s role as the international currency of choice, the preeminent role of U.S. banks in international trade especially in the western hemisphere, and the embargo’s extraterritorial reach combine to


See Adam Smith, A High Price to Pay: The Costs of the U.S. Economic Sanctions Policy and the Need for Process Oriented Reform, 4 UCLA J. INT’L L. & FOREIGN AFF. 325, 353 (1999-2000) (discussing the United States use of economic sanctions in U.S. foreign policy and examining the effects of economic sanctions on people within the sanctioned country as well as the costs incurred by the U.S. both economic and moral, as a result of the use of economic sanctions). In 2006, the Cuban government stated, “[t]he blockade imposes obstacles upon Cuba which hinder maintenance and repair efforts in schools. In the time covered by this report, Cuba spent 2.3 million dollars over and above what it would have paid in the U.S. market to purchase construction materials needed for schools, owing to the distance of alternative markets.” Necessity of Ending the Economic, Commercial, and Financial Blockade Imposed by the United States of America Against Cuba, G.A. Res. 60/12, at 39, U.N. Doc. A/60/PV.45 (Nov 8, 2005).

increase substantially the costs to Cuba of trading with many other countries.

The most recent United Nations report on human rights in Cuba referred to the U.S. embargo as one of the “factors hindering the realization of human rights in Cuba,” and noted that:

The restrictions imposed by the embargo help to deprive Cuba of vital access to medicines, new scientific and medical technology, food, chemical water treatment and electricity. The disastrous effects of the embargo in terms of the economic, social and cultural rights of the Cuban people have been denounced by the United Nations Food and Agriculture Organization, the United Nations Children’s Fund, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization . . . 266

Thus, though the embargo is now promoted as a means of improving human rights, the embargo has had the opposite effect of harming human rights.

A. Nutrition and public health

1. Nutrition

Even before the 1959 revolution that brought Castro to power, Cuba had to import a considerable amount of its food.267 In the 1980s, approximately half of all protein and calories consumed by Cubans were imported.268 As communism collapsed in Eastern Europe in 1989, and Mikhail Gorbachev began reducing Soviet subsidies to Cuba, the Cuban economy entered a steep depression that reduced its GDP by 35%. When the Soviet Union ceased to exist at the end of 1991, Russia’s new leader, Boris Yeltsin, eliminated all aid to Cuba. In addition to the loss of aid, the Cuban economy also lost its highly advantageous membership in the Soviet commercial bloc (COMECON). The virtual disappearance of COMECON in 1990 left Cuba highly vulnerable and forced the nation to start integrating into the wider and less protected capitalist international trading system, an economic readjustment fraught with significant economic pain and hardship. This would have

been an appropriate time for the United States to reconsider its embargo, or to at least narrow it in order to reduce its impact on the majority of innocent Cubans. Instead, the U.S. government not only left the highly indiscriminate and comprehensive embargo in place but further tightened it in 1992 with the passage of the Cuban Democracy Act. Those in Washington that were supportive of a tough policy toward Cuba argued that the embargo had not worked for 30 years because of Soviet subsidies, and that the end of such aid meant that the embargo would finally accomplish its objective of forcing Castro from power.\(^{269}\)

Thus, during Cuba’s painful period of economic readjustment from 1989 to 1994, the embargo became a key contributing factor to what was already an extremely difficult situation. Legally and morally, the United States not only had the opportunity but also the obligation to take Cuba’s deteriorating economic situation into account in the early 1990s as it pondered whether to relax or tighten the embargo. The U.S. government’s actions—to enhance the embargo’s comprehensive and indiscriminate character—had predictably harmful effects on the human rights of innocent people.

The impact on nutrition and public health from Cuba’s economic crisis was devastating. Between 1989 and 1993, Cuban imports declined by approximately 50%\(^{270}\) and resulted in an 18% to 25% decrease in the availability of protein and calorie sources.\(^ {271}\) The decrease in the availability of nutrients had a detrimental effect on the health of the population, particularly pregnant women and young children.\(^{272}\) Data on pregnancy and birth weights taken during the time period reveals troubling trends. For example, low birth weights\(^{273}\) rose 23% from 7.3% in 1989 to 9.0% in 1993.\(^ {274}\)

\(^{269}\) A conversation by the author with a very senior U.S. official late in early 1992 revealed such thinking. In the official’s words, “the embargo has not worked because of the Soviet Union’s aid to Cuba. With the Soviets now pulling the plug on Cuba, the embargo finally will bite and Castro will collapse.”

\(^{270}\) During the same time period, a number of other negative health impacts were reported due to the embargo. For example, from 1990-94, the percentage of the Cuban population without access to clean water rose from 10%-12%. Garfield, \textit{supra} note 269, at 16. A lack of chlorination chemicals necessary to treat water led to an outbreak of Guillain-Barre syndrome in Cuba during 1994. \textit{See Michele Barry, Effect of the U.S. Embargo and Economic Decline on Health in Cuba, 132 ANNALS OF INTERNAL MED. 151, 152 (2000).} During this time period, the number of people who died from diarrheal diseases rose dramatically, from 2.7 per 100,000 people in 1989 to 6.8 per 100,000 people in 1993. Garfield, \textit{supra} note 269, at 16.

\(^{271}\) \textit{Id.}

\(^{272}\) \textit{Id.}

\(^{273}\) Babies born at a low birth weight have an “... increased risk of serious health problems as newborns, lasting disabilities and even death ... a small percentage of survivors develop men-
dition, pregnant women who failed to gain adequate weight rose 18% from 7.9% in 1988 to 9.3% in 1993. Furthermore, in 1991, approximately 50% of pregnant women and six- to 12-month old infants were affected by anemia, levels unheard of since the early 1970’s. Until 1992, children up to the age of 13 and seniors over the age of 65 were regularly given a daily milk ration; in 1992 the ration was limited to children six years old and younger. The declining health indicators thus substantiate the Cuban government’s claim that the embargo affects the “physical and moral integrity of an entire nation, above all its children and its elderly.”

Moreover, a lack of nutrients added to the incidence of disease in the larger Cuban population. An epidemic of optic and peripheral neuropathy, a condition caused in large part by lack of food, affected more than 51,000 Cubans in 1992-1993. Poor nutrition in combination with unsanitary conditions also contributed to an increase from 5.5 cases of tuberculosis per 100,000 people in 1990 to 15.3 cases per 100,000 people in 1994.

In addition to harms suffered by the population due to a lack of sufficient nutrition, the lack of fats led to a soap shortage in 1993-1994, and Cubans were forced to make soap out of lye, caustic soda, and other chemicals. The use of these soap substitutes resulted in an increase in poisoning and burns and an epidemic of esophageal stenosis in toddlers from inadvertent ingestion of lye. Due largely to the lack of soap products, epidemics of lice and scabies reached peak levels in 1994. While reports of these

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274 Garfield, supra note 269, at 16.
275 Id.
276 Id.
277 Id.
279 Id.
280 Barry, supra note 270, at 152.
281 Garfield, supra note 268, at 17.
282 Barry, supra note 270, at 152.
283 Id.
284 Garfield, supra note 268, at 17.
285 Id.
conditions generated significant controversy within the United States regarding the embargo’s appropriateness, the Clinton administration did little to loosen the embargo.

B. Medications and Medical Supplies

The Cuban government claims that in the ten-month period between June 2004 and April 2005, the embargo cost Cuba $75.7 million in public health damages alone. This cost is a result of the laborious licensing process that Cuba must comply with in order to purchase medical products manufactured in the United States or by U.S. subsidiaries. Like the rest of the embargo, the licensing procedures do not target certain carefully selected products but rather are comprehensive and indiscriminate. These procedures pose serious problems when considering that U.S. companies produce approximately 50% of all new patented drugs in the world.

In a widely publicized 1997 report, the American Association for World Health ("AAWH") found that the embargo’s arduous licensing provisions actively discouraged medical trade and commerce. AAWH further reported that in some cases U.S. officials provided American firms with misleading or confusing information. In addition, it reported that several licenses for legitimate medications and medical equipment were denied as "detrimental to U.S. foreign policy interests." The AAWH concluded that, as a result of inaccurate or confusing information from U.S. officials,


288 Barry, supra note 271, at 152.


290 Id.

291 Id. at 6.
one-half of the firms they surveyed incorrectly believed that the embargo prevented all sales of medications and medical supplies to Cuba.\textsuperscript{292}

An arduous and confusing process that discourages even legal sales of medication and medical supplies from U.S. companies or subsidiaries harms Cubans' human rights to health and medical care. The licensing procedures often effectively ensure that vital health products are only available to Cubans through intermediaries at prohibitive prices that are much higher than in the American market.\textsuperscript{293} The resulting impact of medication shortages in Cuba is well documented.\textsuperscript{294} For example, between 1992 and 1993, medication shortages in Cuba accounted for a 48% increase in deaths from tuberculosis; a 67% increase in deaths due to infectious and parasitic diseases; and a 77% increase in deaths from influenza and pneumonia.\textsuperscript{295}

More recently, the Cuban government has issued reports in the United Nations General Assembly documenting the ways in which the U.S. embargo makes the process of obtaining medications and medical equipment unnecessarily difficult and costly.\textsuperscript{296} Two examples include Cuba's unsuccessful attempts to purchase an anti-viral medication called Tenofovir (Viread) from the U.S. firm Gilead and Depo-Provera, a contraceptive drug, from another U.S. firm, Pfizer. Because it would have required an export license from the U.S. government, Gilead was unable to sell Tenofovir, and Cuba was forced to purchase the medication through third-parties at a significantly higher price. The Cuban government cited this as an example of the embargo's negative impact on Cuba's efforts to modernize its HIV/AIDS treatments.\textsuperscript{297} In the Depo-Provera example, Cuba reported that, despite Cuba's attempts to purchase the drug as part of a national program associated with the United Nations Population Fund, Pfizer claimed it could not sell the product to Cuba without obtaining a number of licenses, a process which would take several months.\textsuperscript{298} Cuba's report to the United Nations

\textsuperscript{292} Id. at 16.

\textsuperscript{293} Id. For example, in 1997, it was estimated that Cuba paid 30% more for medical products produced outside the U.S. than they would if purchasing the products from the U.S. Shipping charges for medical products were estimated to be between 50%-400% higher than shipping from the U.S. would be. See Garfield, supra note 269, at 18.

\textsuperscript{294} For examples of varying reliability, see Garfield, supra note 269; see also Report by Cuba on Resolution 60/12 of the United Nations General Assembly, supra note 279, at 38.

\textsuperscript{295} Garfield, supra note 269, at 16-17.

\textsuperscript{296} The data in the report has not been verified, and comes from the Cuban government. See Report by Cuba on Resolution 60/12 of the United Nations General Assembly, supra note 279, at 38.

\textsuperscript{297} Id.

\textsuperscript{298} Id.
also chronicled obstacles the country faced in obtaining medical equipment from U.S. companies and subsidiaries.

Moreover, Cuba reports that the embargo's restrictions go beyond the purchase of medical equipment and medications but also includes replacement components for equipment it already possesses. The country reported being denied the possibility of purchasing replacement pieces containing U.S.-made components for equipment used in its Oncology and Radiobiology Institute. In another example, Cuba reported that the U.S. Treasury refused to authorize Atlantic Philanthropic, a United States NGO, from donating a molecular biology laboratory to Cuba's Nephrology Institute. This technology would have facilitated successful kidney transplants for a larger percentage of Cuban patients. Additional reported examples include film for x-ray machines used to detect breast cancer, Spanish-language medical books from a U.S. conglomerate subsidiary, and U.S.-made components for respirators.

A policy of maintaining an arduous and at times insurmountable licensing procedure for trading health-related products with Cuba harms the health of Cuban citizens. Moreover, the waste of valuable time and the deprivation of necessary medicine and equipment do not make sense morally or politically. In a 1995 speech addressing the use of economic sanctions as a political tool, former United Nations Secretary General Boutros Boutros-Ghali explained: "Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects."

299 It is important to note that the current licensing scheme that hinders or sometimes prevents Cuba from obtaining medicine and medical supplies from the U.S. likely compounds problems that Cuba was facing in its health sector during the early-mid 1990's. For example, from 1990-94, the number of x-rays provided by Cuba's hospitals declined by 75%, and the number of laboratory exams declined by 36%. In addition, spare parts for ambulances can be difficult to obtain in Cuba, resulting in a decrease in access to ambulances. Fewer than half of ambulances worked in June 1994, as compared with the majority of ambulances in the 1980's. See Garfield, supra note 269.

300 Report by Cuba on Resolution 60/12 of the United Nations General Assembly, supra note 278, at 37

301 Id.

302 Id.

303 The Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, ¶ 70, U.N.
C. Education.

The Cuban government boasts of the success of its education system and claims that the country is 97% literate.\(^{304}\) A 2006 Gallup Poll in Cuba indicated that, in spite of wide dissatisfaction by Cubans with several areas of their public life, including basic political and economic freedoms, 78% of Cubans are pleased with the quality of their educational system.\(^{305}\) In June of 2005, the Cuban government announced that “nationwide university enrollment for the academic year beginning in September could well exceed half a million students . . . . [S]ome 380,000 are taking university studies on the island at the moment.”\(^{306}\)

Nonetheless, in its report to the United Nations General Assembly in August of 2006, the Cuban government complained of the U.S. embargo’s negative impact on education in several areas. First, the embargo raises the cost of educational supplies by removing access to products manufactured in the United States and products containing U.S. components.\(^{307}\) For example, the report noted that “[i]nstruments indispensable to art schools (violins, pianos, double basses, flutes, ballet pointed and half-pointed shoes, maillots and leotards) have had to be purchased in third countries, at an additional cost of 16% or $2.5 million.”\(^{308}\) Additionally, “[t]he University of Havana had to pay $40,000 a year for the bandwidth it required for its Internet service as it was denied access to the sub-aquatic fiber-optic cable. For service of this nature, universities in any other country in the region pay $600 per

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\(^{305}\) Report by Cuba in Resolution 60/12 of the United Nations General Assembly, supra note 278, at 23.


\(^{307}\) Cuba's University Enrollment on the Increase. PERIODICO26, June 2, 2005, available at http://www.periodico26.cu. Not only does the Cuban government emphasize the success of its higher education programs, but “[i]nspired by the idea of guaranteeing equal educational possibilities to everyone, the country’s 9,000 elementary schools, more than 6,000 of them in rural areas, enjoy equal resources.” Angel Rodriguez, Education in Cuba: A Demonstration of Political Will, PERIODICO26, Jan. 20, 2005, available at http://www.periodico26.cu.

\(^{308}\) The State Department website indicates Cuba's literacy rate at 97% and then states in parentheses “according to Cuban census data.” It is difficult to assess the accuracy of this data as it comes from the Cuban government itself, but numerous accounts by visitors to the country and recent migrants suggest that this figure is not widely off the mark.
Second, not only does the embargo increase the cost of educational goods, but it also impedes the ability of private U.S. organizations, churches and charitable foundations to provide assistance to Cuban schools. For example, U.S. Customs officials detained a caravan headed for Cuba led by the ecumenical group “Pastors for Peace” in July of 2005. The cargo seized by Customs officials contained older computers of no potential military value whatsoever, as well as scanners, printers, calculators, keyboards, and several school buses destined for use by schools in Cuba. The story of Benjamin Treuhaft, a remarkable New York philanthropist, gives further insight into the embargo’s effects. Since 1995 Treuhaft had been repairing old pianos and sending them to Cuba to replace aging and damaged pianos in Cuban schools, churches, and concert halls. As of 2007, Treuhaft had sent 237 pianos to Cuba. However, tighter embargo restrictions imposed by the Bush administration in 2004 increased pressure on Treuhaft’s organization. The Bush administration revoked the organization’s license to tune pianos in Cuba and attempted to shut the organization down in February of 2004 because it was “not consistent with U.S. foreign policy towards Cuba.” Only in 2006, after considerable outside pressure, did the U.S. government agree to renew the organization’s license.

Third, since 2002, the embargo has also been tightened to restrict the ability of Cuban and American educators to interact and exchange ideas. In 2006, the Cuban government reported that:

309 Id. at 44.
312 Cheryl Smith, Long Arm of the Bush Administration Touches Cuba Caravan, AUSTIN CHRONICLE, July 29, 2005. Smith stated that an IFCO attorney was told that in confiscating the materials, “the Commerce Department is acting on instructions from as far up the chain of command as the State Department and the White House.” Id.
314 Id.
315 See http://www.sendapiana.com/sphlegal.htm (last visited Apr. 6, 2008). This is the organization’s official website and provides a link to a copy of the letter that the organization received from the Department of Commerce denying their license to tune pianos in Cuba.
Around 183 Cubans have been denied visas to participate in scientific, academic, sporting and cultural events in the United States.... In many cases, requests for visas have never been responded to, and, in others, they have been turned down with reference to Section 212, which prohibits the entry of individuals whose presence in the country could be “detrimental to the interests of the United States."

The Chairman of the U.S. Chemistry Association, Charles Casey, criticized the U.S. embargo, stating that “U.S. measures against the island country, including a prohibition on free travel of Cuban and American scientists, have hindered the exchange of information and scientific cooperation between the two countries.” In 2005, the U.S. government denied visas to more than 60 Cuban scholars who had been invited to attend the Latin American Studies Association’s annual meeting in Las Vegas. The academics invited to attend the conference “were to give papers and lectures and engage in intellectual exchanges...” Such large-scale denial of visas had been unprecedented prior to 2004. In fact, the U.S. government had not refused visas to Cuban academics to attend this conference since the conference’s inception in 1979. By way of explanation, the U.S. State Department stated only that “it is the State Department’s view that Cuban officials should not travel freely in the United States.”

According to State Department spokesperson Richard Boucher, “all Cuban academics are government...

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316 Necessity of Ending the Economic, Commercial and Financial Blockade Imposed by the United States of America Against Cuba. G.A. Res 60/12 at 48-9, UN Doc A/60/PV.45 (Nov. 8, 2005). This report provided examples of the impact of the embargo on intellectuals. The report discussed two scientists and one researcher who were all invited to speak at various Colleges in the United States. The United States denied visas to all three individuals.


321 Schweid, supra note 318.
harming, human rights

officials" and "as far as I am aware, none of these individuals has distinguished himself or herself for free thinking and questioning of anything the regime has said."^^^ Pointing out that Cuba's universities are state-run, Boucher argued that these "academics are government officials 'who wanted to enjoy the hospitality of the United States and spread the party line.'"^^^ However, as one observer wondered, "how Castro suffers from the grounding of scholars defies explanation."^^^

D. Right to Family

The right to family, and the obligation of governments to respect the family and refrain from interfering with family life and family relations, is a fundamental human right recognized in numerous international human rights documents and treaties to which the United States is a party. Although these documents focus on the obligations of states toward their own citizens, they also refer to states' obligation to promote the enjoyment of these rights by all. Thus, one of the embargo’s chief legal and moral flaws is that, although it purports to promote the human rights of Cubans on the island, it actually harms their rights—as well as the rights of Cuban-Americans in the United States—to family life.

The Bush administration’s 2004 amendment to the CACRs were particularly damaging. To review, the amendment tightened travel restrictions by: (1) restricting travel to once every three years; (2) limiting the length of travel to 14 days; (3) requiring special licenses to visit Cuba; (4) eliminating any additional visas; (5) reducing the amount of money travelers could spend during their trip to Cuba; (6) restricting remittance amounts; (7) limiting remittance amounts that travelers could bring with them to Cuba;^^^ and (8) redefining “immediate family” to include only “spouse, child, grandchild, parent, grandparent, or sibling of that person or that person’s spouse, as well as any spouse, widow or widower of the foregoing.”^^^ This last definition effectively prohibits aunts, uncles, nieces, nephews and cousins from traveling to Cuba to visit their families,^^^ causing numerous Cubans living in the

322 Id.
323 Id.
325 31 U.S.C. § 515; Berta Esperanza Hernandez-Truyol, Asking the Family Question, 38 FAM. L. Q. 481, 495-496 (2004) (discussing the incongruence between the U.S.’s focus on the family, and the result of these regulations on Cuban families).
327 Human Rights Watch, supra note 326 at 38.
United States to suffer immeasurable emotional turmoil. The emotional toll that the embargo imposes is thus extensive and disproportionate to any conceivable policy goal the regulations might serve, such as denying resources to the Castro regime.  

The human suffering imposed by these restrictions becomes apparent by examining individual stories about their impact. Prior to the implementation of the amended travel restrictions, Marisela Romero, a 53-year old Cuban-American, traveled to Cuba several times a year to visit her 87-year old father who suffers from Alzheimer’s disease. The amended travel restrictions now make it impossible for her to visit more than once every three years. The Office of Foreign Asset Control denied her request for permission to travel more often by stating that “it would be inappropriate for you to make application with the Office of Foreign Assets Control for a specific license to visit a member of your immediate family until the required three-year period has passed.”

Romero’s father was the only living member of her “immediate family” in Cuba, and he was “incapable of cashing checks or even signing them over to someone else” due to his illness. Thus, the restrictions not only limited Romero’s ability to visit her ailing father but also limited her ability to support him by sending remittances. Moreover, the psychological impact of the travel restrictions was severe for both of them. The father’s doctor informed Romero that her father “had become deeply depressed—most likely because of her extended absence—and stopped eating.” He subsequently died before Romero was able to visit him.

The restrictions also weigh heavily upon those left behind in Cuba to care for ill relatives. Prior to the implementation of the amended travel restrictions, Andrés Andrade, a 50-year old Cuban-American, traveled to Cuba regularly to help his sister care for their aging parents. Because of the amended travel restrictions, Andrés’ sister was left largely on her own. Andrés’ mother, who was battling cancer, had to be hospitalized in late 2004

328 See Paolo Spadoni, U.S. Financial Flows in the Cuban Economy, 14 TRANSAT’L L. & CONTEMP. PROBS. 81, 81-82 (2004) (discussing the flow of U.S. currency into the Cuban economy and stating that one of the purpose of sanctions was to “stimulate democratic reforms in Cuba” by exerting economic pressure on the Cuban government by preventing the flow of U.S. currency into Cuba).
329 Human Rights Watch, supra note 326, at 39.
330 Id. at 41.
331 Id. at 40.
332 Id. at 42.
333 Id. at 43.
due to a severe pulmonary complication.\textsuperscript{334} Travel restrictions prevented Andrés from traveling to Cuba to be at his mother’s side and left his sister alone to care for their mother. His sister “spent four straight days without any sleep, sitting on a chair next to her.”\textsuperscript{335} Andrés’ sister believed that their mother “was holding onto life because she hoped that he would come . . . . That day before she died, the screaming was horrible. She wept and cried out his name.”\textsuperscript{336} The death of Andrés’ mother took a terrible toll on Andres’ father’s health. According to Andrés’ sister:

“Every day he tells me that he is waiting for Andrés to come because he has a gift for him that my mom gave him and that only he can tell him…. He says that he wants to go join my mom, that he wants to die but that before he goes he wants to see Andrés and give him the gift that my mother left him….. I pray to God that my dad makes it until 2007 [when Andrés can visit Cuba].…. But he is already 82-years old, and he is very sick…. Sometimes, when I despair, I sit on the patio alone and cry.”\textsuperscript{337}

These accounts evince the deep emotional distress caused by the CACR travel restrictions. Milay Torres, a teenage girl, moved to the United States with her father in 2000.\textsuperscript{338} Milay returned to Cuba to visit her family three years later, and she planned to return again in 2004. With the implementation of the stricter travel rules, however, she would have to wait until 2006.\textsuperscript{339} Upon learning this, Milay “became ‘very depressed, turned rebellious, and stopped going to school.’”\textsuperscript{340} Milay’s mother began to suffer severe anxiety as a result of her daughter’s absence. She explained:

After she left Cuba, I began suffering more anxiety attacks. After I found out [about the travel restrictions] my anxiety worsened. I am seeing psychologists and psychiatrists, and when I get these attacks, I go to the hospital and they inject me with some sedatives and send me home.… When I see the things that are happening there with the travel restrictions . . . my condition worsens because I am waiting for her to come, but she doesn’t come…. Sometimes I tell people that I would give up my life to be able to see my daughter for just five

\textsuperscript{334} Id.
\textsuperscript{335} Id.
\textsuperscript{336} Id. at 43-44.
\textsuperscript{337} Id. at 45.
\textsuperscript{338} Id. at 50.
\textsuperscript{339} Id.
\textsuperscript{340} Id.
Thus, the psychological effects of the CACR restrictions on the multitude of affected families are profound.

Carlos Lazo, a U.S. army Sergeant serving in Iraq, returned to Miami during a leave from service in June of 2004 and purchased an airline ticket to visit his two teenage sons in Cuba. However, “[e]ven though his trip would have started before the new travel restrictions took effect, the Bush Administration directed charter aircraft to stop accepting new passengers, to fly to Cuba empty, and to return only with travelers from Cuba.” As Mr. Lazo commented, “[t]he administration that trusted me in battle in Iraq does not trust me to visit my children in Cuba.” Moreover, Mr. Lazo’s inability to visit his sons left him with deep feelings of inadequacy: “I can’t help out my sons . . . . I can’t give them human warmth. I can’t fulfill my obligation as a father. I can’t send money to my uncles because they are no longer part of my family.”

The following statement by another Cuban-American summarizes the deep heartache caused by the travel restrictions to people on both sides of the Florida straits:

Against my will and for decades I have been deprived of attending important happenings in Cuba such as the death and funeral of my father, grandfather, uncles, aunts, cousins, and high school buddies; weddings, births, and baptisms of nephew, niece, grandnephews, grandnieces and cousins. There were the long illnesses of my father, grandfather, uncle, niece, cousin and grandnephew . . . . Thanks to Washington’s restrictions it got very difficult, onerous and lengthy to obtain and deliver vital medications, thus prolonging the suffering and distress of patients and relatives on both sides of the straits. Telling of the cruelty, hurt, and violation of my human rights (and that of my family) caused by the travel ban could go on and on; its hypocrisy and double standard (go not to Cuba, but OK with China, Vietnam, Russia, Saudi Arabia, etc.) are incredible and not worthy of any nation that truly values family and God.

341 Id. at 51.
342 Id. at 48.
343 View Just Released Video Message from Carlos in Iraq, ACTIVIDADES, Oct. 18, 2005 (on file with author).
344 Id.
345 Human Rights Watch, supra note 327, at 48.
346 Id. at 50.
347 Waldo Parravicini, Cuba Travel Project, CUBA TRAVEL STORY, Jan. 18, 2005
By enforcing an arbitrary definition of "immediate family," and by dictating when Cuban-Americans may visit their sick and dying family members, the embargo's travel restrictions create extreme psychological and emotional distress to those affected by them and violate the basic human right to family.  

E. Culture

"Without culture, and the relative freedom it implies, society, even when perfect, is but a jungle. This is why any authentic creation is a gift to the future."  

The U.S. embargo has had an impact on cultural exchange and preservation. For example, in 2004 the U.S. Treasury Department denied the Hemingway Preservation Foundation's application for a license to assist in preserving Ernest Hemingway's Cuban home. The home holds invaluable pieces of joint American and Cuban literary history, including 2,000 letters, 3,000 photographs, and 9,000 annotated books, as well as drafts of some of the novels Hemingway wrote while there, including For Whom the Bell Tolls, A Moveable Feast, and The Old Man and the Sea. U.S. officials reportedly did not want to assist in any effort that could bring future tourist dollars to the Castro government.

In May 2005, the Hemingway Preservation Foundation reapplied to the U.S. Treasury Department for the license, this time jointly with the National

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348 See Human Rights Watch, supra note 327, at 58-63. This article not only provides excellent personal accounts explaining the psychological effects, but also provides interesting insight into the way in which the definition of "immediate family" in the CACRs causes extreme distress. The article also discusses the way in which the tightened regulations cause divided loyalties among Cuban-Americans who want to abide by the law, but also feel the need to visit family members.


352 Ruth Morris, Love for 'Papa' Fuels Fight for Villa: Hemingway Home Wilts as Embargo Limits Aid to Cuba, SUN SENTINEL, Sept. 26, 2005. This article quotes Representative Ileana Ros-Lehtinen (R-Fla) as stating, "We should be focusing on the shattered lives of poor Cubans, rather than fixing buildings for one of the world's richest dictators."
Trust for Historic Preservation. A letter signed by 60 writers and historians, among them John Irving and Salman Rushdie, compared the home to the preserved homes of Mark Twain and William Faulkner. After meetings with members of the U.S. Treasury and State Departments as well as members of Congress, the license was finally granted but only for the limited purpose of sending a team to give technical advice on the restoration work. The U.S. government expressly prohibited donations of money, resources, materials, and even simple carpentry tools, such as saws or hammers, which might be used by the Cubans to repair the property.

For an example of the embargo’s impact on the visual arts, the Corcoran Art Gallery in Washington, D.C. abruptly cancelled a “cultural program” it had scheduled at the Cuban Interests Section of the Swiss embassy in November of 2004. Though only 41 tickets had been sold to what they described would be a “dialogue about art,” the program had drawn the attention of the State Department. The Office of Foreign Assets Control at the Treasury Department had also contacted the Gallery in order to inquire about where proceeds from the ticket sales would go. As a result, the Gallery quickly chose to “postpone” the program.

Perhaps the best-known embargo-related hindrance to the arts involves the U.S. government’s frequent denials of visas to Cuban musicians. In 2004 alone, Buena Vista Social Club’s legendary singers Ibrahim Ferrer and Omara Portuondo, jazz pianist Jesus “Chucho” Valdés, singer-songwriter Carlos Varela, the dance band Los Van Van, and the folkloric ensemble Los Muñequitos de Matanzas were all forced to cancel performances.

353 Foster, supra note 351.
354 Maria Puente, Hemingway Home in Cuba on Rescue List, U.S.A TODAY, June 3, 2005
355 Foster, supra note 351.
357 Id. The article reports that the State Department “and several groups who have been fighting the government of Fidel Castro and its policies” voiced concern about the event. Questions included who would receive revenues from the program, and concerns about Castro’s jailing of poets and writers.
358 Id.
359 Id. Though the language in the article was “postpone” the program, there is no indication that the program was ever rescheduled or did take place. See http://www.corcoran.org/exhibitions/exhibits_past.asp? Year=2006 (providing a list of the Corcoran Gallery’s past exhibits). The list does not include any exhibits related to Cuba.
360 Mr. Ferrer is best known in the United States for his music documented in the film The Buena Vista Social Club. The film received a Grammy Award, and an Academy Award nomination. Mr. Ferrer himself won a Latin Grammy Award for Best New Artist in 2000, when he was 72 years old.
Harming Human Rights

in the United States as a result of visa denials by the U.S. government.\(^\text{361}\) The U.S. Interests Section in Havana wrote letters asserting that the musicians' entrance to the U.S. would be detrimental to national interests because of its potential to "enrich the government" of Cuba.\(^\text{362}\)

Also in 2004, the U.S. government denied visas that would allow five Grammy Award nominees for Best Tropical Latin Album, including Mr. Ferrer, to attend the ceremony, on the grounds that the visit would be detrimental to the United States.\(^\text{363}\) In surmising why the U.S. government would deny visas to musicians as "detrimental" to U.S. interests, Carlos Acosta, Cuban Vice-Culture Minister and head of the Cuban Music Institute, complained that "something as noble as music is being converted into a policy against Cuba."\(^\text{364}\) In response to the visa denial, Mr. Ferrer was quoted as saying, "I am not a terrorist. I couldn't be one. I am a musician."\(^\text{365}\) In addition to the shadow this policy casts on the U.S. image, it also appears counter-productive, as promoting literary, musical, and artistic exchanges with Cuba could serve to strengthen links with important sectors of Cuban society, broaden cooperation in non-political areas, and contribute to greater openness within Cuba.

F. Civil and Political Rights

The aforementioned 2007 United Nations report on the situation of human rights in Cuba noted that the U.S. embargo actually retards rather than contributes to a political opening. The embargo and the recent Helms-Burton legislation has seriously affected the civil and political rights of Cuban citizens by provoking reactions from Cuban authorities who often respond to foreign interference with domestic policy by enacting repressive laws.\(^\text{366}\) Thus, the embargo is the most powerful political cover under which


\(^{362}\) *Id*. The article explains that the U.S. Interests Section in Havana functions like a proxy U.S. embassy there, since the U.S. and Cuba do not enjoy diplomatic relations.


\(^{364}\) *Id*. In the article, the BBC also reports that Acosta accused the U.S. of making the decision to deny the visas in order to appease the politics of Cuban-American voters in Florida.

\(^{365}\) *Id*. Mr. Ferrer was quoted as making that statement to the press in Havana. Mr. Ferrer was 77 years old in 2004. He passed away on Aug. 6, 2005 at the age of 78.

\(^{366}\) G.A. Res. 60/251, U.N. Doc. A/HRC/4/12 (Mar. 15, 2006). President Carter, when preparing his report of 21 May 2002 following his visit to Cuba, pointed out that the best-known dissidents are unanimous in opposing the strengthening of a very hard United States line towards Cuba, as well as any funding of their activities – which might substantiate the claim, long upheld by President Castro, that they are "lackeys of Washington." *Id*. 
the Cuban government repeatedly justifies its unwillingness to broaden the scope of individual civil and political liberties on the island.

IV. THE EMBARGO'S DUBIOUS LEGITIMACY UNDER CONTEMPORARY INTERNATIONAL LAW

Under traditional international law, states are free to refrain from trading with another state if they so wish. Classical notions of state sovereignty have been the foundation of the centuries-old doctrine that every State has a right to conduct its trade relations as it sees fit. Although this rule must be the starting point of any legal analysis of the embargo, it also must be qualified by a series of further considerations that more accurately reflect the entire fabric of contemporary international law. One of the most important developments in international law and international relations since 1945, and one which has accelerated considerably since 1990, is the increasing salience of human rights obligations on the part of states, not only toward their own citizens but also toward the citizens of other states. This development has been accompanied by a more critical scrutiny of coercive acts by states against other states and their citizens, especially where the coercion is not justified by a national security threat and is carried out unilaterally and without a mandate by a credible, legitimate regional organization.

The justification for the current U.S. embargo against Cuba lacks legal coherence. The underlying “absolute sovereignty” doctrine—that states are free to deny the benefits of trade and investment to any state—requires adherence to the classical international law paradigm in which state sovereignty is the fundamental norm, and in which there is little room for human rights obligations or any other kind of “cosmopolitan” concerns beyond the safety and human rights of one’s own citizens. Ironically, since 1991, the

embargo’s sole touted purpose has been to extend human rights to the people of Cuba, even if it means disregarding the sovereignty of the existing Cuban government. However, the “cosmopolitan” paradigm that could justify a human rights embargo against the policies of another recognized government is very much in conflict with the “absolute sovereignty” doctrine. Under the classical “absolute sovereignty” paradigm, the United States does not need to justify its embargo by a purpose of promoting human rights. Under the more contemporary “cosmopolitan” paradigm, the United States is free to disregard classical notions of state sovereignty in order to promote human rights in Cuba but must pay close attention to the human rights consequences of its embargo. Currently, whenever critics of the embargo attack its human rights basis, the embargo’s advocates conveniently abandon the post-1991 paradigm and take refuge in the old, traditional paradigm, based on notions of absolute state sovereignty.  

In light of the evolution of international legal norms since 1945, the U.S. embargo against Cuba can be subjected to several tests. Because the embargo is unilateral rather than multilateral, is comprehensive rather than limited, and is a “human rights” embargo as opposed to a “national security” embargo, it is subject to strict scrutiny in the form of the following key questions. First, does the embargo enjoy the support, tacit or otherwise, of the United Nations, another credible, legitimate regional organization, or even a significant number of actors in the international system? Second, because the embargo is in place to benefit the Cuban people, does it have their support, as far as it can be ascertained? And third, does the embargo harm human rights in Cuba extensively, and does it violate common standards of discrimination and humanity to such an extent that it undermines its own legitimacy as a tool for the promotion of human rights?

For purposes of legal analysis, sanctions can be divided into four broad categories: multilateral, targeted sanctions; multilateral, comprehensive sanctions; unilateral, targeted sanctions; and unilateral comprehensive sanctions.

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369 See e.g. John W. Smagula, Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate, 21 N.C. J. INT’L. L. & COM. REG. 65 (1995).

370 The embargo’s “comprehensiveness” has to do with two essential elements of it. First, it seeks to cut off all trade, investment, travel and human contact between Cuba and the United States. Second, U.S. authorities go to extraordinary lengths to pressure other countries to do likewise.


373 The United States maintains a multitude of unilateral targeted sanctions.
sanctions. Economic sanctions can also be categorized according to their purposes, including: enhancing national or international security, enforcing treaty compliance, and safeguarding human rights. Simply labeling a particular economic sanction as an exercise of sovereign trade rights—as the United States has done repeatedly regarding the Cuban embargo—is insufficient. The degree of legitimacy a sanctions regime enjoys in international law depends on its categorization.

The United States’ embargo on Cuba represents the power to impose sanctions “at its lowest ebb” because the United States is (1) acting unilaterally against the expressed will of the international community (2) with an embargo that is comprehensive rather than limited for the paradoxical purpose of promoting human rights. Multilateral sanctions have an inherently higher degree of legitimacy because of the diplomatic decision processes needed to implement them. In contrast, unilateral sanctions are necessarily subjective decisions on the part of the sanctioning state and lack the imprimatur of reasoned diplomatic debate and compromise. Moreover, unilateral sanctions must meet the higher, post-1945 threshold of skepticism regarding unilateral coercive measures. Thus, on balance, unilateral sanctions receive a more stringent level of legal and policy review within the international community than multilateral sanctions. Moreover, comprehen-

374 The best example of a comprehensive unilateral embargo is the Cuban embargo itself.
375 Of course, these purposes need not be mutually exclusive and there may be significant overlap. For example, the sanctions on Iran’s nuclear program are ostensibly both security and treaty enforcement measures.
376 S/RES/661, supra note 372.
380 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J, concurring).
381 Id. Justice Jackson’s famous categorization of presidential power is an apt analogy for the exercise of unilateral sanctions. Jackson wrote, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”
383 Id.
sive sanctions are more likely to infringe on principles of sovereign equality and non-intervention than targeted sanctions.\textsuperscript{384} Though targeted sanctions may have unintended consequences, it is reasonable to assume that a "total embargo" increases the likelihood of that outcome.\textsuperscript{385} The increased potential for unjust results is inimical to the requirements of justice, discrimination, and humanity in international relations.\textsuperscript{386} Thus, comprehensive total embargoes have a lesser claim to legitimacy than targeted sanctions. The U.S. embargo against Cuba is far more punitive than current sanctions against both Iran and North Korea, and as a unilateral, comprehensive sanction, the embargo has the lowest possible legitimacy in the economic sanctions hierarchy.

Without doubt, Cuba's confiscation of American properties in 1960-1961 justified some response in the form of proportionate, limited economic sanctions. Moreover, Cuban actions during the 1960s and 1970s could reasonably have been interpreted as posing various threats to American national security, thus serving as legal grounds for further sanctions—as long as the sanctions met the general principles of proportionality, discrimination, and humanity. But by 2007, with the cumulative economic costs alone of the embargo to the Cuban economy over a 47-year period conservatively estimated at $60-80 billion, the embargo appears widely disproportionate and no longer justifiable. This is especially true now that the promotion of democracy and human rights has become the primary rationale for the embargo, making the unilateral, comprehensive, indiscriminate embargo even more difficult to justify legally.

A. Does the Embargo Enjoy the Support of the International Community?:
A Short History of United Nations General Assembly Resolutions on the Cuban Embargo

The years since the end of the Cold War have witnessed the unique phenomenon of annual condemnations—by increasingly large margins—of the U.S. embargo against Cuba by United Nations General Assembly (hereinafter "GA") resolutions.\textsuperscript{387} In a strict sense, the question is whether or not

\textsuperscript{384} U.N. Charter art. 2, para. 1.; U.N. Charter art. 2, para. 7.
\textsuperscript{387} The first resolution was adopted in 1992. G.A. Res. 47/19, U.N. Doc. A/RES/47/19 (Nov. 24, 1992). An identical or similar resolution has been adopted each year thereafter. G.A. Res.
these resolutions have established an international norm against unilateral comprehensive sanctions or, at a minimum, a legal norm against the Cuban embargo specifically. Because the authoritative nature of a particular resolution is difficult to prove and because GA resolutions have traditionally been considered recommendations without legal force, an inquiry starting from this point assumes a negative answer, and the result is thus to underestimate the importance of these GA resolutions. Thus, it may be more instructive to ask whether these resolutions show a trend toward such a norm. There are several important features of the resolutions that aid in this analysis: the language of the resolution, the evolution of the language, the time and circumstances in which the resolutions have been passed, the voting patterns among different states, the delegates' rationales for their votes, and the resolutions' unique and specific purposes.

Shortly after the collapse of the Soviet Union, the GA adopted the first resolution condemning the U.S. embargo on Cuba. Though it was a dramatic proclamation, it is clear that the 1992 resolution focused on the passage of the Cuban Democracy Act. The preamble expressed concern about recently approved “laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction . . . .” The next paragraph refers to the embargo in general but only in order to highlight the extraterritorial aspects of the CDA. The resolution calls upon “all States to refrain from promulgating and applying laws . . . of the kind referred to in the preamble . . . .” The language of the resolution thus demonstrates that, at least in 1992, the


See Porotsky, supra note 388, at 939-40.


GA was more concerned with—or at least more comfortable voting against—the extraterritorial application of the embargo rather than the embargo itself.

One year later, the GA again formally spoke against the embargo. However, the 1993 resolution contained significant new language that signaled its disapproval of the entire affair. The 1993 resolution “took note” of that year’s Ibero-American Summit “concerning the need to eliminate the unilateral application of economic and trade measures by one State against another for political purposes” and essentially signaled substantial agreement with the Summit’s position without adopting it outright. Additionally, by 1993 it had become clear that the Cuban economy was freefalling, following the end of Soviet subsidies and the disintegration of the socialist bloc that Cuba had relied on for the bulk of its outside economic relations for more than two decades. The news coming from Cuba regarding the hardships endured by the Cuban population was grim. The 1993 resolution made reference to the embargo’s effect on the Cuban population for the first time. Overall, the language of the resolution showed a trend toward a wider rejection of unilateral comprehensive sanctions.

Two years later, the GA further broadened its attack on the embargo. The 1995 resolution took note of the Latin American Economic System council meeting, which urged a total end to the embargo. The GA also subtly expanded its suggested ban on unilateral sanctions. The 1995 resolution’s language that signaled agreement with the Ibero-American Summit position was expanded to include disapproval of any economic or trade measure affecting the free flow of international trade that was imposed for political reasons. By incorporating the statements of the Latin American Economic System council and Ibero-American Summit, the GA resolution took another step toward condemning and challenging the legality of unilateral comprehensive sanctions.

Early in 1996, the United States passed the Helms-Burton Act, and the GA responded by adopting its strongest repudiation of the embargo up to that point. The resolution rejected Helms-Burton and reiterated the need

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to eliminate unilateral economic sanctions. In a concentrated synthesis of international opinion, the resolution acknowledged the "declarations and resolutions of different intergovernmental forums, bodies and Governments that express rejection by the international community and public opinion of [unilateral economic sanctions and the Helms-Burton Act]." Helms-Burton was an easy target for international denunciation, and it could be argued that this resolution was evidence of a renewed focus on the extraterritorial aspects of the embargo rather than on the embargo itself. However, the language of the 1996 resolution demonstrated its applicability to the entire embargo. First, the resolution refers to the entire Helms-Burton Act rather than to its extraterritoriality. Second, Helms-Burton codified nearly the entire regulatory scheme of the embargo. Thus, it seems clear that, as used in the 1996 and all subsequent resolutions, references to "Helms-Burton" implicate the entire embargo. Finally, by interpreting international opposition to include rejection of both Helms-Burton and unilateral economic sanctions, the GA resolution evidenced a clear expansion of the sphere of impermissible sanctions. Thus, the linguistic evolution of the resolutions between 1992 and 1996 shows a definite international trend against not only the embargo itself but also against the embargo's unilateral, comprehensive, and extraterritorial characteristics.

Analysis of delegates' rationales for their votes over the past ten years further illuminates the embargo's gradual descent into the realm of questionable legality. The explanations read much like a legislative history, and the delegates' arguments help to define the scope of the GA resolutions regarding an international norm. The world's developing nations have cast votes against economic sanctions since 1965. It is, therefore, instructive to note the changes in rationale—not to mention votes—of members of the European Union and other developed countries such as Japan, Australia, and Canada.

The Helms-Burton Act clearly caused Europe's decision to vote in favor of the GA resolution. It also caused strong traditional U.S. allies, such as Canada and Japan, to change their votes. Two statements are representative. Speaking on behalf of the European Union after the 1997 resolution,
Sylvie Lucas from Luxembourg stated that the European Union "strongly opposed legislation with extraterritorial effects." Michel Duval explained Canada's vote as being opposed to the Helms-Burton Act's extraterritorial effects. Thus, in the immediate aftermath of Helms-Burton, the more advanced Western democracies construed the GA resolutions as international repudiation of the embargo's extraterritorial effects but not necessarily a vote against unilateral comprehensive sanctions.

By 1998, however, the unilateral nature of the embargo weighed more heavily on the considerations of Western delegates. Norwegian delegate Ole Peter Kolby stated strongly that there was "a clear distinction between unilateral measures and sanctions imposed by international bodies." Michel Duval, broadening his statement from a year before, stated that Canada "was against the attempts of the United States to apply unilateral measures . . . ." In commenting on the 1999 resolution, Ana Maria Martinez from Argentina said that "[t]he application of unilateral economic and trade measures against one State . . . did not seem compatible with the [United Nations] Charter." In 2000, the Brazilian delegate, on behalf of MERCOSUR, a regional trade agreement between South American countries, said that "[t]he countries for which [he] spoke joined the almost unanimous voice of the international community in rejecting unilateral measures."

At the turn of the century, Australia had been in substantial agreement with the European Union's explanations of its votes. In 2002, how-

409 Press Release, General Assembly, Assembly Again Seeks Repeal of Extraterritorial Like United States Helms-Burton Act Against Cuba, U.N. Doc. GA/9349 (Nov. 5, 1997). Ms. Lucas also stated that "[t]he Union could not accept that the United States had the right to unilaterally restrict the economic relations of any Union member with any other State." Id. Although this statement mentions unilateral actions, it is in reference to the extraterritorial aspects of Helms-Burton. It thus condemned unilateralism in a narrow sense, rather than in the broad sense that the United States imposed economic sanctions by itself.
410 Id.
412 Id.
413 Press Release, General Assembly, As Assembly Reiterates Call for End to 'Extraterritorial Measures', Cuba Announces $100 billion Damage Suit Against United States, U.N. Doc. GA/9654 (Nov. 9, 1999).
415 See Id. David Stuart said "Australia had consistently expressed its opposition, as a matter
ever, delegate Peter Tesch added emphatically that “[u]nilateral coercive measures were not justified by the principles of international law.”

By 2006, Russian, Icelandic, and Indian delegates had explained their favorable votes for the anti-embargo resolution on the basis that unilateral economic sanctions had no place in an international system ruled by law.

This proliferation of statements against unilateral economic measures is even more significant in light of the voting patterns in the GA, which have passed the anti-embargo resolutions by wider and wider margins every year.

In 1992, the relatively modest language of the resolution passed by a vote of 59-3, with 71 abstentions (coming from strong U.S. allies in Europe and Asia).

In 1996, after the Helms-Burton Act, the vote in favor of the resolution was 137-3 with only 25 abstentions. At the last vote in 2006, there were 183 votes in favor and only four against with zero abstentions.

of principle, to the promulgation and application of laws and measures whose extraterritorial effects affected the sovereignty of other States.”


Sitram Yechury stated “the embargo...did not meet the test of international law” and “India opposed unilateral measures that impinged on the sovereignty of other nations, including efforts to change the laws of another country.”

Beginning in 1992, the vote (for-against-abstain) was 59-3-71, 88-4-57, 101-2-48, 117-3-38, 137-3-25, 143-3-17, 157-2-12, 165-2-8, 167-3-4, 173-3-4, 174-3-2, 179-4-1, 182-4-1, 183-4-1.


U.N. G.A., 50th plen. mtg., U.N. Doc. A/61/PV.50 (Nov. 8, 2006). In addition to Israel, the United States was able to garner votes from former U.S. protectorates Marshall Islands and Palau. The Israeli vote against the anti-embargo resolution reflects Israel’s response to Cuba’s repeated condemnations of Israel at the United Nations, as well as an inexpensive way for Israel to support Washington. The irony is that, unlike the United States, Israel actually
Thus, as of late 2006, a resolution denouncing the U.S. embargo had passed the GA for 15 consecutive years. At a minimum, over this decade and a half, the language, rationale, and voting patterns of the GA resolutions have shown that a norm against extraterritorial “secondary embargos” has emerged. Additionally, it is reasonable to conclude that a norm against unilateral comprehensive sanctions has gained momentum. Finally, it could be argued that a clear global consensus emerged, shared across different economic and political systems and cultures, on the moral inappropriateness and legal dubiousness of justifying unilateral comprehensive sanctions against Cuba in the name of human rights. In fact, the international consensus seems to be that human rights embargos need some kind of broad-based international backing, and the more comprehensive sanctions are, the more international support they require.

The overwhelming majority of United Nations members, including all of the United States’ major allies, oppose the U.S. embargo against Cuba. As noted earlier in this article, the OAS, the only regional organization in the hemisphere with the legitimate authority to impose sanctions, ended its sanctions against Cuba in 1975, and called upon its members—including the United States—to follow suit. In addition to lacking United Nations and OAS endorsement and being opposed by 183 states in the international community, the embargo has no support from the international human rights community—not even from a single international NGO working on human rights or humanitarian issues. The world’s two most prominent international human rights NGOs, Amnesty International and Human Rights Watch, are sharply critical of the Cuban government’s human rights policies. Both strongly oppose the embargo as harmful to human rights in Cuba and as counterproductive to the long-term objective of promoting democracy and human rights on the island.424 The Roman Catholic Church, which under Pope John Paul II gained wide credibility for its stance on behalf of human rights across the globe, has also been highly critical of indiscriminate sanctions in general and of the Cuban embargo specifically.425 The embargo’s purely unilateral character is highlighted by the fact that, with the exception of the governments of the United States, Israel, Palau and the Marshall Islands, there is not a single credible international actor, governmental or oth-

424 Human Rights Watch, supra note 326.
erwise, that supports the embargo or has not expressed clear opposition to it. Finally, even within the United States, the embargo’s supporters consist of a narrow minority located in a small geographic corner of the United States as well as the successive U.S. administrations and members of Congress that are eager to court their votes and financial backing. A 2006 Gallup poll indicated that two-thirds of the American people, while disapproving of the Castro government, would like to reestablish U.S. diplomatic relations with Cuba.\textsuperscript{426} Similarly, a 2007 Zogby poll found that a majority of Americans were in favor of improving relations with Cuba and were against the embargo and its restrictions.\textsuperscript{427}

Thus, the nearly universal disapproval for the Cuban embargo constitutes a fatal flaw in its legitimacy. The established consensus is that comprehensive human rights embargoes require international support in order to be legitimate and free from the taint of partiality and self-interest. This is also a crucial difference between the Cuban embargo and the earlier sanctions imposed against South Africa in the 1980s. Unlike the Cuban embargo, the South African sanctions were limited, supported by many states within the international community across a wide range of different cultures and economic and political systems, backed by a substantial number of international actors from the NGO and corporate sectors, and endorsed by leading members of the South African opposition, such as Bishop Desmond Tutu.\textsuperscript{428}

\textsuperscript{426} Joseph Carroll, Two in Three Americans Favor Re-Establishing Ties With Cuba, Dec. 15, 2006, \textit{in} The Gallup Poll, Public Opinion 2006 (Alec M. Gallup & Frank Newport eds., Rowman & Littlefield Publishers, Inc., 2007). The poll was taken on Dec 8-10, 2006, and found that 67% were in favor while 27% were opposed. \textit{Id.}

\textsuperscript{427} Zogby: Majority of Americans Understand Little about Latin American Neighbors, Aug. 10, 2007, http://www.zogby.com/news/ReadNews.dbm?ID=1346. The Zogby poll, conducted July 27-30, 2007, included 7,362 adults nationwide and carried a margin of error of +/- 1.2%. 58% were in favor of improving relations with Cuba, and 56% were against the embargo.

B. "Human Rights" Embargoes and the Human Rights Paradox

Other international developments have strained the United States’ rationale for its punitive embargo, which is ostensibly to promote human rights in Cuba. Economic sanctions still are a popular alternative to military action. In recent years, however, researchers have begun to note the destructive effects of sanctions on innocent populations. Grave criticisms have been leveled at all types of sanctions but are especially relevant in the context of “human rights” embargos. Unlike “national security” embargoes in which the sanctioning state’s sovereignty is affected by a military or security threat posed by the other state, human rights embargos are merely optional and reflect a desire to pressure the sanctioned state into stricter compliance with human rights norms. Because of their adverse effects on human rights, economic sanctions, especially those as comprehensive as the Cuban embargo, can be disproportionate and can undermine the very legal norms they claim to be promoting.

1. Distinguishing National Security Embargoes and Human Rights Embargoes

The U.S. embargo against Cuba is not a national security embargo. Cuba poses no threat to U.S. national security, and the U.S. government does not claim that it does. Unlike the justifications for the sanctions against

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429 See BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 9 (Cambridge University Press 1988) (quotation of Woodrow Wilson famously arguing in favor of sanctions) (“Apply this economic, peaceful, silent, deadly remedy and there will be no need for force.”)


431 In 1998 the United States government, with the widespread assent of the U.S. intelligence community, the Defense Department, and the head of the U.S. Southern Command, Gen. Charles Wilhelm, issued a report stating that Cuba posed no threat to U.S. national security. The report caused such consternation among the hard-line Cuba exiles in Miami that they successfully pressured the Clinton administration and its then Defense Secretary, William Cohen, to append a “foreword” qualifying the report’s clear conclusion by referring to possible vague threats such as Cuba’s potential, in light of its advanced biotechnology industry, for developing a biological weapons capability. At the time, all serious national security analysts agreed with the report’s stated conclusions and saw the appended “foreword” for what it was,
Iraq in the 1990s and those currently in effect against Iran and North Korea.\(^\text{432}\) the U.S. government does not claim that Cuba is developing weapons of mass destruction or that Cuba poses a danger to American security.\(^\text{433}\) For a decade and a half, the embargo’s sole justification has been the promotion of democracy and human rights on the island.

Distinguishing between a national security embargo and a human rights embargo is important. Because guaranteeing its own security is basic to a state’s sovereignty\(^\text{434}\), states enjoy wide latitude in implementing non-military actions to secure or enhance their physical safety.\(^\text{435}\) This comports with a clear global interest in allowing states to resolve their international security disputes without resort to the use of force. In general, a state’s secu-
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When a state imposes an embargo for human rights' reasons, these important sovereignty concerns do not exist.

The need for a distinction is also clear in the context of cost-benefit analyses. When the United States implements a national security embargo, it theoretically runs the risk of military escalation. However, a human rights embargo works as a tacit admission that no security threat exists. Thus, a cost is imposed on the target state, but no increased risk is born by the state imposing the sanctions. Thrusting the externalities of the embargo entirely on the target state in this manner carries a serious risk of abuse on the part of the sanctioning state. When the sanctions are unilateral and, as in the case of the Cuban embargo, they operate in the face of clear international opposition, there is the additional concern that the sanctions amount to an unlawful intervention that rises to the level of unlawful coercion.

Thus, unilateral, comprehensive human rights embargoes disrupt the balance between competing sovereign rights in a way that national security embargoes do not. In fact, the U.S. sanctions on Cuba trample Cuban sovereign rights with impunity. The embargo's sheer exhaustiveness can also be seen as evidence of the aforementioned risk of abuse. Therefore, the embargo's purpose is especially vulnerable to criticisms based on its deleterious effects on basic human rights. It bears mentioning that even economic sanctions imposed multilaterally for "security" reasons must comply with legal standards that limit the degree to which they may harm the human rights of innocent people.

A 2000 report published by the United Nations Sub-Commission on the Promotion and Protection of Human Rights suggested a test to evaluate sanctions according to human rights and humanitarian law while maintaining

436 Of course, this is not to say that the Cuban government has a right to violate the human rights of its own citizens.

437 See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights [CESCR], General Comment 8, The Relationship Between Economic Sanctions and Respect for Economic, Social, and Cultural Rights, ¶ 7, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997) ("The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected people of that State.")
the viability of sanctions as a policy tool.\textsuperscript{438} According to this test, even national security sanctions must be imposed for valid reasons, target the proper parties and goods discriminatingly, and be time-limited, effective, and not widely opposed by the international community. The American embargo against Cuba fails to meet each element of this test. The embargo harms human rights in Cuba while purporting to promote them, is indiscriminate in targeting and harming large numbers of innocent Cubans, has lasted for nearly half a century, and has failed to dislodge the Cuban government from power. Finally, as mentioned above, it has been condemned repeatedly by 98\% of member states of the United Nations.

\textbf{C. Does the Embargo Enjoy the Support of the Cuban People?}

The embargo's legitimacy is further eroded by the fact that it is opposed by a vast majority of Cubans, the intended beneficiaries. Officially, the United States government argues that the embargo is in place for the benefit of the Cuban people as the most effective instrument available to promote an economic and political opening within Cuban society. One of the more interesting though least debated moral, political, and legal questions posed by the embargo has to do with what Cubans living in Cuba think of the embargo. It seems clear that those actually living under the Castro government would have a well-developed understanding of the policy tools most likely to improve their situation and that their views should be considered by outsiders intent on assisting them. At the very least, discussions about how to promote democracy within Cuban society should include the opinions of those Cubans living on the island. If a key goal of American policy is to foster a democratic culture in Cuba, then it ought to consult Cubans, the intended beneficiaries of U.S. policy, on their preferred way of moving toward greater future political and economic freedom.

During 2001-2002, this author carried out a study to gauge the views of average Cubans, a large group of people that are neglected in discussions about the embargo.\textsuperscript{439} The views of Cuban government officials, all of whom are highly critical of the sanctions, are well-known. The most inde-

\begin{footnotesize}
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\item Alberto R. Coll, "What Do Cubans Think about United Sanctions?" The study was carried out with generous funding from the Christopher Reynolds Foundation. All the materials comprising the study are available at the DePaul University College of Law Library.
\end{enumerate}
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A dependent institution in Cuban society, the Catholic Church, also has expressed its strong opposition on numerous occasions and across all levels, from parish priests to the Cuban Cardinal, as has the Pope during and since his 1998 visit to Cuba. Moreover, among Cuban dissidents, who number several hundred and comprise a wide range of views, the three most prominent leaders, Osvaldo Paya, Vladimiro Roca, and Elizardo Sanchez, all have spoken out strongly against American sanctions as counterproductive and harmful, and they have called for their immediate elimination without preconditions. In addition to the views of these significant sectors of Cuban society, knowing the views of common Cuban citizens would be invaluable.

The Cuban government frowns on public opinion polling, especially if the polls are not carried out under government or Communist Party supervision. Even if one were to obtain Cuban authorization for a formal poll, the results would not be free of controversy. Critics could easily claim that polls authorized by the government would cause many respondents who were afraid of government retaliation to avoid giving truthful answers. While falling short of a scientific poll, this study represented a serious effort to gauge Cuban public opinion regarding the embargo. In conducting an opinion survey in the form of a series of informal conversations with a wide, representative range of Cubans, several steps were taken to insure the highest degree of integrity and reliability possible.

The study was carried out by three persons, the author and two Cubans living on the island. Over a period of 12 months, we engaged a wide range of Cubans from all walks of life in informal conversations. These conversations invariably led to the subject of the country's relationship with the United States and the existing sanctions. The 153 persons interviewed came from the Havana metropolitan area, which encompasses a population of 2.2 million people. To make the conversation as non-threatening as possible for

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441 First, in order to insure the maximum degree of candor, all persons were asked for their views in an informal, casual setting free of any pressure or intimidation. Second, to avoid feelings of being interviewed or pressured to take a particular position, views on the embargo were solicited in the context of a broader, natural conversation. Third, the highest standards of methodological integrity were observed, and all opinions were recorded faithfully. Fourth, a deliberate effort was made to engage persons from different age groups, occupations, levels of education, and socio-economic backgrounds.
respondents and to encourage the free expression of their views, respondents were not asked directly for their views of the current Cuban political system or leadership. Nevertheless, without prompting, a number of people freely offered highly critical views of the government while others expressed their support. A significant number either made no comment on the issue or offered their viewpoints about the advantages and disadvantages of the existing system. Many did express their hope for economic change in the near future in the form of freer economic activity and higher levels of employment and prosperity. Most of them held the view that the sooner American sanctions come to an end, such economic changes would happen more quickly and be more far-reaching.

The survey served as a window not only into what Cubans think about the U.S. sanctions but also into their overall hopes and expectations. Beyond statistical measurements of particular views, it was useful to hear the voices of Cubans as they spoke, often in simple and moving terms, about their daily struggles and the kind of future they would like to see for their country. Government officials who make policy often do not consider the human dimension—the practical consequences of a particular policy for the lives of those most affected by it. By hearing the voices documented in this study, one is reminded of this human dimension and is challenged to consider how both the Cuban and American governments can craft future policies that will serve the Cuban people better than those currently in place.

It is possible to draw several tentative conclusions from this survey. An overwhelming majority of respondents (93%) were against the embargo. Only a small minority (7%) felt that the embargo was either good or that it did not matter. A larger group (14%) believed that although the embargo has a negative impact on the lives of ordinary Cubans, is harmful to the country, and should cease, the embargo's end would not improve their lives significantly because most of Cuba's problems are the result of its own government's poor economic policies and widespread mismanagement. Among the majority (76%) who believed that the elimination of the embargo would make an appreciable difference, opinion was split on how extensive this difference would be. 97% of these respondents had very high expectations and thought the lifting of the embargo would be "the end of all shortages" and provide more well-paid jobs. People with high expectations about the end of the embargo included government sympathizers as well as critics. There was also a small minority (3%) who strongly believed that the embargo's end would improve Cuba's situation but not as extensively as most Cubans thought. Their expectations were constrained by a sense that many of Cuba's economic problems would not be solved simply by ending the embargo.
They did not speak of government mismanagement or incompetence but of "structural problems" that Cuba faces in the global economy as a small Caribbean island and that are difficult to tackle, regardless of whether the economy is socialist or free-market.

The opinions revealed by the survey ran the whole gamut of the Cuban political spectrum and were quite illuminating. There were, for example, several persons interviewed who were connected with state security services who expressed their concern that a large influx of American tourists and trade would present huge challenges to the government's capacity for social and economic control. Other committed government supporters alluded to the dangers of a greater flow of trade and visitors undermining the system's ideological hold over the younger generation. At the other end of the spectrum, many respondents were highly critical of the government and complained about Castro's skillful use of the American sanctions to justify the country's poor economic conditions. The absence of anti-Americanism among respondents was particularly interesting. Even among those highly critical of the sanctions or of President Bush personally, there was not a single negative reference to the American people. The absence of comments about "imperialism" was striking and suggests that there is a powerful reservoir of goodwill in Cuba toward Americans in spite of four decades of hostility between the two governments.

The survey's results raised several important long-term issues. First, the existence of a large majority of people, including many government sympathizers, with high expectations about the beneficial consequences of the embargo's elimination suggests that if American sanctions came to an end and no substantial economic improvement ensued, the Cuban government would find itself with a major political problem on its hands. There would then be no obvious cause for the country's economic problems other than the policies of its government, and the government's credibility and legitimacy would suffer significantly.

Second, most Cubans seem to believe that American sanctions hurt the country and add to whatever problems result from Cuba's own inefficient socialist system. Though this perception has not negatively affected Cubans' sentiments regarding Americans, there are negative long-term consequences for U.S.-Cuba relations after Fidel Castro leaves power. In a future Cuba, many people may become convinced that United States' administrations added to the country's domestic political and economic problems. The impact of this perception on Cuba's future political culture is difficult to gauge, but it could hardly be positive or conducive to harmonious U.S.-Cuba relations. Such a development would be unfortunate from the standpoint of the
national interest of the United States.

Third, the existence of a large majority of Cubans who oppose the embargo challenges one of the core elements of American policy toward Cuba. American officials go to great lengths to explain that the United States does not want to impose a political solution on Cuba and that it is the Cubans themselves who must solve Cuba's political and economic problems. As James C. Cason, the former chief of mission for the U.S. Interests Section in Havana, has explained, "Cubans will decide how the Cuba of tomorrow takes shape and, more importantly, the role that each and every Cuban will have in it." This laudable objective seems to be undermined by a policy tool that the U.S. government continues to use even though most Cubans on the island find it undesirable and counterproductive from the standpoint of gaining greater economic and political freedom within the island. Indeed, if the chief goal of U.S. policy is to promote a more democratic and inclusive Cuban political culture, then the views of most Cubans concerning the best means to open their society should be taken into account as the United States crafts its Cuba policy.

The results of this author's survey are complemented by the most recent Gallup poll of Cuban public opinion, taken in late 2006 from a scientific sample of 1,000 residents from Cuba's two largest cities, Havana and Santiago de Cuba. Respondents were asked the following question: "If Cuba wanted to increase its commercial relations with one other country, which country would be the ideal partner for Cuba?" 44% of respondents indicated the United States while China was a distant second at 17% and Venezuela was further behind at 15%. These recent findings confirm a strong desire on the part of Cubans to have full commercial relations with the United States. The ongoing U.S. embargo currently stands as the principal obstacle to this goal.

CONCLUSION

The Cuban embargo's sole purpose, as articulated officially by the U.S. government, is to promote human rights and democracy on the island. However, because the embargo is comprehensive and indiscriminate, the...
embargo adversely affects the human rights of vast numbers of innocent Cubans, especially in the areas of economic, social, and cultural rights. The embargo has also failed since its inception more than four decades ago to contribute to the promotion of human rights on the island, and it continues to retard any possible political opening by fostering a siege mentality among Cuban leadership. Moreover, the embargo disregards the clear wishes of the people of Cuba for closer economic, family and cultural ties to the United States, thereby contradicting its own ostensibly democratic rationale and further detracting from the limited possibilities currently available to Cubans to create a more open society.

Moreover, the embargo can be justified legally only by grounding it in the classic state sovereignty paradigm according to which states can refuse to trade with any others regardless of the consequences to the target state’s population. This paradigm is completely at odds with the cosmopolitan paradigm which gives states a legitimate interest in the domestic human rights conditions of other states. This latter paradigm is the basis under which the United States has justified its “human rights” embargo against Cuba since 1992. Thus, both philosophically and as a policy instrument, the embargo is incoherent in its very rationale.

As an indiscriminate, comprehensive, unilateral peacetime measure taken by the world’s most powerful nation against a small developing country, the embargo also has come under the strict legal scrutiny of the international community. Because the embargo is a human rights embargo as opposed to a national security embargo, it is subject to a higher degree of scrutiny in terms of its impact on the human rights of the affected population. For the past ten years, overwhelming majorities at the GA, including all of the United States’ closest European, Asian and Latin American allies, have voted against the embargo. Since 2000, the votes in favor of the United States have been reduced to four out of 187: the United States itself, Israel, and two Pacific island mini-states that are heavily dependent on U.S. foreign aid. Even Israel, which ironically maintains full commercial relations with Cuba and allows its citizens to travel and invest there, has explained its vote not as a vote in favor of the embargo but as a vote against condemning the actions of its senior ally. The depth and breadth of the global consensus against the embargo point to serious international doubts regarding its legal permissibility and its appropriateness as an instrument for the promotion of human rights. Thus far, however, Washington shows no signs of paying any heed to this international consensus, just as it ignores what Cubans on the island think of the chief policy instrument though which the United States seeks to bring democracy and human rights to their country.