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THE TIME HAS COME: THE UNITED STATES, CUBA, AND THE END OF THE EMBARGO

INTRODUCTION

On February 7, 1962, President John F. Kennedy, acting under the authority of the Foreign Assistance Act of 1961,¹ issued Proclamation 3447.² Titled “Embargo on All Trade with Cuba,” the proclamation exclaimed that the “United States, in accordance with its international obligations, is prepared to take all necessary actions to promote national and hemispheric security by isolating the present Government of Cuba and thereby reducing the threat posed by its alignment with the communist powers.”³ The proclamation declared an embargo on all trade between Cuba and the United States,⁴ including “the importation into the United States of all goods of Cuban origin and all goods imported from or through Cuba.”⁵

President Kennedy’s move to ban trade with Cuba was an extension of an order by President Eisenhower that embargoed all exports to Cuba made in October 1960.⁶ This proclamation drew a bright line in the sand with respect to United States foreign policy that has directed Cuban-American relations for the past fifty-three years. Despite the occasional thaw in relations and attempts to de-escalate the tension in the relationship—particularly during the Carter administration in the 1970s—the embargo on trade with Cuba has existed since that fateful day. The United States has refused to end the embargo until Cuba holds democratic elections, Cuba restores basic human and political rights, and a Castro-led Communist government no longer rules Cuba.⁷ On December 17, 2014, reversing over fifty years of American foreign policy, President Obama, declaring a “New Course on Cuba,” announced major alterations

1. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (repealed 1978).

2. Proclamation No. 3447 27 Fed. Reg. 1085 (February 7, 1962); reprinted 76 Stat. 1446 (1962).

3. Proclamation No. 3447 27 Fed. Reg. 1085 (February 7, 1962); reprinted 76 Stat. 1446 (1962).

4. Claire Suddath, *A Brief History of U.S.-Cuba Relations*, TIME (Apr. 15, 2009), available at <http://content.time.com/time/nation/article/0,8599,1891359,00.html> (explaining that licensed sale of food and medical supplies were excluded from the embargo until the mid 1960s).

5. Proclamation No. 3447 27 Fed. Reg. 1085 (February 7, 1962); reprinted 76 Stat. 1446 (1962).

6. Gary Clyde Hufbauer et. al., *Case 60-3: US v. Cuba (1960-: Castro)*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, 1 (last updated October 2011), available at <http://www.iie.com/publications/papers/sanctions-cuba-60-3.pdf> [hereinafter Hufbauer].

7. 22 U.S.C. § 6065(a)(7) (2012) (adding, among many other conditions, the United States Congress, through the Cuban Liberty and Democratic Solidarity Act of 1996, established that the embargo cannot be lifted until a government has been formed that does not include Fidel Castro or his brother Raul).

to United States Policy towards Cuba.⁸ Acknowledging the failure of past United States policy, the President recognized that “decades of U.S. isolation of Cuba have failed to accomplish our objective of empowering Cubans to build an open and democratic country.”⁹

In this article I will examine the motivations and justifications for the embargo, specifically the evolving rationalization provided by the United States in implementing the sanctions, from expropriation of American property, to national security, and finally to human rights and the spread of democracy. The article will also discuss the effects of the embargo on Cuba, especially: the economy, the health of the population, and the healthcare sector of Cuba, its effect on the United States’ relationship with the rest of the world, and the continued struggle about the policy in the domestic political arena. Lastly, this article will discuss the current relationship between the two countries, specifically addressing the movements made by both the Obama administration and the government of Raul Castro to open up diplomatic relations and reduce the scope of the economic embargo.

A Chronology of the Embargo

While the proclamation President Kennedy executed is widely recognized as the moment when the embargo began, several events preceded it that set the stage for President Kennedy’s eventual decision to implement the embargo. The embargo was not a unilateral measure imposed by the American government but the result of a long chain of hostile policies of the two countries,¹⁰ each ratcheting up the tension, creating a confrontational and adversarial atmosphere that eventually resulted in a total breakdown in bilateral relations.

The United States had long been involved in Cuban affairs before the Cuban Revolution and the rise of Fidel Castro. The United States invested heavily in Cuba during Spanish rule and continued to hold significant interest in the island when the Cuban War of Independence began.¹¹ The explosion of the United States battleship *Maine* in Havana harbor in February 1898 caused the United States to intervene in the Cuban War of Independence,¹² and end it by August of the same year.¹³ This event marked the beginning of heavy United States involvement in

8. *Charting a New Course on Cuba*, WHITE HOUSE (Nov. 18, 2015 5:26 PM), <https://www.whitehouse.gov/issues/foreign-policy/cuba> [hereinafter WHITE HOUSE].

9. *Id.*

10. HELEN OSIEJA, ECONOMIC SANCTIONS AS AN INSTRUMENT OF U.S. FOREIGN POLICY: THE CASE OF THE U.S. EMBARGO AGAINST CUBA 1 (2006) [hereinafter OSIEJA].

11. JULIA E. SWEIG, CUBA: WHAT EVERYONE NEEDS TO KNOW 9 (2009) [hereinafter SWEIG] (explaining that when the war broke out in 1895, 95% of Cuba’s sugar exports were destined for the United States)

12. *Id.* at 8 (explaining that the Cuban War of Independence is known as the Spanish-American War in the United States).

13. *Id.* at 10.

Cuban affairs until the Cuban Revolution. The Cuban Constitution of 1904, enacted after Cuba won its independence from Spain and the subsequent American military occupation, contained the Platt Amendment, which constrained Cuba from conducting its own foreign affairs and international financial matters,¹⁴ as well as granting the United States the right to intervene in Cuba and establish naval bases. Specifically, Article III required that the government of Cuba consent to the right of the United States to intervene in Cuban affairs for

The preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.¹⁵

While the Cuban government repealed the Platt Amendment in 1934 and replaced it with a treaty that allowed the United States to retain Guantanamo Bay Naval Base,¹⁶ the influence of the United States government in Cuban affairs continued until its break with Fidel Castro in the 1960s.

After the Cuban Revolution succeeded in overthrowing the regime of Fulgencio Batista,¹⁷ in an effort to maintain cordial relations between the two countries, the United States immediately recognized the new Cuban government.¹⁸ After an initial period of calm relations between the two countries, the Cuban government, under the influence of Fidel Castro, began to align itself closer with the Soviet Union. This behavior led the United States to reduce the sugar quota to Cuba and instruct American oil firms not to refine crude oil supplied by the Soviet Union.¹⁹

14. *Id.* at 11-12.

15. Treaty Between the United States and the Republic of Cuba Embodying the Provisions Defining Their Future Relations as Contained in the Act of Congress Approved March 2, 1901, U.S.-Cuba, May 22, 1903; General Records of the United States Government, 1778-2006, RG 11, National Archives.

16. Lester H. Woolsey, *The New Cuban Treaty*, 28 AM. J. OF INT'L L. 530, 533 (1934) (discussing the treaty of relations signed between the two countries and the extension of the lease on the naval base at Guantanamo Bay).

17. SWEIG, *supra* note 11, at 16-27 (Fulgencio Batista was a sergeant in the Cuban Army who helped lead the "Sergeants' Revolt" in 1933, toppling the provincial regime of Carlos Manuel de Cespedes. Batista did not take power himself, choosing instead to remain in the background and influence events behind the scenes until 1940, when he did run and win the presidency. He served from 1940-1944. He chose to run for the presidency again in 1952 and, realizing that he would not win, he initiated another coup and assumed power as a dictator. His reign as dictator was marred by authoritarian control of the press, university, and congress, as well as embezzlement of huge sums from the soaring economy. Batista's coup in 1952 created a new generation of revolutionaries that felt that "brittle democratic institutions, polarization, and corruption had made the path of electoral politics a dead end." This perspective contributed to the creation of the revolutionary movement that would ultimately topple Batista on New Year's Eve 1958); *Fulgencio Batista*, ENCYCLOPEDIA BRITANNICA (2015), available at <http://www.britannica.com/biography/Fulgencio-Batista>.

18. Hufbauer, *supra* note 6, at 1 (noting that the United States recognized the revolutionary government on January 7, 1959).

19. *Id.* at 1.

In response to these actions, the Cuban government subsequently executed a series of government actions that slowly expropriated the assets of American citizens in Cuba. Each expropriation, a reaction to a measure taken by the United States that Cuba perceived as an encroachment on Cuba's sovereignty.

The Cuban government's reaction to the reduction of the sugar quota was to adopt Law No. 851, which characterized the United States action as an "act of aggression."²⁰ Cuban Law No. 851 empowered the Cuban President and Prime Minister to nationalize, by forced expropriation, property or enterprises in which American nationals possessed an interest—a power that Fidel Castro exercised immediately.²¹ In October of 1960, President Eisenhower, further escalating the situation, imposed an embargo on exports to Cuba, reduced the sugar quota to zero and blacklisted vessels carrying cargo to and from Cuba from carriage of United States government-financed cargo.²² When, in January of 1961, Fidel Castro acknowledged his affiliation with Marxist-Leninism and described the revolution as socialist and anti-imperialist, the United States had heard enough and severed diplomatic relations and restricted travel to Cuba.²³

The Bay of Pigs Invasion²⁴ in April 1961 exacerbated the problem and increased the already heightened tensions between the two countries. The attempted overthrow of Fidel Castro pushed him further into the arms of the Soviet Union and only served to increase his well-founded paranoia that the United States would stop at nothing to remove him from power and reverse the Cuban Revolution. The situation came to a head with the discovery of Soviet missiles in Cuba in October of 1962 and the resulting Cuban Missile Crisis.²⁵ The agreement reached between the United States and the Soviet Union, which ended the Cuban Missile Crisis, established a policy of disengagement from the United States in relation to the Cuban government. Part of the agreement to end the crisis was a commitment from the United States not to invade Cuba or overtly attempt the overthrow of the Castro regime. However, while the United States would not take any overt action to remove Fidel Castro from power, the agreement did not deter it from engaging in continued pressure on

20. Berta Esperanza Hernandez-Truyol, *Embargo or Blockade? The Legal and Moral Dimensions of the U.S. Economic Sanctions on Cuba*, 4 INTERCULTURAL HUM. RTS. L. REV. 53, 64 (2009) [hereinafter Hernandez-Truyol].

21. *Id.* at 64.

22. Hufbauer, *supra* note 6, at 1.

23. Danielle Renwick, *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (Aug. 4, 2015), <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

24. JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/The-Bay-of-Pigs.aspx> (last visited Nov. 18, 2015 6:09 PM) (explaining the Bay of Pigs Invasion was a failed military invasion of Cuba undertaken by a CIA-sponsored force of Cuban exiles on April 17, 1961).

25. *Id.*

the Cuban government through further economic measures and less overt, non-military actions.

Since the end of the Cuban Missile Crisis, every American administration until the current one, has kept up a near constant reign of pressure against the Cuban government in an attempt to either alter its behavior or remove it from power completely. The methods various administrations have employed to enforce the regime have included: invoking the Trading with the Enemy Act, which froze all Cuban assets in the United States;²⁶ the banishment of Cuba from the Organization of American States (OAS);²⁷ the passage of the Cuban Democracy Act of 1992;²⁸ the passage of the Libertad Act of 1996;²⁹ and the passage of the Trade Sanctions Reform and Export Enhancement Act.³⁰ These acts, along with severing diplomatic relations with Cuba and including it on the list of state sponsors of terrorism, have succeeded in alienating Cuba from the United States, even if they have not accomplished the objectives of the embargo. This pattern of antagonism and confrontation by both sides has continued for over fifty years, and the Obama and Raul Castro administrations' have only recently been interrupted this pattern because of a desire to normalize relations between the two countries. These efforts represent the first truly deliberate attempts to change the status quo and redefine the relationship in over half a century.

Overview of Economic Sanctions against Cuba

The United States Department of Treasury Office of Foreign Assets Control (OFAC), which oversees and imposes penalties—even occasionally grants licenses to permit activities covered by the sanctions—imposes the primary regulations of United States sanctions against Cu-

26. 50 U.S.C. app. §§ 1–44 (2012) (the Trading with the Enemy Act of 1917 prohibits any American citizen from trading with, transporting, or carrying any letter or writing of an enemy of the United States, as defined by the statute. It was amended in 1977 to only apply to wartime activities but the sanctions against Cuba were grandfathered in).

27. Hufbauer, *supra* note 6, at 3, 23 (in July of 1975, the OAS adopted a resolution to allow individual members to reestablish relations with Cuba pursuant to national interests and policy. On June 3, 2009, the OAS lifted the ban imposed in January 1962 that removed Cuba from the organization because of its adherence to Marxist-Leninist ideology, which was deemed incompatible with the inter-American system).

28. 22 U.S.C. §§ 6001–10 (2012) (the Cuban Democracy Act of 1992 was an attempt to tighten the embargo in the wake of the fall of the Soviet Union by prohibiting foreign-base subsidiaries of U.S. companies from trading with Cuba, as well as further restricting travel to Cuba by U.S. citizens and remittances by Cuban Americans to family members in Cuba).

29. 22 U.S.C. §§ 6021–91 (2012) (the Cuban Liberty and Democratic Solidarity Act of 1996 was a further escalation of the embargo by the United States. Along with codifying much of the embargo, it also extended (controversially) the territorial application of the initial embargo to apply to foreign companies trading with Cuba, as well as attempting to cover property formerly owned by U.S. citizens but confiscated by the Cuban government after the revolution).

30. 22 U.S.C. §§ 7201–11 (2012) (the Trade Sanctions Reform and Export Enhancement Act prohibits any United States citizen from providing “payment or financing terms for sales of agricultural commodities or products to Cuba” except “payment of cash in advance” or “financing by third country financial institutions.” The act also prohibits any “tourist” travel to Cuba).

ba.,³¹ Penalties for violating the sanctions can be either civil or criminal and can include large fines and even imprisonment for severe violations.³²

Under the sanctions imposed by the United States against Cuba, with some limited exceptions, it is unlawful for any “person . . . subject to the jurisdiction of the United States”³³ to do business with or in Cuba.³⁴ The distinction “subject to the jurisdiction” is quite broad and allows the United States government to extend the reach of the sanctions quite expansively. The term covers four distinct classes of people and entities. The first class is any citizen or lawful permanent resident of the United States.³⁵ This jurisdiction extends to wherever that person may be located, wherever they go, and regardless of whom they work for.³⁶ The second class covered by the regulations is any person, regardless of nationality, who is physically present in the United States.³⁷ The third class is any company organized under the laws of the United States, or any state, and that company’s foreign branches, wherever located.³⁸ The last class is any entity “owned or controlled” by a United States citizen, a permanent resident, or a United States organized company, including foreign organized subsidiaries of United States companies.³⁹

These classes of people and entities covered by the sanctions are quite comprehensive and have caused tremendous amounts of conflict both within the United States and internationally. Some criticisms of the sanctions include the right of the United States to extend its jurisdiction extraterritorially, to restrict the travel of its citizens, and to prevent United States businesses from engaging in certain activities, severely restricting their ability to compete successfully in a truly international business arena. Many American companies, especially agricultural producers, have joined the chorus of opposition to the embargo, arguing for its demise in order to open up new markets for their goods.⁴⁰

31. Scott Maberry, *Overview of U.S. Economic Sanctions*, 17 CURRENTS: INT’L TRADE L. J. 52 (2008–2009).

32. 31 C.F.R. § 501.701 (2015); 50 U.S.C. § 1705 (2012).

33. 31 C.F.R. § 515.201(a)(1) (2015).

34. Hernandez-Truyol, *supra* note 20, at 53.

35. 31 C.F.R. § 515.329(a) (2015).

36. 31 C.F.R. § 515.330(a) (2015).

37. 31 C.F.R. § 515.330(a)(2) (2015).

38. 31 C.F.R. § 515.329(d) (2015).

39. 31 C.F.R. § 515.329(d) (2015).

40. FLYNN ADCKOCK ET. AL., *ECONOMIC IMPACT OF U.S. AGRICULTURAL EXPORTS TO CUBA*, 41 (2001). (certain estimates calculate that if the embargo were removed agricultural exports could reach \$1.24 billion annually and that exports to Cuba could stimulate an additional \$3.8 billion in total economic output, with \$2.8 billion in direct and indirect impacts and another \$818 million in household income).

Retaliation for Expropriation of American Property

The United States government has provided multiple reasons as to why it instituted the initial trade restrictions in 1960 and why it continues the full embargo today. During the Cold War between the United States and the Soviet Union, it justified the embargo with the need to maintain national security and prevent the expansion of Communism in the Western Hemisphere. After the dissolution of the Soviet Union and the fall of Communism, the rationale focused on humanitarianism, particularly centered on the notion of human rights and the spread of democracy. The United States has accused the Cuban government, first under Fidel Castro and now under Raul Castro, of widespread human rights abuses, specifically the repression of expression, restriction of travel, large-scale incarceration of political opponents and other arbitrary detentions and short-term imprisonments.⁴¹ However, none of these reasons explains why the United States instituted the initial restrictive trade measures in 1960. The United States imposed those measures not because of national security or humanitarian interests but because of economic interests.

The United States initiated the original trade restrictions in retaliation for Cuba's nationalization of American businesses and expropriation of American property in Cuba. This has been the one unifying rationale for the implementation and continuation of the embargo, having survived the changes in reasoning and been used to justify every congressional and administrative action against Cuba relating to the sanctions since their inception.⁴²

After Cuba signed a trade agreement with the Soviet Union to supply it with sugar in exchange for crude oil, the United States cancelled the its sugar quota with Cuba and instructed United States oil firms not to refine the oil provided by the Soviet Union.⁴³ These actions had a dramatic effect on the Cuban economy, especially in relation to the reduction in the sugar quota. At this point in time, Cuba was the world's largest exporter of sugar, accounting for thirty-three percent of total world sugar exports in 1959.⁴⁴ Sugar exports contributed twenty-five percent of Cuba's national income and more than eighty percent of its total export revenue.⁴⁵

The United States designed and implemented these initial sanctions to weaken the Cuban economy and influence Castro's behavior towards

41. *World Report 2014: Cuba*, HUMAN RIGHTS WATCH, 1–2 (2014), https://www.hrw.org/sites/default/files/related_material/cuba_6.pdf.

42. John W. Smagulat, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 21 N.C.J. INT'L L. & COM. REG. 65, 67 (1995–1996) [hereinafter Smagulat].

43. Hufbauer, *supra* note 6, at 1.

44. The Economic Impact of U.S. Sanctions with Respect to Cuba, Inv. No. 332-413, USITC Pub. 3398, 5-31 (Feb. 2001) (Final) [hereinafter USITC].

45. *Id.* at 5-37, 5-38.

the Soviet Union.⁴⁶ The United States government hoped that by applying economic pressure on Cuba through the sanctions that Fidel Castro would change his behavior towards the United States, sever ties with the Soviet Union, and align itself with the democratic, free-market countries of the West. Unfortunately for the United States, the desired result did not occur. In retaliation to these initial sanctions, Cuba passed the National Law on July 6, 1960, which authorized Cuba to nationalize all interests owned by Americans in Cuba, without regard to the amount owned by the American citizen.⁴⁷ The National Law specifically cites interference from the United States government in Cuban economic affairs as justification for the law.

The attitude assumed by the Government and legislative power of the United States of America of constant aggression for political purposes against the fundamental interests of the Cuban economy...obliges the Revolutionary Government to adopt without hesitation, also measures that it may deem pertinent for the defense of the national sovereignty and the free economic development of our country.⁴⁸

This law provided Cuba with the legal means to expropriate property owned by United States nationals in Cuba. Using the National Law, the Cuban government nationalized all American owned industries and expropriated all American owned property in Cuba by October 5, 1960.⁴⁹ This nationalization provided the central rationale for the implementation of the trade embargo: fair and equitable compensation by the Cuban government to American property owners for their confiscated property.⁵⁰

Although the United States never questioned the right of the Cuban government to expropriate,⁵¹ the process and outcomes were.⁵² The unwillingness of the Cuban government to provide prompt, adequate, and effective compensation was in violation of international law and was of

46. OSIEJA, *supra* note 10, at 72.

47. *Cuba: Nationalization Law*, 55 AM. J. INT'L L. 822, 822-24 (1961) (English translation).

48. *Id.*

49. Smagulat, *supra* note 42, at 75 (as of February 3, 2015, the amount if awards established by the U.S. Foreign Settlement Claims Commission for Cuba is \$1,902,202,248.95 in principal. These settlement claims will be discussed later in the paper); U.S. DEP'T OF JUSTICE: FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S., <http://www.justice.gov/fcsc/claims-against-cuba> (last visited Nov. 19, 2015 9:43 AM).

50. *See* Smagulat, *supra* note 42 at 75.

51. G.A. Res. 1803 (XVII) (Dec. 14, 1962) (it is generally accepted international law that because of state sovereignty, each state has the right to nationalize, expropriate, or requisition property within its borders. However, this right is conditioned by the requirement of the host country to exercise due process, act in good faith, and provide appropriate compensation; for further discussion on the issue expropriation in international law *see* G.C. Christie, *What Constitutes A Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307 (1962)).

52. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (establishing the rule in the United States that courts should refrain from passing judgment on the validity of confiscations under international law out of deference to the other branches. The United States government possesses adequate means to respond to such acts and if it chooses not to it is in the "judgment of the national interest").

great concern to the United States government. The refusal of the Cuban government to address the claims of American property owners provided the United States the reasoning to institute the initial measures of the trade embargo. This rationale, while becoming secondary in many ways to the other rationales mentioned above, has remained present in the minds of policymakers and politicians and has been a sticking point for both nations in regards to possible easing of trade restrictions. The United States government has set forth multiple regulations referencing the expropriations, including the Foreign Assistance Act of 1961.⁵³ That act specifically refers to Cuba and property rights:

No assistance shall be furnished under this [Act] to any government of Cuba . . . until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens . . . or to provide equitable compensation to such citizens and entities for property taken . . . on or after January 1, 1959, by the government of Cuba.⁵⁴

The most recent legislation regarding the embargo in Cuba also mentions the property taken by the Castro regime. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,⁵⁵ more commonly known as Helms-Burton, after the members of Congress who sponsored the bill,⁵⁶ specifically sets the protection of American property in Cuba as a purpose of the Act. The act states specifically that one of its purposes is “to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.” The Helms-Burton Act also contains a provision titled “Protection of Property Rights of United States Nationals,” which states as one of its findings that “the wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development.”⁵⁷ It continues to stipulate that the “United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.”⁵⁸

The United States has also set up a mechanism for American citizens to register claims against the government of Cuba for their expro-

53. Act of Sept. 4, 1961, Pub. L. No. 87-195, 75 Stat. 424, 22 U.S.C. § 2370 (1998).

54. 22 U.S.C. § 2370(a)(2) (2012).

55. 22 U.S.C. §§ 6021–91 (2012).

56. Andrew Mihalik, *The Cuban Embargo: A Ship Weathering the Storm of Globalization and International Trade*, 12 CURRENTS INT’L TRADE L.J. 98, 98 (2003) (U.S. Senator Jesse Helms (R-North Carolina) and U.S. Representative Dan Burton (R-Indiana) co-sponsored Helms-Burton on February 2, 1995).

57. 22 U.S.C. § 6081(2) (2012).

58. 22 U.S.C. § 6081(10) (2012).

riated property. Under the International Claims Settlement Act of 1949,⁵⁹ the Foreign Claims Settlement Commission adjudicates claims on behalf of United States nationals against foreign governments. Title V of that act specifically empowers the commission to determine the amount and validity of claims against the government of Cuba that have arisen since January 1, 1959,⁶⁰ based upon the following two criteria:

1. losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property by that government; and
2. the disability or death of nationals of the United States resulting from actions taken by or under the authority of that government.⁶¹

The commission has completed two programs to determine the total amount of claims by United States nationals against the government of Cuba. The first program covered from the dates of January 1, 1959 to January 1, 1967⁶² and the second program covered from the dates of May 1, 1967 and August 11, 2006.⁶³ These two programs validated 5,913 claims amounting to roughly \$1.9 billion in principal.⁶⁴ Considering inflation from when Cuba seized the properties over forty years ago, the current value of these claims could be as high as \$40 billion.⁶⁵ This clearly establishes, through legislative action, that the confiscation of American owned property in Cuba, along with the recovery of said property, continues to be a principal reason for the establishment and continuation of the embargo.

Threat to United States National Security

A second reason the United States has promulgated for the trade embargo against Cuba is that it is a matter of national security and it is necessary to prevent the spread of Communism, specifically in the Western Hemisphere. The second half of that reason no longer exists with the fall of Soviet Communism and the dissolution of the Soviet Union in 1991. But prior to that, the threat of Communism was very real and the existence of a Communist country aligned with the Soviet Union sitting ninety miles off the shore of the United States was a genuine national security concern.

59. 22 U.S.C. §§ 1621–45 (2012).

60. 22 U.S.C. § 1643 (2012).

61. U. S. DEP'T OF JUSTICE: FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S., <http://www.justice.gov/fcsc/claims-against-cuba> (last visited Nov. 19, 2015 9:43 AM).

62. 22 U.S.C. § 1643 (2012).

63. 22 U.S.C. § 1623 (2012).

64. U. S. DEP'T OF JUSTICE: FOREIGN CLAIMS SETTLEMENT COMM'N OF THE U.S., <http://www.justice.gov/fcsc/claims-against-cuba> (last visited Nov. 19, 2015 9:43 AM). (\$1,90,202,248.95 is the exact amount validated).

65. GARY CLYDE HUFBAUER & BARBARA KOTSCHWAR, ECONOMIC NORMALIZATION WITH CUBA: A ROADMAP FOR US POLICYMAKERS 5 (2014) [hereinafter HUFBAUER & KOTSCHWAR].

While the notion that a communist Cuba posed a security threat to the United States existed from the moment Castro aligned Cuba with the Soviet Union, clearly demonstrated by the desire of the United States to remove Castro and the efforts taken to accomplish that goal through the Bay of Pigs⁶⁶ invasion, the real national security threat exposed itself with the discovery of medium-range ballistic missiles (MRBM) sites in Cuba by a U2 over flight.⁶⁷ The discovery of Soviet MRBM's in Cuba instigated what is widely known as the Cuban Missile Crisis,⁶⁸ a thirteen-day standoff between the United States and the Soviet Union over the placement of missiles and bombers in Cuba. This crisis made it apparent to the government of the United States that a communist Cuba aligned with the Soviet Union posed not only an economic threat to the United States but a national security threat as well. Thus, the Cuban Missile Crisis created a significant amount of consternation in the United States government and further validating the implementation of the embargo within the halls of the Kennedy administration.

Cuba's alignment with the Soviet Union wasn't the only reason the United States viewed it as a national security threat. The success of the Cuban revolution inspired and empowered the Cuban government with the motivation and enthusiasm to spread their revolutionary fervor to other parts of the world that it felt were ripe for revolution. The Cuban revolutionaries saw a world with extreme poverty, racial discrimination, underdevelopment, and injustice.⁶⁹ High on their victory and pulsing with hubris and bravado, they believed they could export their revolution to the decolonization fights in process around the world.⁷⁰

The attempt by the Cuban government to export its revolutionary philosophy caused significant alarm in the United States. The United States government viewed Cuba's support for revolutionary states and revolutionary movements, as well as its ties with Communist and non-Communist Left, especially in Latin America, as a direct threat to not only its hegemony in the region but also the free-market and capitalist economic system that it fully supported. Cuba's active involvement in revolutionary activities around the world provided even greater justification for isolating the country diplomatically and economically, especially during the Reagan administration.

66. JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <http://www.jfklibrary.org/JFK/JFK-in-History/The-Bay-of-Pigs.aspx> (last visited Nov. 19, 2015 11:11AM). (the invasion occurred on April 17, 1961).

67. *Cuban Missile Crisis*, HARV. KENNEDY SCH. BELFER CTR. FOR SCI. AND INT'L AFFAIRS www.cubanmissilecrisis.org/background/timeline/ (last visited Nov. 19, 2015 11:15AM) (the flight occurred on October 14, 1962).

68. *Id.*

69. SWEIG, *supra* note 11, at 105.

70. *Id.* at 104.

While the threat of the spread of Soviet Communism died with the fall of the Soviet Union, the opinion that Cuba posed a security threat to the United States persisted even after its demise. In passing the Helms-Burton Act of 1996,⁷¹ the United States Congress stipulated in its findings that one of the motivations for passing the act was that “for the past 36 years, the Cuban Government has posed and continues to pose a national security threat to the United States”⁷² and that the “Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism, such as the training and supplying of groups dedicated to international violence.”⁷³ Thus, with the fall of the Soviet Union, the national security rationale morphed into a concern about the Cuban government’s continued support for revolutionary movements around the world, its alleged⁷⁴ support for terrorism, and the threat of mass migration of Cubans across the Straits of Florida.

The possibility of a mass exodus of Cuban refugees to the United States is not only real, but also a reality that the United States has experienced in the past on more than one occasion. The existence of large-scale immigration to the United States by Cubans has existed for years, predating the Cuban Revolution in 1958. As opposition to the dictatorship of Fulgencio Batista increased and spread across the island in the late 1950s, the flow of immigrants to the United States increased. With the fall of Batista, the profile of immigrants shifted and became predominately composed of loyalists to his regime who feared retribution by the Revolutionary government. After Castro came to power, the profile shifted again, and the number of immigrants increased dramatically.⁷⁵ Many people started immigrating because they opposed the Castro regime or were concerned about life opportunities in Cuba as it moved steadily toward communism.⁷⁶

In response to the desire of Cubans to immigrate to the United States, along with the corresponding desire of the United States to welcome them and demonstrate that the Cuban Revolution was a failure, United States immigration policy toward Cuba was and is extremely re-

71. 22 U.S.C. §§ 6012–91 (2012).

72. 22 U.S.C. § 6021(28) (2012).

73. 22 U.S.C. § 6021(14) (2012).

74. Country Reports on Terrorism, U.S. Dep’t of State, Bureau of Counterterrorism (2013), <http://go.usa.gov/3mduA>. (according to U.S. State Department reports on state sponsors of terrorism, Cuba was included on the list because of its position that acts by legitimate national liberation movements were not terrorism, alleged support for designated Foreign Terrorist Organizations, as well as a safe haven for suspected terrorists, and its refusal to turn over U.S. fugitives that have taken refuge on the island). [hereinafter Reports on Terrorism].

75. RUTH ELLEN WASEM, CONG. RESEARCH SERV., R40566, CUBAN MIGRATION TO THE UNITED STATES: POLICY AND TRENDS 1 (2009), available at <https://www.fas.org/sgp/crs/row/R40566.pdf> [hereinafter WASEM] (explaining that the exodus of Cubans after the fall of Batista peaked at 78,000 in 1962).

76. Jarret Barrios, *People First: The Cuban Travel Ban, Wet Foot-Dry Foot and Why the Executive Branch Can and Should Begin Normalizing Cuba Policy*, 11 CONN. PUB. INT. L.J. 1, 5 (2011–2012) [hereinafter Barrios].

laxed in comparison to the United States immigration policy towards other countries.⁷⁷ Cuban exiles are generally admitted under the Attorney General's powers of parole, "most without immigrant visas, security checks or confirmed means of financial support required by other immigrants."⁷⁸ The passage of the Cuban Adjustment Act (CAA)⁷⁹ in 1966 adjusted this policy slightly, which essentially clarified and continued the executive policy of admitting Cubans that had previously been in place.

Under the CAA, as amended, any Cuban admitted or paroled into the United States and present for at least one year can adjust to permanent resident status—an opportunity that no other group or nationality has.⁸⁰ This has had the practical effect of allowing essentially any Cuban admitted at the border to become permanent residents.

In the late 1970s, the Cuban economy was suffering due to the stagnant centralized bureaucracy, declining workforce motivation, and the spike in oil prices. Along with increased exposure to new ideas and outside perspectives and realities because of the end of the travel ban by the Carter administration, many Cubans reevaluated their own society and questioned Cuba's vilification of the United States, as well as Cuban exiles living in the United States.⁸¹ This change in perspective increased migratory pressures on the Cuban populace and precipitated the first major migration movement between Cuba and the United States since the early days of the Cuban Revolution.

The Mariel boatlift was the first time the Cuban government opened a port to anyone wishing to depart the country since Cuba and the United States had agreed to allow Cubans to fly from Cuba to Miami on United States government chartered "Freedom Flight" in 1965.⁸² Responding to the growing political crisis in Cuba and the desire of large numbers of Cubans to leave Cuba, Castro opened the port of Mariel and allowed all who wished to leave the country to do so. President Carter responded by declaring, "Ours is a country of refugees We'll continue to provide an open heart and open arms to refugees seeking freedom from communist domination."⁸³ Between April and October 1980, roughly 125,000 Cubans migrated to the United States in small boats, many organized by the Cuban exile community in Miami.⁸⁴ Along with allowing any Cuban to leave the country, Castro also released significant numbers of prisoners and mental patients, leading the mayor of Miami to quip,

77. *Id.* at 5.

78. *Id.*

79. 8 U.S.C. § 1255 (2012).

80. WASEM, *supra* note 75, at 2.

81. SWEIG, *supra* note 11, at 96.

82. Sylvia Rusin et al., *Cuban Immigrants in the United States*, MIGRATION POLICY INST. (Nov. 19, 2015 12:02 PM), <http://www.migrationpolicy.org/article/cuban-immigrants-united-states>. (estimating that about 300,000 Cubans arrived this way between 1965 and 1973).

83. RICHARD GOTT, *CUBA: A NEW HISTORY* 268 (2004).

84. *Id.* at 266.

“Fidel has just flushed his toilet on us.”⁸⁵ The boatlift also caused a significant financial strain on the United States, costing the United States over \$250-million to receive and resettle the refugees in the first year alone.⁸⁶

Mass migration from Cuba to the United States occurred again in the mid-1990s. After the collapse of the Soviet Union, and the subsequent contracting of the Cuban economy, large numbers of Cubans wished to leave the country. Thousands of “balseros,” or rafters, took to the sea in an attempt to reach the shores of Florida.⁸⁷ Fidel Castro accused the United States in fostering the desire of Cubans to leave the country and threatened to open the ports and allow large numbers to migrate if the United States didn’t help deter illegal boat departures.⁸⁸ The ensuing migration crisis resulted in the Cuban Migration Agreement of 1994,⁸⁹ which established what is popularly known as the “Wet Foot-Dry Foot” policy. This policy required the United States government to repatriate Cubans interdicted on the open seas, a change in the policy that previously existed, which allowed all Cubans the right to reach American shore, in spite of where American officials intercepted them. However, it continued to allow those Cubans who were fortunate enough to elude United States’ officials and reach American shores to gain immediate clearance as legal immigrants.⁹⁰

The periodic migration issues experienced by the United States since the Cuban Revolution has made it apparent that such migration can represent a national security threat to the United States. The close proximity of Cuba to the United States, along with the desire for large numbers of Cubans to leave the island and Castro’s willingness to use migration as threat or weapon to manipulate the United States,⁹¹ presents a unique and continuing challenge to the United States, helping to justify the continued implementation of the embargo in the minds of American officials.

The Humanitarian Rationale for the Embargo

A third reason promulgated by the United States government for the continuation of the trade embargo against Cuba, especially since the fall of the Soviet Union, is one rooted in humanitarianism. The establishment of democracy on the island, the implementation of free market capitalism, and the protection of human rights have largely replaced the ra-

85. SWEIG, *supra* note 11, at 98.

86. JAIME SUCHLICKI, HISTORICAL DICTIONARY OF CUBA 374 (2d ed. 2001).

87. Barrios, *supra* note 76, at 7.

88. *Id.*

89. WASEM, *supra* note 75, at 2.

90. Barrios, *supra* note 76, at 8.

91. 22 U.S.C. § 6012(19) (2012) (the Helms-Burton Act also included the accusation of blackmail by Fidel Castro in relation to migration in its findings).

tionale of national security as the most significant reason for the perpetuation of the embargo. The stated policy of the United States government in passing the Cuban Democracy Act included an intention to “seek a peaceful transition to democracy and a resumption of economic growth . . . to continue vigorously to oppose the human rights violations of the Castro regime” and “to encourage free and fair elections to determine Cuba’s political future.”⁹² The Helms-Burton Act cited the “repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights,”⁹³ specifically “torture in various forms . . . as well as execution, exile, confiscation, political imprisonment, and other forms of terror repression”⁹⁴ as a justification for its passage.

Almost since the beginning of the Castro regime, the United States has accused it of human rights abuses, including the use of torture and mass incarceration of the regime’s political opponents. The United States maintained its accusations towards Cuba for human rights abuses throughout the Cold War but really began to focus on them as a reason for continuing, even strengthening the embargo after the end of the Cold War. After the fall of the Soviet Union and the conclusion of the Cold War, the United States’ foreign policy altered its focus generally from fighting communism to humanitarian interests, especially focused on political and civil rights. In an effort to consolidate its victory over communism and increase globalization, the United States placed greater emphasis on the spread of democracy and free-market economics to help the developing world progress politically and economically.⁹⁵ This was apparent when the administration of George W. Bush published a report, which argued that Cubans suffered tremendous human rights abuses, including lack of basic necessities and absence of political rights. The report argued that the United States’ policy should be the hastening of the end of the Castro regime and the transition to democracy and free market economics, even suggesting possible policy initiatives and actions by the United States government may take in support of those objectives.⁹⁶ These actions were part of a larger policy espoused by the Bush administrations, centered on the goal of spreading democracy around the world. The United States hoped that if the developing world

92. 22 U.S.C. § 6002(1)(5)(7) (2012).

93. 22 U.S.C. § 6021(4) (2012).

94. 22 U.S.C. § 602115) (2012).

95. James M. Lindsay & Ivo H. Daalder, *The Globalization of Politics: American Foreign Policy for a New Century*, COUNCIL ON FOREIGN RELATIONS, (Nov. 19, 2015 12:16PM), <http://www.cfr.org/world/globalization-politics-american-foreign-policy-new-century/p6330>.

96. CONDOLEEZZA RICE, & CARLOS GUTIERREZ, COMMISSION FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT (2006).

could make dramatic progress in these areas, then the entire world would be safer and more secure.⁹⁷

Effects of the Embargo on Cuba

Before the Cuban Revolution and the ascension of Fidel Castro to power in Cuba, the United States was Cuba's largest trading partner and heavily involved in all matters of Cuban affairs. In 1958, the United States accounted for sixty-seven percent of Cuba's exports and seventy percent of Cuba's imports.⁹⁸ Among those exports was sugar, which the United States received 2.9-million metric tons of from Cuba in 1959, amounting to seventy-two percent of the United States' import quota for sugar.⁹⁹

The implementation of the economic embargo had far-reaching effects on the Cuban economy and by extension, the Cuban population. Prior to the embargo, the United States had been Cuba's largest trading partner and a source of supply for most of the materials used in the Cuban economy. These items included both food items and medicines, but also manufacturing parts and machinery. All sectors of Cuban society felt the effect on the Cuban economy from the embargo. Cubans experienced a shortage of dietary items such as chicken, rice, and pork, affecting their eating habits and forcing them to look for alternatives.¹⁰⁰

The unavailability of American food production technology and equipment and the lack of medications was another consequence of the embargo. These shortages, or complete unavailability, forced Cubans to look elsewhere for alternatives or replacements, creating a separate set of problems. Cuba was forced to import alternatives from locations that could be great distances away, increasing transportation costs exponentially.¹⁰¹ Also, because of the nature of the relationship between the United States and Cuba prior to the Cuban Revolution and the heavy United States involvement in the Cuban economy, most of the heavy machinery in Cuba was American, as well as private property, such as Chevy cars. The embargo prevented the importation of replacement parts and new machinery from the United States, forcing Cuba to find replacements elsewhere. This was typically accomplished through the Soviet Union or one of its allies. Unfortunately for Cuba, much of this replacement machinery was unsuited for work in the local, tropical climate and was therefore practically useless.¹⁰² These deficiencies caused the

97. George W. Bush, President of the United States, Second Inaugural Address (Jan. 20, 2005), available at <http://www.inaugural.senate.gov/swearing-in/address/address-by-george-w-bush-2005>. (proclaiming in his second inaugural address that "the ultimate goal was ending tyranny in the world.")

98. USITC, *supra* note 44, at 3-1.

99. *Id.* at 5-37.

100. OSIEJA, *supra* note 10, at 77.

101. *Id.*

102. *Id.*

Cuban population to be less efficient, which also contributed to the decline in production.

After assuming power, the government of Fidel Castro began to implement measures to transform the economy and turn Cuba into a socialist country. Some of the measures included nationalizing the means of production, reorganizing the public sector for direct management of production and trade, and centralizing the planning of virtually all-economic activity.¹⁰³ This shift in the Cuban economy coincided with the increased cooperation and alignment between Cuba and the Soviet Union. This relationship would be the cornerstone of Cuban economic policy and the lifeblood for the Cuban economy during the Cold War, allowing it to withstand much of the effects intended by the embargo. Massive Soviet economic assistance dominated the Cuban economy between 1960 and 1989, which is estimated to have peaked at \$6-billion annually in the late 1980s.¹⁰⁴ The economic assistance provided by the Soviet Union and its bloc of allies consisted of guaranteed export markets for Cuba's main exports of sugar and nickel, long-term supply and delivery agreements with prices set on terms favorable to Cuba, and trade credits to support Cuba's ability to import other needed products.¹⁰⁵ The support of the Soviet Union and its allies dampened the effect of the embargo on Cuba, insulating it from United States influence and allowing it to pursue its revolutionary policies.

The fall of the Soviet Union drove Cuba into a severe economic crisis, forcing it to make economic adjustments, described by Fidel Castro as the "special period in a time of peace."¹⁰⁶ With the loss of its largest trading partner, between 1991 and 1994, Cuban trade collapsed and the gross domestic product (GDP) declined by about a third.¹⁰⁷ The decline in trade led to a shortage of major necessities, such as foreign exchange, electricity, water, medicines, and food. The Cuban government responded to this crisis by attempting to stimulate production and consumption, implementing some measured reforms relating to employment, agricultural production and private enterprise, and foreign capital and investment.¹⁰⁸ Many of these reforms were either unsuccessful in transforming the economy or were abandoned in the late 1990s. This presented the first time that Cuba had been fully exposed to the sanctions and the corresponding consequences intended by American officials when they instituted the first sanctions in 1960.

However, the rude economic awakening in Cuba would be rather short lived, because in 2000 Cuba found a partial replacement for the

103. USITC, *supra* note 44, at 3-2.

104. *Id.* at 3-3.

105. *Id.*

106. HUFBAUER & KOTSCHWAR, *supra* note 65, at 31.

107. *Id.*

108. *Id.* at 32.

loss of the Soviet Union's political and economic support. Venezuela, and its sympathetic president, Hugo Chavez, became Cuba's new benefactor. The two countries established the *Convenio Integral de Cooperación*, or comprehensive cooperation agreement, which provided to Cuba a significant amount of oil (between 90,000 and 130,000 barrels per day), at a forty percent discount supplemented by a subsidized loan, the value of which is estimated at about \$1.5-billion per year and covered about half of Cuba's energy needs.¹⁰⁹ Cuba and Venezuela also negotiated a deal that provided for Cuba to deliver to Venezuela, Cuban doctors to work in Venezuela's *misiones*, often at a highly inflated value,¹¹⁰ as well as creating Operation Miracle, an initiative under which Cuban doctors provide eye surgery to thousands of poor Latin Americans annually.¹¹¹ While the total investment of Venezuela into the Cuban economy can't be accurately determined because of the lack of transparency, it is estimated to range between \$10-billion to \$13-billion annually between 2010 and 2013, including the oil for doctors program and other development assistance.¹¹²

The economic assistance provided by Venezuela after 2000 was crucial to the survival of the Castro regime, providing much needed foreign exchange and oil. It reestablished the dome of security from United States sanctions that Cuba had lost at the end of the Cold War, protecting it from attempts by the United States to force change through the embargo. However, the death of Hugo Chavez and the decline in oil revenues has reduced the amount of money that Venezuela has provided to Cuba, requiring the Cuban government to liberalize its economy, and exposing it once again to the consequences of the embargo.

China has also played a role in helping the Cuban government since the fall of the Soviet Union, providing Cuba with interest free loans, credit lines, and investment in its petroleum infrastructure. China has invested in Cuba's health infrastructure, upgraded hospitals and research facilities, and built broadband cable between Venezuela and Cuba.¹¹³

However, the reduction in the support from Venezuela, along with the retirement of Fidel Castro and the ascension of his brother, Raul, to the presidency has created the political space needed for the Cuban government to implement some modifications in the central planned economy and to reform to a more market oriented one. Since the Cuban revolution, the Cuban economy has operated predominately under a centrally planned system, controlled by the single party communist government. State-owned enterprises have dominated domestic production of goods,

109. *Id.* at 16.

110. *Id.*

111. Laurie Garrett, *Castrocare in Crisis: Will Lifting the Embargo Make Things Worse?*, FOREIGN AFFAIRS, July-August 2010, at 69.

112. HUFBAUER & KOTSCHWAR, *supra* note 65, at 16.

113. *Id.* at 19.

while government institutions have tightly regulated international trade and domestic consumption.¹¹⁴ Throughout its reign, the Castro regime has taken certain measures and altered or abolished certain rules to allow for more freedom of choice in the market.¹¹⁵ The rise to power of Raul Castro, first, temporarily in 2006 because of the health issues of Fidel, and then permanently when Fidel resigned the presidency in 2008, has coincided with the largest economic reforms since the establishment of the revolutionary government in 1959. When he came to power, Raul Castro publicly acknowledged deficiencies in the Cuban economy and the need for economic reform. His government began to implement a series of changes focused on increasing individual consumer rights and improving economic productivity.¹¹⁶

Effects of the Embargo on United States

The effects of the embargo on the United States are more apparent in terms of political and social impact, both domestically and internationally, than in terms of direct economic impact on American citizens and industries. The United States has endured decades of international condemnation relating to its policy towards Cuba, as well as years of domestic political conflict, especially after the fall of the Soviet Union and the end of the consensus that coincided with the fight against communism. The United States has prevented its citizens from traveling to Cuba, except in specific situations in which the person acquired a special license, because of the tourism ban.¹¹⁷ That is not to say that the embargo hasn't affected the United States economically, as it has certainly suffered economic loss from the periodic migration crises and the lack of access to Cuban markets or educated workforce by American businesses. Compliance with the sanctions has also increased the cost of doing business for American companies. However, the political and social effects of the embargo on the United States are arguably both more apparent and more extensive.

When the United States initially instituted the embargo, it enjoyed a large consensus of support around the world in condemning Cuba's behavior and establishing sanctions in order to encourage Cuba to abandon its relationship with the Soviet Union. The United States was successful in its attempt to alienate Cuba from much of Latin America, when, in 1964, the OAS passed a resolution requiring all member states to break

114. *Id.* at 16.

115. *Id.* (following the demise of the Council for Mutual Economic Assistance (CMEA), the Soviet trading bloc that Cuba joined in 1970, the Cuban economy suffered tremendous losses and the Cuban government responded by liberalizing some economic activities and industries, particularly the tourism industry. These reforms were rolled back after some improvement in the Cuban economy in the early 2000's, due largely to the influx of Venezuelan investment in Cuba)

116. *Id.* at 33.

117. MARK P. SULLIVAN, CONG. RESEARCH SERV., RL31139, CUBA: U.S. RESTRICTIONS ON TRAVEL AND REMITTANCES 1 (2015), available at <https://www.fas.org/sgp/crs/row/RL31139.pdf>.

diplomatic relations and cease all trade with Cuba.¹¹⁸ The United States was also successful in alienating Cuba from the World Bank and the International Monetary Fund (IMF), preventing it from acquiring the capital and investment resources available to member states of those organizations in developing their economies.¹¹⁹

Over time, the consensus built by the United States government, both internationally and domestically, has eroded. By 1975, the OAS voted to allow its members to engage Cuba diplomatically and resume trade relations, and in 2009 the OAS voted to allow Cuba to rejoin the organization as a full member.¹²⁰

The United States also faced growing opposition to the embargo and the effect of laws passed by the United States Congress by other members of the international community. Since the end of the Cold War, Canada, along with many members of the European Union, especially Spain, have invested in Cuba and attempted to engage it in dialogue about its human rights and democracy, choosing a policy of engagement over one of isolation.¹²¹ This inclination only increased after the retirement of Fidel and the rise to power of Raul Castro, further isolating the United States in its policy towards Cuba. With the retirement of Fidel Castro, the United States arguably lost its most compelling argument for the continuation of the embargo, his removal from power. Historically, Fidel and Raul Castro act similarly, and even though Raul succeeded Fidel as President of Cuba, Raul's immediate recognition of problems in the Cuban economy and the need for systemic changes in it demonstrate a clear desire for Cuba to transition away from its historical, centrally planned economy and into a more market-oriented one.¹²²

The United Nations is another venue where the United States has faced international opposition to the embargo. Again, the position of foreign governments on the embargo can be separated into before the fall of the Soviet Union and after its demise. During the Cold War, the United States could count on most of the world on to support it in its economic warfare with Cuba because it was part of the larger fight against communism. Cuba was seen as the front line, especially in the Western Hem-

118. SWEIG, *supra* note 11, at 113–14. (sympathizing with Cuba's distrust of the United States, Mexico was the only country to ignore the resolution passed by the OAS).

119. HUFBAUER & KOTSCHWAR, *supra* note 65, at 70. (the Helms-Burton Act of 1996 established a policy of alienation for international financial institutions (IFI) towards Cuba. Included in the Act is obligation for the Treasury to withhold from any IFI an amount equal to any loan provided to Cuba).

120. Hufbauer, *supra* note 6, at 23.

121. SWEIG, *supra* note 11, at 192–94. (explaining that there were some setbacks in relations between Cuba, Canada, and EU countries in 2003 when Castro jailed political opponents. But this was reversed after the bombings in Madrid and the retirement of Fidel).

122. Julia E. Sweig & Michael J. Bustamante, *Cuba After Communism: The Economic Reforms that Are Transforming the Island*, FOREIGN AFFAIRS, July-August 2013, at 101–14 (discussing the reforms instituted by Raul Castro since he assumed the office of the President of Cuba in 2006).

isphere, in the war between capitalist countries versus communist ones. However, after the communist threat had passed, the justification for the embargo was much harder for the international community to rationalize for international peace and security. As a result, its support for isolating Cuba has wavered. With the end of the threat of communist takeover, most countries decided that engagement was a better policy towards the remaining communist countries than the previous policy of isolation. The increased cooperation between Cuba, Canada, and several members of the European Union demonstrates this engagement policy, as well as by the successive votes against the embargo in the U.N. General Assembly. Every year since 1991, the U.N. General Assembly has passed a resolution condemning the embargo, with 191 countries voting against it on October 27, 2015. Only Israel joined the United States in voting against the resolution.¹²³

Domestic political disagreement over the embargo has had a serious effect on the United States. The largely unified and politically active Cuban-American population, in both southern Florida and New Jersey, exercised a tremendous amount of influence on the policy toward Cuba, especially in the decade after the fall of the Soviet Union. Because of its unified voice and dominant political position in Florida, a presidential swing state, the Cuban-American population was able to greatly influence policy towards Cuba, forcing both Presidential candidates and Presidents to pander to their wishes.¹²⁴ Since the majority of the Cuban-American population that resides in the United States are exiles because of their support of Batista or opposition to Castro, their positions are decidedly anti-Castro and pro-embargo. This political reality created an atmosphere where the Cuban-American population in the United States met any attempt at rapprochement between the two countries with visceral opposition by, largely preventing any substantial change in the relationship.

A New Day: Changing the Relationship

On December 17, 2014, the White House announced major alterations to the United States policy toward Cuba and the Castro regime.

123. Mimi Whitefield, *United Nations Votes 191-2 to condemn U.S. embargo against Cuba*, MIAAMI HERALD, Nov. 19, 2015, available at <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article41538987.html>. (explaining that The United States voted against the resolution because it claimed it did not reflect “the significant steps that have been taken and the spirit of engagement President Obama has championed.”).

124. Peter Kornbluh & William M. LeoGrande, *The Real Reason It's Nearly Impossible to End the Cuba Embargo*, THE ATLANTIC, Nov. 19, 2015, available at <http://www.theatlantic.com/international/archive/2014/10/the-1996-incident-that-made-it-nearly-impossible-to-repeal-the-cuba-embargo/381107/> (explaining that President Clinton had begun negotiations with Cuba to resume normal relations when the Cuban Air Force shot down two Brothers to the Rescue planes after invading Cuban airspace on February 24, 1995. This effectively ended any negotiations and forced President Clinton to support Helms-Burton in order to secure the Cuban-American vote in Florida during the 1996 presidential election).

Acknowledging the failure of American economic policy towards Cuba in deposing of the Castro brothers from power and the strain that policy has imposed on the United States' relationship with countries all over the world, including many allies, the administration of Barack Obama declared a new policy of engagement with Cuba to "further engage and empower the Cuban people."¹²⁵ The statement released by the Obama administration continued:

It is clear that decades of U.S. isolation of Cuba have failed to accomplish our enduring objective of promoting the emergence of a democratic, prosperous, and stable Cuba. At times, longstanding U.S. policy towards Cuba has isolated the United States from regional and international partners, constrained our ability to influence outcomes throughout the Western Hemisphere, and impaired the use of the full range of tools available to the United States to promote positive change in Cuba. Though this policy has been rooted in the best of intentions, it has had little effect—today, as in 1961, Cuba is governed by the Castros and the Communist party.

We cannot keep doing the same thing and expect a different result. It does not serve America's interests, or the Cuban people, to try to push Cuba toward collapse. We know from hard-learned experience that it is better to encourage and support reform than to impose policies that will render a country a failed state. With our actions today, we are calling on Cuba to unleash the potential of 11 million Cubans by ending unnecessary restrictions on their political, social, and economic activities.¹²⁶

Even though the Helms-Burton Act codified the embargo and required an act of Congress to remove most of the provisions regulating trade with Cuba, the President retains extensive latitude within that framework to adjust rules and regulations in order to loosen the embargo and allow for some limited economic activity and cooperation between Americans and Cubans. Most of the embargo is controlled by the Treasury Department through the Cuban Assets Control Regulations (CACR)¹²⁷ and through these procedures the President retains broad authority to amend the regulations despite the requirement of Congressional action to remove the embargo.¹²⁸ In announcing the changes to Cuban-American policy, the President exercised those prerogatives, altering the regulations to allow for ease of travel to the island, increasing and facilitating remittances to Cuba, authorizing expanded commercial sales and exports from the United States of certain goods and services, authorizing

125. WHITE HOUSE, *supra* note 8.

126. *Id.*

127. 31 C.F.R. § 515 (2015).

128. DIANNE E. RENNACK & MARK P. SULLIVAN, CONG. RESEARCH SERV., CUBA SANCTIONS: LEGISLATIVE RESTRICTIONS LIMITING THE NORMALIZATION OF RELATIONS 1–2 (2015), available at <http://www.fas.org/sgp/crs/row/R43888.pdf>.

American citizens to import additional goods from Cuba, facilitating authorized transactions between the United States and Cuba,¹²⁹ and initiating new efforts to increase Cubans' access to communications by allowing American telecommunications companies to provide data and mobile phone service to Cuba.¹³⁰

The President also moved to restore diplomatic relations with Cuba¹³¹ and remove it from the state sponsor of terrorism list.¹³² Diplomatic relations had been severed between the two countries since President Eisenhower ordered it on January 3, 1961,¹³³ after Fidel Castro proclaimed his allegiance to Marxist-Leninism and declared the Cuban revolution as socialist.¹³⁴ The administration of President Jimmy Carter took steps to soften the embargo and restore diplomatic relations by opening diplomatic interest sections in both Washington and Havana as well as ending the travel ban, with the ultimate objective being the full restoration of trade and diplomatic relations.¹³⁵ Ultimately, President Carter's attempts at reconciliation were either rolled back or left to wither after his defeat by Ronald Reagan in the 1980 presidential election. The refugee crisis caused by the Mariel boatlift and Cuba's involvement in revolutionary activities,¹³⁶ combined with President Reagan's strong anti-communist position didn't allow for any continued cooperation between the two countries. President Reagan reversed many of the changes initi-

129. *Cuban Deals*, THE ECONOMIST, Nov. 19, 2015, available at <http://www.economist.com/news/usa/21661021-despite-embargo-america-exports-plenty-goods-its-erstwhile-enemy-cuban-deals>. (explaining that President Obama redefined Cuban's obligation to pay cash in advance for purchases made from American business as "cash before transfer of title," making it easier to facilitate purchases. This was a revision of the regulatory definition of the statutory term "cash in advance" that was codified with the passing of the Trade Sanctions Reform and Enhancement Act in 2000).

130. WHITE HOUSE, *supra* note 8.

131. Karen DeYoung, *Cuba and U.S. quietly restore full diplomatic ties after 5 decades*, THE WASHINGTON POST, Nov. 19, 2015, available at https://www.washingtonpost.com/politics/on-sultry-morning-old-cold-war-foes-restore-full-diplomatic-ties/2015/07/20/1596d98a-2ecb-11e5-97ae-30a30cca95d7_story.html (explaining that The United States Embassy was reopened in Havana, Cuba on July 20, 2015, 54 years, six months and 17 days since it was shuttered).

132. Julie Hirschfeld Davis, *U.S. Removes Cuba From State-Sponsored Terrorism List*, THE NEW YORK TIMES, Nov. 19, 2015, available at http://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html?_r=2. (explaining that on May 29, 2015, the Obama administration removed Cuba from the list of state sponsors of terrorism after a 45-day congressional notification period that began on April 14, 2015).

133. *A Guide to the United States' History Recognition, Diplomatic, and Consular Relations, By County, Since 1776: Cuba*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, (Nov. 19, 2015 10:37 PM), <https://history.state.gov/countries/cuba>.

134. Lily Rothman, *Why Did the U.S. and Cuba Sever Diplomatic Ties in the First Place?*, TIME, Nov. 19, 2015, available at <http://time.com/3637822/cuba-history/> (explaining that ambassador, Philip W. Bonsal, had been recalled in October 1960 after the two countries had sparred over economics for months. The United States finally closed its embassy doors in January 1961 when Castro demanded that the two countries have exactly the same number of staffers in their respective embassies).

135. SWEIG, *supra* note 11, at 93–6.

136. Hufbauer, *supra* note 6, at 3–4 (explaining that the administration of President Reagan saw Cuba as an instigator of Marxist control in Nicaragua and a supporter of insurgents in El Salvador, as well as supporting revolutionary activities in Angola, Ethiopia, and Zaire (Democratic Republic of Congo)).

ated by President Carter, including the reinstatement of the travel ban. His steps to re-tighten the embargo and general belief that the only way to beat communism was to ratchet up the stakes would end any notion of rapprochement for decades.

Further complicating the relationship between the United States and Cuba, President Reagan placed Cuba on the list of state sponsors of terrorism in 1982.¹³⁷ It cited Cuba's role in supporting leftist insurgents in Latin America as its reasoning for the designation.¹³⁸ This justification has lost weight over the years as Cuba stopped training and funding leftist rebel groups. A 1997 review of Cuba by the entire United States intelligence community concluded that Cuba no longer constituted a threat to American national security.¹³⁹ That report, prepared by the Defense Intelligence Agency, stated, "[a]t present, Cuba does not pose a significant military threat to the U.S. or to other countries in the region."¹⁴⁰

Nevertheless, Cuba remained on the state sponsors of terrorism list until the summer of 2015. The reasoning has evolved over the years and Cuba's continued inclusion on the list has most recently been attributed to its existence as a haven for members of the Basque separatist group ETA as well as Columbia's left-wing FARC¹⁴¹ rebel group.¹⁴²

The removal of Cuba from the list of state sponsors of terrorism by the Obama administration ends certain sanctions that automatically trigger when a country is designated a supporter of terrorism, allowing for greater opportunity for cooperation between the United States and Cuba and eliminating certain obstacles for assistance, especially in the form of economic aid.

The retirement of Fidel Castro has also created a greater opportunity for rapprochement between the two countries within Cuba itself. His absence from power has removed a powerful voice of criticism of both the United States and the embargo itself. Since the enactment of the embargo, Fidel has used it as an excuse and scapegoat for all manner of ills that besieged the island. His regime has successfully exploited the em-

137. Reports on Terrorism, *supra* note 74.

138. SWEIG, *supra* note 11, at 183. (noting the Reagan administration cited Cuba's specific support for the FMLN guerillas in El Salvador as justification for its inclusion on the list).

139. *Id.*

140. U.S. DEP'T OF DEFENSE INTELLIGENCE AGENCY, THE CUBAN THREAT TO U.S. NATIONAL SECURITY (2015), available at <https://fas.org/irp/dia/product/980507-dia-cubarpt.htm>. (prepared by the Defense Intelligence Agency in coordination with the Central Intelligence Agency, the State Department Bureau of Intelligence and Research, the National Security Agency, and the United States Southern Command Joint Intelligence Center).

141. Felicia Schwartz, *Cuba Officially Removed From U.S. State Sponsor of Terrorism List*, THE WALL STREET JOURNAL, Nov. 19, 2015, available at <http://www.wsj.com/articles/cuba-officially-removed-from-u-s-state-sponsor-of-terrorism-list-1432913160>.

142. Juan Forero & Jose de Corboda, *Columbia, FARC Rebel Group Reach Breakthrough Agreement in Peace Talks*, THE WALL STREET JOURNAL, Nov. 19, 2015, available at (noting that Cuba has played an extensive role the recent breakthrough in peace talks between FARC and the Columbian government, including hosting the talks in Havana since 2012).

bargo by denouncing the measures as foreign aggression and calling for a “rally-round-the-flag” as the only remedy to counteract the United States “assault” on Cuba’s national sovereignty.¹⁴³ He has successfully manipulated the majority of the population into opposing the embargo not because they disagree with regime and the goals of the revolution, but because it deprives them of American goods and contacts with exiled friends and family members.¹⁴⁴

The actions taken by the Obama administration to improve the relationship between Cuba and the United States have been met with approval and condemnation. Much of the reaction can be divided along party lines. By and large, the Democratic Party has supported the movement to engage Cuba while the Republican Party has condemned it.¹⁴⁵ However, most of the American public supports improved relations and agrees with the Obama administration that it is time to change the policy. A Pew Research Center poll conducted January 7-11, 2015 showed that sixty-six percent of Americans supported President Obama’s changes to American policy towards Cuba, and sixty-six percent favored ending the embargo altogether.¹⁴⁶ These conditions, along with several other developments in both the domestic and international political arenas, provide a unique opportunity for the United States to reset its relationship with Cuba, reestablish its moral hegemony in the region, and improve the lives of millions of Cubans in the process.

CONCLUSION

The United States has maintained a policy of containment and isolation against Cuba since it first instituted sanctions in 1960, a period spanning over fifty years. Initially instituted as retaliation for confiscated American property by the Cuban government after the Cuban Revolution, the reasoning for the continuation of the embargo has evolved through the national security lens of the Cold War to the spread of democracy and basic human rights in the era of globalization. Despite the evolving reasoning, the objective of the policy has always been the removal of the Castro brothers from power and an adjustment in the Cuban government’s behavior toward its own citizens, as well as the rest of the

143. Sven Kuhn von Burgsdorff, *The Effectiveness of Economic Sanctions: The Case of Cuba*, 4 INTERCULTURAL HU. RTS. L. REV. 31, 46 (2009).

144. *Id.* (discussing that the ‘rally-round-the-flag’ effect has also increased cohesion between the leadership and those who truly believe in the social justice aspect of the revolution. They fear that the U.S. is motivated by the desire to reverse whatever social justice advances Cuba has made since the revolution).

145. Sean Sullivan & Ed O’Keefe, *GOP lawmakers blast Obama’s Cuba policy shift*, THE WASHINGTON POST, Nov. 19, 2015, available at <https://www.washingtonpost.com/news/post-politics/wp/2014/12/17/cuba-deal-reaction-sharply-split-on-capitol-hill/>.

146. Carroll Doherty, et al., MOST SUPPORT STRONGER U.S. TIES WITH CUBA (Jan. 16, 2015), available at <http://www.people-press.org/files/2015/01/1-15-15-Cuba-release.pdf>. (discussing a Pew Research poll conducted January 7–11, 2015, shortly after President Obama announced the changes in U.S.-Cuban policy show that 63% of Americans supported the changes and 66% favor ending the embargo altogether).

world. However, today a Castro is still in power, the Cuban government is still identified as communist, and no expropriated American property has been returned nor compensated for. Not one single purpose that has ever been articulated for the embargo has been achieved. Therefore, by almost any measure, the objective of the embargo has been a complete and total failure. It is time for the United States to repeal all aspects of the embargo and fully engage Cuba politically, diplomatically, and economically. The Cuban people have suffered long enough because of a failed geopolitical strategy of the United States, which lost its justification decades ago.

The election of Barack Obama, the retirement of Fidel Castro, and increased domestic support for improved relations between the United States and Cuba, have allowed, for the first time in decades, the possibility for meaningful change to the policy and a rapprochement between the two countries. The United States should capitalize on the change of circumstances to reengage completely with Cuba, help it to remodel its society to encourage free-market capitalism and democracy .

Full engagement by the United States can help provide much needed investment and capital to Cubans and their businesses, which would lead to expanded growth and improved living conditions. A large influx of Americans, either conducting business on the island or simply visiting as tourists, would also provide increased access to information and ideas that would help awaken and foster democratic tendencies, which have been sidelined during the Castro regime. It is time to end a failed policy that has only had the effect of hampering American businesses, restricting the travel and freedoms of American citizens, and isolating Cubans from much needed economic supplies, as well as exiled family and friends, depriving them of access to resources that would help them improve their lives. The United States policy of embargoing Cuba has only hurt Cubans, failing to achieve the goals articulated by the United States government. It needs to end.

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