

RETHINKING THE CUBAN EMBARGO:
WERE CUBA'S CONFISCATIONS OF U.S.-OWNED PROPERTY LEGAL UNDER
CUSTOMARY INTERNATIONAL LAW?

Kurt S. Schulzke

Associate Professor of Accounting & Business Law
Director of Law, Ethics & Regulation
Corporate Governance Center, Coles College of Business
Kennesaw State University

560 Parliament Garden Way, NW, MD 0402
Kennesaw, Georgia 30144
kurt_schulzke@kennesaw.edu
tel. +1470.578.6379

I. INTRODUCTION

[T]oday the United States is practically a sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition.¹

--- Richard Olney, U.S. Secretary of State, 1895

Recent initiatives by the Obama administration to “normalize relations” between Cuba and the United States have² raised the specter of what one writer styled “the mother of all property disputes”³ over private property confiscated by Cuba following Fidel Castro’s rise to power in 1959. This article examines the facts upon which the U.S. embargo policy was or should have been based and tests the legality under customary international law of the Cuban confiscations and the responsive U.S. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (hereinafter “the Act”).

The U.S. Foreign Claims Settlement Commission has certified 5,913 separate claims against Cuba with a principal value upon certification of \$1.9 billion⁴ and 2014 value approximating \$14 billion.⁵ This article concludes that some or all of the confiscations giving rise to these claims may

¹ Richard Olney, U.S. Secretary of State, *quoted in* WALTER LAFEVER, *THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898* 262 (1964) (warning the British government, in July 1895, against taking territory from Venezuela to expand its colony in Guyana).

² See Barack Obama, Statement of the President on Cuba Policy Changes, <http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> (Dec. 17, 2014); White House, FACT SHEET: Charting a New Course on Cuba, <http://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba> (Dec. 17, 2014).

³ See Daniel Fisher, *Cuba Opening Could Reopen Fight Over Billions in Seized Property*, FORBES.COM (Dec. 18, 2014), <http://www.forbes.com/sites/danielfisher/2014/12/18/cuba-opening-could-mean-mother-of-all-property-disputes/>.

⁴ FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, *COMPETED CLAIMS PROGRAMS – CUBA*, <http://www.justice.gov/fcsc/claims-against-cuba>; FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, 2013 ANNUAL REPORT 30, 37-38 (2013). A complete index of Cuban claims, including claimant names, certified amounts, and links to related Commission decisions is at http://justice.gov/sites/default/files/fcsc/pages/attachments/2015/02/03/cuba_decision_index.xlsx.

⁵ See Fisher, *supra* note 3.

have been legal under customary international law, that Title III of the Act—dishonoring titles to confiscated property now vested in nationals of other nations—is illegal, that the U.S. Congress should repeal the Act in order to preserve its continuing access to customary international law, and if the Act is illegal because the confiscations were a justifiable response to U.S. aggression against Cuba, U.S. owners of confiscated property may have moral or legal claims against the United States for what amounts to geo-political malpractice.

With few exceptions,⁶ legal commentators have assumed that the Castro regime's uncompensated confiscations of private property were illegal.⁷ Illustrative of the genre is the following excerpt, which cites no facts and no law in support of its conclusion:

Customary international law recognizes that adequate compensation is required for any expropriation or nationalization and the international community is fully aware of the fact that Cuba has paid no compensation . . . Castro's confiscation of U.S. property interests during the beginning of his rule *have long been recognized as illegal takings*. . . . Investing in confiscated U.S. property interests in Cuba

⁶ See, e.g., Robert L. Muse, *A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty And Democratic Solidarity (Libertad) Act of 1996)*, 30 GW J. INT'L L. & ECON. 207 (1996) (arguing that Title III of the Act is not “a legitimate exercise of state protection by the United States on behalf of Cuban Americans . . . because Cuba did not breach any international legal obligation owed to the United States when it expropriated properties of Cuban nationals”).

⁷ See, e.g., S. Kern Alexander, *Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law*, 16 DICK. J. INT'L L. 523 (1998); Christian Franken, *The Helms-Burton Act: Force or Folly of the World's Leader?*, 7 MINN. J. GLOBAL TRADE 157, 176-177 (1998) (“even if Cuba's property expropriation violated international law, two wrongs don't make a right”); Michael Wallace Gordon, *Thinking About Cuba: Post-Castro Cuba Began a Decade Ago*, 15 FLA. J. INT'L L. 311 (2003); Natalie Maniaci, *The Helms-Burton Act: Is The U.S. Shooting Itself In The Foot?*, 35 SAN DIEGO L. REV. 897 (1998); Miguel A. Rodriguez, Note, *The Helms Burton Act: United States vs. European Union: Helms Burton: Social Policy and Norm Definition*, 10 U. MIAMI INT'L & COMP. L. REV. 63 (2002); Jonathan R. Ratchik, Note and Comment: *Cuban Liberty and The Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343 (1996); David M. Shamberger, Note, *The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime*, 21 B.C. INT'L & COMP. L. REV. (1998).

amounts to nothing more than theft.⁸

As discussed in Part V, much potentially material evidence has emerged in recent years, only after many related court decisions, passage of the Act, and publication of numerous scholarly analyses. This article more closely examines the factual record on the theory that early conclusions against the confiscations were based on an incomplete factual record either because information was unavailable or because writers assumed supportive facts with insufficient analysis.

The remainder of the article is organized as follows. Part I briefly chronicles the relationship between Cuba and the United States from 1898 to 1996, including the Castro government's uncompensated confiscations of assets belonging to U.S. nationals and the U.S. response thereto. Part II outlines the legislative history and principal provisions of the Act. Part III concludes by responding to the common customary-law-based arguments in favor of the Act⁹ and outlining counterarguments that would be available to defense counsel in a private action for damages under Section 302 of the Act.

II. JUST THE FACTS

The Act is legal or illegal only in its historical context. Regardless of the particular source of public international law—customary law, international agreement, or general principles common to the major legal systems—the inquiry into the Act's *legality* is fact-dependent. Yet, factual selectivity has characterized U.S. policy toward Cuba since at least 1898. President Eisenhower's

⁸ Kathleen S. Adams, Casenote and Comment, *Subchapter III Of the Helms Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?*, 21 HAMLIN L. REV. 147,174 (1997)(emphasis added).

⁹ Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434 (July 1996) [hereinafter "Clagett July"]; Brice M. Clagett, *A Reply to Professor Lowenfeld*, 90 AM. J. INT'L L. 641 (October 1996) [hereinafter "Clagett October"]; Brice M. Clagett, *Helms-Burton Act*, Title III, 23 CANADIAN COUNCIL ON INTERNATIONAL LAW BULLETIN 19 (December 1996 - May 1997) [hereinafter "Clagett May"].

remarks at a press conference on October 25, 1959 illustrate the incapacity or unwillingness of U.S. executives to confront the facts:

[H]ere is a country that you would believe, on the basis of our history, would be one of our real friends. The whole history . . . would seem to make it a puzzling matter to figure out just exactly why the Cubans . . . would be so unhappy when, after all, their principal market is right here, their best market. You would think they would want good relationships. I don't know what the difficulty is.¹⁰

Apparently unbeknownst to Eisenhower, the history of U.S.-Cuban interaction in one of official and quasi-official U.S. intrusion, domination, and aggression that would provoke an invasive response by the United States if the roles were reversed. Such U.S. misconduct does not exculpate Fidel Castro for his well-documented human rights violations. Yet Castro's faults offer no cover for the pathological ineptitude and bad faith of the United States that have fueled popular Cuban distrust of the United States and its pre-Castro Cuban dictator-clients for more than a century.

U.S. misconduct has artificially inflated Fidel Castro's credibility, enabled Castro to rationalize confiscations of U.S.-owned assets and added directly to the economic misery of Cuba at least since the early 1960s. Because the Act purports to respond to Castro's asset confiscations, the legitimacy of the Act may turn upon the legitimacy of the confiscations themselves. If, under international law, Castro's confiscations were legal, then Title III of the Act may itself be illegal

¹⁰ See JULES R. BENJAMIN, *THE UNITED STATES AND THE ORIGINS OF THE CUBAN REVOLUTION* 216 (1990); THOMAS G. PATERSON, *CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION* 3 (1994).

under international law in the sense that the Act solicits private acts of juridical reprisal or piracy. This is not to say, however, that a finding that the confiscations were illegal automatically (a) validates the Act or (b) invalidates property titles in confiscated property conferred by the Cuban government. Even if the Cuban confiscations violated international law, the Act may still be an unjustifiable extension of United States' jurisdiction to prescribe and, therefore, the titles conferred in such property by the Cuban government may still be valid under international law.

Apart from the light they shed on the Act's legality, the facts also contextualize its equity and political wisdom, which some see as a reasonable and justifiable volley in the U.S. war against Fidel Castro. Others see another example of swashbuckling Anglos cruising the Spanish Main in pursuit of somebody else's treasure. The storyline extends back to the days of Sir Francis Drake and Queen Elizabeth.¹¹ To the extent that the Act is nothing more than warmed-over, pre-Castro Anglo privateering, it seems futile to believe that it might finally solve the Cuban "problem" or promote the long-term Caribbean interests of the United States. Anglo aggressiveness contributed to Fidel Castro's rise to power and subsequently drove him into the arms of the Soviets. This article identifies factual highlights most relevant to the evaluation of the legality and fairness of the Act.

A. Spain, the United States, and Adams' Apple

Relations between the United States and Latin American neighbors have often been problematic but none so much as between the United States and Cuba. Official U.S. attitudes toward Cuba have ranged from imperialistic hubris to co-revolutionary solidarity and from mercenary acquisitiveness to paternal disdain or moralistic outrage. In 1823, Thomas Jefferson

¹¹ See SUSAN RONALD, *THE PIRATE QUEEN: QUEEN ELIZABETH I, HER PIRATE ADVENTURERS, AND THE DAWN OF EMPIRE* 60 (2007).

wrote to then President James Monroe:

I candidly confess, that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida Point, this island would give us over the Gulf of Mexico, and the countries an isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being.¹²

In the same year, Secretary of State John Quincy Adams wrote to Hugh Nelson, then United States Minister to Spain:

There are laws of political as well as physical gravitation; and if an apple severed by the tempest from its native tree cannot choose but fall to the ground, Cuba, forcibly disjoined from its own unnatural connection with Spain, and incapable of self-support, can gravitate only toward the North American Union, which by the same law of nature cannot cast her off from its bosom.¹³

Until the collapse of the Soviet Union, Cuba required the support of one patron or another. Spain played this role from the days of *La Conquista* until 1898. The United States followed, from 1898 until 1960, and the Soviet Union from 1960 until the early 1990s.

In July 1897, as the final Cuban insurrection against Spain was boiling to a climax, the U.S. State Department remonstrated privately with Spain over the duration and severity of the war

¹² Letter from Thomas Jefferson to President James Monroe (1823) in JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON (John P. Foley ed., 1900) available at <http://etext.virginia.edu/etcbin/foleyx-browse?id=Cuba> (last visited January 31, 2008).

¹³ Letter from John Quincy Adams to Hugh Nelson (Apr. 28, 1823) in 7 WRITINGS OF JOHN QUINCY ADAMS, 1820-1823, at 373 (Worthing Chauncey Ford ed. 1917).

because of its negative impact on U.S. business and its tendency to create “continuous irritation within [U.S.] borders.”¹⁴ At the time, while popular sentiment in the United States heavily favored the Cuban revolutionaries, the Cleveland and McKinley administrations opposed recognizing the rebels as belligerents because to do so would relieve Spain of her international legal obligation to compensate U.S. nationals for economic losses resulting from the rebellion.¹⁵ The White House, despite considerable congressional pressure, was steadfast in opposing a free Cuba.¹⁶ When the U.S. finally intervened against Spain, in April of 1898, the rebels had already demonstrated at great human cost that Spain was incapable of putting down the rebellion.¹⁷

During the short conflict, as U.S. military personnel and news reporters came into close contact with the Cuban rebels, the rebels’ image as republican warriors melted away to reveal a benighted rabble in a state of utter poverty, “unfit to serve except as guides and bearers.”¹⁸ Such was the rebels’ fall from grace that they were excluded from the formal ceremonies after the Spanish surrender of Santiago, on July 17, and the December 10, 1898 signing of the Treaty of Paris through which Spain renounced its sovereignty over Cuba.¹⁹ After the war, U.S. soldiers bore home tales of “lazy, cowardly, thieving Cubans.”²⁰ No longer were the Cubans brothers in the cause of democracy and freedom. They had metamorphosed into a “tropical people” in desperate

¹⁴ BENJAMIN, *supra* note 11, at 41.

¹⁵ *Id.* at 35.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 42.

¹⁸ See BENJAMIN, *supra* note 11, at 52-53. Stanhope Adams, *Cuba Libre a Chimera*, N.Y. TIMES, Aug. 7, 1898, at 2.

¹⁹ Ignacio E. Sanchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANSNAT’L L. & POL’Y 135, 137 (1994).

²⁰ BENJAMIN, *supra* note 11, at 53.

need of civilized supervision.²¹

B. The Platt Amendment: Revolution Derailed

The shift in popular opinion made it easier for the McKinley administration and the U.S. Congress to undermine Cuban sovereignty. This they did with the so-called Platt Amendment which authorized the President of the United States to end its military occupation of Cuba only if the Cuban constitution contained the following provisions:

- I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorized or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.
...
- II. That the Government of Cuba can sense that the United States may exercise the right to intervene for the preservation of Cuban independence, [and] the maintenance of a government adequate for the protection of life, property, and individual liberty . . .
- III. That all acts of the United States and Cuba during its military occupancy thereof are ratified . . . and all lawful rights acquired thereunder shall be maintained and protected.
...
- VII. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its defense, the Government of Cuba will sell or lease to the

²¹ *Id.*

United States lands necessary for coaling, or enable stations at certain specified points, to be agreed upon by the President of the United States.²²

The Platt Amendment's contradictions foreshadowed many of the logic-defying absurdities that would later emerge between Cuba and the United States. No truly independent nation subcontracts to another the maintenance of government within its borders or gives the subcontractor carte blanche to invade. In essence, under the Platt Amendment, Cuba would be a wholly-owned and controlled subsidiary of the United States. Yet, in June 1901, partly in exchange for guaranteed access to U.S. sugar markets, the Cuban constitutional convention incorporated the Platt Amendment in the new Cuban constitution.²³ U.S. Secretary of War Elihu Root observed, "The trouble about Cuba is that although it is technically a foreign country, practically and morally it occupies an intermediate position, since we have required it to become part of our political and military system."²⁴

C. *Semi-Sovereign Cuba*

On December 31, 1901, Tomas Estrada Palma was elected president of the Republic of Cuba.²⁵ During the ensuing two decades, life was relatively good for Cubans who could exploit new trade opportunities with the United States.²⁶ The good times were fostered by the rising price of sugar upon which the economy of Cuba was heavily dependent.²⁷ The good times were shared by U.S.

²² Platt Amendment, ch. 803, 31 Stat. 895-98 (1901).

²³ See *The United States, Cuba, and the Platt Amendment, 1901*, U.S. DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1899-1913/platt> (last visited Feb. 13, 2015).

²⁴ PATERSON, *supra* note 11, at 5.

²⁵ Sanchez, *supra* note 19, at 138-139.

²⁶ See BENJAMIN, *supra* note 11, at 68-70.

²⁷ See *Id.* at 69.

investors who bought up so much Cuban real estate that the value of private U.S. investment in Cuban land eventually exceeded the value of its land holdings in any other nation.²⁸ Cuba's future shone so brightly that in 1914 Walter Hines Page, then U.S. Ambassador to England confidently declared, "We should do for Europe on a large scale essentially what we did for Cuba on a small scale and thereby usher in a new era of human history."²⁹

Despite such optimism, the United States exercised its physical-intervention prerogative under the Platt Amendment several times between 1902 and 1933.³⁰ The two most notable of these lasted from 1906 to 1909, when the U.S. military returned to govern the entire island, and from 1917 to 1923, when the United States occupied Cuba's Oriente region ostensibly to protect U.S. property interests.³¹ After 1923, official U.S. enthusiasm for physical intervention waned.

D. Descent into Despotism

Between 1923 and 1929, the price of sugar dropped 50 percent,³² creating a serious economic crisis in Cuba.³³ The sugar depression was followed by the Great Depression of the 1930s which devastated what remained of the Cuban economy. As the island's misery index rose, Cuba's notoriously corrupt government came under increasing political attack. Between 1933 and 1940, the resultant unrest produced a string of Cuban presidents sponsored by the Cuban military, then under the command of Fulgencio Batista, and approved by the White House.³⁴ In 1934, provisional

²⁸ *Id.*

²⁹ Letter from Walter Hines Page, U.S. ambassador to England, to President Woodrow Wilson (Nov. 24, 1916), in 2 THE LIFE AND LETTERS OF WALTER H. PAGE, at 190 (Burton J. Hendrick ed. 1922).

³⁰ See IRVING LOUIS HOROWITZ & JAIME SUCHLICKI, CUBAN COMMUNISM 1959-2003 12 (11th ed. 2003).

³¹ See BENJAMIN, *supra* note 11, at 76.

³² See *Sugar*, TRADING ECONOMICS, <http://www.tradingeconomics.com/commodity/sugar> (last visited Feb. 13, 2015).

³³ See BENJAMIN, *supra* note 11, at 80-81.

³⁴ See Sanchez, *supra* note 19, at 139.

President Ramon Grau San Martin abrogated the 1901 constitution, thereby officially undoing the already moribund Platt Amendment.³⁵ Six years later, on July 1, 1940, Cuba published a new, Platt-free Constitution.³⁶

E. Constitution of 1940

The Political Constitution of 1940 granted broad protections to property rights. Article 87 officially recognized the existence and legitimacy of private property which could be limited only for reasons of public necessity or “social interest” as established by law;³⁷ Article 24 prohibited government confiscation of property without a judicial determination of government necessity and compensation.³⁸ Articles 24 and 87 were themselves safeguarded by an arduous amendment process under Articles 285 and Article 286. Under Article 285, an amendment could be scheduled for consideration only by a petition signed by not less than one hundred thousand *literate* voters³⁹ or by a congressional initiative signed by not less than one fourth of at least one house of the Cuban Congress.⁴⁰ After scheduling under Article 285, Articles 24 or 87 could be amended only by a constitutional convention called specifically to amend any combination of Articles 22, 23, 24 and 87.⁴¹

Under the 1940 Constitution, Cuba democratically elected three presidents: Fulgencio Batista

³⁵ *Id.*

³⁶ REPÚBLICA DE CUBA, CONSTITUCIÓN POLÍTICA DE 1940 [Republic of Cuba, Political Constitution of 1940] [hereinafter “1940 Constitution”], *available at* POLITICAL DATABASE OF THE AMERICAS, <http://pdba.georgetown.edu/Constitutions/Cuba/cuba1940.html>.

³⁷ 1940 CONSTITUTION, ART. 87.

³⁸ 1940 CONSTITUTION, ART. 24.

³⁹ 1940 CONSTITUTION, ART. 285(A).

⁴⁰ 1940 CONSTITUTION, ART. 285(B).

⁴¹ 1940 CONSTITUTION, ART. 286.

(1940-1944), Ramon Grau San Martin (1944-1948), and Carlos Prio Socarras (1948-1952).⁴² During this time period, Fidel Castro was beginning to make a hemispheric name for himself. In 1947, he participated in an attempted overthrow of the Dominican dictator Trujillo⁴³ and, in 1948, helped incite riots against the Colombian government in Bogotá.⁴⁴ These activities were noted with concern by the U.S. Central Intelligence Agency (CIA).⁴⁵ The comparative Cuban Camelot of 1940 would be short-lived.

F. Batista Cans the Constitution

Foreshadowing and providing precedential cover for Castro's later complete dismantling of Cuban constitutional due process, the Constitution of 1940 abruptly expired on March 10, 1952 via another of Fulgencio Batista's military coups d'etat to which the United States promptly granted official recognition.⁴⁶ Shortly thereafter, Batista set about undoing whatever constitutional continuity Cuba had enjoyed during the previous twelve years. On April 4, 1952, Batista replaced the Constitution of 1940 with his own Constitutional Act of 1952 (Act of 1952).⁴⁷ The Act of 1952, while incorporating verbatim most of the 1940 Constitution, crippled democratic controls over the constitutional amendment process. Under the Act of 1952, amendments could be effected by a mere two-thirds vote of the presidentially-appointed Council of Ministers.⁴⁸

⁴² See Sanchez, *supra* note 19, at 140.

⁴³ See FIDEL CASTRO, FIDEL CASTRO READER ix (2008).

⁴⁴ See ANN LOUISE BARDACH, CUBA CONFIDENTIAL: LOVE AND VENGEANCE IN MIAMI AND HAVANA 39 (2002).

⁴⁵ U.S. CENTRAL INTELLIGENCE AGENCY, OFFICIAL HISTORY OF THE BAY OF PIGS OPERATION, VOL. III, EVOLUTION OF THE CIA'S ANTI-CASTRO POLICIES, 1959-JANUARY 1961 1 (1979) [hereinafter "CIA HISTORY"], <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB355/bop-vol3.pdf>. This document was declassified in 1998.

⁴⁶ See PATERSON, *supra* note 11, at 16-17. Video of Batista's radio announcement upon taking power is accessible at <https://www.youtube.com/watch?v=KxuA21-4LBQ> (last visited Jan. 5, 2015).

⁴⁷ Sanchez, *supra* note 19, at 142.

⁴⁸ *Id.*

At various times during his dictatorship, Batista suspended the constitutional guarantees promised by the Act of 1952.⁴⁹ His refusal to follow constitutional principles set a precedent for disregarding the rule of law and was the catalyst for numerous Cuban opposition groups.⁵⁰ At the forefront of one was Fidel Castro, who took center stage for the first time with a July 26, 1953 assault on the Moncada Army Barracks in Santiago de Cuba.⁵¹ Militarily, the attack was a bloody failure⁵² but politically it catapulted Castro to heroic prominence in the popular rebellion against the U.S.-supported Batista.⁵³

After Batista's 1952 coup, U.S. officialdom continued to demonstrate an attitude of blasé detachment toward Cuba.⁵⁴ President Eisenhower's choice of ambassadors is illustrative. In 1953 and again in 1957, as Castro's *barbudos*⁵⁵ were fomenting rebellion in Cuba's Sierra Maestra mountains, Eisenhower sent two successive ambassadors to Cuba who neither spoke Spanish nor had serious interest or background in the region.⁵⁶

G. The Castro Era Begins

On January 1, 1959, after waging two years of guerrilla warfare against Batista and, indirectly, the United States, Castro's rebels forced Batista's abdication. Batista's defeat came as a surprise

⁴⁹ *Id.*

⁵⁰ See, e.g., Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 529, 541 (2004) (Batista's coup sparked Castro's insurgency).

⁵¹ PATERSON, *supra* note 11, at 17.

⁵² *Attack on Moncada Barracks*, HISTORY OF CUBAN NATION, <http://www.cubahistory.org/en/corruption-a-coups/attack-on-moncada-barracks.html> (the attack ended in the capture of seventy rebels and the deaths of fifteen soldiers, three policemen, and nine rebels) (last visited Feb. 13, 2015).

⁵³ See, e.g., Antonio Rafael de la Cova, *The Moncada Attack: Birth of the Cuban Revolution* (<https://www.sc.edu/uscpres/books/2007/3672.html>) (Moncada assault was a "propaganda victory that marked the start of Castro's ascent to national power").

⁵⁴ Horowitz, *supra* note 33, at 15 (asserting that Eisenhower did not take Cuban politics seriously until late 1958 and that Secretary of State John Foster Dulles "thought Latin America uninteresting").

⁵⁵ *Barbudos* is Spanish for "bearded ones".

⁵⁶ MARK T. GILDERHUS, *THE SECOND CENTURY: U.S. LATIN AMERICAN RELATIONS SINCE 1889* 165-66 (2000).

to the Eisenhower administration which had continued sending arms to Batista until at least May 1958.⁵⁷ Ambassador Smith's open and notorious support of Batista and opposition to Castro obligated Smith to leave Havana. On January 7, 1959, the United States officially recognized the Castro government.⁵⁸ At this late date, President Eisenhower finally decided to appoint a serious ambassador. Philip Bonsal, a career foreign service officer who spoke Spanish and had extensive diplomatic experience in the Caribbean, arrived in Havana on February 19, 1959.⁵⁹

H. Confiscatory Convulsions

In the meantime, on January 5, the Castro-appointed Cuban President, Manuel Urrutia, raised property-owners' hopes that the Constitution of 1940 might be honored as the law of the land. Urrutia publicly declared it a necessity to "provide for the exercise of the legislative power properly belonging to the Congress of the Republic, in accordance with the 1940 Constitution." Yet eight days later, on January 13, the Castro government issued its first unilateral amendments to the 1940 Constitution. In a single *golpe*,⁶⁰ the newly installed regime not only reverted to the 1952 Act's fast-track constitutional amendment process⁶¹ but also altered Article 24 to read as follows:

Confiscation of property is prohibited. *However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses*

⁵⁷ PATERSON, *supra* note 11, at 138.

⁵⁸ PHILIP W. BONSALE, CUBA, CASTRO, AND THE UNITED STATES 25 (1971); CENTRAL INTELLIGENCE AGENCY, CHRONOLOGY OF SPECIFIC EVENTS RELATING TO THE MILITARY BUILDUP IN CUBA 1 at http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/pfiabchron.pdf (last visited Jan. 31, 2008).

⁵⁹ BONSALE, *supra* note 55, at 38.

⁶⁰ *Golpe* is Spanish for "blow" or "coup".

⁶¹ Sanchez, *supra* note 19, at 142.

against the national economy or the public treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of his property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a court. .

. .⁶²

The reference to “offenses against the national economy” and “the tyrant and his collaborators” were evidently directed toward U.S. businesses that had cooperated with the Batista regime. However, cash compensation and judicial review meant that affected property owners could still expect some remedy. Ironically, in his 1953 “History Will Absolve Me” speech, Castro had castigated the Batista regime for its resort to the constitutional-amendment-by-cabinet subterfuge for installing “a regime which concentrates all power in its own hands.”⁶³ What Castro did not mention was that Batista, unlike Castro, left Article 24 unscathed.

At the beginning of 1959, U.S. interests in Cuba included large tracts of sugar cane; one third of Cuba’s sugar-production facilities; the Cuban electric utility company; the Cuban telephone company; most crude oil importing and refining operations on the island; petroleum exploration assets (but no petroleum in the ground); nickel deposits; a railroad; a cement plant; cattle-raising assets; and banks, hotels, and casinos.⁶⁴ The confiscation of these assets began relatively slowly but picked up steam as relations between the U.S. and Cuba deteriorated. The mechanisms used to

⁶² *Id.* at 143-144 (emphasis added).

⁶³ Sanchez, *supra* note 19, at 142-143; Fidel Castro, History Will Absolve Me (Oct. 16, 1953), *available in English at* <http://www.marxists.org/history/cuba/archive/castro/1953/10/16.htm> (last visited Feb. 13, 2015).

⁶⁴ BONSAL, *supra* note 55, at 43-45.

effect the confiscations differed as did the circumstances giving rise to them.

On February 7, 1959, the regime repealed the 1940 Constitution, replacing it with the Fundamental Law which, like the 1952 Act, mimicked much of the 1940 Constitution. The Fundamental Law and 1940 Constitution differed, however, in major ways. For example, the Fundamental Law designated the Council of Ministers, rather than the Congress, as the supreme legislative body of Cuba and authorized the Council unilaterally to amend the Fundamental Law. In addition, the Fundamental Law reaffirmed the January 13th amendment to Article 24.

On April 19, 1959, Castro visited Washington for the first time after the revolution. While there, he spent three and half hours with then Vice President Richard Nixon. Debriefing the meeting, Nixon wrote a four-page memo to President Eisenhower, Secretary of State Herter and CIA Director Allen Dulles. Nixon wrote:

I spent as much time as I could trying to emphasize that he [Castro] had the great gift of leadership, but that it was the responsibility of a leader not always to follow public opinion but to help to direct it in proper channels . . . It was apparent that while he paid lip service to such institutions as freedom of speech, press and religion that his primary concern was with developing programs for economic progress. . . [Castro is] either incredibly naive about Communism or is under Communist discipline . . . The one fact we can be sure of, is that he has those indefinable qualities which make him a leader of men. Whatever we may think of him, he is going to be a great factor in the development of Cuba and very possibly

in the development of Latin American affairs generally.⁶⁵

Notably, Castro—who was then officially recognized as a head of state—met with the U.S. Vice President, not the President. This cannot have been at Castro’s choosing. Relegating the new head of a neighboring foreign sovereign to less than four hours with the VP was a clear sign of disrespect unlikely to be either missed or forgotten by Castro. Whatever Nixon thought he had accomplished with Castro, it cannot have been much.

Shortly after the meeting with Nixon, in May 1959, Castro began formulating a land reform program and, on June 3, 1959, promulgated a new Land Reform Law. The Law established maximum and minimum land holdings, mandated the compensated expropriation of large agricultural holdings, created the National Institute of Agrarian Reform (INRA), and prescribed valuation standards for the expropriation process. It would have seriously damaged private U.S. interests in Cuba, but was never implemented.⁶⁶ No matter. The *Fidelistas* did not require law to do their work. Ambassador Bonsal had assumed the Castro government’s intentions were embodied in the laws they promulgated but recognized the folly of his assumption as illegal confiscations multiplied through the summer and fall of 1959⁶⁷ and Cubans who opposed them were “eliminated from the government” in November 1959.⁶⁸ Bonsal lamented:

Castro had rammed his own conception of land reform down the throats of his people and was now engaged in demonstrating to them that even the law he himself

⁶⁵ Richard M. Nixon, Rough Draft of Summary of Conversation Between the Vice President and Fidel Castro, April 25, 1959, at <http://www.gwu.edu/~nsarchiv/bayofpigs/chron.html> (last visited Jan.13, 2008).

⁶⁶ BONSAL, *supra* note 55, at 71.

⁶⁷ *Id.* at 95.

⁶⁸ *Id.* at 95.

had issued was not binding on him . . . Yet I did not abandon hope of a rational relationship with the Cuban government. Castro would, I then thought, soon incur opposition from his own countrymen, especially if the Cuban reaction to what he was doing was not distracted by an activist American policy.⁶⁹

On June 13, Castro launched a military assault on the Dominican Republic, intending to topple that nation's Trujillo dictatorship.⁷⁰ The assault failed, as did similar, subsequent Cuban attacks on Nicaragua and Haiti.⁷¹

On October 3, the Castro regime seized the records of all foreign companies that had been prospecting for oil in Cuba⁷² and established import and exchange controls designed to reduce Cuban dependency on imports from the United States.⁷³ Also during October 1959, U.S. Assistant Secretary of State for Inter-American Affairs, Richard Rubottom, reemphasized to the Inter-American Peace Committee the U.S. position that "responsibility for the political affairs of any state should remain with the residents of that state without outside interference, subversion, or aggression or any kind," and that the United States had no intentions of interfering in Cuban affairs except in the context of a unified action sponsored by the Organization of American States.⁷⁴

On November 22, 1959, the Cuban Council of Ministers again expanded their confiscatory reach under Article 24, this time to property of (1) persons found guilty of offenses defined by law

⁶⁹ *Id.* at 78.

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 76.

⁷² *Id.* at 97.

⁷³ *Id.* at 98.

⁷⁴ *Id.* at 113.

as counter-revolutionary; (2) persons evading the action of the revolutionary courts by leaving the national territory in any manner whatsoever; and (3) persons who, having left the national territory, perform conspiratorial acts abroad against the Revolutionary Government.⁷⁵

Before the end of November, Castro installed Che Guevara as head of the National Bank of Cuba.⁷⁶ Guevara was a sworn enemy of the United States and American private enterprise.⁷⁷ His appointment to this sensitive post was clear evidence that Castro had no intention of respecting American property interests in Cuba⁷⁸ even though the Cuban Fundamental Law still required judicial blessing of and judicially determined compensation for confiscations.⁷⁹

On January 10, 1960, Ambassador Bonsal presented to the Cuban Foreign Minister a catalog of the seizures of real estate, equipment, and cattle as well as the cutting of timber, plowing under of pastures, and moving of fences and boundary markers all inflicted on American individuals and firms without Cuban legal authority or court order.⁸⁰

I. Intervention Begins

On January 26, 1960, President Eisenhower issued a statement reiterating the U.S. “policy of non-intervention in the domestic affairs of other countries” and its commitment to resolve differences with Cuba through negotiation or “other appropriate international procedures.”⁸¹ In a related press conference, Eisenhower insisted, “Certainly we are not going to intervene in their

⁷⁵ Sanchez, *supra* note 19, at 145.

⁷⁶ BONSAL, *supra* note 55, at 108.

⁷⁷ *Id.* at 109.

⁷⁸ *Id.* at 109.

⁷⁹ CONSTITUTION OF THE REPUBLIC OF CUBA, TITLE IV § 1, Art. 24, *quoted in* Sanchez, *supra* note 19, at 140.

⁸⁰ *Id.* at 118.

⁸¹ The President’s News Conference, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER 129-130 (Jan. 26, 1960).

[Cuban] internal affairs.”⁸² Ambassador Bonsal maintained that by the phrase “other appropriate international procedures” the President meant international arbitration.⁸³ But Eisenhower knew better. The CIA began actively planning to overthrow Castro on January 8, 1960⁸⁴ and, on January 18, formed a Cuba Task Force and began drafting the Plan of Covert Action Against Cuba⁸⁵ which, over the following sixteen months, would produce the failed assault at the Bay of Pigs.⁸⁶

On February 13, 1960, the Soviet Union agreed to buy one million tons of Cuban sugar per year for five years.⁸⁷ In partial payment, the Soviets would ship to Cuba roughly \$50 million in crude oil annually.⁸⁸ Up to this time, the United States’ imports of Cuban sugar had averaged roughly 2.7 million metric tons each year, about one-third of the U.S. sugar consumption requirement, and one-half of Cuba’s annual sugar production.⁸⁹ The precise level of imports and the price paid were, however, subject to market and U.S. quota fluctuations. From 1950 to 1960, the U.S. price of Cuban sugar imports never exceeded 5.50 cents per English pound⁹⁰ but averaged two cents over the world market from 1955 to 1960.⁹¹ During the same period, the quantity imported into the United States exceeded 3 million long tons only once,⁹² but sugar exports to the

⁸² Statement by the President Restating United States Policy Toward Cuba, January 26, 1960, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, DWIGHT D. EISENHOWER 136.

⁸³ BONSAL, *supra* note 55, at 125.

⁸⁴ CIA HISTORY at 31.

⁸⁵ *Id.* at 31-34.

⁸⁶ *Id.* at 31. *See also* DON BOHNING, THE CASTRO OBSESSION: U.S. COVERT OPERATIONS AGAINST CUBA 1959-1965 20 (2005).

⁸⁷ *See* R. Hart Phillips, *Soviet Gives Cuba 100 Million Credit on Sale of Sugar*, N.Y. TIMES, February 13, 1960, at A1.

⁸⁸ BONSAL, *supra* note 55, at 148.

⁸⁹ *Id.* at 207.

⁹⁰ *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 862 (1962), *rev'd* on other grounds, 376 U.S. 398 (1964).

⁹¹ *See* Phillips, *supra* note 90, at 29.

⁹² *Id.*

United States accounted for between fifteen and twenty percent of the Cuba's national product.⁹³

On St. Patrick's Day 1960, President Eisenhower ordered the CIA to begin training Cuban exiles to invade Cuba.⁹⁴ It is unclear why the United States adopted such tactics before pursuing "other appropriate international procedures." Even if President Eisenhower was certain that Castro was a madman and that mediation or arbitration would be unavailing, a sincere attempt by the United States to invoke them might have enhanced the credibility of U.S. confiscation claims. Conversely, the U.S. decision to resort directly to self-help tends to impeach them.

J. Crude Awakening

On April 19, 1960, the first shipment of Soviet crude oil arrived in Cuba.⁹⁵ At the time, essentially all refinery capacity on the island was controlled by three non-Cuban firms: Standard Oil Company of New Jersey ("Esso") and Texaco, both based in the United States;⁹⁶ and Shell of Canada, owned by Dutch and British investors.⁹⁷ Heretofore, the Cuban refinery assets of these companies had been used primarily to refine crude produced by their own Venezuelan affiliates.⁹⁸ Without access to these refineries, the Castro government would be unable to process or use the Soviet crude.

The oil companies had not effectively managed public relations with the people who now mattered most in Cuba. In addition to their status as "collaborators of the tyrant," the companies

⁹³ See BONSAL, *supra* note 55, at 231, 243.

⁹⁴ Memorandum of a Conference With the President, White House, Washington, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, CUBA, VOLUME VI, DOCUMENT 486 862 (March 17, 1960, 2:30 p.m.) (describing Eisenhower's approval of covert action against the Castro regime, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, CUBA, VOLUME VI, DOCUMENT 481 (Mar. 16, 1960)).

⁹⁵ See BONSAL, *supra* note 55, at 295, Chapter 16, n. 2.

⁹⁶ *Id.* at 145-146.

⁹⁷ See PATERSON, *supra* note 11, at 188.

⁹⁸ See BONSAL, *supra* note 55, at 146.

were also portrayed as having unjustly exported the fruits of Cuban labor. The *Fidelistas* claimed that the transfer prices paid by Esso, Texaco, and Shell (the “Big Three”) for the Venezuelan crude were exorbitant and deliberately designed to siphon hard currency out of Cuba.⁹⁹ The transfer-pricing dispute, while perhaps a pretext, made the oil producers a natural and politically vulnerable target for retaliation. Nevertheless, in an apparent effort to play nice with the new regime, between January 1959 and May 1960, the Big Three permitted the hard-currency, oil-trade balance owed them by Cuba to grow to the sum of \$50 million,¹⁰⁰ equivalent to \$400 million in 2015.

At this juncture, with millions of barrels of Soviet crude languishing in storage and Cuba’s balance-of-payments crisis growing, Che Guevara informed the Big Three that if they wanted hard currency for the Venezuelan crude already imported and refined in Cuba, they must first agree to refine during the last half of 1960 roughly seven million barrels of Soviet crude, roughly half of what they would otherwise have imported during the same period from Venezuela.¹⁰¹

Ambassador Bonsal kept close tabs on the talks between Guevara and the Big Three¹⁰² whom he encouraged to refine the Soviet crude under protest and then pursue relief through the Cuban courts.¹⁰³ If the Cuban courts failed to provide an adequate hearing, then it would fall to the United States government to lodge a diplomatic claim against Cuba.¹⁰⁴

In the actual event, the Big Three opted not to follow Bonsal’s advice. On June 4, 1960, the chief executive of one of the Big Three informed the Ambassador that the U.S. Treasury Secretary,

⁹⁹ *Id.* at 146.

¹⁰⁰ *Id.* at 148.

¹⁰¹ *Id.* at 148.

¹⁰² *Id.* at 148-149.

¹⁰³ *Id.* at 149.

¹⁰⁴ *Id.*

Robert Anderson, had in essence requested that the Big Three unitedly refuse to refine any Soviet crude oil.¹⁰⁵ On June 7, each of the Big Three separately declined to refine the Soviet oil.¹⁰⁶ Here, given the opportunity to ease tensions and bolster its case on the world stage, the United States resorted instead to a form of self-help that threatened Cuba's economic well-being. Faced with a serious threat to its economy and national security, the Cuban government arranged during the next three weeks to obtain its entire annual petroleum requirement from Russia and, on June 29, "intervened" the Big Three's Cuban refineries in order to effectively process the Soviet crude.¹⁰⁷

By the end of June 1960, the CIA had opened its Miami base in preparation for commencement of covert operations in Cuba.¹⁰⁸ Not to be outdone, on July 5, 1960, the Cuban Council of Ministers yet again amended Article 24's confiscation provisions, substituting in place of a court of law an ambiguous, legislatively-designated "competent authority"; substituting a legislatively determined "form of payment" for "cash on delivery," as compensation for expropriated assets; adding "national interest" as a justification for expropriation; and eviscerating the right to judicially appeal expropriation decrees.¹⁰⁹

K. Sugar Pro Quota

One day later, on July 6, in an apparent retaliatory response to the Cuba-Russia sugar agreement, President Eisenhower abruptly suspended what remained of Cuba's 1960 U.S. sugar import quota.¹¹⁰ Ambassador Bonsal was told of the suspension only hours in advance and was

¹⁰⁵ *Id.*.

¹⁰⁶ *Id.* at 150.

¹⁰⁷ *Id.* at 150.

¹⁰⁸ *Id.* at 21 note 80.

¹⁰⁹ Sanchez, *supra* note 19, at 145-146.

¹¹⁰ DWIGHT D. EISENHOWER, PROCLAMATION 3355 – DETERMINATION OF CUBAN SUGAR QUOTA (Jul. 6, 1960)

“deeply disturbed” by the “unwise” complete suspension, while understanding that some reduction might be in order.¹¹¹ On the same day, the Cuban Council of Ministers adopted Law No. 851 which ordered compulsory nationalization of “all the property and enterprises” located in Cuba owned by U.S. nationals.¹¹²

When Law No. 851 was first used against U.S. companies on August 6, 1960, it came with a compensation mechanism later characterized by the U.S. Supreme Court in *Banco Nacional de Cuba v. Sabbatino* as “illusory.”¹¹³ Payment was to be made through 30-year Cuban government bonds paying simple interest at an annual rate of 2 percent, disburseable only out of 25 percent of the foreign exchange received by Cuba through exports of sugar to the United States in excess of 3 million Spanish long tons per year, at a minimum price of 5.75 cents per English pound.¹¹⁴

Sometime in the fall of 1960, the CIA allocated \$200,000 to enlist the mafia to assassinate Castro in concert with the amphibious invasion of Cuba then under development. The likelihood of Castro’s assassination was so high in the view of those responsible for arranging it that they discounted the importance of amphibious assault.¹¹⁵ One would-be assassin was Marita Lorenz, a former Castro lover. Sometime during 1960, Lorenz made it as far as Castro’s bedroom before losing her nerve and ruining the botulism capsules formulated by the CIA for his assassination.¹¹⁶

On October 13, 1960, the Council of Ministers (“Council”) passed Law No. 890 which

(eliminating all but 39,752 of the 739,752 short tons then remaining of Cuba’s 1960 import quota).

¹¹¹ BONSAL, *supra* note 55, at 151.

¹¹² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), n.4.

¹¹³ *Banco Nacional de Cuba*, 307 F.2d at 849-850.

¹¹⁴ *Id.*

¹¹⁵ BOHNING, *supra* note 88, at 25.

¹¹⁶ BARDACH, *supra* note 46, at 53-54 (2002). In his CIA History, Jack Pfeiffer insists that the CIA was not involved in any Mafia plot to assassinate Castro, but the transcript of his interview with Richard Bissell suggests that the CIA was involved in some such plot.

permitted nationalization in national interest “through compulsory expropriation of all industrial and commercial enterprises as well as of the plants, warehouses, stores and other property and rights appurtenant owned by physical or corporate persons.”¹¹⁷

On January 3, 1961, Fidel Castro accused the U.S. embassy in Havana of harboring spies and demanded that its staff be reduced to eleven members, the same number as those allowed at the Cuban Embassy in Washington, D.C.¹¹⁸ The U.S. Charge de Affairs in Havana determined that the Embassy could not operate with so few staff so the U.S. promptly broke off diplomatic ties with Cuba.¹¹⁹

On January 4, the Council amended Article 24, theoretically expanding the universe of at-risk properties to cases “deemed necessary by the Government in order to prevent acts of sabotage, terrorism or any other counter-revolutionary activities.”¹²⁰

Finally, on January 5, 1961, two full years after Castro’s takeover, Tracey Barnes, then Assistant to the Deputy Director (Plans) for Covert Operations, suggested to CIA Director Dulles that developing support among other Latin American nations would be a good idea:

There has been a lot of talk about bi-lateral arrangements with selected Latin American countries in order to get them on our side. Work on this should start immediately particularly now that there has been a break in relations. We are prepared to help on this. With whom should we work, what countries will be

¹¹⁷ Sanchez, *supra* note 19, at 146.

¹¹⁸ U.S. DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1961–1963, VOLUME X, CUBA, JANUARY 1961–SEPTEMBER 1962, DOCUMENT 1 (Jan. 3, 1961).

¹¹⁹ PATERSON, *supra* note 11, at 258.

¹²⁰ Sanchez, *supra* note 19, at 147.

involved and what will the approaches to these countries consist of and when will they be made?¹²¹

Two weeks later, on January 20, 1961, John F. Kennedy was sworn in as the incoming President of the United States. Only three months after that, on April 17, 1961, a U.S.-backed contingent of 1,500 Cuban exiles—who had been training in Florida and Guatemala with the CIA since March 1960—staged an assault at the Bay of Pigs in an effort to overthrow Castro. The night before, futilely trying to conceal U.S. involvement, President Kennedy abruptly decided to withhold the air support the U.S. had promised the attackers from the plan's inception. In large part because of the lack of air support, the assault failed. Despite the efforts at concealment, it was soon widely known that the United States had trained and equipped the insurgents and instigated the attack. As bad as it was already, the Cuba-U.S. relationship would soon grow even worse.

L. Mongoose in a Trenchcoat

President Kennedy and his brother Bobby, who was then Attorney General, took Castro's Bay of Pigs victory as a personal affront, transforming what began as a geo-political conflict into a family feud.¹²² Richard Bissell, the CIA Director of Plans primarily responsible for planning the Bay of Pigs assault, wrote:

From their [Kennedy] perspective, Castro won the first round at the Bay of Pigs.

He had defeated the Kennedy team; they were bitter and could not tolerate his

¹²¹ Memorandum From the Assistant to the Deputy Director (Plans) for Covert Operations (Tracy Barnes) to Director of Central Intelligence Dulles, FOREIGN RELATIONS OF THE UNITED STATES, 1961–1963, VOLUME X, CUBA, JANUARY 1961–SEPTEMBER 1962, DOCUMENT 1 (Jan. 5, 1961, 1 a.m.).

¹²² BOHNING, *supra* note 88, at 68-69.

getting away with it. The president and his brother were ready to avenge their personal embarrassment by overthrowing their enemy at any cost.¹²³

Sam Halpern, the CIA's then Caribbean Desk chief could not understand what governmental purpose might have motivated the Kennedys to respond as they did:

I've tried for a long time to figure out . . . what made these two gentlemen – both the president and the attorney general – so full of hysteria, paranoia and obsession about Cuba . . . Maybe their father convinced them to . . . Don't get mad, get even. I mean, to make Cuba the number-one priority of the [CIA] . . . then to put Bobby in charge . . . and this—this boy, really, this hot-tempered boy – to try to run it and do the personal bidding of the brother. Unbelievable.¹²⁴

In late November 1961, Attorney General Robert Kennedy met with the President, Secretary of State, and Brigadier General Edward Lansdale about “the Cuban problem”. They concluded that it was still possible to overthrow the Castro regime, that the “sugar crop should be attacked at once,” and that Castro should be kept “so busy with internal problems (economic, social and political) that Castro would have “no time for meddling abroad.”¹²⁵ On December 2, 1961, Castro openly declared himself a communist, further solidifying his relationship with both the Soviet Union and China. Two months later, on February 3, 1962, President Kennedy issued Proclamation No. 3447 banning most imports of Cuban products.¹²⁶

¹²³ *Id.* at 69.

¹²⁴ *Id.* at 80-81.

¹²⁵ Memorandum from Richard Helms, CIA Chief of Operations, to CIA Director (Jan. 19, 1962) at http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/620119%20Meeting%20with%20the%20Attorney%20Gen..pdf.

¹²⁶ John F. Kennedy, Proclamation No. 3447 - Embargo on All Trade with Cuba (Feb. 3, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=58824>.

A February 19 Memorandum for the Chief of Operations, Cuba Project, outlined an elaborate set of “Cover and Deception plans” approved by the Joint Chiefs of Staff. These “plans” were calculated to psychologically condition Castro and the Cuban people to think the United States was on the verge of attacking Cuba militarily in order to “lure or provoke Castro, or an uncontrollable subordinate, into an overt hostile reaction against the United States; a reaction which would in turn create the justification for the US to not only retaliate but destroy Castro with speed, force and determination.”¹²⁷

By this time, there were already operating in the United States more than two hundred anti-Castro Cuban exile groups. These, together with the CIA, established a regular pattern of paramilitary attacks on Cuban targets:

Hit-and-run saboteurs burned cane fields and blew up oil storage tanks. One group . . . attacked a Cuban patrol boat off the northern [Cuban] coast. . . . Directorio Revolucionario Estudiantil, another exile organization, used two boats to attack Cuba in August. Alpha 66 attacked Cuba on numerous occasions. CIA officers and “assets” were at the same time plotting to assassinate Fidel Castro. Many of these activities came under the wing of “Operation Mongoose,” the covert effort engineered by [Bobby] Kennedy to disrupt the Cuban economy and stir unrest on the island.¹²⁸

In a February 20, 1962 Memorandum, General Lansdale stated that consistent with the

¹²⁷ Memorandum from William H. Craig, Brig General, DOD/JCS Representative Caribbean Survey Group, to Chief of Operations, Cuba Project (Feb. 19, 1962), http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/620219%20Memo%20for%20the%20Chief%20of%20Ops..pdf.

¹²⁸ PATERSON, *supra* note 11, at 259.

Presidential memorandum of 30 November 1961, the objective of Operation Mongoose was to “help the people of Cuba overthrow the Communist regime from within Cuba and institute a new government with which the United States can live in peace.”¹²⁹

General Maxwell Taylor, Chairman of the Joint Chiefs of Staff was quick to add that while the Operation would be executed mostly by locals, ultimate success would require U.S. military intervention.¹³⁰ In April 1962, the U.S. military staged a high profile, 40,000-man amphibious landing exercise on a small island near Puerto Rico.¹³¹

Although Ambassador Bonsal maintained that the Kennedy administration never intended to invade Cuba in the absence of Cuban actions “that would make the island a security threat to the United States,”¹³² it is evident from the February 19 Memorandum that the U.S. was hoping that Castro would fear an invasion and respond with violence. These hopes were very nearly fulfilled by Cuba’s next move but not as the Kennedy brothers anticipated.

M. Missiles, Assassinations & Trade Embargo

In July 1962, in response to U.S. covert operations in Cuba and the perceived threat of direct invasion, Castro struck the now notorious agreement whereby Cuba allowed Moscow to deploy nuclear missiles in the United States.¹³³ Their deployment set the stage for the Cuban Missile Crisis of October and November 1962 during which the United States and the Soviet Union came to the

¹²⁹ Program Review Memorandum from Brig. Gen. Lansdale, Chief of Operations, Cuba Project (Feb. 20, 1962). The distribution list included the President, Attorney General, Secretary of State, Secretary of Defense, and CIA Director.

¹³⁰ PATERSON, *supra* note 11, at 260.

¹³¹ PATERSON, *supra* note 11, at 260.

¹³² BONSALE, *supra* note 55, at 186.

¹³³ *Id.*

brink of nuclear war. Thanks to simultaneous blinks by John Kennedy and Nikita Khrushchev the Soviets eventually removed the offending missiles and the world was spared to fight another day. With the removal of the missiles, Cuba no longer posed a practical threat to U.S. security.¹³⁴ Yet, despite the absence of a threat, the United States intensified its anti-Cuba economic sanctions and persisted in covert operations against Cuba and Fidel Castro personally. These activities were orchestrated by Bobby Kennedy:

He [Bobby] was really running it. . . Bobby was, as we all know, arrogant and overbearing, prone to hint not too subtly that if you don't do what I say, I'll tell my big brother on you . . . Was Bobby Kennedy obsessed? Absolutely. Oh, absolutely. He was particularly riding the people at the CIA all the time. No question about it, obsessed is the right word.¹³⁵

In June 1963, the National Security Council approved a new sabotage agenda. The CIA renewed its attacks and refocused its efforts to assassinate Fidel Castro through the involvement of Rolando Cubela Secades, an anti-Castro Cuban official. Alpha 66 and Commando L subversives renewed their attacks on Cuban oil facilities, sugar mills, and industrial plants.¹³⁶ On November 22, 1963, Cubela Secades met in Paris with CIA agents who gave him a poisonous ballpoint pen designed for Castro's assassination.¹³⁷ That same day, President John F. Kennedy was assassinated in Dallas, Texas.

¹³⁴ *Id.* at 188.

¹³⁵ BOHNING, *supra* note 80, at 153. Tom Parrott was assistant to CIA Director Allen Dulles at the time of the Bay of Pigs operation. *Id.* at 52.

¹³⁶ PATERSON, *supra* note 11, at 261.

¹³⁷ *Id.* at 262; BOHNING, *supra* note 80, at 166.

After 1962, the rules governing the administratively-imposed Cuban trade embargo were revised numerous times. The essence of the pre-Act Cuban embargo is distilled in the following passage of the Cuban Assets Control Regulations, originally promulgated on July 9, 1963:

Except as specifically authorized by the Secretary of the Treasury . . . no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise:

- 1) Is of Cuban origin; or
- 2) Is or has been located in or transported from or through Cuba; or
- 3) Is made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba.¹³⁸

These rules achieved statutory status under the Cuban Democracy Act of 1992,¹³⁹ which also imposed some restrictions on the U.S. executive's discretion in administering the details of the embargo.¹⁴⁰ On June 29, 1993, consistent with 22 U.S.C. § 6005, President Clinton added § 515.207 to the Cuban Assets Control Regulations. Foreshadowing the Helms-Burton Act, § 515.207 dropped any pretext of territorial circumscription:

Except as specifically authorized by the Secretary of the Treasury . . .

(a) No vessel that enters a port or place in Cuba to engage in the trade of goods or the purchase or provision of services, may enter a U.S. port for the purpose of

¹³⁸ 31 C.F.R. § 515.204 (1996).

¹³⁹ 22 U.S.C. §§ 6001-6010.

¹⁴⁰ Andreas F. Lowenfeld, *The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act*, 90 A.J.I.L. 419, 422 (1996).

loading or unloading freight for a period of 180 days from the date the vessel departed from a port or place in Cuba; and

(b) No vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest may enter a U.S. port with such goods or passengers on board.¹⁴¹

By its terms, § 515.207 extends to *any* vessel—U.S., Cuban, or neutral-flag—that (a) enters a port or place in Cuba to engage in the trade of goods or the purchase or provision of services, or (b) carries goods or passengers to or from Cuba or [carries] goods in which Cuba or a Cuban national has an interest.

Between 1962 and the early 1990s, Castro continuously tried to provoke the government of the United States by allying himself with the Soviet Union and by giving moral, financial, and logistical support to a procession of subversive political, military, and drug-smuggling operations in the Caribbean region and on the African continent. The human rights violations of the Castro regime are legendary. The Cuban economic catastrophe resulting from communist mismanagement and the U.S. embargo, together with the political oppression of the regime, produced intermittent rivers of Cuban refugees flowing northward creating predictable political and economic challenges in the United States. When the Soviet Union collapsed, some observers assumed that Castro's government would rapidly follow suit. However, much to the consternation of Castro's Congressional and personal enemies, the Cuban regime has survived in the face of strenuous U.S. efforts to destroy it.

¹⁴¹ 31 C.F.R. § 515.207 (1996).

III. THE HELMS-BURTON ACT

A. *In the Beginning*

On February 14, 1995, the bill that later became known as the Helms-Burton Act was referred to the U.S. House Committee on International Relations. During the spring and summer of 1995, the bill wound its way through various House and Senate committees. On September 21, 1995, the House of Representatives passed the bill by a vote of 294 to 134. In the Senate, the same bill was filibustered until proponents dropped titles III and IV thereof.¹⁴² The Senate passed this defanged bill on October 19, 1995 by a vote of 74 to 24. On November 7 and December 14, 1995, respectively, House and Senate conferees were appointed to reconcile the bills. However, neither house took further action on the bill until the end of February 1996.

On the afternoon of Saturday, February 24, 1996, a Cuban MiG-29, acting on orders from the Cuban government, shot down two unarmed civilian Cessna-337s flown by U.S. nationals under the aegis of *Hermanos al Rescate*, a private association officially dedicated to searching the Straits of Florida for incoming Cuban refugees in distress.¹⁴³ At the time, the Cessnas were over international waters between five and sixteen miles north of Cuban airspace carrying four passengers three of whom were U.S. citizens.¹⁴⁴ A partial transcript of the interchange between Havana Military Control and the MiG-29 pilot appears below:

MiG-29: We have it in lock-on. Give us authorization.

¹⁴² Lowenfeld, *supra* note 140, at 419 n.2.

¹⁴³ 22 U.S.C.A. § 6046(a); *Shoot-Down Of The Brothers To The Rescue Planes, Hearing Before The House Subcommittee On Crime of the Committee on the Judiciary*, 106th Congress, First Session (Jul. 15, 1999) available at http://commdocs.house.gov/committees/judiciary/hju63608.000/hju63608_0.HTM (last visited Jan. 21, 2008); *Alejandro v. Republic of Cuba*, 996 F.Supp.1239, 1244-45 (S.D. Fl. 1997).

¹⁴⁴ *Alejandro*, 996 F. Supp at 1244.

MiG-29: It is a Cessna 337. That one. Give us authorization, damn it!

Control: Fire.

MiG-29: Give us authorization, damn it, we have it.

Control: Authorized to destroy.

MiG-29: I'm going to pass it.

Control: Authorized to destroy.

MiG-29: We already copied. We already copied.

Control: Authorized to destroy.

MiG-29: Understood, already received. . . Leave us alone for now.

Control: Don't lose it.

MiG-29: First launch.

MiG-29: We hit him! Damn! We hit him! We hit him! We retired him!

MiG-29: Wait to see where it fell.

MiG-29: Come on in, come on in! Damn, we hit. F-----s!¹⁴⁵

Despite considerable public pressure, the Clinton administration declined to retaliate in any significant way. Congress, however, was determined to do so.

B. Provisions of the Act

On February 28, 1996, House and Senate conferees met for the first time, agreed to restore Titles III and IV, and issued the rearmend Conference Report filed the next day, Friday, March 1, 1996, in the House of Representatives as H. Rept. 104-468.¹⁴⁶ Section 3 states its purposes:

¹⁴⁵ *Alejandro*, 996 F. Supp at 1244.

¹⁴⁶ David S. De Falco, Comment: *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: Is the*

- (1) to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere;
- (2) to strengthen international sanctions against the Castro government;
- (3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;
- (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
- (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
- (6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.¹⁴⁷

Title I of the Act strips the U.S. President of virtually any discretion to fine-tune the Cuban economic embargo as in effect upon the enactment of the Act such that the embargo may only be

United States Reaching Too Far?, 3 J. Int'l Legal Stud. 125, 136-137 (1997).

¹⁴⁷ COMMITTEE OF CONFERENCE, CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996, H.R. REP. NO. 104-468, 104th Cong., 2d Sess. 65 (1996) (hereinafter "the Act").

lifted upon an affirmative determination by the President that a statutorily defined “transition” or “democratically-elected” government is “in power” in Cuba and purports to subject such executive determinations to a legislative veto. Title II promises foreign aid and technical assistance for a “transition” or “democratically-elected” Cuban government. Title III creates a new, federal private right of action exercisable against persons who “traffic in” property confiscated by the Cuban government after January 1, 1959. Title IV imposes restrictions on entry into the United States not only by persons who “traffic in” such confiscated property but also persons related to such “traffickers” by family, ownership, or employment.

The text of § 205 defines in excruciating detail the term “transition government,” illustrating the astonishing lengths to which the drafters sought to control Cuba:

SEC. 205. REQUIREMENTS AND FACTORS FOR DETERMINING A
TRANSITION GOVERNMENT.

(a) REQUIREMENTS.--For the purposes of this Act, a transition government in Cuba is a government that--

- (1) has legalized all political activity;
- (2) has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations;
- (3) has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and

(4) has made public commitments to organizing free and fair elections for a new government--

(A) to be held in a timely manner within a period not to exceed 18 months after the transition government assumes power;

(B) with the participation of multiple independent political parties that have full access to the media on an equal basis, including (in the case of radio, television, or other telecommunications media) in terms of allotments of time for such access and the times of day such allotments are given; and

(C) to be conducted under the supervision of internationally recognized observers, such as the Organization of American States, the United Nations, and other election monitors;

(5) has ceased any interference with Radio Marti or Television Marti broadcasts;

(6) makes public commitments to and is making demonstrable progress in

(A) establishing an independent judiciary;

(B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation;

(C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the International Labor Organization, and allowing the establishment of independent social, economic, and political associations;

(7) does not include Fidel Castro or Raul Castro; and

(8) has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.

(b) ADDITIONAL FACTORS.--In addition to the requirements in subsection (a), in determining whether a transition government in Cuba is in power, the President shall take into account the extent to which that government--

(1) is demonstrably in transition from a communist totalitarian dictatorship to representative democracy;

(2) has made public commitments to, and is making demonstrable progress in--

(A) effectively guaranteeing the rights of free speech and freedom of the press, including granting permits to privately owned media and telecommunications companies to operate in Cuba;

(B) permitting the reinstatement of citizenship to Cuban-born persons returning to Cuba;

(C) assuring the right to private property; and

(D) taking appropriate steps to return to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property;

(3) has extradited or otherwise rendered to the United States all persons sought by the United States Department of Justice for crimes committed in the United States; and

(4) has permitted the deployment throughout Cuba of independent and unfettered international human rights monitors.

Section 206 contains additional, detailed criteria for determining whether a “democratically-elected” government is in power in Cuba:

SEC. 206. REQUIREMENTS FOR DETERMINING A DEMOCRATICALLY ELECTED GOVERNMENT.

For purposes of this Act, a democratically elected government in Cuba, in addition to meeting the requirements of section 205(a), is a government which—

- (1) results from free and fair elections—
 - (A) conducted under the supervision of internationally recognized observers; and
 - (B) in which—
 - (i) opposition parties were permitted ample time to organize and campaign for such elections; and
 - (ii) all candidates were permitted full access to the media;
- (2) is showing respect for the basic civil liberties and human rights of the citizens of Cuba;

(3) is substantially moving toward a market-oriented economic system based on the right to own and enjoy property;

(4) is committed to making constitutional changes that would ensure regular free and fair elections and the full enjoyment of basic civil liberties and human rights by the citizens of Cuba;

(5) has made demonstrable progress in establishing an independent judiciary . . .

In terms of detail, Sections 205 and 206 dwarf the Platt Amendment. Although the Act does not explicitly require Cuba to acquiesce in U.S. military occupation, it is hard to imagine how a full-blown invasion and occupation could achieve a greater level of U.S. control over the island.

Section 302(a) of the Act creates a private right of action against traffickers in confiscated property. It reads, in relevant part, as follows:

(1) LIABILITY FOR TRAFFICKING-

(A) Except as otherwise provided . . . any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages in an amount equal to the sum of--

(i) the amount which is the greater of--

(I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949, plus interest;

(II) the amount determined under section 303(a)(2), plus interest; or

(III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and

(ii) court costs and reasonable attorneys' fees. . . .

(B) Interest under subparagraph (A)(i) shall be . . . computed by the court from the date of confiscation of the property involved to the date on which the action is brought under this subsection.

Under § 302(a)(4)(C), in the case of property confiscated on or after the date of the enactment, a U.S. national who after the property is confiscated acquires ownership by assignment for value is prohibited from bringing an action. Section 302(a)(6) precludes U.S. courts from declining, based on the act of state doctrine, to decide the merits of a § 302 action. Thus, § 302 empowers virtually *any* national of the United States who owns a claim to confiscated property, even persons who were not nationals at the time of the alleged confiscation, to sue *any* person who “traffics” in the property subject to the claim. The term “confiscated” is defined in § 4(4) as

(A) the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959--

(i) without the property having been returned or adequate and effective compensation provided; or

(ii) without the claim to the property having been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure;

Section 4(13) defines the term “traffics” for purposes of Title III:

(A) . . . a person “traffics” in confiscated property if that person knowingly and intentionally--

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

C. Congressional Commentary

The Act as a whole raised serious policy concerns among some members of Congress. However, the intrusiveness and extraterritorial pretensions of Title III were viewed as particularly problematic. The speed with which the Act was rushed to a vote was also a source of concern. During the Senate debate, on Tuesday, March 5, 1996, Senator Dodd pleaded with his colleagues to read Titles III and IV before voting on the bill:

But if we rush to legislate a bill that has been around a year or so, and it has been around because, frankly, people had serious problems with it. The problems are not

any less because of what happened last Saturday. This bill would have passed a long time ago if it had intelligent provisions [for dealing] with Castro.¹⁴⁸

Senator Dodd continued, quoting from Gaddis Smith's March 3, 1996 article in the *Los Angeles Times*:

[T]rade and foreign investment are the real targets of Helms-Burton. If its provisions become law, and are sustained in the courts, they would burn down the house of U.S. foreign policy. Seeking to overthrow the regime of one little country, the law inflicts great injury to the larger fabric of U.S. trade and investment.¹⁴⁹

Likewise, Senator Bingaman:

The Helms-Burton legislation will only injure and alienate ordinary Cubans, weaken Cuba's civil society, and retard Cuba's democratization. And the unprecedented effort to impose United States policies on other countries will make it more difficult for the United States Government to cooperate with its allies in fashioning a joint approach towards Cuba.¹⁵⁰

...

Fidel Castro has survived the enmity of nine American Presidents. In concert with his enemies in South Florida, he retains a hypnotic ability to induce stupidity in Yankee policymakers. That seems unlikely to change until the United States

¹⁴⁸ 142 Cong. Rec. S1490-1491 (1996) (hereinafter "Senate Debate") (statement of Sen. Dodd).

¹⁴⁹ *Id.* at S1491.

¹⁵⁰ *Id.* at S1484 (statement of Sen. Bingaman).

Government gets around to taking control of its Cuba policy away from a small, self-interested lobby group.¹⁵¹

Senator Helms, who had promised to put the bill “on the President's desk before the blood dries on Castro's hands,”¹⁵² closed the Senate debate by comparing 1996 Cuba to Adolf Hitler's Germany:

They [the Canadians] advocate making a deal with Castro. . .

That is precisely what Neville Chamberlain advocated about dealing with Hitler . .

. Well, Neville Chamberlain was wrong; one man, Winston Churchill, rebuked Chamberlain and declared that he was wrong. Winston Churchill was right.¹⁵³

Following Senator Helms' remarks, the Senate passed the Act on a “Yea-Nay” vote of 74-22. The next day, Rep. Diaz-Balart introduced the bill in the House with these words:

This conference report is the response of the United States, of the Congress, and the President, to the murder of three American citizens and another U.S. resident by Castro over international waters on February 24.

Helms-Burton is also premised upon the firm conviction that an accelerated end to the Stalinist dictatorship in Cuba is not only something that we need to strive for because of elemental notions of solidarity with the terrorized and oppressed people of Cuba--but also because the establishment of democracy in Cuba is in the national interest of the United States.¹⁵⁴

¹⁵¹ *Id.* at S1484 quoting Walter Russell Mead in the *New Yorker*.

¹⁵² WASHINGTON POST, Feb. 27, 1996, at A1.

¹⁵³ Senate Debate, *supra* note 148, at S1505 (statement of Sen. Helms).

¹⁵⁴ 142 CONG. REC. H1724 (1996) (hereinafter House Debate) (statement of Rep. Diaz-Balart).

In other words, as Rep. Diaz-Balart saw it, the bill was primarily intended as a reprisal for the downing of the two Cessnas and, secondarily, as a means of overthrowing Fidel Castro's government. During the ensuing debate, Rep. Beilenson lamented

Ironically, the Helms-Burton Act---a radical departure from current United States policy---will actually weaken our ability to encourage democracy in Cuba.... [T]his legislation locks the United States into a failed policy, and denies the President the flexibility needed to respond to any future democratic transition in Cuba.¹⁵⁵

After the close of debate on March 6, the Act was passed by the House on a 336-86 "Yea-Nay" vote¹⁵⁶ and signed into law by President Clinton on March 12, 1996.¹⁵⁷

D. Foreign Sovereign Reactions

The international response to the Act was overwhelmingly negative. Canada, Mexico, and the European Union all officially registered forceful objections and invoked dispute-resolution provisions of multilateral trade agreements such as NAFTA and WTO. Excerpts from European Council Regulation 2271/96, adopted on November 22, 1996, is illustrative:

Whereas a third country has enacted certain laws . . . which purport to regulate activities of natural and legal persons under the jurisdiction of [the EU]; Whereas by their extra-territorial application such laws, regulations and other legislative instruments *violate international law* . . .

¹⁵⁵ House Debate, *supra* note 154, at H1725 (statement of Rep. Beilenson).

¹⁵⁶ *Id.* at H1512.

¹⁵⁷ De Falco, *supra* note 146 at 137.

...

Whereas, under these exceptional circumstances, it is necessary to take action at Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons . . .

...

Article 6

Any person referred to in Article 11 [natural or juridical person who is a national of an EU Member State], who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex [the Act and the Iran and Libya Sanctions Act of 1996] or by actions based thereon or resulting therefrom.

Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.¹⁵⁸

In other words, any national of a European Union Member State who pays damages under the Act is entitled by EC Regulation 2271/96 to damages and legal costs incurred because of the Act from the original Helms-Burton plaintiff or any other person “causing” such damages. This regulation is not merely hortatory. It is directly applicable and binding upon all fifteen Member

¹⁵⁸ EUROPEAN COUNCIL REGULATION 2271/96, adopted November 22, 1996 (emphasis added).

States of the European Union.

The Helms-Burton Act continues to be of concern to the European Union. In its 16th Annual Report on United States Barriers to Trade and Investment, the European Commission reiterated its continuing objections to the Act:

The EU strongly opposes the extraterritorial provisions of certain US legislation, which hamper international trade and investment by seeking to regulate EU trade with third countries conducted by companies outside the US. Of particular concern at the present time are the Helms-Burton Act and the Iran Libya Sanctions Act. Important headway towards a lasting solution to this dispute was made at the 18 May 1998 EU/US Summit in London. However, implementation of the Understanding reached at that occasion continues to depend on US Congress legislative action.¹⁵⁹

The agreement reached at the Summit in no way softens the EU's position that the Helms-Burton and ILSA Acts are contrary to international law. At no point in time did the EU acknowledge the legitimacy of these Acts. We have fully reserved our right to resume the WTO case against the Helms-Burton Act in the event of action being taken against EU persons or companies under either this Act or ILSA or the waivers not materialising. The agreements are of a political nature and do not in any way lend any sort of validity to the illegal provisions of the US laws in question.¹⁶⁰

¹⁵⁹ 2000 EUROPEAN COMMISSION REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 4.

¹⁶⁰ 2000 EUROPEAN COMMISSION REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 10. These

The Commission continued:

There is a second element in US trade policy-making about which the EU has regularly complained: unilateralism. This tendency takes the form of either unilateral sanctions or retaliatory measures against “offending” countries, or companies. These measures are unilateral in the sense that they are based on an exclusive US appreciation of the trade-related behaviour of a foreign country or its legislation and administrative practice, without reference to, and sometimes in defiance of, multilaterally agreed rules. This approach casts doubt on US support for a multilateral rules-based system of addressing trade problems and can also lead to bilateral agreements with elements of discrimination.¹⁶¹

Canada, whose annual trade with Cuba now amounts to \$575 million,¹⁶² has also taken the Act to heart. Under the Canadian *Foreign Extraterritorial Measures (United States) Order, 1992*

Every Canadian corporation and every director and officer of a Canadian corporation shall . . . give notice to the Attorney-General of Canada of any directive, instruction, intimation of policy or other communication relating to an extraterritorial measure of the United States in respect of any trade or commerce between Canada and Cuba that the Canadian corporation . . . has received from a

concerns are reiterated in 2006 EUROPEAN COMMISSION REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 7 available at http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133290.pdf, last accessed January 26, 2008.

¹⁶¹ 2000 EUROPEAN COMMISSION REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 10-11, available at <http://europa.eu.int/comm/trade/pdf/usrbt2000.pdf> (last visited September 2, 2000).

¹⁶² Susan Riggs, *Canada's challenge to U.S. hegemony*, THE TIMES UNION (ALBANY, NY), March 18, 1997, at A7.

person who is in a position to direct or influence the policies of the Canadian corporation in Canada.¹⁶³

Elsewhere, Canadian trade law now imposes a Cdn \$1.5 million fine for “consorting with America over Cuba.”¹⁶⁴

7.1 Any judgment given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 shall not be recognized or enforceable in any manner in Canada.¹⁶⁵

8.1 Where an order may not be made under section 8 in respect of a judgment because the judgment has been satisfied outside Canada, or where a judgment has been given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, the Attorney General of Canada may, on application by a party against whom the judgment was given who is a Canadian citizen, a resident of Canada, a corporation incorporated by or under a law of Canada or a province or a person carrying on business in Canada, by order, declare that that party may recover, under the provisions of section 9 that the Attorney General identifies, any or all amounts obtained from that party under the judgment, expenses incurred by that party, or loss or damage suffered by that party.

¹⁶³ Richard G. Dearden, *Trade With Cuba - Canada and the United States: Set on a Collision Course*, ABA International Law News, Vol. 25, No. 2, Spring 1996. This Canadian Order resembles a U.S. statute, 50 App. U.S.C. § 2407(b)(2), drafted in response to the Arab boycott of Israel.

¹⁶⁴ Riggs, *supra* note 162, at A7.

¹⁶⁵ FOREIGN EXTRATERRITORIAL MEASURES ACT, R.S.C., ch. F-29, § 7.1 (Can.) (LEXIS through Vol. 134 The Canada Gazette, No. 16, Part II, August 2, 2000).

On October 23, 1996, Mexico promulgated the *Law Protecting Commerce and Investment from Foreign Standards that Contravene International Law*.¹⁶⁷ The provisions of this law were deliberately drafted to block the application of the Act to persons in Mexico or to commercial activity having substantial effects in Mexico. Article 1 prohibits natural and juridical persons from performing any act motivated by compliance with the Act. Article 2 prohibits covered persons from providing information that “foreign” authorities request pursuant to the purposes of the Act.

Like the *Canadian Order*, Article 3 mirrors U.S. anti-boycott reporting requirements. If U.S. law enforcement officials or courts request information pursuant to the Act, Mexican law requires that the recipient of the request immediately inform Mexico’s Secretaries of Commerce and Foreign Relations. Article 9 imposes severe monetary fines for violation of Articles 1, 2, or 3.

Since its original enactment, U.S. presidents have consistently held in suspension the private right of action conferred by Title III¹⁶⁸ on the theory that suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.¹⁶⁹ Thus, so far, contrary winds of U.S. national interest and the ever elusive Cuban transition to democracy are holding the America’s modern armada of reprisal snugly in the harbor.

¹⁶⁶ FOREIGN EXTRATERRITORIAL MEASURES ACT, R.S.C., ch. F-29, § 8.1 (Can.) (LEXIS through Vol. 134 The Canada Gazette, No. 16, Part II, August 2, 2000).

¹⁶⁷ EL CONGRESO DE LOS ESTADOS UNIDOS DE MEXICO, LEY DE PROTECCION AL COMERCIO Y LA INVERSION DE NORMAS EXTRANJERAS QUE CONTRAVENGAN EL DERECHO INTERNACIONAL (1997).

¹⁶⁸ *Glen v. Club Mediterranee*, 450 F.3d 1251, 1256 (11th Cir. May 31, 2006).

¹⁶⁹ *See, e.g.*, Text of Letter from President Barack Obama to the Chairmen and Ranking Members of the House and Senate Committees on Appropriations, the House Committee on Foreign Affairs, and the Senate Committee on Foreign Relations, July 15, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/07/15/letter-president-regarding-cuban-liberty-and-democratic-solidarity-act-1>.

IV. ISSUES LEGAL AND POLITICAL

Title III of the Act presents four fundamental questions of international law: (1) with respect to particular Cuban confiscations, whether such confiscations violated international law; (2) whether, in general, confiscations that violate international law are so ineffective at passing title that other states are either entitled or obligated to dishonor them; (3) assuming that the Cuban confiscations cannot create good title, whether the creation in U.S. nationals of a private right of action against the nationals of other countries for confiscations executed by the Cuban government is an illegal exercise of extraterritorial prescriptive jurisdiction; and (4) to what extent, if any, other nations are obligated to honor judgments by U.S. courts rendered pursuant to the Act.

Beyond these legal issues are potentially weightier questions regarding the political wisdom and fairness of the policies furthered by the Act. How fair is this U.S. approach, not only to Cuba, but perhaps more importantly to neutral nations with whom the United States has long-standing commercial relationships? How, *ex aequo et bono*, should the United States conduct itself toward Cuba?

V. INTERNATIONAL LAW

A. *General Principles*

The most reliable guide to applicable international law is the Restatement (Third) Foreign Relations Law of the United States (1987) (Restatement). The Restatement was written by U.S. nationals primarily for U.S. nationals and is frequently cited with approval by the U.S. Supreme

Court.¹⁷⁰ The U.S. Congress implicitly endorsed the Restatement by appealing to § 402 as justification for the Act's extraterritorial reach.¹⁷¹ Thus, the Restatement arguably provides the best available framework for addressing the issues presented here because of its U.S. provenance, its endorsement by U.S. courts and legislators, and the absence of a useful alternative.

According to Restatement § 101, international law “consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.” Under the Restatement § 102, a rule of international law is one that *has been accepted as such* by the international community of states

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world where the following hold true:
 - (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
 - (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.
 - (4) General principles common to the major legal systems, even if not

¹⁷⁰ See, e.g., *Moises Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2697 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004); *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

¹⁷¹ The Act, *supra* note 147, at § 301(9).

incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

Under Restatement § 102 comment b, the “practice of states” includes public measures, other governmental acts, and official statements of policy. Such practices may be undertaken unilaterally or in cooperation with other states. The practice necessary to create customary law may be of comparatively short duration, but it must be “general and consistent.” A practice can be general even if not universally followed. While no precise formula dictates how widespread a practice must be, it “should reflect wide acceptance among the states particularly involved in the relevant activity.” A customary principle is not binding on a state that declares its dissent therefrom during the principle’s development. According to Restatement § 102, comment e, the practice of states in a regional or other special grouping may create regional customary law among those states.

B. Legality of the Cuban Confiscations

1. U.S. Apologia

Some have argued that the Cuban confiscations “violated international law not only because no compensation was ever paid but because the confiscatory measures explicitly targeted U.S. nationals and were express reprisals against lawful measures of the U.S. government.”¹⁷² However, this argument may be undercut by Restatement § 712 and by regional customary law such that (a) no compensation is due, at least not yet; (b) the discrimination against U.S. nationals was only temporary and, as such, does not make the confiscations illegal; and (c) under the circumstances, Cuban reprisal against the United States may have been a justified and proportionate response to

¹⁷² Clagett May, *supra* note 9, at 19.

U.S. aggression.

2. International Law

In U.S. case law, it might appear that the illegality of the Castro confiscations under international law was settled in 1967 by the Second Circuit in *Banco Nacional de Cuba v. Farr*.¹⁷³ Yet this appearance may be misleading. In *Farr*, the court concluded that the confiscation at issue violated international law because the expropriation decree failed to provide adequate compensation and “involved a retaliatory purpose and a discrimination against United States nationals.”¹⁷⁴ However, the *Farr* court opined without evidence only recently published suggesting that because of hostile conduct by the United States, Cuba may have acted legally in confiscating the property at issue.

For example, details of the Bay of Pigs assault and the Kennedy administration’s subsequent “Operation Mongoose” would likely be central to any case turning on the international legality of Cuba’s confiscations. Yet much of this information was classified and off limits for civil litigation until 1997 or later. The CIA’s Official History of the Bay of Pigs Operation, Volume 3, was discovered by accident in 2005.¹⁷⁵ Volume 4 was finally declassified only in August 2011,¹⁷⁶ while Volume 5 remains classified thanks to a May 2014 holding by the D.C. Circuit granting it full protection under the deliberative process privilege.¹⁷⁷ Not surprisingly, as of February 15, 2015, the Lexis-Nexis combined federal court cases database contains only one mention of the term

¹⁷³ *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183-85 (1967).

¹⁷⁴ *Banco Nacional de Cuba*, 383 F.2d at 183 (emphasis added).

¹⁷⁵ Peter Kornbluh, *National Security Archive Electronic Briefing Book No. 355*, THE NATIONAL SECURITY ARCHIVE (Aug. 15, 2011), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB355/>.

¹⁷⁶ *Id.*

¹⁷⁷ *National Security Archive v. Central Intelligence Agency*, 752 F.3d 460, 465 (D.C. Cir. 2014).

“Operation Mongoose”—in a Texas criminal case having nothing to do with Cuba.

Even assuming that *Farr* was correctly decided, federal courts hearing future litigation under Act § 302 may find it inapposite in light of the intervening development of customary international law and factual distinctions between *Farr* and other confiscation cases. Changes in customary international law alone might cause the Second Circuit to reverse itself if it were to rehear *Farr* today.

Yet even if the *Farr* court’s analysis of international law and its application of that law to the *Farr* facts retains validity, *Farr* is unlikely to control many cases brought under § 302 because of factual differences. *Farr* involved the confiscation of one shipload of Cuban sugar—a single transaction involving the sale of perishable goods. In contrast, much of the litigation inspired by § 302 would likely focus on interests in “fixed” assets such as land, buildings, and perhaps machinery that remained in Cuban territory after their confiscation. The legal principles that define rights in real property are different in important respects from those defining rights in personalty. These differences could produce disparate results.

Other potentially significant differences may be found in the roles played by various potential plaintiffs in § 302 actions. For example, none of the parties in *Farr* appear to have been willing participants, as were the Big Three, in the early stages of the United States’ economic war against Cuba. If a § 302 plaintiff is found to have acted against the Cuban government, this fact might affect the plaintiff’s right to recover damages. In each case brought under § 302, the timing of events, the specific reactions of the plaintiff in response to confiscatory actions, and the extent to which the plaintiff pursued available local remedies may affect the nature and extent of the remedy

available under § 302.

If the Cuban confiscations were illegal under international law, they must have been so under treaty law, customary law or general principles. Cuba has never signed a treaty requiring just compensation for the expropriation of property belonging to alien nationals. Therefore, if the Cuban confiscations are invalid, they must be found so under customary law or general principles.

Arguably, at least some of the confiscations were either outright legal or fall under a widely recognized prerogative of a state to temporarily confiscate property without compensation during the pendency of a war or similar internal crisis. Some commentators seem to concede without debate a rule prohibiting all uncompensated property confiscations, but it is an overstatement to say that such a rule had been *accepted as such by the international community of states* at the time of the Cuban confiscations or that such a rule has ever been generally accepted by the major Latin American or Caribbean states.

Restatement § 712 provides a general framework for analyzing the taking of property by one nation from the nationals of another:

A state is responsible under international law for injury resulting from:

(1) a taking by the state of the property of a national of another state that

(a) is not for a public purpose, or

(b) is discriminatory, or

(c) is not accompanied by provision for just compensation;

For compensation to be just under this Subsection, it must, *in the absence of exceptional circumstances*, be in an amount equivalent to the value of the property

taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national; . . .

(2) a repudiation or breach by the state of a contract with a national of another state . . .; or

(3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.¹⁷⁸

Section 712, comment d concedes that “exceptional circumstances” might include takings “of alien property during war or similar exigency.”¹⁷⁹ Under § 712, comment f, takings that invidiously discriminate based on nationality of owners are unreasonable, but nationality-based discrimination that is “rationally related to the state's security or economic policies might not be unreasonable.” Furthermore, discrimination may be difficult to prove “where there is no comparable enterprise owned by local nationals or by nationals of other countries, or where nationals of the taking state are treated equally with aliens but by discrete actions separated in time.” Whether one state can take private property in retaliation for another state’s violation of international law, such as for the other’s unlawful takings of private property, is said to be “doubtful.” On the other hand, Reporter’s Note 1 agrees with the U.S. Supreme Court that “there are few if any issues in international law today on which opinion seems to be so divided as the limitations of a state's power to expropriate the property of aliens.”¹⁸⁰

¹⁷⁸ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987) (emphasis added).

¹⁷⁹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. d (1987).

¹⁸⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

Article 4 of the United Nations Covenant on Civil and Political Rights, ratified by the United States on June 8, 1992, permits a state to seize or regulate property and detain or regulate the activities of persons, whether nationals or aliens “in time of public emergency which threatens the life of the nation” but “only to the extent strictly required by the exigencies of the situation.”

Regional customary law also appears to support the Cuban confiscations. At the time, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, and Panama all had constitutional provisions permitting the state to temporarily expropriate property without compensation for the duration of a war or other internal crisis of similar magnitude.¹⁸¹ Similarly, the Constitution of Mexico authorizes unilateral suspension of property rights without compensation during times of invasion, serious disruption of public peace, or any other situation that places society in serious danger or conflict.¹⁸² The Guatemalan and Nicaragua constitutions permit the confiscation of property belonging to “enemy nationals.” During World War II, the Costa Rican constitution permitted the confiscation of property belonging to Italian, Japanese, and German nationals.¹⁸³

Restatement § 902, comment i observes

Like other claims for violation of an international obligation, a state's claim for a violation that caused injury to rights or interests of private persons is a *claim of the state and is under the state's control*. The state may determine what international remedies to pursue, may abandon the claim, or settle it. . . . Any

¹⁸¹ See generally ROBERT C. CASAD and ROGELIO SOTELA MONTAGNE, EXPROPRIATION IN CENTRAL AMERICA AND PANAMA: PROCESSES AND PROCEDURES (1975) (hereinafter CASAD).

¹⁸² LA CONSTITUCION DE LOS ESTADOS UNIDOS MEXICANOS, ARTICULO 29 (1997) (copy on file with author).

¹⁸³ CASAD, *supra* note 122, at 161-162.

reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state.

State claims deriving from private injury differ from other interstate claims in some respects. The injured person may disable the state from making the claim by failing to exhaust local remedies.¹⁸⁴

In other words, under international law, when it is alleged that a sovereign state has violated the international rights of a foreign national, natural or juridical, the established dispute resolution procedure requires that the sovereign of the aggrieved party make a claim against the accused foreign sovereign. The claim then belongs to the claiming state “and is under the state’s control.” In a sense, the sovereign claimant subrogates itself to the claim of its injured national, thereby removing the national as a party to the dispute. If the accused sovereign offers reparation, the proceeds in reparation accrue to the sovereign claimant which can then dispose of the proceeds as it sees fit.

In contrast, the Act attempts to set on its head the process prescribed by Restatement § 902. Under the Act, private U.S. nationals subrogate themselves to the claims of their sovereign against Cuba. Recall Rep. Diaz-Balart’s introductory statement that the Act was the official U.S. response to “the murder of three American citizens” and was “premised upon the firm conviction” that Cuba democracy is *in the national interest of the United States*.¹⁸⁵

Thus, Lincoln-Balart portrayed the Act as one sovereign’s attack against another through the instrumentality of privateers. It encourages U.S. nationals to privately wage economic war against

¹⁸⁴ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 cmt. i (emphasis added).

¹⁸⁵ Statement of Rep. Diaz-Balart, *supra* note 154 (emphasis added).

Cuba on behalf of the United States by pursuing the nationals of third countries for satisfaction of confiscation claims only incidentally related to the real motivations behind the Act: the “murder of three American citizens” and “the national [policy] interest of the United States.” The cold war waged by the English Queen Elizabeth I against Spain offers an off-beat precedent for the Act’s inverted § 902 approach but the currency and applicability of Elizabeth’s approach to the conflict between Cuba and the U.S. is questionable.

During Elizabeth’s reign, Spanish economic and military muscle became a serious threat to England. In May 1585, England had no navy worthy of the term. A number of English merchant ships then at anchor in Spanish harbors were arrested, their crews imprisoned and their cargoes confiscated.¹⁸⁶ This mass confiscation of English assets created an uproar in London, especially among the merchants whose vessels and cargoes were forfeit. In response to their demands for redress, on July 1, 1585, the Queen granted letters of reprisal to those who proved their losses to the Lord High Admiral’s satisfaction.¹⁸⁷ These letters licensed holders to arm their vessels as if for war and to sally forth in pursuit of Spanish goods on land or sea. It was a convenient arrangement for Queen Elizabeth whose navy was far too small on its own to take on Spanish.¹⁸⁸ The letters enabled the English Queen to cut Spain down to a manageable size without, in a narrow legalistic sense, committing an act of war. They were issued ostensibly to remedy private wrongs, but served the dual purpose of furthering the Queen’s foreign policy objectives. As may be expected, the formal procedure for obtaining letters of reprisal was taken seriously, at first, by both merchants

¹⁸⁶ KENNETH R. ANDREWS, *ELIZABETHAN PRIVATEERING: ENGLISH PRIVATEERING DURING THE SPANISH WAR 1585-1603* 3 (1964).

¹⁸⁷ RONALD, *supra* note 12, at 278-279.

¹⁸⁸ RONALD, *supra* note 12, at 31.

and lawyers.¹⁸⁹ Soon, however, the Lord High Admiral, his courts and family members turned English privateering into a well-recognized if not illustrious career path for highly motivated Englishmen, including Sir Francis Drake.¹⁹⁰

Elizabeth's letters of reprisal, however, offer little serious customary-law support for the Act. In contrast to Elizabeth's Spain, Cuba by itself poses no significant economic or long-run military threat to the United States as Spain did to England. Unlike Elizabeth, the United States has the world's strongest armies and navies, presumably capable of fighting their sovereign's battles. Cuba, unlike Spain, has no galleons of any consequence and confiscated assets in response to aggression by the United States, not the other way around as between Spain and England. Finally, the Act, unlike Elizabeth's letters, specifically targets neutral parties rather than the nationals of the country toward which the United States is ill-disposed.

Clagett asserts that the Cuban confiscations were an unjustified retaliation for "lawful" actions by the United States. This assertion must be evaluated against the details of Restatement § 905, which strictly limits a state's recourse to unilateral or self-help remedies in response to another state's violations of international law:

(1) Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures

(a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and

¹⁸⁹ ANDREWS, *supra* note 184, at 3.

¹⁹⁰ RONALD, *supra* note 12, at 277-315.

(b) are not out of proportion to the violation and the injury suffered.

(2) The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1).

On these facts, it seems, initially at least, that § 905 could cut either way. A more detailed discussion of the implications of § 905 follows below.

3. Application

Under the “exceptional circumstances” clause of § 712 and the regional customary law mentioned in § 102 comment e, most of the Cuban confiscations at issue were arguably lawful because they were executed out of national necessity during a time of economic, political, and military crisis. The crisis was compounded, if not induced, by hostile economic and military actions of the United States.

By January of 1959, Cuba had been in a state of civil war for two years. On the heels of that civil war, the new Cuban government, recognized at once as legitimate by the United States, was in the process of reorienting Cuba’s economy toward what it hoped would become real independence and sovereignty. Castro’s inflammatory rhetoric, constitutional manipulations, and human rights violations were indisputably wrong. The mobocracy prevalent in Cuba after his rise to power was undoubtedly destructive and was probably a violation of international law. But none of these facts alters the view that if the Castro government had been given sufficient breathing room by the United States, a mutually satisfactory negotiated settlement *might* have been reached. We will never know for sure.

As it happened, the possibility of such a settlement was destroyed by questionable actions of the U.S. executive. In March 1960, Eisenhower started the CIA training for the Bay of Pigs. This was followed by an economic “one-two” punch. In June, Eisenhower orchestrated the Big Three’s refusal to refine Russian oil. In July, he abruptly suspended Cuba’s sugar quota. This severe economic attack left Castro no alternative but to turn to Russia for help. Since then, the economic and military pressures exerted against Cuba by the United States have never let up thereby continuing unabated the state of siege justifying the confiscations. If the United States could allow Cuba to pick itself up off the floor, perhaps there would be time and hard currency to allow for meaningful discussions of the now decades-old confiscations.

It can also be argued that the economic aggression and attempts at self-help leading up to the confiscations of the Big Three’s oil refineries entitle the Big Three and their refineries to special treatment under international law. As obnoxious Che Guevara’s ultimatum to the refineries was, the Big Three could have followed Ambassador Bonsal’s advice and pursued established procedures for the resolution of such disputes. Their calculated refusal to assist Cuba in refining its Soviet oil shipments came at a very sensitive time for the Castro government. If Guevara had not “intervened” the refineries when he did, the Castro revolution would almost certainly have been scuttled. Presumably, this was President Eisenhower’s objective. However, Cuba’s plight at the time seems tailor-made for the “exceptional circumstances” clause of § 712. Castro absolutely needed to refine the Soviet oil and, at the time, he had insufficient hard currency to pay the refiners their due for the Venezuelan oil previously imported into the country. By refining the Soviet oil, the refineries would have helped Cuba generate much needed currency and might well have

received full payment themselves. If they had not then received payment, they could have pursued available legal remedies including a request for diplomatic intervention by their respective governments.

In any case, by deliberately declining to exhaust available local remedies before taking the law into their own hands, the Big Three arguably disabled the United States, under Restatement § 902, comment i, and § 713, comments b and f, from claiming compensation for their confiscated refineries. This argument receives support from Ambassador Bonsal who was of the opinion that the Big Three should have pursued local remedies first before playing foreign policy games on behalf of the United States government.

The allegation of discriminatory treatment should be examined more closely in light of § 712, comment f, according to which nationality-based discrimination that is “rationally related to the state's security or economic policies might not be unreasonable.” Arguably, the sugar and refinery confiscations were “rationally related” within the meaning of comment f, given (a) the vital importance of both of these industries to the Cuban economy and (b) the fact that they were virtually monopolized by U.S. (read “enemy”) nationals at a time when the government of the United States was openly hostile toward Cuba.

Likewise, comment f indicates that discrimination may be difficult to prove where nationals of the taking state are treated equally with aliens but by discrete actions separated in time. The only “discrimination” to which U.S. nationals were subjected by the Castro confiscations was as to timing. By the mid-1960s, virtually all private property in Cuba had been nationalized without compensation. If discriminatory treatment is the standard by which the confiscations are made

illegal, then just compensation should be limited to the interest or profits that would have accrued to U.S. property owners during the interval between their “early” confiscations and the later ones. In the case of the U.S.-owned sugar producers and oil refineries, the profits accruing during that interval would most likely have approximated zero because of the effects of U.S. trade sanctions if not because of non-discriminatory nationalization by the Cuban government.

What of the argument that Castro’s “confiscatory measures were express reprisals against *lawful* measures of the U.S. government?”¹⁹¹ Its accuracy is dubious at best. In some cases, it may be clear that the confiscation was made for a retaliatory purpose or through random mob violence without legitimate public purpose. In other cases, including those of the Big Three oil refineries, the confiscations appear to have been executed pursuant to legitimate public purposes. In each claim brought under § 302, it would presumably be necessary to determine to which U.S.-government measure or measures the particular Cuban confiscation responded. After more than fifty years, proving such action-and-response relationships would be an enormous evidentiary challenge. However, if a “source” U.S. measure can be identified, the next question would be whether the Cuban confiscatory counter-measure was lawful. The primary international-law standards are provided by Restatement § 713 and § 905.

Under Restatement § 713, a state whose national has been injured by another state “may resort to any of the remedies usually available to a state . . . including international claims procedures and other diplomatic measures or permissible international responses.” Section 905 discourages self-help but permits it if the self-help measures are (a) necessary to terminate or remedy the

¹⁹¹ See Clagett May, *supra* note 9, at 19.

violation or to prevent further violation; and (b) not out of proportion to the violation and the injury suffered.

The sequence of events is critical. The problem is reminiscent of a UCC § 2-207 battle-of-the-forms, in which the legal outcome depends on when the battle begins. Here, it might begin with the United States' forced insertion of the Platt Amendment into the 1901 Cuban Constitution. Alternatively, it could be the destruction by Castro forces of U.S.-owned property during the Castro revolution. Ultimately, the international law answer may turn on who offered the *first* unlawful provocation.

For the sake of argument, let us assume that we begin with the seizures and occupations of lands, buildings, and equipment that gave rise to Ambassador Bonsal's January 10, 1960 recital to the Cuban Foreign Minister. Assuming that the seizures were unlawful, the Ambassador's recital was the first proper step toward resolution through diplomacy. When diplomacy failed to produce results, the United States might have invoked other dispute resolution mechanisms such as international arbitration or adjudication before the International Court of Justice. On general principles, ICJ adjudication or arbitration seem preferable to a military invasion or nation-crushing trade sanctions, but the United States pointedly ignored those alternatives.

The Russian oil-for-sugar deal was concluded in February. In March, the CIA began training. In June, the United States coaxed the Big Three into refusing to refine Russian oil. Castro responded by "intervening" the refineries. The U.S. parried by suspending the sugar quota. This was followed, in August, by the nationalization of U.S. sugar assets. The United States countered, in February 1961, with the Bay of Pigs "invasion."

The facts at each juncture show the United States overreacting in ways that were neither proportionate nor helpful. Evidence even suggests that after the Bay of Pigs, official U.S. moves were motivated by personal malice on the part of President Kennedy and his brother, Bobby. It is hard to imagine what positive result—other than the political and military destruction of Castro—the Eisenhower and Kennedy administrations hoped to achieve through (a) the oil-refinery “game,” (b) the severance of its single most important external sugar supplier, (c) the Bay of Pigs invasion, and (d) the attempted assassination of Fidel Castro.

The Restatement condones neither assassinations nor the use of military force as self-help dispute resolution mechanisms. These U.S. actions make sense only in terms of the concerted U.S. strategy—to destroy the Castro government—whose existence is conclusively proven by the classified Cuba Operation memos written by Craig and Lansdale on February 19 and 20, 1962¹⁹² and other documents more recently uncovered, including the . Under the circumstances, such a strategy is hard to justify as a necessary or proportionate response to Cuban actions especially in light of the U.S. failure to first attempt less hostile dispute resolution techniques. In this context, the Act only compounds the disproportionate nature of the U.S. response.

In contrast, the Cuban responses to U.S. aggression, with the notable exception of the Soviet missile agreement, seem muted. Even the missile agreement was concluded *after* the United States had pulled Cuba’s sugar concession, staged the Bay of Pigs assault, and commenced Operation Mongoose to convince Castro that the United States was about to invade. Thus, Cuba’s entry into the missile agreement could be reasonably be viewed as a necessary and proportionate response to

¹⁹² See Craig *supra* note 120 and Lansdale *supra* note 122.

a justifiable fear of U.S. military aggression. Thus, the suggestion that the Cuban confiscations were unlawful reprisals against lawful U.S. government actions must fail.

C. Effectiveness of Titles to Confiscated Property

1. U.S. Apologia

It has next been asserted that “confiscations that violate international law are not effective in passing title to property, and a state is under no obligation to recognize a title acquired by such a confiscation.”¹⁹³ Professor Clagett concedes that this “rule” cannot be derived with any certainty from existing international law but insists that “no consensus exists that an internationally unlawful confiscation *does* pass good title.”¹⁹⁴ Yet this is a long way from an international consensus that the U.S. Congress is entitled to label the confiscated property as contraband, or that U.S. courts are not obligated to recognize titles now vested in Canadian, Mexican, or European nationals to properties confiscated by Cuba half a century ago.

2. International Law & Application

The anti-confiscation analysis of this issue is weak partly because it relies primarily on learned commentary¹⁹⁵ described in the Restatement as “secondary evidence” of international law.¹⁹⁶ The learned commentary relies, in turn, on other secondary evidence such as judicial decisions of national courts. Such secondary evidence “may be negated by primary evidence, for example, as to customary law, by proof as to what state practice is in fact.”¹⁹⁷ Under the Restatement, the best

¹⁹³ Clagett July, *supra* note 9, at 438.

¹⁹⁴ *Id.* at 438.

¹⁹⁵ *Id.* at 438 n.18.

¹⁹⁶ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. a (1987) (emphasis added).

¹⁹⁷ *Id.*

evidence of customary law is “proof of state practice, ordinarily by reference to official documents and other indications of governmental action.”¹⁹⁸

A wealth of primary authority on actual state practice contradicts the notion that the United States is not obligated to recognize the titles to confiscated property. The list of authorities includes the established practice of the United States, the language of the Act itself, and the legislative acts of major trading partners documented in Part III.D., Reactions Far and Near.

According to the Restatement, the United States has historically pressed its nationals’ claims against foreign governments through diplomatic channels, not against individual or corporate holders of confiscated property, for alleged violations of international with the U.S. Foreign Claims Settlement Commission acting as intermediary.¹⁹⁹ Thus, historical U.S. practice rejects the Act’s implicit invalidation of titles to confiscated property. The Act’s creation of private judicial causes of action against third-country purchasers for value appears to be significantly beyond the parameters of established international law.

The Act self-identifies as a unilateral attempt to change the practice of major states, reporting the legislative finding that “the international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.”²⁰⁰ This is a clear admission that before the Act it was *not* the

¹⁹⁸ *Id.*

¹⁹⁹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 reporter’s note 9 (1987) (noting e.g., settlements reached with Chile (1853), Mexico (1923), and Iran through the U.S. Foreign Claims Settlement Commission).

²⁰⁰ Act § 301(8).

general and consistent practice of the United States or any other major state to recognize private causes of action against third-parties who purchase for value property confiscated by a foreign sovereign. Professor Clagett implicitly concedes as much by arguing that (a) other nations should quit carping about the Act's irregularity so that they can focus on "encouraging wider and deeper respect for property rights . . . in international law,"²⁰¹ and (b) it would sure be nice to have a treaty among major trading nations that would "codify the rule that titles acquired by confiscation are invalid and agree not to recognize such titles."²⁰² If this proposed rule were already supported by customary international law its codification would be superfluous.

Finally, the Restatement's best evidence that the Act violates customary international law is the proof of state practice in the "official documents and other indications of governmental action" of major nations. Virtually all of the United States' trading partners have officially objected to the Act on the grounds that it violates international law. More importantly, the legislatures of the European Union, Canada, and Mexico have all passed laws or issued executive orders that forcefully proclaim that the Act does not conform to their understandings of customary international law. European Council Regulation 2271/96, of November 22, 1996, proclaims that the Act "violates international law" and is "likely to affect the established legal order." The title of Mexico's October 23, 1996, *Law Protecting Commerce and Investment from Foreign Regulations that Violate International Law* is by itself a clear condemnation of the Act. The Canadian *Foreign Extraterritorial Measures (United States) Order, 1992*, at least implicitly labels the Act a violation of international law.

²⁰¹ Clagett October, *supra* note 9, at 643.

²⁰² *Id.* at 643. See also Clagett May, *supra* note 9, at 22.

In summary, the primary evidence of customary international law offers little support for the Act. Neither the historical practice of the United States, nor the language of the Act, nor the official documents and actions of major states evince any general or consistent practice of dishonoring titles to confiscated property. On the contrary, the practice, for at least the past century-and-a-half, has been that sovereign states reach settlements *inter se* through diplomacy, international adjudication or arbitration.

D. Restatement § 403: Substantial Effects

Defenders of the Act rely heavily on Restatement § 402, which permits a state to prescribe law with respect to “conduct outside its territory that has or is intended to have a substantial effect within its territory.” In legislative findings, Congress appealed directly to the Restatement to justify the Act’s extraterritorial reach: “International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.”²⁰³ However, as Professor Lowenfeld points out,²⁰⁴ Congress was cherry picking the Restatement to rationalize its otherwise untenable position. Beyond § 402 is § 403(1), which reads:

Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.²⁰⁵

²⁰³ Act § 301(9).

²⁰⁴ Lowenfeld, *supra* note 140, at 431.

²⁰⁵ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987).

Along these lines, Professor Lowenfeld asks how the United States would respond if France were to pass a Helms-Burton-like law giving French nationals the right to sue U.S. nationals who, in the 1990s, bought up properties that Vietnam confiscated from French nationals in the 1950s.²⁰⁶ That France has passed no such law, despite considerable French economic losses in Indochina, is evidence that the Act is unreasonable and, therefore, is not a legitimate exercise of extraterritorial prescription under Restatement § 402.

E. Legislative Estoppel: U.S. Anti-boycott Rules

Professor Lowenfeld asserts that Title III of the Act amounts to a secondary boycott of Cuba similar in intent and effect to the efforts by Arab nations to enforce a secondary and tertiary boycott against Israel.²⁰⁷ In response to the Arab boycott efforts, the Congress enacted rules under the Export Administration Act (EAA) to prohibit the participation of U.S. nationals in the Arab boycott.²⁰⁸ The U.S. Senate Subcommittee on International Finance of the Committee on Banking, Housing, and Urban Affairs added this endorsement to the anti-boycott rules of the EAA:

[T]he committee strongly believes that the United States should not acquiesce in attempts by foreign governments through secondary or tertiary boycotts to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions. . . .²⁰⁹

In fairness to the Senate, it is possible that the Subcommittee on International Finance, if given

²⁰⁶ Lowenfeld, *supra* note 140, at 431.

²⁰⁷ *Id.* at 429.

²⁰⁸ 50 App. U.S.C. § 2407 (1998).

²⁰⁹ ARAB BOYCOTT: HEARINGS ON S. 69 AND S. 92 BEFORE THE SUBCOMM. ON INT'L FINANCE OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS 21, 95th Congress, 1st Sess. 279 (1977).

a chance to review the Act before it was rushed to the floor, might have recognized this inconsistency. Nevertheless, the point remains that no one except perhaps a few Arab nations really believes that such peacetime secondary boycott measures are either reasonable or fair.

Nevertheless, Clagett insists that Congress passed the anti-boycott rules not because the Arab boycott violated customary international law, but rather because it violated United States public policy.²¹⁰ Therefore, he asserts, the anti-boycott rules should not be viewed as evidence that secondary boycotts such as that which the Act attempts to enforce violate international law.²¹¹ This argument fails because U.S. federal law is itself primary evidence of international law. Thus, U.S. anti-boycott statutes and regulations—regardless of the specific policy rationale supporting them—are primary evidence of international law prohibiting *peacetime* secondary boycotts.

Alternatively, if the United States insists that its secondary boycott of Cuba is a legitimate one, the rest of the world may take it as an admission that the United States is *at war* with Cuba and, therefore, Cuba has been justified all along in holding the confiscated properties without compensating former owners.

VI. CONCLUSION

Successive U.S. presidents have engaged in repeated episodes of political, economic and military hostility against Cuba and Castro personally. The official negligence and malice of the government of the United States contributed significantly to Fidel Castro's rise to power in 1959 and shares the blame for the human and economic costs Castro has inflicted on the people of Cuba, the Caribbean, and the United States during the five decades since.

²¹⁰ Clagett October, *supra* note 9, at 642.

²¹¹ *Id.* at 642.

The international customary law arguments against the Act are substantial. Some confiscations executed by Castro appear to have been legal. If not, it is nevertheless doubtful that the United States is entitled under customary international law to dishonor the titles to such property now vested in the nationals of other nations. Even if the United States were so entitled, the Act arguably represents an illegal extension of extraterritorial prescriptive jurisdiction.

At the very least, material issues of fact and international law remain unresolved and, therefore, summary judgment in favor of private Helms-Burton Act plaintiffs would be premature. The Cuban confiscations as a whole and individual confiscatory acts merit *de novo* examination through the adversarial process utilizing the full array of evidence now available documenting the historical context of the confiscations. The U.S. Congress might also benefit from reexamination of the history of the relationship between Cuba and United States. Congressional impatience with the facts of the Cuba-United States relationship is, to paraphrase the legendary Karl Llewellyn, a sign that Congress needs to study them more intently.

U.S. litigators and politicians tend to evaluate contemplated actions in the international arena against a narrow standard that they call the law. This is a deceptive and dangerous tendency. It is deceptive because it feigns reliance on precise precepts of international law where actual precision is lacking. As the Second Circuit Court of Appeals observed in *Banco Nacional de Cuba v. Sabbatino*, “Anyone who undertakes a search for the principles of international law cannot help but be aware of the nebulous nature of the substance we call international law.”²¹² Yet its nebulous nature belies its importance.

²¹² *Banco Nacional de Cuba*, 307 F.2d at 862.

The danger is that frequent U.S. retreats behind the ramparts of unrealistically precise legality in defense of boorish foreign policy undermine the trust that undergirds public international law and fosters comity among nations. “International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not.”²¹³ A nation that consistently violates broad principles of morality behind a legalistic facade risks its own international credibility and encourages lawlessness among nations.

As a world leader, the United States should carefully consider its response to the international consensus against the Act. The continuing power and validity of customary international law rests on the willingness of nations to play by the spirit of the rules despite the availability of contrary hyper-technical, legalistic rationale. If the United States wishes to continue enjoying the benefits of a system of customary international law, then Congress should admit its mistake and repeal the Helms-Burton Act. In fairness to private property owners harmed by their government’s foreign policy malpractice, the U.S. Congress might also consider directly compensating the owners of property confiscated by Cuba.

²¹³ *Id.* at 862.