

CUBAN BASEBALL PLAYERS, THE UNLUCKY ONES: UNITED STATES-CUBAN PROFESSIONAL BASEBALL RELATIONS SHOULD BE AN INTEGRAL PART OF THE UNITED STATES-CUBA RELATIONSHIP

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“I think about my family (in Cuba) every moment,” [Rene] Arocha says. “From the first day, I knew it might be a separation of many years. On one side, I was prepared to do that and on the other, I can’t help but think about them.” That is the price Arocha and other Cuban baseball players are paying to defect.¹

On July 10, 1991, Rene Arocha became the first Cuban to defect from his country in order to play professional baseball in the United States.² Since then, nearly 200 Cuban baseball players have followed his lead.³

INTRODUCTION

Stemming from Fidel Castro’s elimination of professional baseball in Cuba and the United States trade embargo⁴ against Cuba, current Cuban baseball players wanting to pursue a professional baseball career are left with no choice but to defect from their home, with a slim chance of ever returning.

Fidel Castro prides himself on the international successes of *Equipo Cuba*,⁵ the Cuban National baseball team. *Equipo Cuba* dominated the international baseball world from

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¹ Kevin Baxter & Fernando Dominguez, *Baseball Si, Cuba No; Castro’s Island May be a Gold Mine for Major League Talent, But Under His Regime, We May Never Know to What Extent*, SPORTING NEWS, Mar. 21, 1994, at 12.

² See Matthew J. Frankel, Note, *Major League Problems: Baseball’s Broken System of Cuban Defectors*, 25 B.C. THIRD WORLD L.J. 383, 383-84 (2005).

³ See *Chasing Dreams: Cuban Baseball Defectors—Part 1*, BASEBALLDEWORLD.COM, Jan. 15, 2010, <http://baseballdeworld.com/2010/01/15/chasing-dreams-cuban-baseball-defectors-part-1/> [hereinafter *Chasing Dreams—Part 1*].

⁴ An embargo is a non-tariff based barrier on trade. See RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 290 (7th ed. 2009).

⁵ “*Equipo Cuba*” means the Cuban National Team. MILTON H. JAMAIL, FULL COUNT: INSIDE CUBAN BASEBALL 1 (2000).

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1987-1997, when the team remained undefeated with a winning streak of 150 games.⁶ Fidel Castro, as Cuban President, and adamant baseball fan, considers the reduction of talent from Cuba to Major League Baseball (“MLB”) as a source of international embarrassment.⁷

More than 200 Cubans have defected in order to play professional baseball, however only thirty-six have played Major League Baseball (“MLB”) thus far.⁸ Since Rene Arocha’s defection in 1991, only four players have participated in the All-Star game⁹ while just five have received awards for their accomplishments.¹⁰ In Cuba, Castro’s regime “fashions national heroes out of its star ballplayers.”¹¹ Cuban players who defect, on the other hand, are given the label *traidores al béisbol*, or “baseball traitors,” by the government.¹² Despite these characterizations, Cubans prefer to play in the MLB, mainly because of the large contracts,¹³ the size of which varies depending on the sophistication of the team.¹⁴ While small market teams are willing to pay more for Cuban prospects, the large market teams “prefer to spend

⁶ See *id.* at 45.

⁷ See Matthew N. Greller, Note, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14 AM. U. INT’L L. REV. 1647, 1695 (1999) (analogizing how Castro’s disgust for defections poisons United States-Cuba relations with the disdain MLB teams and fans hold for free agent players who depart to rival teams).

⁸ See *Chasing Dreams—Part 1*, *supra* note 3; *Major League Baseball Players Born in Cuba*, BASEBALL-ALMANAC.COM, <http://www.baseball-almanac.com/players/birthplace.php?loc=cuba> (last visited Nov. 22, 2010).

⁹ Cuban All-Stars: Rolando Arrojo, in 1998; Danys Baez, in 2005; Jose Contreras, in 2006; and Livan Hernandez in 2004 and 2005. See *Baseball Encyclopedia of MLB Players*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/> (last visited Nov. 22, 2010) [hereinafter *Baseball Encyclopedia*].

¹⁰ Cuban player awards: Jose Contreras—American League Most Valuable Player (“MVP”); Livan Hernandez—National League Championship Series MVP, Major League World Series MVP, and Silver Slugger award; Orlando “El Duque” Hernandez—American League Championship Series MVP; Rey Ordonez—3 Gold Gloves for shortstop; and Alexi Ramirez—Silver Slugger. See *Baseball Encyclopedia*, *supra* note 9.

¹¹ Frankel, *supra* note 2, at 391.

¹² *Id.* at 402. The Cuban government “acts as if the departed players no longer exist, never mentioning them again in the state-controlled press. In official record books, baseball defectors have asterisks by their name; the explanation reads, *abandonó el país*, or ‘left the country.’” *Id.* This is similar to how Americans feel about steroid users in professional sports. For instance, “the ball Barry Bonds hit for his record-breaking 756th home run [was] branded with an asterisk and sent to the Baseball Hall of Fame.” *Designer to Brand Asterisk on Ball; Hall of Fame to Accept It*, ESPN.COM, Sept. 26, 2007, <http://sports.espn.go.com/mlb/news/story?id=3036756> (stating that “[f]ashion designer Marc Ecko, who bought the ball in an online auction, set up a Web site for fans to vote on the ball’s fate, and . . . announced the decision to brand it won out over the other options — sending it to [the Hall of Fame at] Cooperstown unblemished or launching it into space.”). However, Barry Bonds and others used a substance to enhance their level of play whereas Cuban defectors merely escaped for the opportunity to play baseball at the professional level.

¹³ See Frankel, *supra* note 2, at 399.

¹⁴ See Mark Kurlansky, *Cuba’s Major-League Cachet*, WALL ST. J., Apr. 10, 2010, at W9, available at <http://online.wsj.com/article/SB10001424052702303720604575170171909416204.html> (asking “why is everyone in baseball talking about [Aroldis Chapman]? Why were half the ball clubs in the major leagues interested in him, and why did the Cincinnati Reds pay \$30 million for him?” Explaining that it, “at least in part, is because he is Cuban—so not only does he come from a fabled baseball tradition, but he is also a defector, which is a popular political story.”); Tim Brown, *Glut of Cuban Defectors Seek MLB Jobs*, YAHOO!SPORTS.COM, <http://sports.yahoo.com/mlb/news?slug=ti-cubandefectors030310> (Mar. 2, 2010) [hereinafter Brown, *Glut of Defectors*].

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their money on known commodities.”¹⁵ For example, in 2010 the Cincinnati Reds signed Cuban pitching sensation Aroldis Chapman to a five-year \$30-million contract, whereas the Boston Red Sox signed Jose Iglesias, a Cuban shortstop, to a four-year, \$8.2 million contract.¹⁶

For the last thirty years, the baseball community has explored the idea of implementing a worldwide draft, some claiming that it will help the defection issue.¹⁷ The main idea behind the global draft, as discussed below, is to eliminate the free agency status of all foreign players and require all amateur players, worldwide, regardless of nationality, to participate in the amateur draft.¹⁸ Global draft advocates claim that this will reduce competition between teams, thus stabilizing bonuses, as well as resolve the issue of competitive balance.¹⁹ A worldwide draft is a potential solution to the international free agency issue. However, it is unlikely to solve the problems facing Cuban baseball players until the embargo is lifted, or, at the very least, weakened.

This Note addresses the baseball player defection tension between Cuba and the United States, which began with Fidel Castro’s 1959 Cuban Revolution. It argues that Cuban baseball players should not be forced to defect to play for a Major League club. Rather, they should be treated, just like any international free agent.²⁰ The U.S. and Cuba should use baseball to improve international relations. The United States Government and the commissioner of baseball should together remove player restrictions placed by the embargo, revoke the Kuhn Directive, and create an agreement with the Cuban amateur league permitting the international movement of Cuban baseball players from Cuba to the United States.

Part II of this Note lays out the relevant baseball history, the legal statutes of the U.S. trade embargo on Cuba, and the political landscape. Part III analyzes the potential solutions to Cuban defections that have been proposed and introduces a new solution. Finally, Part IV concludes that baseball should be an integral part of the U.S.-Cuban relationship.

¹⁵ Dave Sheinin, *Baseball Notebook: Reds Deal Big for Chapman*, WASH. POST, Jan. 11, 2010, available at 2010 WLNR 576035 [hereinafter Sheinin, *Baseball Notebook*].

¹⁶ See Brown, *Glut of Defectors*, *supra* note 14; see also *infra* notes 279-81 and accompanying text.

¹⁷ See *infra* Section III(B).

¹⁸ See Scott M. Cwiertny, Note, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 426 (2000).

¹⁹ See Daniel Hauptman, Note, *The Need for a Worldwide Draft to Level the Playing Field and Strike Out the National Origin Discrimination in Major League Baseball*, 30 LOY. L.A. ENT. L. REV. 263, 274 (2010). Hauptman avidly supports the use of a worldwide draft, explaining that it would “equaliz[e] the entry rules for U.S. and international players,” as well as “address the significant competitive issue of large-market teams outbidding others for top foreign talent.” *Id.* See also Gary Klein, *Global Draft is a Foreign Notion Still*, L.A. TIMES, June 3, 2003, at B6 (stating that members of the baseball community, such as owners, endorse the implementation of a worldwide draft because they would like “to stop paying multimillion-dollar bonuses to domestic draftees and foreign free agents. Most also believe that a global draft would level the playing field between smaller-market teams and big-budget franchises such as the . . . New York Yankees . . . who have invested heavily in international scouting and have reaped the benefits.”); Alan Schwarz, *Pressure Building for Draft of Players from Outside U.S.*, N.Y. TIMES, July 13, 2008, at SP4; Barry M. Bloom, *Report: Cubs Fined for Draft Violations*, MLB.COM, July 21, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080721&content_id=3169284&vkey=news_mlb&fext=.jsp&c_id=mlb.

²⁰ The embargo impacts Cuban baseball players in that “no ‘payment or transfer’ (in baseball terms, a signing bonus) may be made to any Cuban national athlete to secure his services, thus rendering an already draft ineligible player as also ineligible to be an international free agent.” Rick J. Lopez, Comment, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball*, 41 ARIZ. ST. L.J. 349, 358 (2009); see also 31 C.F.R. § 515.309(a).

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History Pre-Embargo

Prior to the establishment of the present Cuban government, baseball was a common interest for the United States and Cuba, helping to bind the two countries together. Similar to its American counterpart, “Cuban baseball has always been tightly intertwined with history, politics, and social change.”²¹ The game of baseball began during the 1840s in New York City,²² and soon spread to Cuba, with organized Cuban leagues dating back to 1878.²³ At this time, “baseball became a cultural bridge between Cuba and the United States, with ballplayers constantly in transit from one country to the other.”²⁴ Since there were no restrictions, from the 1870s until the Cuban Revolution in 1959, Cuban baseball stars often traveled to the U.S. to play professional baseball²⁵ and several Major League teams participated in exhibition games or Cuba’s spring training program.²⁶ Americans frequently played for Cuban teams and top Cuban players played in the MLB.²⁷ Cuba’s winter league rosters often contained several major league players.²⁸ From 1947 until 1959, Cuba provided the Major Leagues with the leading source of Latin-American baseball talent.²⁹ The Cuba-U.S. baseball relationship was so intertwined that several Cubans envisioned a future that included a Cuban MLB franchise.³⁰ However, the Cuban Revolution of 1959 brought this harmonious relationship to an abrupt stop.³¹

The Embargo’s Restrictions on the Freedom of Cuban Baseball Players

Cuba implemented a widespread sports reform program in 1961, which eliminated professional baseball and instead emphasized socialist values.³² The government adopted a Soviet model of physical culture, which stressed “mass participation in sports and the development of champions.”³³ The following year Cuba introduced a replacement for the professional baseball system.³⁴ This new Cuban League was centered on a socialist paradigm of

²¹ Frankel, *supra* note 2, at 388.

²² *See id.* at 387.

²³ *See* Katherine E. Baird, *Cuban Baseball: Ideology, Politics, and Market Forces*, 29 JOURNAL OF SPORT & SOCIAL ISSUES 164, 166 (2005).

²⁴ Frankel, *supra* note 2, at 388.

²⁵ *See id.*

²⁶ *See* Baird, *supra* note 23, at 166; Frankel, *supra* note 2, at 389.

²⁷ *See* Baird, *supra* note 23, at 166; Frankel, *supra* note 2, at 389.

²⁸ *See* Baird, *supra* note 23, at 166; Frankel, *supra* note 2, at 389.

²⁹ *See* Jamail, *supra* note 5, at 20 (explaining that Cuban players like Orestes “Minnie” Miñoso, Tony Oliva, and Tony Pérez, were a crucial part of professional baseball in the U.S.); Frankel, *supra* note 2, at 389.

³⁰ *See* Baird, *supra* note 23, at 166.

³¹ *See id.*; Frankel, *supra* note 2, at 389.

³² *See* Baird, *supra* note 23, at 166; Frankel, *supra* note 2, at 389-90. President Castro believed that “selling baseball players . . . was a crude manifestation of the worst elements of capitalism, akin to slavery, and he referred to professional baseball as *la pelota esclava*. For Fidel, the first Serie Nacional in 1961-1962 was *el triunfo de la pelota libre sobre la pelota esclava* (the triumph of free baseball over slave baseball).” Jamail, *supra* note 5, at 29.

³³ Baird, *supra* note 23, at 167.

³⁴ *See id.* at 168.

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amateur sports motivated by national ideals rather than money.³⁵ Here, the state provides each player with their salary, an amount comparable to the earnings of the majority of the labor force.³⁶ In 2005, the monthly government salary of Cuban baseball players ranged from approximately 250 to 350 pesos (\$10 to \$15 per month).³⁷ Ultimately, the low salary stemming from Cuba's lack of a professional baseball league akin to the MLB led players, such as Rene Arocha,³⁸ to defect.

Baseball players were not the only Cubans fleeing to America to escape Castro's regime during this time. Many Cubans fled Cuba for the United States to find an improved life and experience the "American dream."³⁹ In response to this rising tide of defection, the federal government enacted harsh immigration constraints governing Cuban immigrants and imposed strict criminal sanctions on Americans caught smuggling Cubans into the U.S.⁴⁰ The Helms-Burton Act⁴¹ has especially impacted Cuban defectors and MLB.⁴² This Act requires the U.S. government to enforce the Cuban Assets Control Regulations ("CACR"),⁴³ which bans MLB clubs from performing any business in Cuba, including scouting or signing players.⁴⁴ Thus, if Cuban nationals desire to play for an MLB team, they must flee Cuba, defect, and surrender their Cuban citizenship,⁴⁵ with the possibility of never returning home.⁴⁶

³⁵ See *id.* Cuban officials hold a negative view of professional sports: "Since the revolution, Cuban officials have characterized professional sports in the United States as a 'capitalist perversion of athletics.' [Fidel] Castro himself has likened professional sports to slavery and sought to remake Cuban baseball reflecting the values of the revolution." *Id.* at 167 (internal citations omitted). The league is divided into sixteen teams, each corresponding to a different Cuban province, except for Havana City, which has two teams. See *id.* at 168. The teams do not relocate and, on the whole, the players remain with their team. See *id.* The province where the player originates determines the team for which he will play. See *id.* The idea behind the regional structure is that the players have a sense of pride for their town; this intensifies rivalries, interest, and the degree of play, which in turn replaces professional salaries as the motivation behind championship-caliber play. See *id.* at 167-68.

³⁶ See *id.* at 169.

³⁷ See *id.*

³⁸ See *supra* notes 1-2 and accompanying text.

³⁹ See Frankel, *supra* note 2, at 391; Matthew A. Pingeton, Note, *United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329, 329 (1999); Read Sawczyn, Note, *The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should Be Changed So That Cuban Immigrants Are Treated Similarly to Other Immigrants*, 13 FLA. J. INT'L L. 343, 346 (2001); see also Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 238-39 (1998) (explaining the Cuban exodus).

⁴⁰ See *infra* Section II(B)(2)(ii).

⁴¹ See *infra* notes 162-165 and accompanying text.

⁴² See Frankel, *supra* note 2, at 393.

⁴³ See *infra* notes 154-156 and accompanying text.

⁴⁴ 22 U.S.C. § 6032(c); see Frankel, *supra* note 2, at 393.

⁴⁵ See Frankel, *supra* note 2, at 394.

⁴⁶ See Kurlansky, *supra* note 14.

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Major League Baseball's eligibility rules

The Major League Baseball Rules describe the eligibility requirements for MLB teams to acquire players: Rule 3 explains how to sign a player⁴⁷ and Rule 4 illustrates the First-Year Player Draft.⁴⁸ Rule 3(a)(1)(A)-(B), in pertinent part, provides:

- (a) **ELIGIBILITY TO SIGN PROFESSIONAL BASEBALL CONTRACTS.**
- (1) **General Rules.** Subject to the High School, College, Junior College and American Legion Rules listed in this Rule 3(a), a Major or Minor League Club may contract with a player under the conditions and restrictions set forth in this Rule 3. . . . For purposes of this Rule 3, the term "United States" shall mean the 50 States of the United States of America, the District of Columbia, Puerto Rico, and any other Commonwealth, Territory or Possession of the United States of America.
- (A) A player who has not previously contracted with a Major or Minor League Club, and who is a resident of the United States or Canada, may be signed to a contract only after having been eligible for selection in the Rule 4 draft. A player shall be considered a "resident of the United States" if the player enrolls in a United States high school or college or establishes a legal residence in the United States on the date of the player's contract or within one year prior to that date.
- (B) A player who has not previously contracted with a Major or Minor League Club, who is not a resident of the United States or Canada, and who is not subject to the High School, College or American Legion Rules, may be signed to a contract if the player:
- (i) is at least 17 years old at the time of signing, or
 - (ii) is 16 at the time of signing, but will attain age 17 prior to either the end of the effective season for which the player has signed or September 1 of such effective season, whichever is later.⁴⁹

For teams to acquire players, MLB separates them into two groups: (1) legal residents of the United States, Canada, and Puerto Rico and (2) any other player.⁵⁰ Rule 3(a)(1)(A), which applies to the first group, requires the players to participate in the Rule 4

⁴⁷ See *Major League Baseball, The Official Professional Baseball Rules Book*, R. 3, Office of the Commissioner (NY 2003), available at Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit C, *Viera v. Major League Baseball Enterprises* (M.D. Fla. 2001) (No. 8:01-CV-1037-T-27MAP) [hereinafter *MLB Rules Book*]; see also Frankel, *supra* note 2, at 395 n. 99; Andrea K. Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 480-81 (2001).

⁴⁸ See *MLB Rules Book*, *supra* note 47, at R. 4; see also Frankel, *supra* note 2, at 395 n. 99; Schneider, *supra* note 47, at 480-81.

⁴⁹ *MLB Rules Book*, *supra* note 47, at R. 3(a)(1)(A)-(B).

⁵⁰ See *id.*

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amateur draft.⁵¹ Non-U.S. citizens, however, lack this requirement and may enter into an employment contract with a team as a free agent, provided they abide by the criteria in Rule 3(a)(1)(B).⁵² Free agency is more appealing than the draft because players may choose between any team who offers them a contract. Generally, free agency has a tendency to generate larger contracts, because the player is likely to choose the highest bidder.⁵³

Cubans are subjected to more complex MLB rules than other baseball players for several reasons. For one, Cubans are forced to defect from Cuba to play professional baseball,⁵⁴ which involves leaving the country as well as renouncing their Cuban citizenship.⁵⁵ In 1977, MLB Commissioner Bowie Kuhn instituted the Major League's rules concerning Cuban players in the "Kuhn Directive."⁵⁶ The Directive, updated in 1991, prohibits "the discussion or negotiation with anyone in Cuba regarding the signing of any player in Cuba."⁵⁷ In other words, it bars team representatives, such as scouts, from speaking with any Cuban player while they are in Cuba. However, if a scout sees a Cuban ballplayer outside of Cuba, there are no restrictions.⁵⁸ Thus, while team representatives may not recruit or negotiate with the ballplayers in Cuba, they may do so in another country.⁵⁹ Because MLB teams are only allowed to sign players who are residents of a country other than Cuba, this policy coerces Cubans who

⁵¹ See *MLB Rules Book*, *supra* note 47, at R. 3(a)(1)(A)-(B); Cwiertyny, *supra* note 18, at 414 n.242; Schneider, *supra* note 47, at 480. A resident of the United States, Canada, or Puerto Rico may only sign a contract with a team once he has participated in the amateur draft. See Schneider, *supra* note 47, at 480. However, if every team in the draft passes over him, then he is permitted to sign as a free agent. See *id.*

⁵² See *MLB Rules Book*, *supra* note 47, at R. 3(a)(1)(B); Schneider, *supra* note 47, at 480. This system is more or less logical:

The amateur draft ensures an equitable distribution of the universally-known talent. Would-be draftees, primarily high school and college athletes, are well-known to all franchises. A draft in which teams take turns reserving the right to sign known prospects helps ensure competitive balance among the teams and prevents wealthier teams from cornering the top talent.

Players from foreign nations are not as visible. Different franchises have varying talent scouting strength in different nations. Some teams conduct thorough talent searches the world over, while other teams concentrate their international efforts in particular countries. Still others largely ignore the foreign talent pool. Accordingly, international players, be they highly visible stars in a foreign professional league or obscure kids from the far corners of the Earth, enjoy free agency to sign a contract with any of [MLB's] franchises that would have them.

Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at 4, *Viera v. Major League Baseball Enterprises*, No. 8:01-CV-1037-T-27MAP (M.D. Fla. 2001) (internal citations omitted) [hereinafter Memorandum for the Plaintiff].

⁵³ See Cwiertyny, *supra* note 18, at 413-14; Frankel, *supra* note 2, at 396.

⁵⁴ See Schneider, *supra* note 47, at 480.

⁵⁵ See Greller, *supra* note 7, at 1661-66; Cwiertyny, *supra* note 18, at 411-16; Schneider, *supra* note 47, at 479-86; see also Walter T. Champion & Danyahel Norris, *Why Not Row to the Bahamas Instead of Miami?: The Conundrum That Awaits Cuban Elite Baseball Players Who Seek Asylum and the Economic Nirvana of Free Agency*, 9 V.A. SPORTS & ENT. L.J. 219, 224 (2010).

⁵⁶ See Baxter & Dominguez, *supra* note 1, at 12; see also Frankel, *supra* note 2, at 397; Greller, *supra* note 7, at 1665; Schneider, *supra* note 47, at 480.

⁵⁷ Baxter & Dominguez, *supra* note 1, at 12; see also Frankel, *supra* note 2, at 397; Greller, *supra* note 7, at 1664-65; Schneider, *supra* note 47, at 480.

⁵⁸ See Schneider, *supra* note 47, at 480; Champion & Norris, *supra* note 55, at 222.

⁵⁹ See Schneider, *supra* note 47, at 480; Champion & Norris, *supra* note 55, at 222.

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want to play baseball to leave their home and establish residency elsewhere.⁶⁰ Consequently, Cubans are treated differently than any other athlete.⁶¹

In addition, if a Cuban player defects directly to the U.S. to obtain political asylum, MLB considers him a member of the Rule 3(a)(1)(A) group, which requires that he enter the June 1 amateur draft.⁶² Although Cubans would seemingly fall under the second category of foreign players, this is not the case; Cubans may not come to the U.S. and sign a free agency contract like other international players.⁶³ Therefore, through a “loophole” discovered by Joe Cubas,⁶⁴ MLB essentially encourages Cubans who defect to establish residency in another country and become a free agent, or be subject to the amateur draft.⁶⁵ Lastly, Cubans also differ from Rule 3(a)(1)(A) players in another respect: if they enter the annual draft and each team passes over them, then they are unable to attain free agency.⁶⁶

Defection options

As previously stated, Cubans have two options if they want to play professional baseball, both of which require an initial abandonment of their homeland. They can either defect directly to the U.S. to enter the amateur draft (essentially acquiring “legal resident” status), or they can follow Joe Cubas’ route to international free agency and take advantage of the “loophole.”⁶⁷

⁶⁰ See Frankel, *supra* note 2, at 397; Greller, *supra* note 7, at 1665; Schneider, *supra* note 47, at 480; Baxter & Dominguez, *supra* note 1, at 12.

⁶¹ Cuba is not necessarily the only country whose citizens have to defect to participate in professional sports in the United States:

There is at least one other country from which athletes must defect in order to compete in [United States] professional sports: North Korea. Michael Ri . . . dreams of playing in the National Basketball Association. His dreams are on hold because the Clinton administration will not allow him to come to the United States to play unless he defects, something he is unwilling to do.

Jamail, *supra* note 5, at 165 n. 7 (citing Barbara Smith, “Hoops Player Waits on Diplomatic Jump Ball,” *USA Today*, 1 April 1998)).

⁶² See Cwiertny, *supra* note 18, at 413-14; Frankel, *supra* note 2, at 398; Baxter & Dominguez, *supra* note 1.

⁶³ See Memorandum for the Plaintiff, *supra* note 52, at 4.

⁶⁴ See *infra* notes 71-78 and accompanying text. The “loophole,” as explained later, encourages Cuban players to defect to a country other than the United States because they can sign a free agency contract instead of entering the amateur draft. See Jason S. Weiss, Note, *The Changing Face of Baseball: In an Age of Globalization, Is Baseball Still as American as Apple Pie and Chevrolet?*, 8 U. MIAMI INT’L & COMP. L. REV. 123, 140 (1999-2000); Champion & Norris, *supra* note 55, at 225. The primary goal of all professional baseball players, especially Cubans, is to sign a large contract. See Champion & Norris, *supra* note 55, at 222. A free agency contract is superior because it allows for bidding wars, which usually result in more lucrative contracts, whereas only one team has the rights to a player’s contract if they enter the Rule 3 amateur draft. See *id.* at 225; Frankel, *supra* note 2, at 396.

⁶⁵ See Memorandum for the Plaintiff, *supra* note 52, at 4; Cwiertny, *supra* note 18, at 414. Interestingly, American-born players are unable to avoid the draft by establishing residency in another country. See Memorandum for the Plaintiff, *supra* note 52, at 5.

⁶⁶ See Memorandum for the Plaintiff, *supra* note 52, at 5.

⁶⁷ See Cwiertny, *supra* note 18, at 412-16; Frankel, *supra* note 2, at 397-400; Lopez, *supra* note 20, at 360; Schneider, *supra* note 47, at 480-85; Greller, *supra* note 7, at 1666-79; Weiss, *supra* note 64, at 136-41.

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Prior to December 1995, defection was a relatively uncommon occurrence.⁶⁸ Thus, when Rene Arocha defected in 1991,⁶⁹ MLB hastily chose to hold a special lottery open to any team who wished to sign him instead of subjecting him to the amateur draft, like his successors.⁷⁰ In 1995, Joe Cubas, a Cuban-American agent, discovered a loophole in the MLB rules for Cuban defectors to avoid the amateur draft:⁷¹ if a Cuban ballplayer goes to a country other than the United States and establishes legal residency, then he can enter the league as any other international player and become a free agent.⁷² For example, Andy Morales defected to Florida in the summer of 2000.⁷³ Since Cubans are granted residency under the Cuban Adjustment Act (“CAA”),⁷⁴ Morales would have been forced to enter the MLB through the amateur draft.⁷⁵ However, in that case, one team would receive sole negotiating rights with Morales, diminishing his control over receiving a rewarding contract.⁷⁶ If Morales relocates to another country, he is considered a free agent, enabling him to negotiate with any team.⁷⁷ This is currently how most Cubans join MLB teams.⁷⁸

Defection is not a simple task; it entails abandoning one’s family, friends, as well as one’s country.⁷⁹ Although no form of defection is simple, seemingly the easiest way to defect is to follow Rene Arocha’s escape plan; he walked away from the Cuban National Team while on an international tournament in the U.S.⁸⁰ However, this option is not available to the majority of Cuban baseball players.

Each year, at the end of the Cuban League’s playoff season, the sports ministry’s government officials select the players to compete for *Equipo Cuba*, the Cuban national

⁶⁸ See Frankel, *supra* note 2, at 397.

⁶⁹ Immediately after Arocha left his teammates at Miami International Airport, he requested political asylum. See Weiss, *supra* note 64, at 137. The Immigration and Naturalization Service granted Arocha political asylum, consistent with “the policy of granting asylum to those who flee Castro’s regime.” *Id.*; see also Immigration and Naturalization Act § 208, 8 U.S.C. § 1158 (2010).

⁷⁰ Lopez, *supra* note 20, at 360; see also Frankel, *supra* note 2, at 397. After Arocha’s defection, most Cuban defectors were subject to the amateur draft:

MLB did not always follow this model, however, in dealing with the Cubans who followed Arocha’s lead. In 1992, Cuban national team shortstop Osmani Estrada and left fielder Alexis Cabreja defected while in Mexico and later walked across the border into the United States. Although both sought free agent status, MLB balked at the notion of allowing illegal immigrants to sign with the highest bidder. Instead, MLB subjected both players to the domestic amateur draft.

Frankel, *supra* note 2, at 397-98 (internal citations omitted).

⁷¹ See Frankel, *supra* note 2, at 398; see also Champion & Norris, *supra* note 55, at 220.

⁷² See Cwiertny, *supra* note 18, at 413; Frankel, *supra* note 2, at 394; Lopez, *supra* note 20, at 360; see also Steve Fainaru & Shira Springer, *Hardball in a Ruthless, Global Competition to Get Star Cuban Athletes to Defect for Pro Careers in the United States, Sports Agents Will Do Almost Anything to Succeed*, BOSTON GLOBE, May 28, 2000, at A1 (stating that in 1995 Joe Cubas “discovered that by taking the players to ‘third countries’ outside the United States after their defections, he could get around the major league draft and register the players as free agents.”).

⁷³ See Laura Parker, “Wet Foot” Policy Fuels Smuggling, USA TODAY, July 24, 2000.

⁷⁴ See *infra* notes 111-116 and accompanying text.

⁷⁵ See Parker, *supra* note 73.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Lopez, *supra* note 20, at 360.

⁷⁹ STEVE FAINARU & RAY SÁNCHEZ, *THE DUKE OF HAVANA: BASEBALL, CUBA, AND THE SEARCH FOR THE AMERICAN DREAM* 70 (Villard Books 2001).

⁸⁰ See Weiss, *supra* note 64, at 136-7; Baxter & Dominguez, *supra* note 1, at 12.

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team.⁸¹ In the summer of 1991, after pitching for *Equipo Cuba* at an international tournament, Arocha merely left his team and walked out of the Miami International airport.⁸² Initially, this was the easiest method.⁸³ However, since Arocha's exit, the Cuban players are often selected based on political views, instead of athletic performance.⁸⁴ Since the Cuban government selects the players for the Cuban national team, they refrain from choosing players they deem to be a "flight risk."⁸⁵ Therefore, Cubans who want to defect, but cannot leave the country, are forced to resort to defecting by sea via tragically deficient means, such as a float or a makeshift boat, or professional smuggling.⁸⁶

The Dangers of Defecting by Sea

Defecting by sea is extremely dangerous because players are forced to take desperate measures to avoid being interdicted in the ocean.⁸⁷ Furthermore, the boats that Cubans use are frequently poorly constructed, overflowing, and unsafe.⁸⁸ Despite the fact that one of the major goals of the 1995 U.S.-Cuba migration treaty is safe travel, the leniency of U.S. immigration laws encourages Cuban refugees to take the short, yet treacherous, journey to America.⁸⁹

The day after Christmas in 1997, Orlando Hernandez, a Cuban commonly known by his nickname "El Duque," and seven of his friends left Cuba for the United States in a twenty-foot sailboat.⁹⁰ After four days, their ship was in such abysmal condition that they were forced to land in the Bahamas.⁹¹ While determining whether to send El Duque back to Cuba, the Bahamian government placed him in a detention center.⁹² During this time, the Commissioner of Baseball, Bud Selig prohibited any major league team from meeting with El Duque.⁹³ Joe Cubas went to the Bahamas and strongly advised El Duque to seek refuge in a third country, unsure if the Bahamian government would send El Duque back to Cuba or grant

⁸¹ See Baird, *supra* note 23, at 169. The national team participates in several international tournaments, such as the IBA World Championships, the Intercontinental Cup, the Olympic Games, and the Pan Am Games. *Id.*

⁸² See Frankel, *supra* note 2, at 383.

⁸³ Some other players who followed Arocha's defection method are Osvaldo Fernandez, Michael Tejera, and Rey Ordenez. List of Defectors, *available at Cuban Defectors*, CUBANBALL.COM, <http://www.cubanball.com/defect.html> (last visited Jan. 23, 2011).

⁸⁴ See Baird, *supra* note 23, at 169 (explaining that "[b]ecause international play outside Cuba gives players an opportunity to defect, players with so-called political loyalty may not be selected.>").

⁸⁵ Michael Lewis, *Commie Ball: A Journey to the End of the Revolution*, VANITY FAIR, July 2008, *available at* http://www.vanityfair.com/politics/features/2008/07/cuban_baseball200807.

⁸⁶ See Frankel, *supra* note 2, at 394-95.

⁸⁷ Matt Crossman & Bob Parajon, *An Incredible Journey: The Story of Six Cuban Baseball Defectors*, SPORTING NEWS, July 4, 2008, <http://www.sportingnews.com/mlb/article/2008-07-04/an-incredible-journey-the-story-six-cuban-baseball-defectors> (explaining "Wet Feet, Dry Feet" policy) [hereinafter Crossman & Parajon, *Story of Six Cuban Baseball Defectors*]; see *infra* notes 123-126 and accompanying text.

⁸⁸ See Frankel, *supra* note 2, at 408-410; Pingeton, *supra* note 39, at 329-31.

⁸⁹ See *infra* Section II(B)(2)(ii); Cwiertny, *supra* note 18, at 419 (explaining that the MLB loophole directly undermines safety and instead encourages players to leave).

⁹⁰ See Cwiertny, *supra* note 18, at 415.

⁹¹ See *id.*

⁹² See *id.* After the El Duque situation, Bahamian, Dominican, and Costa Rican governments all tightened their repatriation agreements with Cuba because they wanted to avoid becoming the stomping grounds for Cubans en route to the U.S. *Id.* at 420.

⁹³ See *id.*

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him refugee status.⁹⁴ Upon receiving El Duque's permission, Cubas arranged with Costa Rican President Jose Maria Figueras for an indefinite, albeit temporary, visa for the ball player.⁹⁵ El Duque's "defection story" ended when he signed as a free agent with the Yankees for \$6.6 million.⁹⁶ Unfortunately, most Cubans will not be as lucky as El Duque or Yunel Escobar, another player who defected from Cuba to play baseball in the United States.

When the Cuban National team failed to add Yunel Escobar to the roster, he decided that he needed to pursue his future somewhere else.⁹⁷ After gathering five fellow baseball friends, they organized their escape to America.⁹⁸ On October 6, 2004, at approximately 8 p.m., they boarded an undersized boat with thirty other people.⁹⁹ The weather was exceptionally stormy, with waves up to eighteen feet high.¹⁰⁰ The tumultuous waves broke one of the motors, requiring Escobar and the other passengers to remain at sea an extra day.¹⁰¹ Conditions were so bad that "[e]veryone around the players vomited. If the waves didn't make the passengers throw up, if the people around them throwing up didn't make them throw up, the overpowering smell of gasoline did. Escobar—a proud man—admits he vomited."¹⁰² Sharks even circled their boat.¹⁰³ Although the distance between the northern coast of Cuba and Florida is only about ninety miles,¹⁰⁴ their trip lasted two days and two and a half nights without food or water.¹⁰⁵ On October 9, at about 1 a.m., after their laborious voyage, the boat finally arrived in Florida.¹⁰⁶ Yunel Escobar's story is unlike the majority of recent Cuban defectors¹⁰⁷: as a talented young baseball player, Escobar defected directly to the U.S., gained political asylum, and entered the amateur draft instead of utilizing the loophole.¹⁰⁸ Moreover, he has been so successful that he is currently the starting shortstop for the Toronto Blue Jays.¹⁰⁹

⁹⁴ *See id.*

⁹⁵ *See id.* Believing that El Duque would be severely punished if the Bahamian government returned him to Cuba, the American State Department actually offered El Duque a special humanitarian visa before he went to Costa Rica. *See id.* at 416, 416 n. 265. However, per Cubas' recommendation, El Duque declined the visa. *See id.* at 416.

⁹⁶ *See id.* at 416.

⁹⁷ *See* Crossman & Parajon, *Story of Six Cuban Baseball Defectors*, *supra* note 87.

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.* (noting that Escobar revealed that he did not think they were going to make it to their destination alive).

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See* Donald L. Brown, Comment, *Crooked Straights: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 274 (2002).

¹⁰⁵ *See* Crossman & Parajon, *Story of Six Cuban Baseball Defectors*, *supra* note 87.

¹⁰⁶ *See id.*

¹⁰⁷ The truth is that "[m]ost Cuban defectors never play a game at the major league level, and those who do reach MLB can be hampered by injuries or, for older players, age-related decline." Frankel, *supra* note 2, at 407.

¹⁰⁸ *See* Matt Crossman & Bob Parajon, *An Incredible Journey: Six Amazing Stories*, SPORTING NEWS, July 4, 2008, <http://www.sportingnews.com/mlb/article/2008-07-04/an-incredible-journey-six-amazing-stories?obref=obinsite> [hereinafter Crossman & Parajon, *An Incredible Journey*].

¹⁰⁹ *See id.* The Cuban baseball culture is much different than that of professional baseball in the United States. Despite the obvious language barrier, the atmosphere is different—more professional. Cuban ballplayers, who are fortunate enough to play professional baseball after defecting, often experience a cultural shock and face a tough adjustment period. *See* David O'Brien, *This Team Can Compete*, ATLANTA J.-CONST., July 12, 2009, at

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Human Smuggling

Since the first embargo in the early 1960s, many Cubans have abandoned Cuba to travel the ninety-mile stretches to the United States, utilizing any form of flotation device they could find.¹¹⁰ Although many reasons motivate Cubans to flee to America, the United States immigration policy, the Cuban Adjustment Act of 1966 (“CAA”), provide most with the push they need.¹¹¹ The CAA grants Cubans with asylum status upon arriving on American

C1; Claire Smith, *On Baseball: Less Adjusting for Japanese Pros*, N.Y. TIMES, Apr. 6, 1998, at C5 (asserting that “baseball players from Japan have easier time adjusting to major leagues than players from Cuba”). For example, Yunel Escobar’s “fast rise didn’t come without a few waves. Escobar plays like a guy who defected from Cuba without thinking about the danger involved. He plays cocky. He plays with so much enthusiasm he bothers some people. It sounds ridiculous, but he gets criticized for enjoying himself too much.” Crossman & Parajon, *An Incredible Journey*, *supra* note 108. Yunel Escobar is the prime example of the difficulties Cuban players experience when they are forced to leave their home and move to a completely different country. On July 14, 2010, the Atlanta Braves traded Escobar, the team’s starting shortstop since 2008, for Alex Gonzalez. See Mark Bradley, *Was it a Good Move? Yes, Team Won’t Miss Lack of Hustle*, ATLANTA J.-CONST., July 15, 2010, at C4. Most sports writers suggested that the main reason for the trade was Escobar’s personality and his lack of effort:

To trade 27-year-old Escobar for 33-year-old Gonzalez is to acknowledge that Escobar wasn’t becoming the player the Braves thought he was. More than that, it’s to acknowledge that Escobar just didn’t fit. There were the times [Escobar] was more concerned about his own errors than with whether the team was winning or losing. He may still develop into the player the Braves thought they had.

Jeff Schultz, *What They Said*, ATLANTA J.-CONST., Jul. 16, 2010, at C7, available at 2010 WLNR 14243307. Cuban Defector, Jose Iglesias, also experienced the difference between the two baseball cultures. See Kevin Thomas, *Sox Pinning a Lot of Hope on Cuban Shortstop*, ME. SUNDAY TELEGRAM, Jan. 24, 2010, at C9, available at 2010 WLNR 1662744. In an interview before the 2010 spring training camp, Iglesias stated that he has already learned that physical fitness is not the only factor, mental readiness is equally important in MLB:

“I have not seen much of the American game, but of what I’ve seen, there is more of an emphasis on being focused,” Iglesias said through an interpreter. “I really have to concentrate more than I would in Cuba.”

. . .

Iglesias already has learned one lesson about American baseball. When you hit a homer, you don’t run around the bases waving your arms and celebrating, like you would in Cuba.

Iglesias homered in his third game in Arizona and pranced around the bases. He was drilled by a pitch in the ribs in his next at-bat.

“You can call it a rookie mistake,” Iglesias said. “It’s very different from where I come from in Cuba, where that is something normal.

“I learned from the bruise. Hopefully it won’t happen again.”

Id.

¹¹⁰ See Pingeton, *supra* note 39, at 329 (noting how Cubans use “makeshift boats, rafts, and even inflated tire tubes . . . to cross the treacherous Straits of Florida en route to the promised land”). See also Sawczyn, *supra* note 39, at 346.

¹¹¹ See Sawczyn, *supra* note 39, at 346 n.26, citing Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 [codified as amended at 8 U.S.C. § 1255 (1999)]:

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

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land.¹¹² This policy is unique in comparison to non-Cuban immigrants because to remain in the U.S. Cubans are not obligated to prove their refugee status.¹¹³ Essentially, the United States initiated the CAA “to reward those who were courageous enough to leave the repressive regime of Fidel Castro.”¹¹⁴ Although several of the early refugees escaped Cuba for political reasons, after 1980 the Cuban immigrants mostly sought refugee from the dwindling economy.¹¹⁵ Fortunately for these Cubans, economic reasons suffice.¹¹⁶

The objectives of the CAA backfired in 1980, when the Cuban government opened its border allowing approximately 125,000 Cubans to flee to the United States.¹¹⁷ This episode, which became known as the “Mariel Boatlift,” intensified concern about illegal immigration in the United States.¹¹⁸ The bulk of the “Marielitos” were peaceful and hardworking people, however approximately 10,000 to 15,000 were expelled because they were former mental patients and violent criminals.¹¹⁹ Subsequently, in 1984, Cuba and the United States

alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

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

¹¹² See Sawczyn, *supra* note 39, at 346.

¹¹³ See Sawczyn, *supra* note 39, at 346 n.27, citing Refugee Act of 1980, Pub. L. NO. 96-212, 94 Stat. 102 (1980):

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

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

¹¹⁴ Paul J. Greene, *Boats, Baseballs, and What a Repeal of the Cuban Refugee Adjustment Act Might Mean for Both*, 27 ENT. & SPORTS LAW. 4, 4 (Summer 2009). The implementation of the CAA stemmed from two foreign policy goals aimed at dealing with Fidel: “(a) to destabilize Castro’s government by draining it of vital human resources (such as physicians, teachers, and technicians); and (b) to discredit the regime through encouraging the flight of thousands from a ‘Communist’ to a ‘free’ country.” Sawczyn, *supra* note 39, at 347 (quoting FELIX ROBERTO MASUD-PILOTO, *WITH OPEN ARMS* 1 (1988)).

¹¹⁵ See Sawczyn, *supra* note 39, at 347.

¹¹⁶ See Pingeton, *supra* note 39, at 332.

¹¹⁷ Brown, *supra* note 104, at 275.

¹¹⁸ See Pingeton, *supra* note 39, at 330; see also Brown, *supra* note 104, at 275 n. 9. It became known as the Mariel Boatlift because “[b]etween April and September 1980, 124,776 Cuban migrants were rescued at sea and brought to the United States.” *Id.*

¹¹⁹ See Pingeton, *supra* note 39, at 330.

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came to an agreement that any individual who was ineligible to stay in the U.S. would be sent back to Cuba.¹²⁰

Ten years later, Fidel subdued rallying mobs precipitated by electrical blackouts and island-wide food shortages by once again permitting unrestricted sea departures.¹²¹ However, the 30,000 Cubans who were rescued from the sea in 1994 were taken to Guantanamo Bay, instead of straight to the United States.¹²² From this, stemmed the “Wet Foot, Dry Foot” rule¹²³: because of Cuban refugees’ unique condition they are allowed to stay in the United States if they actually touch United States *soil*, whereas if they are intercepted at sea, they are repatriated to Cuba.¹²⁴ As a result, the United States and Cuba instituted joint migration agreements in 1994 and 1995 to promote safe, organized, and legal immigration.¹²⁵ Additionally, the United States promised “to provide no less than 20,000 visas annually for legal immigration of Cubans to the United States.”¹²⁶

Nonetheless, many Cubans continue to emigrate illegally.¹²⁷ Since 1994, most alternative methods of escape have proven to be ineffective, triggering Cubans dependence on professional smugglers from the United States.¹²⁸ Human or immigrant smuggling is “a con-

¹²⁰ See *id.* (explaining that at the time of the agreement an estimated 2700 Cubans were returned who either confessed to executing serious crimes in the United States or Cuba, or who suffered from acute mental disorders).

¹²¹ See Brown, *supra* note 104, at 275-76; Pingeton, *supra* note 33, at 330.

¹²² See Brown, *supra* note 104, at 276; Pingeton, *supra* note 33, at 330.

¹²³ While the majority of U.S.-Cuba immigration policy is viewed as irrational, critics find the “Wet Foot, Dry Foot” rule to be especially ridiculous. For example, Paul J. Greene, an attorney who concentrates on immigration issues related to professional athletes, criticized this policy in his article, *Boats, Baseballs, and What a Repeal of the Cuban Refugee Adjustment Act Might Mean for Both*:

The act allows a unique path to U.S. citizenship as it gives any Cuban who sets foot on U.S. soil the chance to bypass the route all other immigrants must take to become legal permanent residents. For example, a Cuban boxer can defect after a fight in Mexico City, take the bus to the American border, cross into the United States without a valid visa, and become a green card holder. A Mexican boxer who makes the same trip would be subject to immigration detention and deportation for crossing into the United States illegally. The same is true for a citizen of any other country except Cuba.

Greene, *supra* note 114, at 4. In addition, Matt Crossman, a writer for Sporting News, described the policy in an article he wrote about Baseball defectors, while adding his own comical “stab”:

The U.S. government generally follows a “wet foot, dry foot” policy—an unofficial title for an unofficial policy that a Border Patrol official borrowed from a Dr. Seuss book. If a boat of defecting Cubans is intercepted at sea, those aboard are sent back to Cuba. . . . If a boat makes it to land, the people on board are allowed into the country. After a year and a day, they are eligible to become permanent legal residents.

Crossman & Parajon, *Story of Six Cuban Baseball Defectors*, *supra* note 87.

¹²⁴ See Frankel, *supra* note 2, at 394-95; Sawczyn, *supra* note 39, at 348-49; Crossman & Parajon, *Story of Six Cuban Baseball Defectors*, *supra* note 87.

¹²⁵ See Joint Statement on the Normalization of Migration, Building on the Agreement of Sept. 9, 1944, U.S.-Cuba, May 2, 1995, 35 I.L.M. 327; Brown, *supra* note 104, at 276 (stating that “[t]hese accords stipulate, inter alia, that Cuban migrants interdicted at sea will be returned to Cuba and will receive instruction on legal means of immigration, and oblige Cuba to refrain from any action against returned migrants for attempting to immigrate illegally.”).

¹²⁶ Brown, *supra* note 104, at 276.

¹²⁷ See *id.* at 276-77.

¹²⁸ *Id.* at 278-79. Before 1994, homemade rafts were the most prevalent vehicles of migration. *Id.* at 278. However, after the horde of immigrants in 1980 and 1994, the United States Coast Guards established a system allowing them to extradite the majority of the rafters to Cuba. *Id.*

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tractual agreement in which one person (the smuggler) agrees to take, guide, or transport another person (the smuggled human) across a national border illegally.”¹²⁹

Immigrant smuggling is the superior form of escape for several reasons. For one, smugglers have access to boats with “speed and maneuverability” that can outdistance law enforcement vessels.¹³⁰ Secondly, the smuggler captains have the knowledge and skill to steer alongside the coast of Cuba as well as Florida, and receive ample compensation for evading law enforcement.¹³¹ Lastly, a professional smuggler has access to the “necessary logistical coordination of the covert transit through an underground network collecting advance payment or financing or expensive fees from relatives in both Cuba and the United States.”¹³² However, safety is not a main concern.¹³³

In [November] 2001, thirty Cuban men, women, and children each reportedly secured payment in excess of \$10,000 to smugglers in Florida for covert transit to the United States. They crowded onto a hired stranger’s speedboat on the north coast of Cuba for the 100-mile crossing under the cover of darkness. When the vessel failed to arrive in South Florida the following day, . . . the United States Coast Guard was notified. The Coast Guard’s search discovered a capsized vessel believed to be that driven by the hired smuggler, but no survivors or bodies were found. This event is typical of many unsuccessful human smuggling trips in the Straits of Florida, as smuggling has flourished in this corridor since 1998.¹³⁴

While some have faced trials for smuggling Cubans, no one had been convicted¹³⁵ until MLB agent Gustavo “Gus” Dominguez in April 2007.¹³⁶ Despite a letter expressing Dominguez’s “strong character and high moral principles,”¹³⁷ written by Hall of Famer Sandy Koufax, Dominguez was given the mandatory minimum sentence of five years in prison for funding two smuggling trips to Florida.¹³⁸

¹²⁹ Edward J. Schauer and Elizabeth M. Wheaton, *Sex Trafficking Into the United States: A Literature Review*, 31 CRIMINAL JUSTICE REVIEW 146, 148 (2006). Although human smuggling and human trafficking are often mistaken for each other in the media, “[h]uman smuggling differs from trafficking in that smuggling suggests consent of the parties, whereas trafficking includes deception, fraud, coercion, force, or exploitation of the trafficked human by the trafficker.” *Id.*

¹³⁰ See Brown, *supra* note 104, at 279.

¹³¹ See *id.*

¹³² *Id.* at 279.

¹³³ *Id.* at 280 (explaining that the coordinators main concern is to maximize profit which entails delivering as many people without alerting the authorities and therefore the boats are often crowded and unsafe).

¹³⁴ *Id.* at 273-74 (citing Jody A. Benjamin, Tanya Weinberg, & Vanessa Bauza, *Search for 30 Cubans Called Off: U.S. Officials Begin Inquiry into Fatal Smuggling Attempt*, SUN-SENTINEL, Nov. 22, 2001, at A1); see also David Cazares, *Tragedy at Sea Puts Spotlight on U.S. Policy*, SUN-SENTINEL, Nov. 22, 2001, at 42A (describing the same incident).

¹³⁵ Brown, *supra* note 104, at 279; see also *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982) (“dismissing indictments charging defendants with transporting illegal aliens during the Mariel Boatlift”).

¹³⁶ See Jay Weaver & Cammy Clark, *Federal Court: Player-Smuggling Case*, MIAMI HERALD, July 10, 2007, at B.

¹³⁷ *Id.*

¹³⁸ *Id.*

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The U.S. Trade Embargo on Cuba

On January 1, 1959, Fidel Castro seized control of the Cuban government and the previously amicable U.S. relationship came to an abrupt halt.¹³⁹ Shortly thereafter Fidel Castro became Cuba's prime minister, marking his first assumption of administrative responsibilities for the new government.¹⁴⁰ U.S.-Cuban relations severely declined in the early 1960s, when Fidel "began to build a repressive communist dictatorship and moved his country toward close relations with the Soviet Union."¹⁴¹ Since January 1, 1959, until his resignation in 2006, Fidel Castro ruled the island of Cuba with an iron hand.¹⁴²

The Cuban Government's goals for the revolution were to implement land reform, develop the economy, obtain new international allies, and establish socialism as the new political authority.¹⁴³ They adopted the first Agrarian Reform Law in May of 1959,¹⁴⁴ which involved confiscation by the Cuban government of all agricultural land over 165 acres, in order to divide the large property holdings for allocation amongst the poor.¹⁴⁵ To lessen United States economic influence and presence, Cuba enacted Law No. 851, confiscating all United States-owned businesses.¹⁴⁶ In response to the Cuban government's nationalization of

¹³⁹ See LIBRARY OF CONGRESS, FED. RESEARCH DIV., CUBA: A COUNTRY STUDY 4-5 (Rex A. Hudson ed. 4th ed. 2002) [hereinafter COUNTRY STUDY]; see also ROBERTO GONZÁLEZ ECHEVARRÍA, THE PRIDE OF HAVANA: A HISTORY OF CUBAN BASEBALL 302-304 (1999); MARIFELI PÉREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE, AND LEGACY 52-60 (2d ed. 1999).

¹⁴⁰ See COUNTRY STUDY, *supra* note 139, at 64. Initially, the only official position that Fidel undertook was commander of the armed forces, which only lasted a few weeks. See *id.* See also BBC *On This Day, 1959: Castro Sworn in as Cuban PM*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/february/16/newsid_2544000/2544431.stm (last visited Jan. 30, 2010).

¹⁴¹ MARK P. SULLIVAN, CUBA: ISSUES FOR THE 111TH CONGRESS 15 (Cong. Research Serv., CRS Report for Congress, Order Code R40193, Mar. 25, 2010). In April 1961, Fidel declared that the "Cuban Revolution" was socialist, and then in December 1961 he publicly adopted Marxism-Leninism. *Id.* at 5. Almost immediately before Castro's declaration of socialism, in April 1961, the U.S. instigated the Bay of Pigs catastrophe to attempt to oust the Castro government. See Jamail, *supra* note 5, at 9. See also BRIAN LATELL, AFTER FIDEL: THE INSIDE STORY OF CASTRO'S REGIME AND CUBA'S NEXT LEADER 69 (2005). The Marxism-Leninism theory:

The substance of the Marxist doctrine was the idea that private ownership of the means of production is the origin of social inequality and class struggle. Thus such ownership had to be abolished. [T]he root of all social evil is class antagonism; social classes can, and must, be suppressed by prohibiting the private appropriation of productive forces and by putting them at the disposal of the collectivity which will exploit them in the common interest. . . . [T]he new society. . . will have neither state nor law. . . . Man will once again be free. When the Marxist party—also known as the Bolshevik party—succeeded in gaining power in Russia, Lenin, the leader of the party, played such an important role that the theory became known as Marxism-Leninism.

Zhanna Bulkina, Comment, *Development of Ukrainian Real Property and Mortgage Law: The American Perspective*, 10 SAN DIEGO INT'L L.J. 591, 601 n. 62 (citing RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 155-62 (2d ed. 1978)) (internal citations omitted) (internal quotations omitted).

¹⁴² See Sullivan, *supra* note 141, at 5.

¹⁴³ See Pérez-Stable, *supra* note 139, at 10; Crystal Jamison, Comment, *Family Tradition: Cuban Policy Reform as Raul Castro Takes the Reigns*, 15 L. & BUS. REV. AM. 891, 892 (2009).

¹⁴⁴ See COUNTRY STUDY, *supra* note 139, at 65.

¹⁴⁵ See *id.*; Jamison, *supra* note 143, at 892.

¹⁴⁶ See Jamison, *supra* note 143, at 892; Jose A. Ortiz, Note, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 332 (2000). Fidel also implemented Law No. 890, expropriating practically all Cuban-owned businesses and nationalizing all Cuban-owned industries. *Id.*

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all American commercial property and business in Cuba, the development of a relationship with the Soviet bloc, and the assistance to various anti-American organizations during the Cold War, the Eisenhower administration placed the first limitation on Cuban exports between the years of 1960-61, which essentially barred all trade and travel between the two states.¹⁴⁷

The United States' embargo against Cuba stems from the 1917 Trading With the Enemy Act ("TWEA"),¹⁴⁸ which bans transfers of property between United States citizens and enemy nations, unless authorized by the President.¹⁴⁹ Currently, the TWEA maintains that during wartime, the President may:

investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.¹⁵⁰

However, in 1933 the TWEA was extended to include circumstances of "existing national emergency."¹⁵¹ The authority in the amended portion, Section 5(b), is "intended to be exercised in peacetime to enable the President to engage in extensive regulation of international economic transactions when a national emergency so required."¹⁵² In other words, the President retains the power to enforce embargoes upon foreign countries, irrespective of a wartime emergency.¹⁵³

The TWEA's embargo was codified in 1963 with the implementation of the Cuban Assets Control Regulations ("CACR"),¹⁵⁴ which prohibits "transactions incident to travel to, from, and within Cuba" and "payment or transfer" to Cuban nationals.¹⁵⁵ Although Congress

¹⁴⁷ See WILLIAM RATLIFF & ROGER FONTAINE, *A STRATEGIC FLIP-FLOP IN THE CARIBBEAN: LIFT THE EMBARGO ON CUBA* 9 (2000); Frankel, *supra* note 2, at 390; Greller, *supra* note 7, at 1685.

¹⁴⁸ Trading With the Enemy Act, 12 U.S.C. § 95a, 50 U.S.C. app. § 1-44 (2009).

¹⁴⁹ John O'Brien, Comment, *Political Balk: Opening the Door for U.S.-Cuba Policy Reform Via Diplomatic Blunder at the World Baseball Classic*, 15 VILL. SPORTS & ENT. L.J. 135, 140 (2008).

¹⁵⁰ 50 U.S.C. app. § 5(b)(1)(B) (2009).

¹⁵¹ See Act of Mar. 9, 1933, ch. 1, 48 Stat. 1, 1; see also *Regan v. Wald*, 468 U.S. 222, 225-226 (1984); O'Brien, *supra* note 149, at 141. In 1977, Congress amended the TWEA an additional time so that it only pertains to times of war. See Trading With the Enemy Act, Pub L. No. 95-223, §101, 91 Stat. 1625 (1977) (codified as amended to 50 U.S.C. app. § 5(b)(1) (1994)); Cwiertyny, *supra* note 18, at 397.

¹⁵² *Cornet Stores v. Morton*, 632 F.2d 96, 97 (9th Cir. 1980) (referring to Act of Mar. 9, 1933, ch. 1, § 2, 48 Stat. 1).

¹⁵³ Cwiertyny, *supra* note 18, at 396 (citing *United States v. Fernandez-Pertierra*, 523 F. Supp. 1135, 1137 (S.D. Fla. 1981)).

¹⁵⁴ Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-901 (2009); see Cwiertyny, *supra* note 18, at 396.

¹⁵⁵ 31 C.F.R. §§ 515.305, 515.309(a), 515.415(a)(1); see Frankel, *supra* note 2, at 393. The CACR has a substantial impact on baseball:

[T]his means no U.S. baseball organization is allowed to engage in any transactions with Cuba unless it requests a specific license. No club may enter into contractual relations with Cuba or Cuban nationals. And if a Cuban ballplayer signed a multimillion-dollar contract with a U.S. team, he would be prohibited from sending money home to Cuba without a Treasury Department License.

Jamail, *supra* note 5, at 129.

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revised the embargo in 1977 to only pertain to times of war, it simultaneously enacted legislation that includes renewable one-year options, which authorizes the President to enforce the Cuban embargo in times of peace.¹⁵⁶

Insisting on a regime change in Cuba, the United States passed the Cuban Democracy Act (“CDA”) of 1992¹⁵⁷ and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also called the Helms-Burton Act),¹⁵⁸ which together strengthened the existing embargo sanctions.¹⁵⁹ The CDA broadened the ban on conducting business in Cuba to U.S.-owned or controlled businesses located overseas.¹⁶⁰ Despite this expansion, it also aspired to bring humanitarian assistance to the Cuban people.¹⁶¹ Due to considerable amounts of foreign investments in Cuba, the United States subsequently enacted the newest, most restrictive embargo, the Helms-Burton Act.¹⁶² This codified the Cuban embargo, including all limitations under the CACR.¹⁶³ The Helms-Burton Act aims to globalize the current U.S. trade embargo over Cuba by discouraging third-party countries and their nationals from dealing or investing in Cuba while also granting a cause of action in U.S. federal courts to U.S. citizens whose property was taken against subsequent purchasers.¹⁶⁴ Furthermore, the purpose of the Helms-Burton Act is “to seek international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes.”¹⁶⁵ These restrictions largely contribute to the current issues facing Cuban nationals who want to play major league baseball.

¹⁵⁶ See Trading With the Enemy Act, § 101(b), 91 Stat. at 1625 (codified at 50 U.S.C. app. § 5 note (2009)); see also Cwierny, *supra* note 18, at 397 (2000); Lopez, *supra* note 20, at 358.

¹⁵⁷ Cuban Democracy Act of 1992, Pub. L. No. 102-484, Title XVII, §§ 1701-1712 [H.R. 5006], 106 Stat 2315 (codified as amended at 22 U.S.C. §§ 6001-6010 (2009)) [hereinafter CDA].

¹⁵⁸ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114 [H.R. 927], 110 Stat. 785 (codified as amended at 22 U.S.C. §§ 6021-6091 (2009)) [hereinafter Helms-Burton Act].

¹⁵⁹ See Sullivan, *supra*, note 141, at 16; Sheryl L. Lutjens, *Cuba and the Security Frame*, 33 *LATIN AMERICAN PERSPECTIVES* 3, 7 (2006); O’Brien, *supra* note 149, at 146.

¹⁶⁰ See CDA, *supra* note 157, at § 1706; see also Cwierny, *supra* note 18, at 398.

¹⁶¹ See O’Brien, *supra* note 149, at 146 (CDA “sought to bring humanitarian aid to Cuba through food donations [CDA § 1705(b)], provision of medical supplies [CDA § 1705(c)], and the introduction of a postal infrastructure [CDA 1705(f)].”).

¹⁶² See Frankel, *supra* note 2, at 394; 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, 12 (1998-99). Prior to implementation of the Helms-Burton Act, on February 24, 1996, four pilots from Brothers to the Rescue (a humanitarian group made up of Cuban exiles) flew over Cuba in order to drop political pamphlets. See *COUNTRY STUDY*, *supra* note 139, at lix; Catherine M. Clendinning, Comment, *The Great North American Trade-Off: Legislation Shaping Trade Policies Between Cuba and the United States*, 14 *L. & BUS. REV. AM.* 139, 142-43 (2008). After they strayed from the path that they previously agreed on with the Cubans, a Cuban military aircraft shot down the jets, killing them. *Id.* Seemingly in retaliation, the Senate approved the Helms-Burton legislation on March 5 and President Clinton hastily signed it into law on March 12 (despite fervent, articulated criticism by Russia, Canada, the EU, and the Caribbean Community). See *COUNTRY STUDY*, *supra* note 139, at lix.

¹⁶³ See Sullivan, *supra* note 141, at 16.

¹⁶⁴ See French, *supra* note 162, at 7.

¹⁶⁵ Helms-Burton Act, *supra* note 158. The Helms-Burton Act consists of four major parts:

- (1) it imposes sanctions against persons or companies from third countries who do business with Cuba (under a “trading in stolen goods” argument) and establishes the financing of the U.S.-organized “opposition”; (2) it continues the blockade until all nationalized properties have been returned and seeks to regulate the process of the overthrow of the Cuban Revolution (including stipulating specific people who are not to

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A Change in the Political Landscape Presents New Opportunities for Baseball

The change in the political landscape presents a unique opportunity for a new arrangement for Cuban baseball players to participate in Major League Baseball.

American relations with Cuba before the Obama administration

The embargo against Cuba was warranted when it was first introduced in 1960: “[t]he United States wanted to expedite change in the Cuban form of government while protecting its own national security because Cuban-Soviet relations were growing apace with the development of world communism.”¹⁶⁶ However, the end of the Cold War eliminated these initial concerns.¹⁶⁷ The situation has drastically changed since the enactment of this outdated embargo but, unfortunately, the Cuban people are still forced to deal with the consequences.

Several critics argue that the conclusion of the Cold War should have precipitated the removal of the embargo.¹⁶⁸ Instead, the U.S. foreign policy toward Cuba transformed with the new goals of “bringing democracy” to the island.¹⁶⁹ President Bill Clinton and President George W. Bush both focused on a status quo approach to “maintain the U.S. dual-

be included in a new government); (3) it establishes the rights of former owners of nationalized property to institute proceedings against those who “traffic” in these properties; and (4) it sets out rules for denying U.S. visas to those who do business with Cuba and to their families.

Tim Anderson, *Contesting “Transition”: The U.S. Plan for a “Free Cuba,”* 32 *LATIN AMERICAN PERSPECTIVES* 28, 35 (2005). The Helms-Burton Act contains four major titles. The first title, called Strengthening International Sanctions Against the Castro Government, focuses on attaining a democratic form of government for Cuba by mixing restrictions with incentives. See Helms-Burton Act, *supra* note 158, at §§ 101-116; see also French, *supra* note 162, at 8-9. Under Title II, labeled Assistance to a Free and Independent Cuba, once Cuba initiates a transition to a “democratically elected government,” Helms-Burton Act, *supra* note 158, at § 201(14), the President of the United States may provide assistance to Cuba through numerous types of financial aid and by lifting the economic embargo. See Helms-Burton Act, *supra* note 158, at §§ 201-207; French, *supra* note 162, at 9-10. Title III, Protection of United States Nationals, internationalizes the embargo by attempting to deter foreign investors from conducting business with Cuba. See Helms-Burton Act, *supra* note 158, at §§ 301-306; see also French, *supra* note 162, at 10 (explaining how Title III is often considered the most controversial part because it “creates a cause of action for United States citizens against any person or government that traffics in property that once belonged to a United States citizen and that was confiscated by the Castro regime.”). Lastly, Title IV, Exclusion of Certain Aliens, excludes any foreigner from the United States who has expropriated property, directed the expropriation of property, or trafficked in expropriated property. See Helms-Burton Act, *supra* note 158, at § 401; see also French, *supra* note 162, at 11.

¹⁶⁶ French, *supra* note 162, at 1; see also *U.S.-Cuba Relations Time for a New Approach*, *CTR. FOR NAT’L POLITICS* 4 (Jan. 2003) [hereinafter *U.S.-Cuba Relations*] (explaining the initial justification for the embargo: “During the Cold War, the U.S. had reason to be concerned about the existence of a Soviet ally only 90 miles off our shores. . . . In that context, a policy of containment and isolation was understandable.”).

¹⁶⁷ See *U.S.-Cuba Relations*, *supra* note 166 (stating that “Russia and many of the former Eastern Bloc countries have become U.S. allies, and the prospect of communist revolution sweeping across Latin America is no longer credible.”).

¹⁶⁸ See Pérez-Stable, *supra* note 139, at 174-81; see also Anderson, *supra* note 165, at 42-44 (describing the new U.S. policy toward Cuba as contradictory and irrational); see generally Soraya M. Castro Mariño, *U.S.-Cuban Relations During the Clinton Administration*, 29 *LATIN AMERICAN PERSPECTIVES* 47 (2002); French, *supra* note 162.

¹⁶⁹ See Mariño, *supra* note 168, at 48.

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track policy of isolating the Cuban government while providing support to the Cuban people.”¹⁷⁰

President Bill Clinton’s Dual-Track System

President Clinton’s term followed the dual-track policy.¹⁷¹ Representing the first track, the beginning of the administration was characterized by increased pressure, through the Cuban Democracy Act and the Helms-Burton Act, in an attempt to abruptly wipe out the Cuban Revolution.¹⁷² However, when that path failed, he proceeded with track two:¹⁷³ Clinton lessened the restrictions imposed by the trade embargo in order to “ease the plight of the Cuban people and help them prepare for a democratic future.”¹⁷⁴ For example, Clinton enabled United States residents to aid Cubans more effectively; they could: (1) send more money (\$1,200 a year) to individual families and non-governmental groups¹⁷⁵; (2) sell food and medicines to organizations unaffiliated with the government, e.g., religious groups; (3) schedule direct flights to Cuban cities, excluding Havana; (4) create a mail service directly to Cuba; and (5) partake in people-to-people contacts through exchanges between academics, scientists, and athletes.¹⁷⁶

Clinton explained that his administration strategically devised these measures to help the Cuban citizens without providing support to Castro’s government.¹⁷⁷ He felt very strongly about promoting this policy of “people-to-people exchange.”¹⁷⁸ For example, in 1999, Clinton enabled the Baltimore Orioles to compete against the Cuban National Team in two exhibition games, one in Havana and the other in Baltimore, with a provision that the profits be given to Cuban charities rather than Castro’s government.¹⁷⁹ Through the implementation of his new policies, Clinton concluded his term by setting the stage to improve the forty-year hostility between these two nations.

¹⁷⁰ Sullivan, *supra* note 141, at 17.

¹⁷¹ See generally Mariño, *supra* note 168.

¹⁷² See *id.* at 48.

¹⁷³ See *id.* at 52-54; Greller, *supra* note 7, at 1650 n. 5.

¹⁷⁴ Statement on United States Policy Toward Cuba, 35 WEEKLY COMP. PRES. DOC. 7, 7 (Jan. 5, 1999) [hereinafter Statement on U.S. Policy].

¹⁷⁵ Initially, Clinton only allowed Cuban Americans to send remittances to their immediate families in Cuba. However, he later expanded on this, permitting any U.S. resident to transit money to Cubans. See *id.*

¹⁷⁶ See *id.*; Greller, *supra* note 7, at 1650 n. 5; Weiss, *supra* note 64, at 155.

¹⁷⁷ See Statement on U.S. Policy, *supra* note 174, at 7. Clinton stated: “They are consistent with our policy of keeping pressure on the regime for democratic change—through the embargo and vigorous diplomatic initiatives—while finding ways to reach out to the Cuban people through humanitarian efforts and help in developing civil society.” *Id.* at 7-8. In addition, he proclaimed: “They demonstrate the United States’ compassion for the Cuban people, our strong interest in building bonds between the citizens of our nations, and our determination to provide the people of Cuba with hope in their struggle against a system that for four decades has denied them even basic human rights.” *Id.* at 7.

¹⁷⁸ See Lutjens, *supra* note 159, at 7 (contrasting Clinton’s strict legislation that called for a change in the Castro regime, such as the CDA and Helms-Burton Act, with his “Cuba policy [that] was characterized, too, by the post-cold war context, by his conceding of authority over sanctions regulations to Congress, and by his faith in people-to-people exchange as the means to bring change to Cuba.”).

¹⁷⁹ See Greller, *supra* note 7, at 1650-52; Weiss, *supra* note 64, at 155-57; Thomas W. Lippman, *U.S. Ready to Play Ball With Cuba: Clinton to Ease Trade Embargo, Using Orioles As Unofficial Envoys*, WASH. POST, Jan. 5, 1999, at A1.

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President George W. Bush's Stricter Dual-Track System

By the time President Clinton left office, U.S.-Cuba relations were, seemingly, headed in the right direction, towards a weakening of the embargo. However, this setting did not last long. Although President Bush maintained the dual-track U.S. policy system,¹⁸⁰ his approach to relations between the two nations was entirely different than his predecessor. President Bush zealously sought enforcement of the long-standing embargo against Cuba and, consequently, the Cuban people.¹⁸¹ In 2006, Bush's administration attempted to preclude Cuba from participating in the World Baseball Classic ("WBC").¹⁸² When Bush thought that Cuba might partake in the WBC, he placed a political barrier on "the Caribbean dictatorship's participation, only to be countered by an equally savvy political move from Castro."¹⁸³ Fidel promised to donate all of the proceeds from the WBC to the victims of Hurricane Katrina.¹⁸⁴ Although Bush eventually allowed Cuba to participate in the games and the WBC ensued without any problems, his actions stood as a reminder to anyone who happened to forget about the longstanding hostility between the two nations.¹⁸⁵

Rather than proceed with Clinton's progress, Bush essentially moved backwards in the development of relations with Cuba. For one, his administration stressed greater implementation of economic restrictions and intensified sanctions on humanitarian gift packages, travel, and remittances.¹⁸⁶ In addition, President Bush increased constraints on Cuban Americans visiting family in Cuba and conditions for payment of U.S. agricultural exports to Cuba.¹⁸⁷ Although Bush did not completely abolish Clinton's reductions of sanctions, he added limitations on Clinton's improvements instead. For example, Clinton permitted American travel to Cuba intended for any educational activity, while Bush required this travel to be directly associated with a structured educational program.¹⁸⁸ Due to these new restrictions, if President Obama plans to improve the tension, he should revert back to U.S.-Cuba relations prior to President Bush's term.

Current political landscape: New administrations moving toward easing restrictions

Currently, U.S. President Barack Obama and Cuban President Raul Castro are working to improve United States-Cuba relations. Given their stances on the embargo, the respective leaders are more likely to establish a solution to the restrictive, dangerous, and ineffective embargo than their predecessors.¹⁸⁹ The Obama administration has already initiated its process of reform.¹⁹⁰ In September 2009, the Treasury Department executed the Omnibus Ap-

¹⁸⁰ See Sullivan, *supra* note 141, at 18.

¹⁸¹ O'Brien, *supra* note 149, at 136.

¹⁸² See *id.*; Carol J. Williams, The World; At Guantanamo, a Cross-the-Fence Chat, *L.A. Times*, Oct. 20, 2006; see also THOMAS F. CARTER, *THE QUALITY OF HOME RUNS: THE PASSION, POLITICS, AND LANGUAGE OF CUBAN BASEBALL 197-199* (2008) (discussing the politics of Cuba's involvement in the WBC).

¹⁸³ O'Brien, *supra* note 149, at 136-37.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 137.

¹⁸⁶ See Sullivan, *supra* note 141, at 18.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See Adam Jadhav, *Thaw Seems Near for U.S., Cuba*, ST. LOUIS POST-DISPATCH, Apr. 12, 2009.

¹⁹⁰ See Sullivan, *supra* note 141, at 22-24.

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appropriations Act of 2009¹⁹¹ along with other presidential policy directives,¹⁹² which authorized the easing of restraints on travel, remittances, gifts, and agricultural exports to Cuba.¹⁹³ Outside of legislation and executive action, in June 2009, the United States and Cuba took a large step toward lifting the embargo when they decided to revive the semi-annual migration talks; talks that the U.S. suspended in 2004. Further, the American and Cuban governments are considering establishing a direct postal service between the countries.¹⁹⁴ Finally, in June 2009, the State Department shut off an electronic billboard in the U.S. Interests Section in Havana that displayed news and pro-democracy messages, which bothered the Cuban government.¹⁹⁵ All of these policy changes represent Obama's desire to improve relations with Cuba. Unfortunately, after these initial actions, President Obama chilled interaction with Cuba for some time.¹⁹⁶

In the ensuing stalemate, several analysts had varying opinions on the outcome of possible diplomacy between the United States and Cuba. On one hand, some predicted Raul Castro would be receptive to providing the Cuban people with additional economic freedoms.¹⁹⁷ On the other hand, some felt that Raul would follow in his brother's footsteps and that it is unlikely for the United States to expect Cuba to impose democratic reforms.¹⁹⁸ For

¹⁹¹ See generally Omnibus Appropriations Act, Pub. L. 111-8, 2009 H.R. 1105 (2009).

¹⁹² See Sullivan, *supra* note 141, at 28; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-951R, U.S. Embargo on Cuba: Recent Regulatory Changes and Potential Presidential or Congressional Action 8, (Sept. 17, 2009), available at <http://www.gao.gov/new.items/d09951r.pdf> [hereinafter U.S. GAO]. In March 2009, the Treasury Department's Office of Foreign Assets Control ("OFAC"), restored the authorization for family travel to Cuba to the provisions which existed before Bush's June 2004 policy. See Sullivan, *supra* note 141, at 28. Obama announced in April 2009 that he would further ease the travel restrictions by removing all sanctions pertaining to family travel. See *id.* at 22.

¹⁹³ See Sullivan, *supra* note 141, at 25, 28; U.S. GAO, *supra* note 192, at 9-11 (detailing the changes in each policy); Rob Biertempfel, *MLB Clubs Await Thaw in Relations with Cuba*, PITTSBURGH TRIB. REV., Apr. 29, 2009. To initiate President Obama's plan of seeking "a new beginning with Cuba," he amended part of the CACR. *Id.* For example, in September of 2009, the regulation of "Remittances to nationals of Cuba" was amended. See U.S. GAO, *supra* note 192, at 9, 10. The older version stated:

(a) Periodic \$300 family household remittances authorized. Persons subject to the jurisdiction of the United States who are 18 years of age or older are authorized to make remittances to nationals of Cuba who are members of the remitter's immediate family, provided that:

(1) The remitter's total remittances do not exceed \$300 per recipient household in any consecutive 3-month period, regardless of the number of members of the remitter's immediate family comprising that household;

(2) The remittances are not made from a blocked source. . .

31 C.F.R. § 515.570 (2008). The amended regulations: (1) "[a]uthorized remittances to close relatives, provided no remittances are authorized to prohibited Cuban government officials or Cuban Communist Party officials;" (2) "[r]emoved limitations on the amount and frequency of remittances"; and (3) "[a]uthorized family travelers to Cuba to carry up to \$3,000 in remittances." U.S. GAO, *supra* note 192, at 10; see 31. C.F.R. § 515.570 (2009) (amended by 74 FR 46006).

¹⁹⁴ Sullivan, *supra* note 141, at 23. The first set of talks was on July 14, 2009. The next stage were planned to occur in Havana in December 2009, but were postponed until February 2010. *Id.*; *Migration Talks with Cuba Put Off to February*, WASH. POST, Dec. 4, 2009, at A17.

¹⁹⁵ See Sullivan, *supra* note 141, at 23 (the State Department announced the billboard's removal in late July 2009).

¹⁹⁶ See *Cuba and the United States: Resistant to Sticks and Carrots*, 950 ECONOMIST, Nov. 21, 2009 [hereinafter *Resistant to Sticks and Carrots*]; Marc Lacey, *In Cuba, Hopeful Tenor Toward Obama Is Ebbing*, N.Y. TIMES, Dec. 31, 2009, at A6 (explaining how Raul Castro and the Cuban people's initial enthusiasm about President Obama has declined; "The Obama honeymoon is over.").

¹⁹⁷ See Jadhav, *supra* note 189.

¹⁹⁸ See Biertempfel, *supra* note 193.

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example, one critic explained that although the “economic reforms are greatly improving the weathered county, Raul is not taking the measures necessary to ensure their continued success, including reestablishing trade with the United States and encouraging foreign investment.”¹⁹⁹ The discourse was accompanied by a mixed reply from Cuba’s government:

Days after President Raul Castro said he was willing to negotiate, his older brother, Fidel Castro, said Cuba will not give in to American demands. Change will be a slow process, for both sides. “Just because the USA decides it will normalize relations, that does not negate what 51 years of the Cuban Revolution and anti-American sentiments have solidified into a society,” [Rene] Gayo [the Pittsburgh Pirates’ director of Latin American scouting] said. Distrust of America is prevalent throughout Cuban government. According to Gayo, the sentiment runs especially deep at the country’s National Institute of Sports. “The Communist Party will not go away because the USA wants to get access to what Cuba has to offer,” Gayo said. “It will take time for the Cubans to infiltrate (American baseball), volume-wise, to the extent that the Dominicans and Venezuelans have.”²⁰⁰

Despite the opinions on Raul’s reluctance to embrace an easing or lifting of the embargo, his economic progress and willingness to abandon certain socialist mechanics are a symbol of the possibilities for direct diplomacy with the United States. Since taking office, Raul has significantly improved Cuba’s economy, in spite of suffering a gigantic setback caused by Hurricanes Ike and Gustav’s destruction.²⁰¹ In addition, he has assisted the agricultural sector,²⁰² rebuilt Cuba’s infrastructure, and encouraged spending.²⁰³

Raul’s policy reforms symbolize a shift away from Fidel’s aggressive socialist rule.²⁰⁴ Prior to January 2009, the government was responsible for constructing homes.²⁰⁵ In

¹⁹⁹ Jamison, *supra* note 143, at 891.

²⁰⁰ Biertempfel, *supra* note 193.

²⁰¹ See Jamison, *supra* note 143, at 899.

²⁰² The farmers are very happy with the changes Raul has made thus far. The problem with state-run distribution of agricultural goods is that farmers lack motivation for additional self-development. See Jamison, *supra* note 143, at 900. Thus, Raul increased the price that the state will compensate farmers, doubling and sometimes tripling it, to promote further expansion. See *id.* In addition, farmers now retain the authority to purchase essential supplies, which were formerly dispensed by the government’s regulatory system, in order to maintain their crops and prevent uncultivated land stemming from scarcity in the rationed stock. See *id.* Lastly, he returned the unused government-owned land to the people, instituting Law Decree 259, which granted private owners and cooperatives segments of the vacant farmland. See *id.* Raul’s new land policies transferred the majority of farmland ownership from the government to the citizens. See *id.* (explaining how “the balance in ownership of farmlands virtually inverted itself. Farmers now control eighty-five percent of the total farm acreage, while prior to Raul taking office the state maintained ownership of eighty percent.”). This action defies one of the principles of socialism. See Bulkina, *supra* note 141, at 601 (noting the essence of the Marxist doctrine: “the idea that private ownership of the means of production is the origin of social inequality and class struggle. Thus such ownership had to be abolished.”).

²⁰³ See Jamison, *supra* note 143, at 899-903.

²⁰⁴ See Fiona Govan, *Raul Castro Lifts Ban on Cubans Building Their Own Homes*, TELEGRAPH, Jan. 5, 2009, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/cuba/4126471/Raul-Castro-lifts-ban-on-Cubans-building-their-own-homes.html>.

²⁰⁵ See Jamison, *supra* note 143, at 901; Govan, *supra* note 204.

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response to Cuba's housing shortage emergency,²⁰⁶ Raul revoked the ban, permitting Cuban residents to build their own homes, and he announced that several new housing reforms are expected.²⁰⁷ Furthermore, Raul admitted to inadequacies in Cuba's education system stemming from the majority of teachers seeking other, better paying jobs.²⁰⁸ Therefore, he introduced incentives to attract retired teachers to return to the classrooms.²⁰⁹ In the spring of 2008, President Raul Castro initiated reforms to improve the economy by pushing the Cuban people to increase their spending.²¹⁰ Other policies, which became effective in April of 2008, included removal of the long-standing ban against buying electronic goods²¹¹ and conclusion of the "tourism apartheid," in which only tourists, not Cuban citizens, were allowed access to car rentals and hotel stays.²¹²

As expected, many are still critical of President Raul Castro, claiming that his development is too slow and trivial.²¹³ However, even though these adjustments may appear to be fairly small, "they are gradually leading to the decentralization of the government, something Cuba has not experienced in half a decade."²¹⁴ If Raul Castro continues down this path, progressively granting the people more freedoms, the U.S. will have no choice but to continue easing restrictions on the embargo.

Recently, Cuban officials have gradually become more critical of President Obama's administration.²¹⁵ For example, in December, the Cuban Foreign Minister criticized President Obama, calling him an "imperialistic, warmongering Cuba hater."²¹⁶ Cuban officials have also complained about the U.S. including Cuba on the Transportation Security Administration's new list of countries that require enhanced security screening procedures.²¹⁷ While these happenings are certainly disheartening to those in favor of lifting the embargo, "[t]here was and still is potential for the Obama administration to change relations with Cuba."²¹⁸

President Obama has slowly initiated the changes he promised during his presidential campaign. He pledged to remove constraints on family travel to Cuba and on Cuban Americans sending remittances to Cuba, which he fulfilled.²¹⁹ However, Obama continues to uphold the embargo as a source of power, a bargaining chip, to induce change.²²⁰ He has also declared: "if the Cuban government takes significant steps toward democracy, beginning with

²⁰⁶ For three years prior to lifting the ban, the Cuban government failed to execute its annual goal of constructing 100,000 new homes. See Govan, *supra* note 204. The issue intensified further when three hurricanes razed more than half a million houses. See *id.*

²⁰⁷ See Jamison, *supra* note 143, at 901.

²⁰⁸ See *id.* at 902 (stating that Cuba is ranked fifty-first in the world).

²⁰⁹ See *id.* (contrasting Fidel's policy almost a decade ago, which attempted to employ high school graduates as temporary teachers).

²¹⁰ See *id.*

²¹¹ See *id.* (including computers, mobile phones, microwave ovens, and car alarms).

²¹² See *id.*

²¹³ See *id.* at 903.

²¹⁴ *Id.*

²¹⁵ See Sullivan, *supra* note 141, at 23; *Resistant to Sticks and Carrots*, *supra* note 196.

²¹⁶ Lacey, *supra* note 196; see also Sullivan, *supra* note 141, at 23.

²¹⁷ See Sullivan, *supra* note 141, at 36; Igor Sill, *The US-Cuban Relation, What Next!*, CARIBBEAN NET NEWS (Grand Cayman, Cayman Is.), Jan. 6, 2010.

²¹⁸ Lacey, *supra* note 196 (quoting Wayne S. Smith, a former American diplomat in Havana).

²¹⁹ See Sullivan, *supra* note 141, at 22; *Spain Predicts Thaw in US and EU Relations with Cuba*, VOICE OF AMERICA NEWS, July 21, 2010 [hereinafter *Spain Predicts Thaw*].

²²⁰ See Sullivan, *supra* note 141, at 22.

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the freeing of all political prisoners, then the United States would take steps to normalize relations and ease the embargo.”²²¹ Although the freeing of all political prisoners may seem implausible, it is much more rational than requiring Cuba to become a democratic state as a prerequisite of weakening the embargo.

On July 14, 2010, President Raul Castro “took his first major step away from decades of hardline policy,” when he announced Cuba’s plan to free 52 political prisoners who were arrested in 2003.²²² Under the deal that Raul and Cardinal Jaime Ortega of the Roman Catholic Church discussed, “five of the prisoners were to be released ‘within days,’ . . . and the rest within months, bringing the number of political prisoners in Cuba—once numbering in the tens of thousands—to fewer than 150, the lowest in the regime’s history.”²²³ Within two weeks, Raul had already released twelve prisoners who joined their families and moved to Madrid, Spain.²²⁴ After this, many felt that it was President Obama’s turn to reciprocate.²²⁵ As previously stated and as is now even more evident, President Raul Castro has taken many steps, which steer away from basic communist policies, in order to improve his country and its economy. However, it is unlikely that Raul will implement more of these changes without action from President Obama.

The United States embargo on Cuba should be eliminated because of the detrimental effect it has had on Cuban citizens, Cuban baseball players, as well as to both the Cuban and American economy. In the early 1960s, President Eisenhower’s implementation of the embargo was warranted: “Cuba was the ally of [the U.S.’s] principal global adversary, the Soviet Union, and . . . Cuba was trying to overthrow other governments in the hemisphere.”²²⁶ However, that was a long time ago and circumstances have changed.²²⁷ While a majority of Americans support a change in U.S.-Cuba policy,²²⁸ President Obama’s administration re-

²²¹ *Id.* Secretary of State, Senator Hillary Clinton reiterated Obama’s position of maintaining the embargo for the time being because it “provides an important source of leverage for further change in Cuba.” *Id.* at 69.

²²² Patrick Symmes, *New Tactics for an Old Regime in Cuba*, NEWSWEEK, July 19, 2010, at 9.

²²³ *Id.*

²²⁴ See *Spain Predicts Thaw*, *supra* note 219.

²²⁵ As Patrick Symmes, writer for Newsweek, described:

The stone-faced Raúl has put 52 cards on the table. If, after years of advocating tit-for-tat improvements, Washington does not reciprocate—perhaps by increasing trade with the island or finally appointing a U.S. ambassador to a post left vacant since 1961—the Obama administration could look like the unhappy gambler whose bluff was called.

See Symmes, *supra* note 222, at 9.

²²⁶ *House Ways and Means Subcommittee on Trade Hearing: Hearing on U.S.-Cuba Policy*, Apr. 29, 2010 (testimony of Wayne S. Smith, Senior Fellow, Center for International Policy), [hereinafter Wayne Smith Testimony].

²²⁷ See *id.* Wayne Smith clarifies that not only does the Soviet Union cease to exist, but also the U.S. and the Russian Federation, its successor, now have “friendly relations.” See *id.* Furthermore, Cuba has “long since halted any efforts to overthrow other governments in the hemisphere. It now has normal diplomatic and trade relations with all of them.” *Id.* In fact, the U.S. is the only nation in the Western Hemisphere without normal relations with Cuba. See *id.*

²²⁸ The administration declared that the restrictions will remain until Cuba makes substantial steps towards creating a democratic government, such as releasing the political prisoners. See *id.* (stating that a poll in April 2010 “indicated that 58% of Americans surveyed supported full diplomatic relations with Cuba, while only 33% opposed. And 61% of those polled believed that all U.S. citizens should be allowed to travel to Cuba, and 57% that U.S. companies should be allowed to do business there.”).

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quires improbable prerequisites to lift the economic embargo initially imposed on Fidel Castro's regime in 1960.²²⁹

On August 17, 2010, following the release of the political prisoners in Cuba, the Obama administration announced that it plans to lessen the restrictions placed on Americans travelling to Cuba.²³⁰ While this may not seem like an obvious advantage to Cuba, an increase of U.S. citizens in Cuba would in fact boost the Cuban economy, as well as promote contact between the two countries.²³¹ President Raul Castro's proactive stance toward repairing his country proves that he has a strong desire to improve Cuba and help its people. Moreover, the fact that the Obama administration has already lifted restrictions that were imposed by President Bush, and Raul's tendency to eliminate socialists' policies that harm the country illustrates that the countries are both taking steps in the right direction.²³² Fortunately, if Cuban President Raul Castro and U.S. President Barack Obama continue taking steps toward enhancing the United States-Cuba relationship, there is a good chance that the embargo will eventually be lifted and Cuban baseball players would no longer need to defect to play professional baseball.

PROPOSED SOLUTIONS

Baseball Diplomacy Act

The current MLB rules, which encourages Cuban baseball players to defect, is flawed and there are many plausible plans to remedy them.²³³ In September of 1995, a year before the enactment of the Helms-Burton Act, U.S. Representative José E. Serrano, introduced House Bill 2311, "A Bill to Waive Certain Prohibitions With Respect to Nationals of Cuba Coming to the United States to Play Organized Baseball."²³⁴ This bill, now called the "Baseball Diplomacy Act," creates an exception to the embargo, allowing Cubans to enter

²²⁹ See Sullivan, *supra* note 141, at 22; *Resistant to Sticks and Carrots*, *supra* note 196.

²³⁰ See Ginger Thompson, *U.S. Said to Plan Easing Rules for Travel to Cuba*, N.Y. TIMES, Aug. 17, 2010, at A4.

²³¹ See *id.* (explaining that the expansion of travel opportunities for Americans "was meant to loosen restrictions on academic, religious and cultural groups that were adopted under President George W. Bush, and return to the 'people to people' policies followed under President Bill Clinton.").

²³² See *Resistant to Sticks and Carrots*, *supra* note 196; see generally Lacey, *supra* note 196. Wayne Smith, a former American Diplomat to Havana and a Senior Fellow for the Center of International Policy, proposed several ways for an improvement in U.S.-Cuba relations. Smith suggests the removal of travel restrictions as the first step. See Wayne Smith Testimony, *supra* note 226. Smith explains that Miami's "Cuban exile community" appreciates—and is taking full advantage of—the small step taken by the Obama administration to lift the limitations on travel and family remittances of Cuban-Americans. See *id.* He concedes that at the very least the administration needs to eliminate restrictions on academic and "people-to-people" travel. See *id.* Furthermore, he asserts two simple steps that the U.S. should: an increase in agricultural sales to Cuba and the removal of Cuba from the list of "state sponsors of terrorism." See *id.* Smith argues that Cuba does not engage in terrorist activities. See *id.* Since the U.S. has no evidence proving Cuba's involvement, removing the name would demonstrate to the rest of the world that the U.S. is shifting towards a more stance against terrorism that centers on "factual analysis rather than propaganda ploys." *Id.* Finally, Smith proposes launching an open dialogue between the U.S. and Cuban governments to civilly discuss their countless disagreements. See *id.* Although both Castro and Obama have mentioned this open dialogue, it has yet to successfully occur. See *id.*

²³³ See Cwierny, *supra* note 18, at 425-27; Greller, *supra* note 7, at 1700-12; Lopez, *supra* note 20, at 355-78.

²³⁴ See H.R. 2311, 104th Cong. § 1 (1994); Cwierny, *supra* note 18, at 422.

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America on a visa to play baseball.²³⁵ Specifically, H.R. 187 provides a special work visa to Cuban baseball players, permits them to bring their salary back to Cuba, restricts the time they may stay in the U.S. to the duration of the baseball season, and expresses that the players do not need to renew their contract each year, as long as it is valid.²³⁶ Since 1995, Representative Serrano continues to raise this issue; however, the law has yet to be enacted.²³⁷ Therefore, despite the Act's good intentions, its inception is unlikely.

Worldwide Draft

Recently, baseball, America's national pastime, has become more of a global sport, as evidenced by the implementation of the World Baseball Classic²³⁸ ("WBC") in 2006.²³⁹

²³⁵ See Cwiertyny, *supra* note 18, at 422; see also Jamail, *supra* note 5, at 132 ("Serrano's bill would allow the U.S. Immigration and Naturalization Service to grant work visas similar to those given to players from other countries.").

²³⁶ See Baseball Diplomacy Act, H.R. 187, 111th Cong. (2009) (referred to Subcomm. on Immig., Citizenship, Refugees, Boarder Sec., & Int'l Law). It states, in pertinent part:

Sec. 2. Removal of Certain Restrictions.

(a) Restriction on Embargo Authority- The authorities of section 620(a) of the Foreign Assistance Act of 1961, those authorities under section 5(b) of the Trading with the Enemy Act that were being exercised with respect to Cuba on July 1, 1977, as a result of a national emergency declared before that date, and are being exercised on the date of the enactment of this Act, and section 203 of the International Emergency Economic Powers Act may not be exercised to regulate or prohibit—

(1) those transactions permitted under section 515.571 of title 31, Code of Federal Regulations, by or on behalf of a Cuban national who enters the United States from Cuba on a visa issued under section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act for the purpose of playing organized professional baseball; and

(2) a Cuban national described in paragraph (1) from returning to Cuba with the earnings made in playing organized professional baseball.

(b) Restriction on Immigration Authority- The authority contained in section 212(f) of the Immigration and Nationality Act may not be used to deny a visa described in subsection (a)(1) to a Cuban national for the purpose of playing organized professional baseball.

(c) Inapplicability of Other Restrictions- This section applies notwithstanding section 102(h) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

Sec. 3. Duration of Visa.

A visa described in section 2(a)(1)—(1) shall permit the alien to whom the visa is issued to remain in the United States only for the duration of the baseball season; and (2) need not be renewed for subsequent entries into the United States for the duration of a valid contract entered into between the alien and the professional baseball team with which the alien played in the preceding baseball season.

Id.

²³⁷ See Cwiertyny, *supra* note 18, at 422; H.R. 187: Baseball Diplomacy Act, 111th Congress: Related Legislation (2009-2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=H111-187&tab=related> [hereinafter H.R. 187, Related Legislation] (providing a legislative history of the bill). On February 9, 2009, H.R. 187 was referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. See H.R. 187, Related Legislation. See also Jamail, *supra* note 5, at 132 (explaining that several Congressmen were against the bill because they feared the Cuban government would seize the players' paychecks).

²³⁸ See O'Brien, *supra* note 149, at 136 (providing the details of the WBC); see also John F. O'Connor, *World Baseball Classic of 2009: The 16-Nation WBC Will Take Place in Japan and North America*, SUITE101.COM, Mar. 1, 2009, http://international-baseball.suite101.com/article.cfm/world_baseball_classic_of_2009. Sixteen teams participated: in the 2009 World Baseball Classic: Canada, United States, Italy, Venezuela, South Africa, Cuba, Australia, Mexico, Netherlands, Dominican Republic, Panama, Puerto Rico, China, Japan, Chinese Taipei, and Korea. *Id.* See generally, PETER BJARKMAN, *DIAMONDS AROUND THE GLOBE: THE ENCYCLOPEDIA OF INTERNATIONAL BASEBALL* (Greenwood Press 2005) (discussing the history of international baseball).

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In the past few years, a large number of international players have left their home country to play in the U.S. or Canada as part of MLB.²⁴⁰ Due to a flood of new ballplayers, several commentators and team officials have lobbied for establishing a worldwide draft, and even Commissioner Selig can be counted among the proposal's supporters.²⁴¹ Reasons for a global draft vary, but generally advocates believe that it could resolve the issue of competitive balance by providing small-market baseball clubs the opportunity to sign a top foreign prospect.²⁴²

One commentator, Scott Cwiertyny, argues that in order to mend the defections dilemma, MLB needs to alter its rules concerning Cubans.²⁴³ In other words, MLB should adopt a worldwide draft consisting of players of foreign residency.²⁴⁴ This would completely abolish free agency status for foreign players, which would have considerable effects on Cuban defectors.²⁴⁵ First, it would lower the monetary incentives for agents and scouts to aggressively and unlawfully pursue players in Cuba.²⁴⁶ Second, the end of free agency would remove bidding wars for Cuban free agents who live outside of the U.S., consequently diminishing agents' motivation for inflating players' abilities in order to tempt them to defect.²⁴⁷ Finally, it would lessen MLB scouts incentives to breach the Kuhn Directive, and thus the Cuban embargo.²⁴⁸

Cwiertyny also claims that the Baseball Diplomacy Act is inherently problematic.²⁴⁹ He alleges that even if the bill is enacted, it will fail to prevent both teams and agents from breaching the Cuban embargo.²⁵⁰ Furthermore, this bill will never pass due to Congress' fifteen-year reluctance.²⁵¹ Lastly, he asserts that the members of the Major League Baseball Organization, instead of Congress, should resolve the troubles pertaining to Cuban baseball players.²⁵² In 2000, MLB's owners granted Commissioner Selig "more unilateral power than any commissioner in baseball history."²⁵³ Because of Selig's plenary power, MLB is better

²³⁹ See Frankel, *supra* note 2, at 418 (noting the "rapid influx of foreign ballplayers into the MLB ranks during the 1990s").

²⁴⁰ See Weiss, *supra* note 64, at 129.

²⁴¹ See *Baseball Commissioner Bud Selig Says Playoff Schedule Will Have Fewer Days Off*, HAMILTON SPECTATOR, Nov. 18, 2009.

²⁴² See Frankel, *supra* note 2, at 418-19.

²⁴³ See Cwiertyny, *supra* note 18, at 421-28.

²⁴⁴ See *id.* at 426.

²⁴⁵ See *id.* at 426; Frankel, *supra* note 2, at 419.

²⁴⁶ See Cwiertyny, *supra* note 18, at 426; Frankel, *supra* note 2, at 419.

²⁴⁷ See Cwiertyny, *supra* note 18, at 426; Frankel, *supra* note 2, at 419. The success rates of Cuban defectors is very low, agents will often tell players that their skill levels are better than they actually are in order to convince them to defect. See Kevin Baxter, *For Cuban Athletes Who Defect, Success in Sports is Elusive*, MIAMI HERALD, June 2, 2002.

²⁴⁸ See Cwiertyny, *supra* note 18, at 426; Frankel, *supra* note 2, at 419 (explaining that if every team has access to each international player, it is less likely that individual teams would profit from assisting in a Cuban player's defection).

²⁴⁹ See Cwiertyny, *supra* note 18, at 422.

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² See *id.* at 422-423.

²⁵³ Ross Newhan, *In Bud They Trust*, L.A. TIMES, Jan. 26, 2000.

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equipped to remedy these issues because its process of executing any new measures would be quicker and more proficient than Congressional action.²⁵⁴

However, even if the commissioner adopts a worldwide draft, it is unclear whether Raul Castro would be willing to hand over his baseball players to MLB. Ballplayers in Cuba were pivotal to *Fidel* Castro's "propaganda"; his regime heralded the amateur and national teams' successes, identifying them as victories for the revolution and the Cuban citizens.²⁵⁵ Furthermore, baseball players were "expected to be political as well as athletic examples for others to emulate."²⁵⁶ If Bud Selig amends the restrictions facing Cuban players, it is questionable whether Raul would follow his brother's strict practice by preventing them to play in the professional league. However, until Fidel passes away, it is likely that the current system will remain the same.

According to Cwiertyny, his proposition is not infallible, especially concerning agents; however he proposes other means to monitor them.²⁵⁷ Under the global draft model, an agent such as Joe Cubas would lack monetary incentive to assist in a player's, such as El Duque's, defection because the player would not be a free agent.²⁵⁸ Moreover, any agent breaching the Cuban embargo would face severe penalties.²⁵⁹ However, in order for this process to work, the MLB and the MLBPA ("Major League Baseball Players Association") will need to be much more active in their position against this type of illegal behavior.²⁶⁰

Rick Lopez proposed another option; he suggests implementing a worldwide draft that excludes Cuba.²⁶¹ If MLB were to implement the global draft including Cuba, then, due to the Kuhn Directive, the drafting teams would be forced to sign players without the opportunity to scout.²⁶² Lopez believes that this global draft alternative would drive Congress to take action and adopt the Baseball Diplomacy Act.²⁶³

Another critic, Matthew Greller, suggests a four-part method toward improving U.S.-Cuba relations through baseball diplomacy, which includes incorporating Cubans into the amateur draft.²⁶⁴ Greller requires: (1) the MLB, the United States, and Cuba to abolish their exclusionary procedures²⁶⁵; (2) then the MLB must change Rule 4(a) and Rule (3)(a)(1) to enable Cubans to participate in the amateur draft²⁶⁶; (3) next MLB should impose a reason-

²⁵⁴ See Cwiertyny, *supra* note 18, at 423 (stating that the "owners significantly increased Selig's disciplinary authority, restored his ability to act in the best interest of the game and authorized him to 'take such action as he deems appropriate to ensure an appropriate level of long-term competitive balance.'"); see also ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 96 (Temple University Press 1998) (explaining that "[t]he commissioner has broad power to . . . make rules governing the administration of the baseball enterprise.").

²⁵⁵ See Frankel, *supra* note 2, at 426.

²⁵⁶ Baird, *supra* note 23, at 168.

²⁵⁷ See Cwiertyny, *supra* note 18, at 426.

²⁵⁸ See *id.*

²⁵⁹ See *id.* (explaining that "any agent violating the Cuban embargo would be dismissed as a player's agent under the MLBPA regulations and criminally prosecuted under the CACR. If caught interfering in the political asylum process, agents would be reprimanded as well.").

²⁶⁰ See *id.*

²⁶¹ See Lopez, *supra* note 20, at 361.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See Greller, *supra* note 7, at 1702-05.

²⁶⁵ Greller requires MLB commissioner Bud Selig to remove the Kuhn Directive and Castro to abandon the 1960s ban on Cuban competition in professional sports. See Greller, *supra* note 7, at 1701.

²⁶⁶ See *id.* at 1704.

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able tax on teams that sign Cuban players in order to support Cuban scouting and infrastructure²⁶⁷; and (4) finally, the U.S. needs to amend existing immigration laws to permit Cubans to play professional baseball in America without being forced to defect.²⁶⁸

While each of these ideas introduces several potential benefits for MLB, it is unlikely that a worldwide draft or a draft including Cubans is in the imminent future. Even with the latest defection of Aroldis Chapman²⁶⁹ fresh in the Commissioner's mind, the implementation of the worldwide draft currently seems improbable for several reasons. For one, there is strong opposition, especially from members of the MLBPA, MLB officials, and agents.²⁷⁰ Additionally, big-market teams, such as the Yankees, Mets, Red Sox, and Dodgers, disagree with the idea of an international draft.²⁷¹ One scout stated his concern that teams with poor scouting skills would be rewarded in a global draft.²⁷² Furthermore, several scouts are skeptical that the draft would actually solve the competitive balance problem it is meant to address.²⁷³ Opponents of the global draft also believe that more problems will be created than solved.²⁷⁴ For example, MLB would need to decide the sufficient number of rounds for an international draft.²⁷⁵ It is also questionable whether this draft is legal and if so, whether it can then be enforced worldwide.²⁷⁶ As a result of these quandaries, the adoption of a worldwide draft in the near future is not likely.

²⁶⁷ See *id.* at 1705.

²⁶⁸ See *id.* at 1708-10; see also Frankel, *supra* note 2, at 418.

²⁶⁹ See *Chasing Dreams—Part 1*, *supra* note 3.

²⁷⁰ See Frankel, *supra* note 2, at 420 n. 306; Dave Sheinin, *Player Draft Remains Unsettled, Worldwide Draft for New Talent Could Become "Logistical Nightmare,"* WASH. POST, June 3, 2003, at D4 [hereinafter Sheinin, *Player Draft*].

²⁷¹ See Frankel, *supra* note 2, at 420 n. 306; John Delcos, *Baseball Feels a Draft Coming On*, JOURNAL NEWS (Westchester Cty., N.Y.), Mar. 31, 2003, at 8K; Sheinin, *Player Draft*, *supra* note 270.

²⁷² See Delcos, *supra* note 271.

²⁷³ See Frankel, *supra* note 2, at 420 n. 306; see also Sheinin, *Player Draft*, *supra* note 270 (Jim Callis, executive editor of Baseball America, which is deemed the nation's authority on amateur baseball, said: "Nobody thinks it would resolve the [competitive-balance] issue. Before, the Expos could find a Vladimir Guerrero and sign him for cheap. Now they'd have to draft him and negotiate a huge signing bonus.").

²⁷⁴ See Frankel, *supra* note 2, at 420. For example, major questions concerning age eligibility would arise: North American players are entitled to enter the draft after their high school class graduates, while international players may be signed at the age of sixteen and a half. See Sheinin, *Player Draft*, *supra* note 270. Some important questions arise concerning age eligibilities: "Under a worldwide draft, should the eligibility age for Latin Americans remain 16 1/2, would that be fair to North American players? Or should the age be raised to 18—and how would that affect the development of Latin American players?" *Id.*

²⁷⁵ See Sheinin, *Player Draft*, *supra* note 270; see also Frankel, *supra* note 2, at 420 n. 306 (explaining that the MLBPA and the owners disagree over the number).

²⁷⁶ See Frankel, *supra* note 2, at 420 n.306.

Even if MLB can overcome philosophical and logistical opposition to a global draft, the league must contend with the real question of whether the draft is legal and enforceable. The United States already has a treaty in place with Japan, the Republic of Korea, and Taiwan that prohibits "roster raiding" between the professional baseball leagues in each country. These three Asian nations believe the treaty's provisions apply to amateur ballplayers, as well, making it likely that they would be excluded from any worldwide draft system. With respect to those countries that would not be excluded from the draft by treaty, MLB would be treading on politically sensitive ground. Various labor- and foreign policy-related conflicts could arise from drafting players in foreign countries, especially those with developed professional baseball leagues. MLB would be hard pressed to extend the draft to countries such as Mexico and the Dominican Republic, where rules already closely regulate whether and how teams from outside the country can

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Theoretically, a worldwide draft is a good solution to some of the current problems facing MLB.²⁷⁷ However, it does not resolve the issue of Cuban defectors. In fact, one sports writer, Dave Sheinin, noted that the “supposed need for a worldwide draft may be overblown.”²⁷⁸ Sheinin pinpointed the exact problem for Cuban players, using the Aroldis Chapman deal as a prime example. Following the 2009 baseball season, Chapman received one of the biggest free agent contracts from the Cincinnati Reds, a small market team.²⁷⁹ Sheinin noted that all of the big market teams ultimately withdrew from the bidding war.²⁸⁰ These teams were not concerned about Chapman’s pitching skills, but they would rather use their money on “known commodities.”²⁸¹ If worldwide draft advocates are worried about the big market teams signing all of the quality international free agents, their concerns appear to be exaggerated.

Baseball’s Potential Benefits for the U.S. and Cuba Requires an Alternative Solution

Cuban participation in Major League Baseball benefits both the U.S. and Cuba

When the embargo is ultimately lifted, or if the Baseball Diplomacy Act is passed, unrestricted Cuban participation in MLB will be beneficial to both the United States and Cuba for several reasons. Since Major League teams are lacking homebred quality players, they are forced to import players from overseas.²⁸² The U.S. generates an insufficient number of valuable players to fill thirty major league team rosters. On the other hand, Cuba produces a surplus.²⁸³ While the best athletes in the U.S. choose between a wide array of sports, including football, basketball, soccer, or volleyball, the best in Cuba choose baseball.²⁸⁴ Moreover, the Cuban athletic system excels at identifying and advancing young players.²⁸⁵ Lastly, the Cuban health care and educational systems are far superior to those of the Dominican Republic, presently the chief supplier of international players for MLB.²⁸⁶ Hence, unrestricted ac-

sign native ballplayers. As Yankees Assistant General Manager Jean Afterman explains, “I don’t think there’s any country out there that believes it would be subject to a worldwide draft.” Thus, non-cooperation or outright hostility from other countries might be the most serious impediment to successfully implementing a global draft.

Id. (internal citations omitted).

²⁷⁷ See Sheinin, *Player Draft*, *supra* note 270; see also Cwiertyny, *supra* note 18, at 425-27 (proposing the worldwide draft as a solution to the defection problem); Diana L. Spagnuolo, Comment, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk their Futures in Major League Baseball*, 24 U. PA. J. INT’L ECON. L. 263, 282-83 (2003) (suggesting the implementation of a worldwide draft to solve recruitment problems of Dominican players); Bill Madden, *Moving Toward a World Draft: Baseball Looks to Keep Big Market Teams from Stockpiling Cheap Talent*, N.Y. DAILY NEWS, May 26, 1999; see generally Lopez, *supra* note 20 (proposing a global draft as a solution to the bonus skimming problem).

²⁷⁸ Sheinin, *Baseball Notebook*, *supra* note 15.

²⁷⁹ See *id.*

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² See Jamail, *supra* note 5, at 10 (explaining that “[w]hile some U.S. major league teams go into Latin America, Asia, Australia, and Europe as a cost-cutting measure, the baseball industry also must recruit talent overseas because it suffers from a shortage of quality players at home”).

²⁸³ See Jamail, *supra* note 5, at 10; Biertempfel, *supra* note 193.

²⁸⁴ See Jamail, *supra* note 5, at 11.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

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cess to the best, well-coached, well-educated, and healthiest international baseball players (Cubans) would certainly be advantageous to the U.S.

Cuba would also benefit from participation with the MLB. For one, Cuban baseball players who desire to play professionally would not be forced to defect from their home country. A commonly held belief in Cuba is that the current baseball system, which prohibits professional baseball, is insufficient.²⁸⁷ While Roberto Gonzáles Echevarría, a Cuban baseball historian, is apprehensive about the idea of MLB presence in Cuba, he believes that “anything is better than what we have now.”²⁸⁸ Gilberto Dihigo a Cuban baseball journalist whose father, Martín Dihigo, is in the Baseball Hall of Fame in Cooperstown, New York, is more optimistic.²⁸⁹ Dihigo supports Cuban participation in the majors for two reasons. First, he explained that it would greatly impact the players because they would have the opportunity to make money and receive well-deserved recognition.²⁹⁰ Secondly, he believes it would benefit the Cuban fans because “[t]hey could see Cubans in the big leagues as well as when the *peloteros* [ballplayers] return home to play in the winter. It would be good for everyone except Fidel.”²⁹¹

Sports anthropologist Alan Klein asserts that unrestricted Cuban participation in MLB would present incredible opportunities for a vast number of Cuban players, if it were handled correctly.²⁹² For example, Klein states that the best scenario would include MLB feeling “a refined sense of responsibility, of cultural responsibility and economic responsibility, and [doing] what it takes to grow the game in those [Latin American] countries.”²⁹³ Furthermore, he asserts that a stronger system of Cuban baseball, as opposed to the current weaker structure, is more beneficial for everyone, especially MLB and Cuban ballplayers.²⁹⁴

Cuban baseball players would truly benefit from lifting the embargo act or from simply enacting the Baseball Diplomacy Act. For example, many Cuban players do not have the opportunity to advance to new levels because only a limited number of openings are available in the Cuban League, with a considerably smaller amount of openings for *Equipo Cuba*, the elite twenty-four-man team.²⁹⁵ In addition, similar to the major leagues in the U.S., veteran players, with long careers, receive priority.²⁹⁶ With a limited amount of roster space, this places younger players in a tough situation because they are not given the opportunity to

²⁸⁷ See *Stealing Home: The Future of Cuban Baseball*, PBS.ORG, <http://www.pbs.org/stealinghome/debate/future.html> (last visited Feb. 15, 2010) [hereinafter *Future of Cuban Baseball*].

²⁸⁸ *Id.* Echevarria fears that once Cubans are able to participate in MLB, the situation in Cuba will resemble that in the Dominican Republic and Puerto Rico. He claims that in these countries the interest in playing for one's own country is fading and the leagues are treated more as a holding station for the athletes, where they develop their talents at home and then move to the United States to advance their careers. *Id.*

²⁸⁹ See Jamail, *supra* note 5, at 11.

²⁹⁰ See *id.* at 138.

²⁹¹ *Id.* at 138.

²⁹² See *Future of Cuban Baseball*, *supra* note 287.

²⁹³ *Id.* Klein argues that MLB will gain a great amount of talent when Cuban ballplayers are treated the same as the other international players. Therefore, MLB should assist in setting up an organized system in Cuba. See *Stealing Home: Cuban National League*, PBS.ORG, <http://www.pbs.org/stealinghome/debate/cnl.html> (last visited Aug. 29, 2010) [hereinafter *Cuban National League*].

²⁹⁴ See *Future of Cuban Baseball*, *supra* note 287.

²⁹⁵ See Jamail, *supra* note 5, at 66.

²⁹⁶ See *id.* at 66-67 (“Prior to 1995, retirement from Cuban baseball was almost identical to what occurs in the U.S. major leagues: a player, due to age or deteriorating skills, moves out of the game.”).

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develop their skills to their utmost potential.²⁹⁷ Therefore, if Cubans were permitted to play baseball in the U.S., more players would be able to participate, develop their talents, and ultimately fulfill their dreams of playing professional baseball. There is a concern among Cubans that the baseball players will lose their Cuban identity if they are allowed to play in the United States.²⁹⁸ Klein dismisses this matter, “Cubans will not become instant prostitutes for some kind of form of capitalism”; many players will continue to play baseball in Cuba.²⁹⁹ However, he stresses that certain people or groups, such as MLB officials or Cuban baseball officials, should make it their responsibility to ensure that Cubans maintain their identity.³⁰⁰

Both the U.S. and Cuba would benefit from unrestricted Cuban participation in MLB. The problem is determining how to create this symbiotic relationship. The obvious solution is removal of the U.S. embargo on Cuba. However, an immediate solution is to utilize baseball as a means to achieving that end.

Baseball as the solution to the U.S.-Cuban problem

The United States and Cuba should utilize their common baseball history as a means to improve their current relationship. Throughout U.S. history, baseball has been used for more than just entertainment; it has been used to overcome some of the nations largest issues. Jackie Robinson, the first African-American Major League player, not only broke the color barrier on the baseball field, but was also instrumental in bringing about a new political relationship between blacks and whites off the field.³⁰¹ More recently, after the September 11th tragedy, President Bush and Commissioner Selig used baseball as a coping mechanism for the American people.³⁰² In fact, “as baseball became a ritualistic performance of American faith and patriotism, it supported George W. Bush’s declaration of war against evil and the subsequent invasion of Iraq.”³⁰³ These instances prove that baseball can be utilized to further political and social agendas.

Therefore Commissioner Selig should remove player restrictions placed by the embargo by revoking the Kuhn Directive and creating an agreement with the Cuban amateur league, which permits the international movement of Cuban baseball players from Cuba to the United States. One critic claims that the Kuhn Directive merely restates the restrictions placed

²⁹⁷ *Id.* at 66.

²⁹⁸ *See Cuban National League, supra* note 293.

²⁹⁹ *Id.*

³⁰⁰ *See id.*

³⁰¹ *See* Greller, *supra* note 7, at 1683 (stating that “[o]ff the field, [Jackie] Robinson’s heroic struggle eventually changed the political landscape and sparked legislation that re-evaluated race relations in American society.”); Frankel, *supra* note 2, at 388 n.3.

³⁰² *See* Michael L. Butterworth, *Ritual in the “Church of Baseball”: Suppressing the Discourse of Democracy After 9/11*, 2 COMM. & CRITICAL/CULTURAL STUD. 107, 115 (2005). Butterworth stated:

[I]t is clear that the game was to be seen as an instrument of healing. Selig himself commented at the time that “we are a social institution. As such, I hope that the game, and the games, will contribute to the nation moving forward, to helping people.” Further, the attitude of the players, as expressed by Trot Nixon of the Boston Red Sox, was that they could “be part of the antidote for all of this stuff because the game can take some of the focus off all of the tragedy.”

Id. (internal citations omitted).

³⁰³ *See id.* at 109.

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by the embargo into baseball terms.³⁰⁴ Further, he argues “it would only be a symbolic gesture to revoke the Kuhn Directive before the embargo is substantively altered to accommodate Cuban ballplayers.”³⁰⁵ However, if Selig develops an agreement with the Cuban League regarding the movement of international players,³⁰⁶ then removing the Kuhn Directive would have a stronger effect.

A concerted effort of the MLB and the current administration could use baseball as a catalyst and bring Cuban-United States relations to the forefront of the general public concerns. The awareness of the populations of both countries, united by a common thread, would be a significant driving force in lifting the embargo.

CONCLUSION

Baseball is as much a part, if not more, of United States-Cuba past relations and should be an integral part of the future United States-Cuba relationship. Altering the current Cuban baseball policy has the potential of effecting U.S.-Cuban relations as a whole.

Due to the U.S. trade embargo on Cuba and the Kuhn Directive, Cubans are forced to defect to participate in the MLB. Not only is defecting dangerous, but it requires Cubans to leave their home, with the possibility of never returning. Unfortunately, it seems that Cuban ballplayers will continue to defect as long as the embargo remains in effect. Although the complete revocation of the embargo is some years away, other solutions exist.

Members of the baseball community have suggested a worldwide draft as a possible solution to the issue of Cuban defections. This argument is flawed for several reasons. For one, a global draft is far from being implemented. Regardless of this, due to the current status of the U.S. embargo on Cuba, a worldwide draft would have no effect on Cubans baseball

³⁰⁴ See Frankel, *supra* note 2, at 422.

³⁰⁵ *Id.* at 422-23.

³⁰⁶ Selig should consult the agreements regulating the international movement of players that MLB has already established with other foreign leagues, such as those used by Japan, Korea, and China. See Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 299-300 (2009). For example, MLB has implemented an agreement with the Japanese Professional Baseball:

The professional league in Japan is known as the Nippon Professional Baseball Organization of Japan (NPB). NPB is composed of two leagues, Central and Pacific, each consisting of six teams. The Central League members are the Chunichi Dragons, Hanshin Tigers, Hiroshima Toyo Carp, Tokyo Yakult Swallows, Yokohoma BayStars and Yomiuri Giants. The Pacific League members are the Chiba Lotte Marines, Fukuoka SoftBank Hawks, Hokkaido Nippon Ham Fighters, Orix Buffaloes, Saitama Seibu Lions and Tohoku Rakuten Golden Eagles.

In contrast, amateur baseball players from countries that are not subject to the MLB draft (e.g., Venezuela) may be signed by any Major League organization and may be signed at age 16. As only residents of the United States, Puerto Rico and Canada (and foreigners enrolled at U.S. universities) are subject to the reverse-order amateur draft, all other foreign ballplayers come to the United States as free agents. Foreign-born players today constitute more than one-fifth of all major leaguers. Major League Baseball also has an accord with Korean Professional Baseball. The terms of this pact closely parallel those of the U.S.-Japanese agreement. Major League Baseball has also entered into an agreement with the China Baseball Association that permits major league teams to scout and sign Chinese players.

Id. at 300 n.95 (internal citations omitted).

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players—they would still need to leave the country in order to participate. This is because of the Kuhn Directive, which prohibits communication with anyone in Cuba. Rather, a global draft is a solution to the competitive imbalance present in Major League Baseball, not defection.

To immediately deter Cuban baseball players from defecting, Commissioner Selig should remove the Kuhn Directive and negotiate an agreement with the Cuban amateur league that would allow Cubans to play in the Major Leagues and provide scouts the opportunity to see the Cuban talent. In addition, supporters of the Baseball Diplomacy Act should lobby to other members of Congress to institute this policy.

By emphasizing the embargo's effect on both baseball and political affairs, the baseball community can prove its importance not only to politicians, but also to the general public of the U.S. and Cuba. Elevating the awareness of their citizens can create a significant driving force for each administration; a force which would see the restriction lifted for the good of both countries and their national past times. Ultimately, Americans and Cubans should utilize baseball to improve the current international relationship, eventually leading to the removal of the fifty-year embargo.

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