

COMMENTS

YOU'RE OUT: HOW OFAC'S REGULATORY CHANGEUP ENABLES CUBAN BASEBALL PLAYER SMUGGLING TO THE UNITED STATES

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INTRODUCTION

In January 2019, U.S. citizen Matthew McLaughlin stepped up to plate for the Cuban Baseball Federation (CBF)¹ provincial series team, Plaza.² McLaughlin became the first U.S. baseball player to play in a Cuban league in six decades.³ Ninety miles away that same month, another ballplayer set his sights on a future professional league career. Cuban baseball player Yolbert Sanchez became eligible to sign with Major League Baseball (MLB) clubs.⁴ However, Sanchez had to first establish residency in a third country, the Dominican Republic, before he could arrive in the United States and play.⁵ Unlike their U.S. teammates, Sanchez and other Cuban nationals face limited, and often dangerous, options to play professional baseball—a sport beloved in both countries.⁶

Whether on a precarious journey by boat or in the hands of a smuggler,⁷ at least 250 Cuban baseball players have taken enormous risks for a chance to play in MLB.⁸ Members of the criminal enterprise *Los Zetas* held player Yasiel Puig captive for almost an entire month in 2013 before Puig's smuggler paid

1. The Cuban Baseball Federation's full Spanish language title is *Federacion cubana de béisbol*, abbreviated in Spanish as "FCB." This Comment will refer to the Cuban Baseball Federation by its English language abbreviation, "CBF."

2. Nelson Acosta, *Cuban Baseball Welcomes First U.S. Player in Six Decades*, REUTERS (Jan. 22, 2019, 3:49 PM), <https://www.reuters.com/article/us-cuba-usa-baseball/cuban-baseball-welcomes-first-u-s-player-in-six-decades-idUSKCN1PG2KD>.

3. *Id.*

4. Joe Trezza, *Will O's Target Cuban SS Sanchez*, MLB (Feb. 1, 2019, 1:23 PM), http://wap.mlb.com/bal/news/article/20190201303423428/?locale=es_CO [<https://perma.cc/N8MG-WY3W>].

5. *Id.*; see Scott M. Cwiertyny, Note, *The Need for a Worldwide Draft: Major League Baseball and its Relationship with the Cuban Embargo and United States Foreign Policy*, 21 IMMIGR. & NAT'LITY L. REV. 333, 357–58 (2000) (explaining how ballplayers use the third-country residency model).

6. See Matthew N. Greller, Note, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14 AM. U. INT'L. L. REV. 1647, 1693–94 (1999) (describing Cuban ballplayer defections and how both countries love baseball). *But see* Andrea Kupfer Schneider et al., *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 474–79 (2001) (unpacking both positive and negative reactions to baseball diplomacy through the lens of 1999 Cuba–Baltimore Orioles exhibition game).

7. While scholarship and media often characterize Cuban baseball player irregular migration to the United States as “trafficking,” the term “smuggling” is more accurate. See *infra* Part II. This Comment will use the term “smuggling.”

8. Anna Kaminsky, Note, *A Major Smuggle Struggle: It's Time for Major League Baseball to Step up to the Plate and Alleviate Its Cuban Smuggling Problem*, 24 CARDOZO J. INT'L & COMP. L. 193, 204 (2015).

for him to enter the United States from Mexico.⁹ Puig's testimony would later be used to convict an intermediary who assisted in his smuggling from Cuba to the United States.¹⁰ Similarly, even four years after he left Cuba, Yoan Moncada's journey to the United States is still shrouded in secrecy; presumably due to its illicit nature.¹¹ One known detail is that Moncada required full-time bodyguard protection in Guatemala before signing to MLB.¹²

On December 19, 2018, MLB and CBF jointly announced a deal to provide Cuban baseball players an opportunity to safely and legally sign with an MLB club.¹³ The deal, according to the leagues, would seek to end smuggling of Cuban players who pursue MLB careers.¹⁴ Nearly four months later, President Trump announced that MLB and CBF struck out on the collaboration.¹⁵ The Trump Administration found that the deal violated the U.S. embargo on Cuba; specifically, the Cuban Asset Control Regulations (CACR).¹⁶

The sixty-year-old embargo, regulated by the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC), mandates sanctions

9. See Jesse Katz, *Escape from Cuba: Yasiel Puig's Untold Journey to the Dodgers*, L.A. MAG. (Apr. 14, 2014), <https://www.lamag.com/longform/escape-from-cuba-yasiel-puigs-untold-journey-to-the-dodgers/> (detailing Puig's journey out of Cuba).

10. *Id.*

11. See Jorge Arangure Jr., *The Weirdest Cuban Defector Story You'll Ever Read*, VICE (Dec. 4, 2014, 10:00 AM), https://www.vice.com/en_us/article/3d9w4b/the-weirdest-cuban-baseball-defector-story-youll-ever-read (noting how Moncada's full story is unclear).

12. *Id.*

13. Press Release, Major League Baseball, MLB, MLBPA Reach Deal with Cuban Federation (Dec. 19, 2018), <https://www.mlb.com/news/mlb-announces-deal-with-cuban-federation-c302036110> [hereinafter *MLB Press Release*]; Dave Sheinin & Karen DeYoung, *MLB, Cuban Baseball Federation Reach Agreement: Trump Administration Signals It has Issues with Deal*, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/sports/2018/12/19/mlb-cuban-baseball-federation-reach-agreement-that-will-eliminate-need-players-defect/>.

14. *MLB Press Release*, *supra* note 13.

15. See Parker Asmann, *Trump-Cuba Curveball May Boost Baseball Smuggling Networks*, INSIGHT CRIME (Apr. 10, 2019), <https://www.insightcrime.org/news/brief/trump-cuba-curveball-boost-baseball-smuggling>; Letter from Nikole Thomas, Acting Assistant Dir. for Licensing, U.S. Dep't of the Treasury, to Laura Fraedrich & Chase Kaniecki, Jones Day (Apr. 5, 2019) [hereinafter *OFAC Response*], https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5caca2784e17b64f3f97da4b/1554817657817/MLB_letter.pdf.

16. 31 C.F.R. § 515.201 (2019); see Asmann, *supra* note 15. "Cuban embargo" refers to the U.S. embargo on Cuba. The Cuban state refers to the same embargo as *el bloqueo*, or the blockade. Marcia Narine Weldon, *You Say Embargo, I Say Bloqueo – A Policy Recommendation for Promoting Foreign Direct Investment and Safeguarding Human Rights in Cuba*, 32 EMORY INT'L REV. 1, 10 (2017) (explaining the term while theorizing about how U.S. corporations can protect Cuban workers).

against individuals and businesses doing business with Cuba.¹⁷ The U.S. embargo on Cuba provokes strong reactions across the political spectrum.¹⁸ The pro-embargo lobby counts multiple influential Congressional members among its ranks.¹⁹ These members passionately speak out against almost all Cuban government engagement, including the recent baseball deal.²⁰

Part I of this Comment provides political and legal context for the U.S. embargo on Cuba. Part II discusses how the embargo's sanctions hinder Cuban baseball players' ability to play professional baseball in the United States. The discussion in Part II continues by noting current proposed solutions that address Cuban ballplayer smuggling. Part III analyzes a U.S. President's role in coordinating with OFAC to carry out Cuba sanctions. This analysis centers on the Trump Administration's rollback of previously thawing U.S.–Cuba relations through CACR updates. Part IV assesses whether courts can judicially review an OFAC licensing decision, such as OFAC's actions that led to the MLB–CBF deal cancellation. Part IV also examines how agency deference applies to OFAC's deal interpretation. This Comment concludes with recommendations on how the federal government could facilitate regularized Cuban baseball player travel to the United States.

I. DEVELOPMENTS IN U.S.–CUBA RELATIONS UNDER THE EMBARGO

President John F. Kennedy declared the total trade embargo at issue between the United States and Cuba in February 1962.²¹ President Kennedy

17. 31 C.F.R. § 515.201; *infra* Part III.

18. See G.A. Res. 74/7 (Nov. 12, 2019) (detailing that a majority of countries are opposed to the embargo); *Cuba: Historical Trends*, GALLUP, <https://news.gallup.com/poll/1630/cuba.aspx?version=print> (last visited May 11, 2020) (reporting 59% of Americans favor ending the embargo); William Leogrande, *The Cuba Lobby*, FOREIGN POL'Y (Apr. 12, 2013, 12:23 AM), <https://foreignpolicy.com/2013/04/12/the-cuba-lobby/> (assessing the “loose-knit conglomerate” who loudly support the Cuban embargo).

19. See Matthew J. Frankel, Note, *Major League Problems: Baseball's Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L.J. 383, 392 (2005) (emphasizing power of the anti-Castro Cuban–American political lobby).

20. See, e.g., Marco Rubio (@marcorubio), TWITTER (Dec. 19, 2018, 09:26 PM), <https://twitter.com/marcorubio/status/1075578130461540353?lang=en> (“[D]eal [that] allows Cuba to conduct state sponsored trafficking of baseball players[]”); Mario Díaz-Balart (@MarioDB), TWITTER (Dec. 19, 2018, 11:47 AM), <https://twitter.com/mariodb/status/1075432511835119618?lang=en> (“Shameful that @MLB would consider joining with the Cuban regime to exploit Cuban baseball players. It would be unconscionable for an American organization to participate in human trafficking . . .”).

21. See generally Mark Sullivan, CONG. RESEARCH SERV., R45657, CUBA: U.S. POLICY IN THE

invoked authority under § 620(a) of the Foreign Assistance Act (FAA) of 1961, which allows a U.S. President to place a total U.S.–Cuba trade embargo.²² The U.S.–Cuba embargo aimed to isolate Cuba economically because its Soviet Union ties could have threatened U.S. security interests.²³ Amendments to the Trading with the Enemy Act of 1917 (TWEA) and the promulgation of the 1963 CACR codified the embargo.²⁴

Prior to the embargo, the game of baseball had tied the United States and Cuba together for over one hundred years.²⁵ However, the Cuban government banned professional sports, including baseball, in the 1960s.²⁶ Castro instead repurposed the amateur Cuban national baseball team to supply the country with athletic heroes.²⁷ MLB reinforced the separation between U.S. and Cuban baseball players through the 1977 Kuhn Directive letter.²⁸ The Kuhn Directive prohibited MLB clubs from discussing or negotiating with anyone in Cuba about signing a Cuban baseball player.²⁹

The 1990s brought tensions between the United States and Cuba to the forefront, including in baseball. This decade saw the passage of the Cuban Democracy Act of 1991 (CDA) and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.³⁰ Together, the Acts further reinforced

116TH CONGRESS (2019) [hereinafter 116TH CONGRESS], <https://crsreports.congress.gov/product/pdf/R/R45657> (explaining political and country conditions that affect the Cuban embargo).

22. *Id.*; Foreign Assistance Act (FAA) of 1961, 22 U.S.C. § 2370(a)(1) (2018); *see also* United States v. Brodie, No. CRIM. 00-CR-629, 2001 WL 1159756, at *1 (E.D. Pa. Aug. 11, 2001) (reaffirming that FAA bolsters Executive Branch's power to act on Cuba matters).

23. Frankel, *supra* note 19, at 390.

24. Trading with the Enemy Act (TWEA) of 1917, 12 U.S.C. § 95 (2018); 22 U.S.C. § 2370(a)(1); 31 C.F.R. § 515.201 (2019); *see also* Regan v. Wald, 468 U.S. 222, 232–36 (1984) (concluding that Congress intended the President to retain some flexibility in adjusting the U.S. embargo on Cuba).

25. *See* Evan Brewster, Note, *Cuban Baseball Players in America: Changing the Difficult Route to Chasing the Dream*, 5 MISS. SPORTS L. REV. 215, 215–19 (2016) (explaining ties); Stephen Kurczy, *Top 10 Plays in U.S.-Cuba Baseball Diplomacy*, AMS. QUARTERLY. (Mar. 22, 2016), <https://www.americasquarterly.org/content/top-10-plays-us-cuba-baseball-diplomacy> (detailing 150 years of U.S.–Cuba baseball exchanges).

26. Frankel, *supra* note 19, at 389–90.

27. Brewster, *supra* note 25, at 217.

28. *See* Greller, *supra* note 6, at 1664–65 (noting how the Kuhn Directive aligned with Cuba's "anti-professional" sports political stance). Since a Cuban ballplayer could not sign directly with a club, he could only play in Major League Baseball (MLB) by defecting to the United States. *Id.* at 1665–66.

29. Greller, *supra* note 6, at 1664–65.

30. *See* Cuban Democracy Act of 1992 (CDA), 22 U.S.C. §§ 6001–6010 (2018); Cuban Liberty and Democratic Solidarity Act of 1996 (LIBERTAD), 22 U.S.C. §§ 6021–6024

the three-decade-old embargo.³¹ According to this codification, both the President and Congress must agree that certain strict standards, including a democratically elected government, are met in order to lift the embargo on Cuba.³² Tensions concurrently arose in the sports realm as well. Cuban national Rene Arocha became the first Cuban player to defect while physically in the United States in 1991.³³ However, MLB would only allow him to play for teams if he first entered a special lottery-style draft.³⁴ The lottery winner only held contract rights to Arocha for one year.³⁵ By the late 1990s, Cuban players had turned to a third-country residency model—a drastic and unnecessary solution to begin with—to maintain free agency and avoid a draft.³⁶

Eighteen years after the passage of CDA and LIBERTAD, then-President Barack Obama announced his intent to normalize U.S. relations with Cuba.³⁷ Using the authority granted by TWEA,³⁸ Obama began the “thaw.”³⁹ The Obama Administration’s actions included a meeting with Cuban officials on trafficking-in-persons in January 2016.⁴⁰ In the prior year, Obama removed Cuba from the U.S. Department of State’s “state sponsor of terrorism” list.⁴¹ One week before leaving office, Obama ended the “wet-foot, dry-foot” policy

(2018); see also Nicole Zaworska, *Striking Out the Cuban Trade Embargo: A Contractual Approach to the Transfer of Cuban Baseball Players to the Big Leagues*, 24 SPORTS L.J. 135, 138–39 (2017) (describing the purposes behind LIBERTAD, also known as the Helms-Burton Act, and CDA).

31. Zaworska, *supra* note 30, at 153–54.

32. See Cwiertny, *supra* note 5, at 340–41 (identifying steps needed to lift the embargo on Cuba).

33. See *id.* at 354–55 (describing Rene Arocha’s path to the United States and MLB).

34. *Id.*

35. *Id.* at 355–57; see also Scott Kendrick, *Learn About Major League Baseball’s Free Agency Rules*, LIVEABOUTDOTCOM (Jan. 25, 2019), <https://www.liveabout.com/free-agency-primer-320660?print> (noting year-to-year basis of free agent contracts).

36. See Cwiertny, *supra* note 5, at 357–58 (telling the stories of Joe Cubas and Orlando “El Duque” Hernandez, two prominent Cuban MLB players who utilized third-country residency).

37. See *Charting a New Course on Cuba*, WHITE HOUSE, <https://obamawhitehouse.archive.s.gov/issues/foreign-policy/cuba> (last visited May 11, 2020) (analyzing how the Obama Administration would “[c]ut loose the anchor of failed policies of the past” to increase U.S.–Cuba diplomatic engagement); see also *infra* notes 110–112 (discussing the policy changes).

38. See Zaworska, *supra* note 30, at 139 (stating how TWEA authority is key for the President to effectuate regulatory changes on the U.S.–Cuba embargo); *infra* Part III.A.

39. The Cuban state also refers to the normalization of relations under Obama as “*deshielo*,” or the “thaw.” Weldon, *supra* note 16, at 47.

40. Zaworska, *supra* note 30, at 139.

41. *Charting a New Course on Cuba*, *supra* note 37.

for Cubans immigrating to the United States.⁴² Similarly, Cuban leadership underwent significant changes starting in 2010.⁴³ After Fidel Castro left power in 2008, Raul Castro instituted reforms to open the economy.⁴⁴ Miguel Díaz-Canel Bermúdez succeeded Raul Castro in April 2018.⁴⁵ Unlike Obama's attempt to deescalate the tenuous relationship between the countries, Trump publicly stated that the United States will not do business with a country in the "Troika of Tyranny."⁴⁶ President Trump links Cuba to Venezuela, and has threatened to escalate the embargo and sanctions until the Cuban state stops its military support.⁴⁷

II. UP TO BAT: MLB, CBF, AND THEIR PLAYERS

A. Player Smuggling: Problems and Proposed Solutions

During the Obama thaw, MLB started to test the waters as to how Cuban baseball players might legally play professional baseball in the United States.⁴⁸ The catalyst was an increasingly visible concern about Cuban

42. Zaworska, *supra* note 30, at 141; Daniel Rivero, *Cuban Immigrants Were Given a Haven in the U.S.; Now They're Being Deported*, NPR (May 11, 2019, 5:00 AM), <https://www.npr.org/2019/05/11/722201692/cuban-immigrants-were-given-a-haven-in-the-u-s-now-theyre-being-deported> (explaining how Obama ended the "wet-foot, dry-foot" policy). Under "wet-foot, dry-foot," Cubans could stay in the U.S.—even if arriving illegally—as long as they stepped one foot on solid ground. This rule only applied to Cuban nationals. *Id.*

43. See generally 116TH CONGRESS, *supra* note 21, at 4 (describing Cuban political reforms during the 2010s).

44. See Rachel D. Solomon, Note, *Cuban Baseball Players, the Unlucky Ones: United States-Cuban Professional Baseball Relations Should be an Integral Part of the United States-Cuba Relationship*, 10 J. INT'L. BUS. & L. 153, 174–76 (2011) (detailing the economic reforms Raul Castro implemented after succeeding Fidel Castro). Fidel Castro died in November 2016. 116TH CONGRESS, *supra* note 21, at 4.

45. 116TH CONGRESS, *supra* note 21, at 4.

46. *Id.* at 25; see also *President Donald J. Trump is Taking a Stand for Democracy and Human Rights in the Western Hemisphere*, WHITE HOUSE (Apr. 17, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere/> [hereinafter *Taking a Stand*] (presenting dichotomy between the governments of Cuba and Venezuela, and their people's freedom).

47. Donald J. Trump (@realDonaldTrump), TWITTER (May 20, 2019, 1:28 PM), <https://twitter.com/realdonaldtrump/status/1130525604976168960?lang=en> (claiming that Cuba and Venezuela partnering "subvert[s] democracy").

48. See Zaworska, *supra* note 30, at 136–37 (discussing MLB Legal Officer's trip to Cuba to meet with the Castros about baseball in December 2015).

player smuggling.⁴⁹ Smugglers either transport Cuban baseball players illegally into the United States or, like Yoan Moncada, arrange a third-country residency so a player can arrive in the United States legally.⁵⁰

The U.S. Department of Justice (DOJ) and Department of Homeland Security (DHS) have each conducted investigations into Cuban baseball player smuggling since the early 2000s.⁵¹ Operation Boys of Summer and Operation Safety Squeeze externally targeted criminal smugglers; however, the investigators likely also considered MLB's willful ignorance on the issue.⁵² There is also an ongoing DOJ investigation into how the agent-smuggler relationship, common both in the third-country residency and defection models, might violate the Foreign Corrupt Practices Act.⁵³

Policymakers and scholars alike have proposed diverse solutions to reduce Cuban baseball player smuggling. Some call for lifting all restrictions that the embargo places on travel and trade with Cuba.⁵⁴ One example of this

49. See Frankel, *supra* note 19, at 412–16 (considering the human dimension of Cuban ballplayer defections and journeys to the United States); *supra* notes 7–12 (sharing details of Cuban baseball player defection stories).

50. See, e.g., Jay O'Brien, *Cuban National Implicated in Human Smuggling of MLB Players in South Florida Case*, CBS 12 NEWS (Oct. 1, 2019), <https://cbs12.com/news/local/cuban-national-implicated-in-human-smuggling-of-mlb-players-in-south-florida-case> (explaining recent federal conspiracy charges against alleged Cuban ballplayer smuggler); see also Drew M. Goorabian, Comment, *Baseball's Cuban Missile Crisis: How the United States and Major League Baseball Can End Cuban Ballplayer Trafficking*, 20 UCLA J. INT'L L. & FOREIGN AFF. 425, 426–30 (2016) (telling stories of Cuban ballplayers smuggled to the United States using the third-country residency model).

51. Scott Eden, *Federal Investigations into Cuban Smuggling, Major League Baseball Slow*, ESPN (Aug. 7, 2015, 1:08 PM), www.espn.com/espn/print?id=13383092 (discussing certain legal cases in the early 2000s).

52. *Id.* As early as 2009, internal communications indicated MLB knew of Cuban baseball player smuggling, but MLB did not actively try to learn more or share information with federal authorities. See *id.* (contrasting official statements that the league is an innocent bystander); see also Sheryl Ring, *BTBS Exclusive: The "Baseball Cop" Tells His Story*, SB NATION: BEYOND THE BOX SCORE (Sept. 30, 2019, 12:00 PM), <https://www.beyondtheboxscore.com/2019/9/30/20888890/btbs-exclusive-the-baseball-eddie-dominguez-dayan-viciedo-manfred-selig-biogenes> (interviewing former MLB official about suspicious activity on Cuban ballplayer contracts).

53. See Michael McCann, *How the MLB-FCB Deal Could Face Legal Hurdles, Political Resistance*, SPORTS ILLUSTRATED (Dec. 22, 2018), <https://www.si.com/mlb/2018/12/22/legal-breakdown-mlb-cuba-fcb-deal> (detailing the DOJ's investigation into smugglers ["buscones"] who arrange defections, which often threaten player safety).

54. See, e.g., Frankel, *supra* note 19, at 428 (asserting that the U.S. government should lift the embargo, as it has failed to achieve its stated goal of promoting Cuba democratization). *But cf.* Zaworska, *supra* note 30, at 151–52 (presenting lifting the embargo as the first solution to end Cuban baseball player smuggling, while recognizing it as "futile").

solution is the Freedom to Export to Cuba Act of 2019.⁵⁵ The Act calls for amending the FAA, TWEA, CDA, LIBERTAD, and “any regulation that imposes direct restriction on trade with Cuba”; however, the bill remains stalled in committee.⁵⁶ Ending sanctions through executive or congressional action also requires Cuba to meet CDA and LIBERTAD’s strict standards.⁵⁷ With strong concerns about Cuba’s human rights record, meeting these standards is unlikely.⁵⁸ Others suggest instituting a “worldwide draft,” but this faces opposition from MLB and the baseball community.⁵⁹ Carving out an exemption to the embargo is also a popular option.⁶⁰ Representative Jose Serrano has advocated for this option through the Baseball Diplomacy Act.⁶¹ The Baseball Diplomacy Act states that the TWEA authority cannot be used to restrict salary transactions and employment visa issuance for Cubans playing professional baseball in the United States.⁶² Cuba has also allowed its baseball team members to play in Mexican and Japanese professional leagues, with a portion of their salaries paid to the Cuban government.⁶³

55. Freedom to Export to Cuba Act of 2019, S. 428, 116th Cong. (2019).

56. *Id.*; 116TH CONGRESS, *supra* note 21.

57. CDA, 22 U.S.C. §§ 6001–6007 (2018); LIBERTAD, 22 U.S.C. §§ 6021–6024 (2018); *see also* Weldon, *supra* note 16, at 47 (arguing that human rights need to progress before lifting the embargo). *But cf.* Kevin J. Fandl, *Trading with the Enemy: Opening the Door to U.S. Investment in Cuba*, 49 GEO. J. INT’L L. 564, 604 (2018) [hereinafter *Trading with the Enemy*] (criticizing focus on “dramatic political reform” to meet embargo standards because it disincentivizes Cuba from making incremental reforms).

58. *See* Kelly Craft, Ambassador, U.S. Mission to the United Nations, Remarks at a UN General Assembly Meeting on the Cuba Embargo Resolution (Nov. 7, 2019), <https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-on-the-cuba-embargo-resolution/> (rebuking the Cuban regime for restricting its citizens’ freedoms); Elliott Abrams, *Time to Tighten the Screws on Cuba?*, COUNCIL ON FOREIGN REL. (Apr. 2, 2018), <https://www.cfr.org/expert-brief/time-tighten-screws-cuba> (arguing that the Cuban regime is no closer to “American values” of freedom and democracy).

59. *See* Cwiertny, *supra* note 5, at 368 (proposing a “worldwide draft” to combat player smuggling; Solomon, *supra* note 44, at 182–83 (advocating for global draft).

60. *See, e.g.*, Goorabian, *supra* note 50, at 456 (suggesting a carve-out similar to the exemption available to Cuban literary figures and artists); *infra* note 141.

61. Baseball Diplomacy Act of 2019, H.R. 213, 116th Cong. (2019).

62. Representative Serrano has proposed the Baseball Diplomacy Act for more than twenty years. Aaron Klein & Jake E. Markus, Note, *United States-Cuba Normalized Relations and the MLB Influence: The Baseball Coalition Committee*, 47 U. MIAMI INTER-AM. L. REV., 258, 293–94 (2016) (2015 Baseball Diplomacy Act); Greller, *supra* note 6, at 1708–09 (1999 Baseball Diplomacy Act).

63. Klein & Markus, *supra* note 62, at 273–74.

Agency-driven solutions focus on regularizing Cuban migration to and from the United States.⁶⁴ Using the third-country residency model, U.S. professional teams can now legally sponsor Cuban nationals for standard nonimmigrant work visas to the United States.⁶⁵ In MLB's case, a club would file a U.S. Citizenship and Immigration Services (USCIS) Form I-129, *Petition for Nonimmigrant Worker*, for either the O-1A or P-1A visa classification.⁶⁶ MLB then would file O-1A visas for those with extraordinary ability in athletics and P-1A visas for internationally recognized athletes.⁶⁷ Extending the use of these visas could allow Cubans to apply directly for visas at the U.S. Embassy in Havana; an end goal many Cuban ballplayers would prefer.⁶⁸

While O-1A and P-1A visas are attractive options, the two leagues serving as employers remain an obstacle under the current CACR.⁶⁹ An O-1A visa filing requires a copy of any written contract between the club and player, or a summary of the oral agreement under which the beneficiary will be employed.⁷⁰ A P-1A visa—the more common of the classifications—requires that the U.S. sports league or team submit a contract to USCIS before

64. An example of regularizing Cuban migration is ending the “wet-foot, dry-foot” policy. See Rivero, *supra* note 42 (detailing the policy); see also Brewster, *supra* note 25, at 240–41 (“The ultimate goal should be to treat Cubans with normalcy, not with exceptions to the rules.”).

65. Soccer player Luis Paradela is an example of a Cuban athlete using the third-country residency model. He plays for a U.S. professional soccer team pursuant to a nonimmigrant work visa. Paradela's employer, however, is *not* a Cuban entity—it is a Guatemalan club. See Steven Goff, *One Cuban Soccer Player is able to Chase His Pro Dream in the U.S. — Without Defecting*, WASH. POST (Oct. 8, 2019, 2:05 PM), <https://www.washingtonpost.com/sports/2019/10/08/one-cuban-soccer-player-is-able-chase-his-pro-dream-us-without-defecting/> (noting Paradela's desire to play in the United States without defecting).

66. See U.S. CITIZENSHIP & IMMIGRATION SRVS., DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR PETITION FOR NONIMMIGRANT WORKER 20, 22 (2020), <https://www.uscis.gov/i-129> (listing required employer evidence for O-1A and P-1A visa classifications).

67. *Id.*; see also *P-1A Athlete*, U.S. CITIZENSHIP & IMMIGRATION SRVS., <https://www.uscis.gov/working-united-states/temporary-workers/p-1a-athlete> (last visited May 11, 2020) (describing how a professional sports team may petition for an athlete under the P-1A classification); *O Nonimmigrant Classifications: Questions and Answers*, U.S. CITIZENSHIP & IMMIGRATION SRVS., <https://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-nonimmigrant-classifications-question-and-answers> (last visited May 11, 2020) (confirming that an athlete's U.S. employer can be the sponsor for the O-1A classification).

68. See *MLB Press Release*, *supra* note 13 (discussing how regularized migration would reduce the “significant hardship to Cuban players and their families”); *infra* Part IV.C.

69. See *infra* Part III (detailing issues that arose with MLB–CBF deal under Cuban Asset Control Regulations (CACR)).

70. See *Instructions for Petition for Nonimmigrant Worker*, *supra* note 66, at 17 (emphasizing importance of contract or agreement as documentary evidence).

approval.⁷¹ Even if the contract is between a MLB club and the player, salary language may still impede visa issuance.⁷² A contract where MLB pays part of a ballplayer's salary to a Cuban entity like CBF may be considered an illegal payment to the Cuban state under CACR § 515.571(e).⁷³ Therefore, while the O-1A and P-1A visas are available to Cuban baseball players, they would either need to be on loan from another country or defect directly to the United States.

B. *The MLB–CBF Deal*

After receiving confirmation from OFAC, MLB began bargaining with CBF on legalized player exchange in 2016.⁷⁴ Because the Obama Administration did not consider CBF part of the Cuban government, MLB requested a general license from OFAC for its engagement with CBF.⁷⁵ Both leagues framed the deal as a humanitarian-driven, bilateral cooperation.⁷⁶ However, each league also stood to gain financially—MLB by mitigating bad press and CBF by receiving payments from their players.⁷⁷

On December 19, 2018, MLB announced that the leagues would coordinate to give Cuban baseball players “a safe and legal path to sign with a Major League Club.”⁷⁸ The MLB–CBF deal is similar to Cuba's existing agreements with the Japanese, Korean, and Chinese professional baseball leagues.⁷⁹ Cuban ballplayers over twenty-five years old, with six or more years of playing experience, could be released to sign with any MLB club

71. *Instructions for Petition for Nonimmigrant Worker*, *supra* note 66, at 18–19 (calling the category the “P-1 Major League Sports Classification”).

72. *See MLB Press Release*, *supra* note 13 (speaking to salary scheme in MLB–CBF deal).

73. *See* 31 C.F.R. § 515.571(e) (2019) (explaining how the CACR bar exchanges of money between United States entities and the Cuban government); *infra* note 137.

74. McCann, *supra* note 53. However, MLB said they would act on legalized player exchange as early as 2007. *See* Kaminsky, *supra* note 8, at 221–22 (quoting MLB executive on the need to fix Cuban baseball player policies).

75. Klein & Markus, *supra* note 62, at 307 (opining on mid-2010s MLB position that the White House would support its anti-smuggling position). OFAC license applications disallow entities part of, or complicit with, the Cuban state. *See infra* Part III (explaining licenses).

76. *MLB Press Release*, *supra* note 13.

77. *See* Sheinin & DeYoung, *supra* note 13 (discussing reactions to the MLB–CBF baseball deal).

78. *See* Zaworska, *supra* note 30, at 163 (advocating for a MLB–CBF contract to eliminate Cuban baseball player smuggling industry, one year before deal announced); *MLB Press Release*, *supra* note 13 (referencing eliminating player smuggling at the onset, even before defining the agreement terms and conditions). *Contra* Frankel, *supra* note 19, at 426 (arguing Cuban ballplayers are too essential a regime propaganda to play in the United States).

79. *MLB Press Release*, *supra* note 13; *see also* Klein & Markus, *supra* note 62, at 273–74 (noting how Cuba has special agreements to send its baseball players abroad).

prior to physically departing Cuba.⁸⁰ The MLB club that signs the Cuban player would pay a release fee to the CBF,⁸¹ and the player could travel between the United States and Cuba between seasons using a standard nonimmigrant work visa.⁸²

The MLB–CBF deal faced immediate criticism from both embargo proponents and from within the sport itself.⁸³ MLB’s own rules on foreign players—Rules 3 and 4⁸⁴—still tacitly encouraged defection because a Cuban player could have more contractual choices through the defection model than by remaining in Cuba.⁸⁵ The deal also lets Cuba choose its own eligible national players.⁸⁶ This choice could enable the Cuban government to select players not for their athletic performance, but by an assessment of potential flight risk. Even if CBF is not officially a Cuban government entity, there is still concern that players would need to pay the government for the opportunity to travel and play in the United States.⁸⁷ The Trump Administration, utilizing OFAC and its own executive authority, would decide the deal’s true intentions for itself.⁸⁸

80. *MLB Press Release*, *supra* note 13. The option for a baseball player to apply for the visa while physically in Cuba is a key difference from the third-country residency model. *See Greller*, *supra* note 6, at 1673–79 (discussing ballplayers who applied for visas in countries other than Cuba).

81. *MLB Press Release*, *supra* note 13.

82. *Id.* *But see* Sheinin & DeYoung, *supra* note 13 (referencing comment by the U.S. Department of State that Cuban ballplayers may still need visas issued outside Havana).

83. *See supra* Part I (explaining political climate before and after the deal cancellation).

84. MLB Rule 3 explains how a ballplayer negotiates and accepts a contract. MLB Rule 4 describes the structure of the first-year player draft. *See* MLB, MAJOR LEAGUE RULES 19–62 (2019), <https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf> (listing Rules 3 and 4); *see generally* Klein & Markus, *supra* note 62, at 278–89 (providing background on how Rules 3 and 4 impact solutions to Cuban baseball player smuggling).

85. *See* Klein & Markus, *supra* note 62, at 280–84 (comparing Rule 4 draft, international free agency, and bonus pools as contractual paths to MLB); McCann, *supra* note 53 (noting how a defection may be more financially advantageous to a Cuban baseball player in the long run).

86. *MLB Press Release*, *supra* note 13.

87. *See* Mimi Whitefield et al., *Cuba Will Impose New Income Tax on Players who Sign Major League Baseball Contracts*, MIAMI HERALD (Jan. 7, 2019, 8:02 PM), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article224042760.html> (expressing concern that taxes would go exclusively to Cuban government); OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATED TO CUBA (2019) [hereinafter OFAC CUBA FAQs], https://www.treasury.gov/resource-center/sanctions/programs/documents/cuba_faqs_new.pdf (explaining the applicability of the ban on payments to the Cuban government).

88. *See* OFAC Response, *supra* note 15 (showing OFAC’s letter, which offered the Trump

III. HOW THE UNITED STATES REGULATES CUBA SANCTIONS

A. *The Office of Foreign Asset Control (OFAC)*

The U.S. Department of the Treasury derives power to implement the U.S. embargo on Cuba through TWEA or, alternatively, FAA.⁸⁹ OFAC, a subdivision of the Department of the Treasury, enforces the Cuba sanctions through CACR.⁹⁰ The sanctions aim to isolate the Cuban state economically and deprive the country of U.S. dollars.⁹¹ The embargo impacts most transactions between the United States, including persons abroad subject to its jurisdiction, and Cuba.⁹²

CACR has three areas particularly relevant to the 2018 MLB–CBF deal. First, CACR applies to prohibited officials and entities of the Government of Cuba.⁹³ The Department of State determines which entities are considered part of the Cuban government.⁹⁴ CACR next details how a U.S. business can legally engage with a Cuban business, or employ and pay Cubans receiving salaries within U.S. jurisdiction.⁹⁵ CACR specifically discourages

Administration's official position on how the CACR general license applies to its activities with the MLB–CBF deal); *see also* Asmann, *supra* note 15 (announcing deal cancellation).

89. TWEA, 12 U.S.C. § 95 (2018) (requiring member banks of the Federal Reserve System to transact banking business subject to regulations imposed by the Secretary of the Treasury); FAA, 22 U.S.C. § 2370(a)(1) (2018); *see* Cwiertny, *supra* note 5, at 395–97 (examining how TWEA and FAA empower the Department of the Treasury to regulate Cuba sanctions).

90. *Resource Center: Cuba Sanctions*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/cuba.aspx> (last visited May 11, 2020); OFAC CUBA FAQs, *supra* note 87, at 2.

91. Zaworska, *supra* note 30, at 138 (citing *The U.S. Embargo Against Cuba: Its Impact on Economic and Social Rights*, AMNESTY INT'L 8 (2009), <https://www.amnestyusa.org/pdfs/amr250072009eng.pdf>).

92. *Id.* (discussing the potential for the embargo to apply to all trade between the United States and Cuba under the FAA, and the extension of such restrictions to U.S. subsidiaries and nationals under the CDA).

93. 31 C.F.R. §§ 515.337–38 (2018) (including ministers, military, and members of the Politburo).

94. *See List of Restricted Entities and Subentities Associated with Cuba*, U.S. DEP'T OF STATE, (Nov. 19, 2019), <https://www.state.gov/cuba-sanctions/cuba-restricted-list/list-of-restricted-entities-and-subentities-associated-with-cuba-effective-as-of-november-19-2019/> [hereinafter *List of Restricted Entities*] (listing entities with which the United States cannot directly transact business).

95. *See* 31 C.F.R. § 515.534 (contingent contracts); 31 C.F.R. §§ 515.542, 515.578 (business presence in Cuba); 31 C.F.R. § 515.571 (Cubans receiving salaries in the United States); 31 C.F.R. § 515.559(b),(d) (export and import transactions).

“U-turn transactions.”⁹⁶ In a U-turn transaction, banking institutions subject to U.S. jurisdiction processes fund transfers originating and terminating from outside the United States.⁹⁷ Finally, CACR penalizes transactions that involve transporting a Cuban national to the United States without the correct license.⁹⁸

The 1981 Southern District of Florida case, *United States v. Fernandez-Pertierra*,⁹⁹ tested the constitutionality of CACR.¹⁰⁰ The plaintiff argued CACR was an unconstitutional exercise of executive power and an equal protection violation that failed even a rational basis review test.¹⁰¹ The Southern District of Florida upheld CACR’s general constitutionality,¹⁰² noting that TWEA provides the President with “a virtually unqualified grant of authority . . . to regulate foreign commerce with Cuba”¹⁰³ The Supreme Court affirmed the President’s statutory authority to regulate travel both to and from Cuba in *Regan v. Wald*.¹⁰⁴ CACR involves the executive branch’s role in foreign affairs; therefore, regulatory updates do not require notice-and-comment rulemaking.¹⁰⁵

OFAC uses a licensing system to determine which entities and transactions are exempt from CACR.¹⁰⁶ An OFAC license can either be “general” or “specific.”¹⁰⁷ A general license, encompassing twelve defined categories, does not require a written request to OFAC.¹⁰⁸ An entity or individual not in a general license category must apply for a specific license prior to pursuing the Cuba-related activity.¹⁰⁹

96. 31 C.F.R. § 515.584; *see also* Press Release, U.S. Dep’t of the Treasury, Treasury Issues Changes to Strengthen Cuba Sanctions Rules (Sept. 6, 2019), <https://home.treasury.gov/news/press-releases/sm770> [hereinafter Treasury Press Release] (defining “U-turn transactions”).

97. 31 C.F.R. § 515.584; Treasury Press Release, *supra* note 96.

98. 31 C.F.R. § 515.415 (transportation); 31 C.F.R. § 515.701(a) (penalties).

99. 523 F. Supp. 1135 (S.D. Fla. 1981).

100. *See id.* at 1137, 1142 (finding a woman violated CACR by engaging in a transaction to transport Cubans to the United States without a license during the Mariel Boatlift).

101. *Id.* at 1137.

102. *Id.* at 1140.

103. *Id.* at 1141.

104. 468 U.S. 222, 225, 232–36 (1984).

105. *See* Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, 48,875–78 (Oct. 20, 2017) (stating that a Notice of Proposed Rulemaking is needed for CACR).

106. 31 C.F.R. § 515.560 (2018); *see* OFAC CUBA FAQs, *supra* note 87 (clarifying questions about OFAC licenses); *infra* note 156.

107. *See* OFAC CUBA FAQs, *supra* note 87 (distinguishing general from specific licenses).

108. *See id.* (encompassing education, cultural exchange, and religious missions).

109. *See id.*

From 2014 to 2017, the Obama Administration expanded both general licenses and remittances.¹¹⁰ The March 16, 2016 CACR rule allowed Cubans living in the United States to receive direct salary payments, which could then be sent to Cuba.¹¹¹ The October 17, 2016 CACR rule made it easier for parties performing transactions to receive a general license; it therefore decreased the need for specific licenses.¹¹² The Obama Administration also created an export control license exception called “Support for the Cuban People” (SCP).¹¹³ While the license changes were emblematic of a warming in U.S.–Cuba relations, the embargo itself still remained in effect.¹¹⁴

B. Cuba Sanctions Under Trump

The Trump Administration takes a more conservative approach to U.S.–Cuba relations.¹¹⁵ Even before taking office, Trump signaled that he would not pursue Cuba normalization.¹¹⁶ He referred to “canceling the last administration’s completely one-sided deal with Cuba” as early as June 2017.¹¹⁷ Instead, the Trump Administration emphasizes the need to “hold the Cuban regime accountable for its oppression . . . support of other dictatorships . . . [and to] curb the Cuban government’s bad behavior.”¹¹⁸

110. *Charting a New Course on Cuba*, *supra* note 37 (providing a timeline of such actions).

111. 81 Fed. Reg. 13,989, 13,989–91 (Mar. 16, 2016) (to be codified at 31 C.F.R. pt. 515).

112. 81 Fed. Reg. 71,372, 71,372–74 (Oct. 17, 2016) (to be codified at 31 C.F.R. pt. 515).

113. License Exceptions, 15 C.F.R. § 740.21 (2016).

114. See Sheryl Ring, *The Possible Legal Issue with MLB’s Cuba Deal*, FANGRAPHS (Dec. 27, 2018), <https://blogs.fangraphs.com/the-possible-legal-issue-with-mlbs-cuba-deal> (predicting potential legal conflict in the MLB–CBF deal, due to the embargo).

115. While President Trump’s approach on Cuba is overall more conservative, he did not reinstate the “wet-foot, dry-foot” policy that the anti-Cuban government proponents supported. See *Special No More: An End to Wet Foot, Dry Foot*, THE ECONOMIST (Jan. 21, 2017), <https://www.economist.com/the-americas/2017/01/21/an-end-to-wet-foot-dry-foot> [hereinafter *Special No More*]. The ending of “wet-foot, dry-foot” aligns with the Trump Administration’s concerns about border security. See Rivero, *supra* note 42 (connecting Trump’s immigration enforcement policies with Cuban migration to the United States).

116. See *Special No More*, *supra* note 115 (assessing then-presidential candidate Trump’s stances on normalizing U.S. relations with Cuba). But see Ryan Forrest et al., *Cuba: Déjà vu or New Beginnings*, 26 U. MIAMI BUS. L. REV. 1, 25 (2017) (noting that Trump scouted Cuba for business opportunities prior to his election in November 2016).

117. Donald Trump, President of the U.S., Remarks on the Policy of the United States Towards Cuba (June 16, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-policy-united-states-towards-cuba/> [hereinafter June 2017 Remarks].

118. See Carol Morello & Karen DeYoung, *U.S. Sets Limits on Money Cuban Americans Can Send*

Pending U.S.–Cuba normalization bills—including efforts to repeal or make exemptions to the embargo—remain stagnant.¹¹⁹

The Trump Administration implemented the National Security Presidential Memorandum 5 (NSPM-5), “Strengthening the Policy of the United States Toward Cuba.”¹²⁰ The October 20, 2017 Federal Register states that NSPM-5 supersedes the 2016 Presidential Memorandum on Cuba.¹²¹ NSPM-5’s significant provisions include: a restriction of transactions that disproportionately benefit the Cuban government, a mandate for the Department of State to update the banned entity list, and a directive “to discourage dangerous, unlawful migration” by Cubans to the United States.¹²² NSPM-5 also notes that this guidance does not interfere with work in support of the Cuban people or visa acquisition for permissible travel.¹²³

NSPM-5’s strong momentum continued into 2019. In April 2019, Trump announced that the United States would allow people to sue the Cuban government for property seized during the 1959 Revolution.¹²⁴ He cited national security concerns and Cuba’s support for Venezuela as rationale for this action.¹²⁵ Two months later, Department of the Treasury Secretary Steven Mnuchin formally announced the Trump Administration’s intent to reverse previously loosened of embargo prohibitions.¹²⁶ The reversal included restricting most general licenses for people-to-people travel,¹²⁷

to *Family in Cuba*, WASH. POST (Sept. 6, 2019), https://beta.washingtonpost.com/national-security/us-sets-limits-on-money-cuban-americans-can-send-to-family-in-cuba/2019/09/06/e1d2fa04-d0b3-11e9-8c1c-7c8ee785b855_story.html (quoting Secretary of the Treasury Steven Mnuchin on CACR changes).

119. See Cuba Trade Act of 2017, H.R. 442, 115th Cong. (2019) (repealing statutory provisions of the embargo); Baseball Diplomacy Act of 2019, H.R. 213, 116th Cong. (2019); United States-Cuba Relations Normalization Act of 2019, H.R. 2404, 116th Cong. (2019).

120. See Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875 (Oct. 20, 2017) (publicly announcing National Security Presidential Memorandum 5 (NSPM-5)).

121. *Id.* at 48,877.

122. *Id.* at 48,876–77.

123. *Id.*

124. *Taking a Stand*, *supra* note 46; see also Mark P. Sullivan, CONG. RESEARCH SERV., IF10045, CUBA: U.S. POLICY OVERVIEW (2020), <https://crsreports.congress.gov/product/pdf/IF/IF10045> (noting that prior administrations did not permit LIBERTAD-authorized lawsuits).

125. *Taking a Stand*, *supra* note 46; Sullivan, *supra* note 124; see also Trump, *supra* note 47 (tweeting about Cuba subverting democracy).

126. Press Release, U.S. Dep’t of the Treasury, Treasury and Commerce Implement Changes to Cuba Sanctions Rules (June 4, 2019), <https://home.treasury.gov/news/press-releases/sm700>.

127. 84 Fed. Reg. 25,992, 25,993 (June 5, 2019) (to be codified at 31 C.F.R. pt. 515).

along with eliminating nonfamily remittances.¹²⁸ The United States would also block U-turn transactions beginning September 2019.¹²⁹

The Trump Administration also has a different view on how MLB should employ Cuban baseball players. Under the Obama Administration, MLB became eligible to employ Cuban ballplayers using general licenses.¹³⁰ The Department of State did not consider CBF to be part of the Cuban government during the Obama Administration.¹³¹ However, the Trump Administration classifies the CBF as a banned entity, which would preclude the proposed MLB agreement.¹³² The Trump Administration justifies its stance on CBF with the claim that Fidel Castro's son runs the organization.¹³³ Under this view, MLB would now violate the CACR when a player remuneration goes to CBF.¹³⁴ In December 2018, a Trump official reported that the Administration would investigate the MLB-CBF relationship for scheming to exploit players in an "oppressive political system."¹³⁵

In April 2019, OFAC informed MLB's counsel that it revoked the general license underlying the December 2018 MLB-CBF deal.¹³⁶ OFAC noted that MLB could only seek a specific license under CACR § 515.571(e), since a payment to CBF would be a payment to the Cuban government.¹³⁷ MLB lobbied Congress the next month on its antihuman smuggling deal with

128. 84 Fed. Reg. 47,121, 47,121–23 (Sept. 9, 2019) (to be codified at 31 C.F.R. pt. 515); Morello & DeYoung, *supra* note 118.

129. 31 C.F.R. § 515.584 (2019) (defining U-turn transactions); Treasury Press Release, *supra* note 96.

130. Goorabian, *supra* note 50, at 446.

131. Ring, *supra* note 114; *see also* David Waldstein & Michael Tackett, *Trump Ends Deal Between M.L.B. & Cuban Baseball Federation*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/sports/mlb-cuba-donald-trump.html> (discussing how the Department of State's stance on CBF changed between administrations); Karen DeYoung, *Trump Administration Cancels MLB Deal with Cuba*, WASH. POST (Apr. 8, 2019 10:07 PM), https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html (quoting government official on how the Obama Administration "fudged" the law on classifying CBF as not part of the Cuban government).

132. Ring, *supra* note 114.

133. *Id.*

134. *See* OFAC CUBA FAQs, *supra* note 87 (stating prohibition on direct financial transactions with entities on the Cuba Restricted List).

135. *See* Sheinin & DeYoung, *supra* note 13 (discussing MLB's "leverage" attempt).

136. OFAC Response, *supra* note 15.

137. *Id.*; 31 C.F.R. § 515.571(e) (2019) (stating that an employer cannot hire or sponsor a Cuban national by paying the Cuban government).

CBF.¹³⁸ Talks between the Trump Administration and MLB resumed in June 2019; they were conditioned on MLB urging Cuba to stop its support of the Maduro regime.¹³⁹ There is no public update on the talks as of March 2020.

IV. STRIKE OUT, OR SOLUTIONS?

Prior to the Trump Administration, proposed remedies to the Cuban baseball player smuggling problem included instituting a worldwide draft,¹⁴⁰ as well as creating an exemption to the embargo for Cuban baseball players.¹⁴¹ However, amending the embargo remains legally complicated and, in the current national security climate, politically untenable.¹⁴² Nevertheless, MLB and CBF could pursue other pathways for Cuban ballplayers to travel to the United States. First, this Part evaluates whether OFAC's MLB–CBF license determination could be judicially reviewed. This Part then analyzes how agency deference impacts CACR interpretation. Finally, this Part concludes with suggestions on how MLB could work with other federal agencies and Congress to combat Cuban baseball player smuggling to the United States.

A. *Judicial Review*

MLB could challenge OFAC's finding on the MLB–CBF deal license through the courts.¹⁴³ OFAC considers a license determination a final agency action; only requests for redetermination are available as a review

138. See Raymond Arke, *Ballard Partners to Pinch Hit for MLB as It Lobbies Trump for Deal with Cuba*, OPENSECRETS.ORG (May 13, 2019, 3:35 PM), <https://www.opensecrets.org/news/2019/05/ballard-partners-to-pinch-hit-for-mlb/> (discussing MLB's summer 2019 lobbying on the Cuban baseball player deal with CBF).

139. See Franco Ordoñez, *Trump Will Play Ball with MLB on Cuban Players if League Helps with Venezuela*, NPR (June 12, 2019, 1:22 PM), <https://www.npr.org/2019/06/12/731966442/trump-will-play-ball-with-mlb-on-cuban-players-if-league-helps-with-venezuela> (reporting that the Trump Administration was reconsidering MLB general license); Trump, *supra* note 47 (tweeting about Cuba partnering with Venezuela). *But see* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 12, 2019, 10:22 AM), <https://twitter.com/realDonaldTrump/status/1172198767627526151> (noting that Trump wanted more Cuba action than the prior National Security Advisor, John Bolton).

140. Compare Cwiertny, *supra* note 5, at 368 (suggesting that a worldwide draft is the “proper solution”), with Solomon, *supra* note 44, at 182–83 (assessing, but ultimately rejecting, the value of a worldwide draft for Cuban baseball players).

141. See Baseball Diplomacy Act, H.R. 213, 116th Cong. (2019); see also Goorabian, *supra* note 50, at 456–57 (describing a possible Cuban baseball player embargo exemption).

142. See *supra* Parts I, III (describing political challenges in U.S.–Cuba relations).

143. OFAC Response, *supra* note 15.

tool.¹⁴⁴ A potential Article III judicial review of an OFAC license decision requires examining the roles of executive power and agency deference.

The Article II Commander-in-Chief power is critical to OFAC's ability to make and enforce Cuba licensing decisions.¹⁴⁵ Through the Commander-in-Chief power, the President has an implied vested authority to make decisions and determinations in foreign affairs.¹⁴⁶ TWEA grants the President "a virtually unqualified grant of authority" to administer sanctions against Cuba through OFAC.¹⁴⁷ OFAC derives its authority to promulgate the CACR, including licensing procedures, through this statutory grant.¹⁴⁸ The Agency's internal licensing procedures are neither subject to a notice of proposed rulemaking (NPRM) nor a hearing on the record because of the foreign affairs function.¹⁴⁹

A court would likely support the presumption of an OFAC licensing decision being final through the agency deference doctrine. Under *Chevron U.S.A., Inc. v. National Resources Defense Council Inc.*,¹⁵⁰ a court must assess (1) whether a statute has unambiguous congressional intent and (2) whether the agency's interpretation of the statute was reasonable.¹⁵¹ The Supreme Court has affirmed that *Chevron* deference applies when an agency implements a particular statutory provision under a delegated rulemaking authority.¹⁵²

144. See Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2018) (discussing final agency action at § 704); see also OFAC CUBA FAQs, *supra* note 87 (answering whether an applicant can formally appeal an adverse license determination). Requests for reconsideration require the applicant to demonstrate good cause, either through changed circumstances or additional relevant information available. *Id.*

145. See U.S. CONST. art. II, § 2, cl. 1 (enumerating the executive's Commander-in-Chief power); see also Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L.J. 293, 295 (2017) [hereinafter *Adios Embargo*] (contending that Congress legislating an embargo interferes with the Commander-in-Chief power on diplomacy).

146. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (holding that the President is the nation's "sole organ" in international affairs).

147. *United States v. Fernandez-Pertierra*, 523 F. Supp. 1135, 1141 (S.D. Fla. 1981).

148. *Id.* at n.16.

149. APA, 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2018); 81 Fed. Reg. 71,372, 71,374 (Oct. 17, 2016). Neither the statute nor the regulations require that an OFAC license applicant receive even a "quasi-judicial procedure" in challenging an adverse license decision. See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of the Treasury*, 606 F. Supp. 2d 59, 70 (D.D.C. 2009) (determining that plaintiffs could not prevail on a procedural APA claim for a license denial).

150. 467 U.S. 837 (1984).

151. *Id.* at 842–43.

152. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Here, Congress has not spoken directly to the issue.¹⁵³ OFAC promulgates CACR final rules using authority that Congress has unambiguously delegated under TWEA.¹⁵⁴ Courts accept the OFAC's interpretation of having power to grant or revoke licenses for persons or businesses subject to U.S. jurisdiction as reasonable.¹⁵⁵ OFAC identifies national security and foreign policy concerns as guiding its license determinations.¹⁵⁶ These concerns are not subject to notice-and-comment rulemaking.¹⁵⁷ Both OFAC and NSPM-5 cite international relations and national security—matters that underlie TWEA's grant to the President through the Commander-in-Chief power—to strengthen and enforce CACR.¹⁵⁸ Therefore, *Chevron* deference would likely apply to OFAC's licensing system.

MLB could try to challenge its OFAC license adjudication under the Administrative Procedure Act (APA).¹⁵⁹ Under § 706 of the APA, courts may review and set aside a final agency decision if it was “arbitrary and capricious.”¹⁶⁰ Arbitrary and capricious is a rigorous standard of review.¹⁶¹ The arbitrary and capricious standard requires a court to consider whether there was a “clear error of judgment,” and whether an agency made its decision from a “consideration of the relevant factors.”¹⁶² The court may reverse a decision only if an agency failed to consider an important aspect of the problem

153. See *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 498 F. Supp. 2d 150, 164–66 (D.D.C. 2007) (analyzing how Congress has not spoken directly to the issue of OFAC regulation and determining that OFAC has a reasonable interpretation of TWEA).

154. See *Regan v. Wald*, 468 U.S. 222, 232–36 (1984) (concluding that “Congress intended the President to retain some flexibility” in adjusting the U.S. embargo on Cuba).

155. See, e.g., *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 502 (S.D.N.Y. 1997) (noting that court is generally not an appropriate forum to review license issuance).

156. CACR, 31 C.F.R. 571(e) (2019).

157. 5 U.S.C. § 553(a) (2018) (listing the notice-and-comment rulemaking exceptions).

158. *Strengthening the Policy of the United States Toward Cuba*, 82 Fed. Reg. 48,875, 48,876 (Oct. 20, 2017) (“My Administration’s policy will be guided by the national security and foreign policy interests of the United States”); U.S. CONST. art. II, § 2, cl. 1 (noting the commander in chief power); TWEA, 12 U.S.C. § 95 (2018).

159. 5 U.S.C. § 706 (scope of review provision).

160. *Id.* Section 706 also discusses setting aside agency decisions for exceeding agency authority or not observing procedure required by law, which do not apply in this situation. *Id.*

161. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (recognizing the scope of review as narrow). Courts will uphold an agency decision if there is a rational connection between the facts found and the conclusions made. *Id.*

162. *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

or relied on impermissible factors to make its decision.¹⁶³ Alternatively, a court may reverse if the agency's explanation is implausible because of the evidence presented, or it cannot be explained by differences in view.¹⁶⁴

The U.S. District Court for the District of Columbia case, *Emergency Coalition to Defend Education Travel v. U.S. Department of the Treasury*,¹⁶⁵ provides an example of an APA challenge to an OFAC regulation.¹⁶⁶ The plaintiffs, students and teachers that wanted to participate in Cuba-based university classes, challenged how OFAC tightened educational license requirements under § 706 of the APA.¹⁶⁷ The lawsuit alleged that OFAC made the underlying decisions to create new restrictions in an arbitrary and capricious manner.¹⁶⁸ Plaintiffs also claimed that OFAC's decision lacked a rational connection between the facts and legal conclusions.¹⁶⁹ The District Court rejected this argument; it instead found that, even if plaintiffs disagreed with the findings and recommendations, the disagreement was not sufficient to make OFAC's interpretation unreasonable, arbitrary, or capricious.¹⁷⁰

MLB could sue OFAC under the APA for determining that the MLB–CBF deal is ineligible for a general license.¹⁷¹ Unlike parties applying for specific licenses, those interested in a general license do not file a specific application for consideration before OFAC.¹⁷² Rather, a party like MLB would operate pursuant to a general license until OFAC says otherwise.¹⁷³ MLB could still use its 2016–2019 correspondence with OFAC as evidence that establishes standing.¹⁷⁴ MLB would be within the “zone of interest” for

163. *Id.*

164. *Id.*

165. 498 F. Supp. 2d 150, 153 (D.D.C. 2007).

166. *Id.*

167. *Id.* at 152–53. Plaintiffs also challenged the OFAC regulatory updates on First and Fifth Amendment grounds. *Id.*

168. *Id.* at 155.

169. *Id.*

170. *See id.* at 165–66 (describing why the plaintiffs' suit failed under the arbitrary and capricious standard).

171. *See supra* text accompanying notes 155–163 (establishing that courts review APA challenges using the arbitrary and capricious standard).

172. OFAC CUBA FAQs, *supra* note 87; 31 C.F.R. § 515.571(e) (2019) (license provision).

173. OFAC CUBA FAQs, *supra* note 87. One example of a general license change would be if OFAC informs a party that it is engaging in a direct financial transaction with an entity on the Cuba Restricted List. *Id.*

174. MLB and OFAC exchanged correspondence on MLB–CBF deal issues in August and September 2016. MLB corresponded with OFAC in January 2019, three months before the deal cancellation. *See* Jared Diamond & Vivian Salma, *Trump Administration Blocks Baseball*

seeking permission from OFAC to proceed with the 2018 MLB–CBF deal.¹⁷⁵ MLB’s lawsuit would focus on how OFAC cannot adequately explain its reversal years after the original decision.

MLB would contend that OFAC acted in an arbitrary and capricious manner when it reclassified CBF as part of the Cuban government under 31 C.F.R. §§ 515.337–38 between 2016 and 2019.¹⁷⁶ MLB’s strongest argument would be that the available administrative record does not provide enough information to assess any reasoning behind the reclassification. In *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Department of the Treasury*,¹⁷⁷ the U.S. District Court for the District of Columbia determined that OFAC affidavits or testimony can illuminate the reasoning behind a licensing determination.¹⁷⁸ While not an affidavit or testimony, MLB could bring up prior assurances that the MLB–CBF deal met the embargo requirements.¹⁷⁹ MLB could also argue that the record is deficient given that the April 2019 letter is the only OFAC document that is accessible to the public.¹⁸⁰ Alternatively, MLB would assert that OFAC failed to consider an important aspect of the issue: the plight of Cuban baseball players without other means to enter the United States.¹⁸¹

Despite these arguments, a court would likely uphold the MLB license decision on the grounds the agency acted within its expertise.¹⁸² Courts afford significant deference to an agency carrying out a national security or

Players from Cuba, WALL ST. J. (Apr. 8, 2019 09:45 PM), <https://www.wsj.com/articles/trump-administration-set-to-tighten-rules-for-baseball-players-from-cuba-11554747444> (detailing MLB–OFAC 2016 correspondence); McCann, *supra* note 53.

175. OFAC Response, *supra* note 15; *e.g.*, *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 504 (S.D.N.Y. 1997) (finding defendants lacked standing to challenge an OFAC license denial since they were not parties in the licensing procedure and were not in the zone of interests of the CACR).

176. See 31 C.F.R. §§ 515.337–38 (listing who and what is considered part of the Cuban government).

177. 606 F. Supp. 2d 59 (D.D.C. 2009).

178. See *id.* at 68–69 (explaining that, when the administrative record fails to adequately explain the challenged agency action, a court may consider agency affidavits or testimony representing a contemporaneous explanation of the agency decision).

179. McCann, *supra* note 53.

180. OFAC Response, *supra* note 15.

181. See *supra* Part II.A (noting how Cubans have limited legal options to play for MLB); *cf.* OFAC Response, *supra* note 15 (stating only that a general license does not exist because a payment to the CBF amounts to a payment to the Cuban government, without stating other important considerations).

182. See *supra* Part III.A (describing OFAC); OFAC Response, *supra* note 1588.

foreign affairs function.¹⁸³ OFAC would argue it fits within this definition when making license determinations.¹⁸⁴ The OFAC is apt to deny licenses when there is a connection to the Cuban military or intelligence service.¹⁸⁵ Thus, OFAC could use justify its decision by linking Fidel Castro's son to CBF.¹⁸⁶ OFAC could further support its decision by referencing the Cuban government's use of seemingly innocuous industries to generate state revenue.¹⁸⁷ For example, the state has utilized a military-run tourism company, Gaviota, to profit from the recent influx of U.S. visitors to the island.¹⁸⁸ OFAC could cite this as using permissible factors—national security and foreign affairs—to revoke MLB's license.¹⁸⁹ OFAC could also reference how the Trump Administration's policy initiatives aim to foster Cuban civil society by not funding the government.¹⁹⁰ The Agency would also prevail on an alternative argument—that its position on CBF is simply due to an administration change. Courts recognize that plaintiffs cannot win under the arbitrary and capricious standard with only a permissible difference in view.¹⁹¹

183. See *United States v. Curtiss-Wright*, 299 U.S. 304, 315–22 (1936) (expounding upon the foreign policy powers of the executive).

184. See *Havana Club Holding, S.A. v. Galleon, S.A.*, 961 F. Supp. 498, 503 (S.D.N.Y. 1997) (holding that since CACR are instruments of foreign policy, OFAC's license determinations involve foreign policy considerations that should not be disturbed by courts).

185. See Forrest et al., *supra* note 116, at 25 (noting that the Trump Administration has said it would prohibit economic practices that would benefit the Cuban government, military, intelligence, or securities agencies over the Cuban people).

186. See Ring, *supra* note 114 (noting the connections between Fidel Castro's son and the CBF); cf. 31 C.F.R. § 515.571(e)(1) (2019) (stating that employers cannot make payments to the Cuban government).

187. See Eric B. Lorber, *Fine Tuning the Cuba Embargo*, FOREIGN POL'Y (June 15, 2017, 3:40 PM), <https://foreignpolicy.com/2017/06/15/fine-tuning-the-cuba-embargo-trump-obama-castro-tourism/> (analyzing the impact of Cuba sanctions to pressure regime reform).

188. *Id.* But see Christopher Sabatini, *Trump Risks Escalating Cuba Tensions by Scrapping Baseball Deal*, AXIOS (Jan. 16, 2019), <https://www.axios.com/trump-risks-escalating-cuba-tensions-by-scrapping-baseball-deal-6ae0c9a8-3eb6-4ba8-a493-36345a65bd09.html> (differentiating between the CBF and Cuban state entities).

189. See *United States v. Curtiss-Wright*, 299 U.S. 304, 315–22 (1936) (discussing executive foreign policy powers); cf. Lorber, *supra* note 187 (discussing use of sanctions as foreign relations).

190. See *Strengthening the Policy of the United States Toward Cuba*, 82 Fed. Reg. 48,875, 48,876 (Oct. 20, 2017) (noting that the purpose of the Trump Administration's policy towards Cuba is to channel funds towards the Cuban people and away from the government).

191. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (asserting that an agency action cannot be challenged when it represents a permissible difference in view); see also McCann, *supra* note 53 (stating that MLB could argue that an administrative decision to terminate the license for political reasons is arbitrary and capricious).

Another option would be for MLB to challenge OFAC's determination directly. One avenue MLB could pursue is to file a new specific license application while simultaneously requesting interpretive guidance on the general license issues.¹⁹² OFAC's policy is to not grant applications for a specific license when a general license authorization exists.¹⁹³ However, OFAC has informed MLB that the MLB-CBF deal does not qualify for a general license and that it can apply for a specific license instead.¹⁹⁴ This specific license strategy has a key strategic advantage over judicial review or an APA challenge: OFAC itself creates and drives the process.¹⁹⁵

MLB's new filing would be strongest if it reflects the factors OFAC presents for challenging a license application denial.¹⁹⁶ OFAC permits requests for redetermination on licenses when there is a change of circumstances, good cause, or additional relevant information available.¹⁹⁷ MLB's most persuasive points from these factors are a change of circumstances and good cause. MLB could work with OFAC to redirect the tax assessment or other player remuneration to an entity that OFAC has not restricted.¹⁹⁸ Modifying the CBF payment scheme by working with a nonrestricted entity would meet both the change of circumstances and good cause factors. Players could present the contracts and have their visas issued directly by the U.S. Embassy in Havana. By having the visas issued in Cuba,

192. See *OFAC License Application Page*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx> (last visited Apr. 14, 2020) [hereinafter *OFAC Licensing*] (stating that the Agency considers licenses on a "case-by-case basis"); *Submitting an Application for a Specific License*, U.S. DEP'T OF THE TREASURY, <https://licensing.ofac.treas.gov/Apply/Introduction.aspx> (last updated July 23, 2018) [hereinafter *OFAC Specific License Application*] (listing requesting guidance with the option to apply for a specific license).

193. *OFAC Licensing*, *supra* note 192.

194. OFAC Response, *supra* note 1588.

195. See *OFAC FAQs: General Questions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#licenses (last updated Feb. 6, 2019) [hereinafter *OFAC General FAQs*]; *OFAC Licensing*, *supra* note 192 (listing Cuba specific application license category).

196. *OFAC General FAQs*, *supra* note 195.

197. *Id.*

198. MLB previously explored a similar option involving a Cuban entity comprised of Cuban entrepreneurs, baseball officials, and a players' union. See Ben Strauss, *Major League Baseball Wants to Let Cuban Players Sign Directly with Teams*, N.Y. TIMES (Mar. 2, 2016), <https://www.nytimes.com/2016/03/03/sports/baseball/major-leagues-have-proposal-to-easepath-for-cuban-players.html> (noting MLB had no response from OFAC on proposal).

the change would meet good cause by reducing demand for dangerous baseball player smuggling.¹⁹⁹

Cuba's arrangement with a nonrestricted entity helps inform this potential solution between MLB, the United States, and Cuba.²⁰⁰ In October 2019, Cuba announced a deal between CBF and the World Baseball and Softball Confederation (WBSC).²⁰¹ WBSC will serve as a liaison for contracts between CBF and professional teams outside of Cuba.²⁰²

OFAC under the Trump Administration would still likely deny any request by MLB to reconsider its CBF views. OFAC may find that MLB and CBF using a nonrestricted entity—like WBSC—circumvents the embargo's financial provisions.²⁰³ Specifically, the CACR prohibits U-turn transactions.²⁰⁴ While WBSC appears independent, OFAC may conclude that a partnership with this organization is nothing more than a pitching change—and is actually an accessory in an illegal transaction.²⁰⁵ While there would be a change of circumstances, the outcomes for MLB and CBF would be too similar to the deal OFAC already cancelled.²⁰⁶ OFAC also notes that a specific license finding does not constitute a finding of fact or conclusion of law with respect to CACR.²⁰⁷

B. CACR Regulatory Interpretation

MLB could also pursue legal action that focuses on affirmative OFAC remedies. An affirmative OFAC remedy would utilize its power to interpret regulations. OFAC could reevaluate how it interprets CACR by considering NSPM-5's text, structure, history, and purpose.²⁰⁸ Using a reinterpretation,

199. See *supra* notes 69–73 (explaining how CACR conflicts with current visa issuance).

200. See *Cuba to Insert More Baseball Players in International Leagues*, ONCUBA (Oct. 23, 2019), <https://oncubanews.com/en/sports/cuba-to-insert-more-baseball-players-in-international-leagues> (detailing CBF's deal with the World Baseball and Softball Confederation to pay Cuban baseball players sent abroad).

201. *Id.*

202. *Id.*

203. See 31 C.F.R. § 515.534 (2019) (contingent contracts); §§ 515.542, 515.578 (business presence in Cuba); § 515.571 (Cubans receiving salaries in the United States); § 515.584 (U-turn transactions); § 515.559(b),(d) (export and import transactions).

204. Cuban Assets Control Regulations, 84 Fed. Reg. 47,121, 47,123 (Sept. 9, 2019) (to be codified at 31 C.F.R. § 515.584); see generally Sullivan, *supra* note 124 (emphasizing the Trump Administration's distaste for transactions that financially benefit the Cuban government).

205. See 31 C.F.R. § 515.584 (defining U-turn transactions).

206. See OFAC Response, *supra* note 15.

207. *OFAC Specific License Application*, *supra* note 192.

208. See Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, 48,875–78 (Oct. 20, 2017) (directing OFAC to act under NSPM-5); *infra* note 211.

OFAC could issue clarifying guidance that would better address the CACR legal issues underlying the MLB–CBF deal cancellation.²⁰⁹

Two landmark U.S. Supreme Court cases—*Auer v. Robbins*²¹⁰ and *Kisor v. Wilkie*²¹¹—impact how OFAC interprets CACR. The controlling test for regulatory interpretation arises in *Auer*.²¹² Under the *Auer* doctrine, an agency’s construction of its own regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”²¹³ However, the June 2019 *Kisor* decision limited how an agency can interpret its own regulations.²¹⁴ Under *Kisor*, reflexive deference should only occur if an agency has a truly ambiguous regulation.²¹⁵ In all cases, an agency’s interpretation must be “reasonable” before resorting to deference.²¹⁶ A reasonable interpretation carefully considers the regulation’s text, structure, history, and purpose.²¹⁷

OFAC’s justification for the MLB license revocation disregards the history and purpose factors that *Kisor* requires for a reasonable agency interpretation. First, OFAC’s current interpretation ignores its prior assessment of the MLB–CBF deal. At the deal’s inception in 2016,²¹⁸ an Obama-era OFAC determined that the deal cleared the regulatory requirements of not paying the Cuban government.²¹⁹ Both the Obama and Trump Administrations demonstrated their support for regularized travel to Cuba.²²⁰ The 2018 MLB–CBF deal promoted regularizing Cuban baseball player travel to and from the United States through standardized nonimmigrant work visas.²²¹ Making visas obtainable in Cuba would eliminate the need for Cuban

209. While clarifying guidance is a persuasive authority, it is not binding. See Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order 13,891, 84 Fed. Reg. 55,235, 55,235–38 (Oct. 15, 2019) (President Trump’s executive order on agency use of non-binding guidance documents in the regulatory process).

210. 519 U.S. 452 (1997).

211. 139 S. Ct. 2400 (2019).

212. *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

213. *Id.*

214. *Kisor*, 139 S. Ct. at 2408 (rendering the decision two months after the OFAC letter).

215. *Id.* at 2415 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

216. *Id.*

217. *Id.*

218. See McCann, *supra* note 53.

219. 31 C.F.R. §§ 515.337–38, 515.571(e) (2016).

220. See *Charting a New Course on Cuba*, *supra* note 37 (describing Obama’s views toward Cuba; Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. at 48,875–78 (NSPM-5); Rivero, *supra* note 42 (analyzing Trump’s Cuban immigration views and ending of the “wet-foot, dry-foot” policy).

221. See *MLB Press Release*, *supra* note 13.

ballplayers to defect to another country or endure a dangerous smuggling journey to the United States.²²²

OFAC's justification also dismisses the history and purpose behind NSPM-5's Cuba directives.²²³ NSPM-5 instructs OFAC and other agencies to restrict transactions that disproportionately benefit the Cuban government at the expense of its citizens.²²⁴ The Executive Branch uses fund restrictions to theoretically induce "economic necessity" to promote freedom and democracy.²²⁵ However, it also instructs agencies not to interfere with support for the Cuban people.²²⁶ NSPM-5 specifically emphasizes that agencies should act to discourage dangerous unlawful migration while not interfering with lawful visa acquisition.²²⁷ Cuban baseball players obtaining visas, rather than arriving illegally, also aligns with the Trump Administration's desire to stop unauthorized migration to the United States.²²⁸ Allowing Cubans to play for MLB—a professional sports league—supports the Cuban people by using baseball diplomacy to promote democratization.²²⁹

The Trump Administration's actions after cancelling the MLB–CBF deal also call into question whether OFAC receives reflexive deference. President Trump and members of his Administration have increasingly voiced their concern that Cuba supports oppression and other dictatorships.²³⁰ These

222. See Greller, *supra* note 6, at 1673–79 (describing third-country residency and defections); June 2017 Remarks, *supra* note 117 (desiring to safeguard Cubans from dangerous travel).

223. Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. at 48,875–78.

224. *Id.* at 48,876; cf. Lorber, *supra* note 187 (declaring that tightening embargo restrictions is a "smart use of economic power" to address human rights abuses in Cuba). *But see Trading with the Enemy*, *supra* note 57, at 587 (quoting former Secretary of State Rex Tillerson about using commercial and economic engagement to "see the sunny side of benefits to the Cuban people").

225. See Siddhartha Mahanta, *The Case for the Cuban Embargo*, THE ATLANTIC (Dec. 3, 2016), <https://www.theatlantic.com/international/archive/2016/12/robert-menendez-cuba-castro-embargo/509366/> (arguing that current U.S. policy wrongfully funds Cuban oppression). *Contra Adios Embargo*, *supra* note 145, at 345 (advocating for trade as a tool of cultural awareness, since sanctions unintentionally hurt individuals more than governments).

226. Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. at 48,876.

227. *Id.* at 48,876–77; June 2017 Remarks, *supra* note 117.

228. See Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. at 48,876–77 (instructing the executive branch, the Secretary of State, and the Secretary of Homeland Security to discourage unlawful Cuban migration); Rivero, *supra* note 42 (ending the "wet-foot, dry-foot" policy fits into the Trump Administration's greater immigration enforcement goals).

229. See Kurczy, *supra* note 25 (advocating for use of baseball, a shared national pastime and sport beloved by both countries, to promote U.S.–Cuba relations).

230. See Cuba Restricted List, 84 Fed. Reg. 17,228, 17,228–30 (Apr. 24, 2019) (declaring

statements came months after OFAC's response about MLB's general license, and *at least three years* after OFAC gave permission to proceed on the deal.²³¹ The Trump Administration thus far has not presented evidence on its reclassification of CBF as part of the Cuban government.²³² An agency using a post hoc rationalization to interpret does not qualify for *Kisor* deference.²³³

OFAC would counter that it has a permissible, reasonable interpretation under the *Kisor* text and structure factors.²³⁴ OFAC uses the Department of State's Restricted Entity List to make determinations and classifications for its presumptively final licensing decisions.²³⁵ OFAC would first argue that the deal cancellation logically follows from reading NSPM-5's language, which prohibits supporting the Cuban regime.²³⁶ OFAC would argue that it cannot interpret a venture in "support of the Cuban people" to what it views as the contrary: a deal that threatens national security and imperils human rights.²³⁷ However, this reasoning logically fails on two fronts. First, even embargo proponents recognize that Cuba is not a serious national security threat.²³⁸ Second, the sanction enforcement against Cuba is inconsistent with other

that Cuba's support for Maduro undermines democracy); Matt Spetalnick, *U.S. Issues Travel Ban for Cuba's Castro over Human Rights Accusations, Support for Venezuela's Maduro*, REUTERS (Sept. 26, 2019 01:01 PM), <https://www.reuters.com/article/us-usa-cuba-castro/us-sanctions-cubas-castro-for-supporting-venezuelas-maduro-human-rights-violations-idUSKBN1WB2B5> (stating how Cuba's support for Maduro undermines democracy).

231. McCann, *supra* note 53.

232. See OFAC Response, *supra* note 1588 (arguing that paying CBF funds the Cuban government).

233. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 2417 (2019) (listing the reasonable interpretation factors).

234. *Id.* at 2415.

235. See 31 C.F.R. § 515.209 (2019) (discussing the Cuban assets control regulations); *List of Restricted Entities*, *supra* note 94 (detailing a list of Cuban entities with direct financial transactions would benefit at the expense of the Cuban people); OFAC CUBA FAQs, *supra* note 87, at 2–3 (providing guidance about the State Department's Cuba Restricted List).

236. See 31 C.F.R. § 515.209 (restricting transactions with entities classified as part of the Cuban government that would directly and disproportionately benefit the Cuban government).

237. See Craft, *supra* note 58 (noting the disparaging state of human rights in Cuba); see also Weldon, *supra* note 16, at 23 (recognizing that Cuba does not provide for freedom of speech, assembly, or protection from arbitrary arrest and detention); Abrams, *supra* note 58 (finding no movement towards freedom and democracy under both Obama and Trump); *supra* notes 46–47 (referencing President Trump's statements on Cuba and Venezuela).

238. See Mahanta, *supra* note 225 (stating that Cuba has not been a national security threat since 1962); cf. *Adios Embargo*, *supra* note 145, at 334 (questioning President's ability to enforce Cuba sanctions when the country's Soviet connections and nuclear ambitions are moot).

nondemocratic regimes, such as China.²³⁹ Even with these arguments, OFAC would still likely meet the reasonableness requirement for agency deference.²⁴⁰ The Trump Administration publicly personifying Cuba and Venezuela as conspiring to undermine fundamental U.S. values—freedom and democracy²⁴¹—strongly suggests that the Executive Branch is framing NSPM-5 as a nearly unchallengeable use of the foreign affairs power.²⁴²

Developments with OFAC's sibling agency, the U.S. Department of Commerce's Bureau of Industry and Security (BIS), provide insight on potential future OFAC action. BIS oversees the Export Administration Regulations (EAR), which restrict Cuban exports.²⁴³ Like OFAC, BIS uses a case-by-case review policy in issuing its licenses to export and reexport goods to meet the needs of the Cuban people.²⁴⁴ In October 2019, BIS announced a new rule to further restrict U.S.–Cuba transactions.²⁴⁵ Echoing Secretary of the Treasury Mnuchin, Secretary of Commerce Wilbur Ross referenced the need to “send another clear message to the Cuban regime” to “cease [its] destructive behavior at home and abroad.”²⁴⁶ BIS also links Cuba's support for the Maduro regime in Venezuela to national security concerns.²⁴⁷ The practical consequence is that exports must not primarily generate income for the Cuban state.²⁴⁸

One idea that OFAC could adopt as guidance relates to BIS's license exception in support of the Cuban people. BIS's “Support for the Cuban

239. *Trading with the Enemy*, *supra* note 57, at 605 (opining on how the United States waived restrictions on China until trade normalizations in 2000 and did not require a governance change).

240. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

241. *See supra* notes 46–47 (examining Trump's statements on Cuba and Venezuela).

242. *See* Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, 48,876–77 (Oct. 20, 2017) (advancing national security rationale).

243. *See* Restricting Additional Exports and Reexports to Cuba, 84 Fed. Reg. 56,117, 56,117–19 (Oct. 21, 2019) (to be codified at 15 C.F.R. pts. 734, 740, 746) (outlining how the Bureau of Industry and Security implements Cuba export sanctions).

244. *See generally* 15 C.F.R. §§ 730–74 (2019) (listing what items qualify for export and reexport to Cuba).

245. *See* Restricting Additional Exports and Reexports to Cuba, 84 Fed. Reg. at 56,117–19 (restricting aircraft licenses and similar transactions further).

246. Press Release, U.S. Dep't of Commerce, U.S. Department of Commerce Further Tightens Cuba Sanctions (Oct. 18, 2019), <https://www.commerce.gov/news/press-releases/2019/10/us-department-commerce-further-tightens-cuba-sanctions>.

247. Restricting Additional Exports and Reexports to Cuba, 84 Fed. Reg. at 56,117.

248. *See* BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, CUBA FREQUENTLY ASKED QUESTIONS 3 (2019) [hereinafter *Commerce Cuba FAQs*], <https://www.bis.doc.gov/index.php/documents/pdfs/2484-bis-cuba-consolidated-faqs-1/file> (providing guidance on Cuba export rules).

People” (SCP) license exception allows for items to be exported for use in Cuban private sector economic activities.²⁴⁹ Examples of SCP exceptions include historic preservation, sports and recreation facilities, and other infrastructure that directly benefits the Cuban people.²⁵⁰ In applying this idea to the MLB–CBF deal and CACR, the main obstacle would be the adverse banned entity label from the State Department Restricted List.²⁵¹ However, BIS allows SCP to apply if the transactions are consistent with § 2 and § 3(a)(iii) of NSPM-5.²⁵² While the MLB–CBF deal would likely not fall under the former section (§ 2 of NSPM-5), the section regarding regularizing visa travel (§ 3(a)(iii)(D)) may apply.²⁵³ The U.S. Department of State even features its commitment to the U.S.–Cuba Migration Accords on its website.²⁵⁴ OFAC could bridge the divide between NSPM-5 and CACR by issuing further guidance on language about support for the Cuban people.²⁵⁵ The guidance could state how regularized visas promote baseball diplomacy between Cuba and the United States,²⁵⁶ and help Cuban ballplayers obtain O-1A or P-1A visas in Havana.²⁵⁷ This guidance may also encourage more league–agency dialogue on how to pay Cuban baseball players, or result in a request for redetermination or a new MLB license application. However, guidance faces a similar challenge to reinterpretation: it is very difficult for OFAC to act completely contrary to the Executive’s stated position on

249. *Id.* at 2; 15 C.F.R. § 740.21(b).

250. 15 C.F.R. § 740.21(c)(1).

251. In the context of both OFAC’s and Bureau of Industry and Security’s (BIS’s) purview, the MLB–CBF deal raises issues with respect to revenue directed toward the Cuban state. However, the tax assessment in the MLB–CBF deal is far lower than the 92% taken from Cuban state workers’ salaries. *MLB Press Release*, *supra* note 13; Weldon, *supra* note 16, at 29.

252. *See* Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48,875, 48,876 (Oct. 20, 2017) (identifying free enterprise and lawful travel as policy objectives and mandating that agencies cannot prohibit transactions that support visa issuance for permissible travel); *Cuba*, U.S. BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba> (last visited May 11, 2020) (noting that Support the Cuban People includes transactions that intend to facilitate travel and commerce).

253. 82 Fed. Reg. at 48,876 (“Amplify efforts to support the Cuban people through the expansion of . . . lawful travel.”).

254. *U.S. Relations With Cuba Bilateral Relations Fact Sheet*, U.S. DEP’T OF STATE (Nov. 22, 2019), <https://www.state.gov/u-s-relations-with-cuba/> (promoting “safe, orderly, and legal migration from Cuba”).

255. *Id.*; 82 Fed. Reg. at 48,875–76 (identifying “support [of] the Cuban people” as a foreign policy goal).

256. *See, e.g.*, Greller, *supra* note 6, at 1712–13 (expressing hope that baseball can improve U.S.–Cuba relations); Kurczy, *supra* note 25 (noting U.S.–Cuba baseball diplomacy successes).

257. *MLB Press Release*, *supra* note 13; *see supra* notes 66–73 (explaining visa issuance).

Cuba.²⁵⁸ MLB and CBF would be more successful in seeking relief from other U.S. agencies and Congress.

C. Agency Coordination and Congress

The Department of State, United States Citizenship and Immigration Services, and Congress could also use their authority to reduce Cuban baseball player smuggling to the United States. The MLB–CBF deal authorized Cuban ballplayers to receive nonimmigrant work visas at the U.S. Embassy in Havana.²⁵⁹ Even without the deal, the Department of State has discretion to issue P-1A and O-1A visas to qualifying Cuban nationals.²⁶⁰ However, the Embassy suspended almost all visa processing as of May 2019 due to “sonic attacks.”²⁶¹ If the Department of State reinstated even limited visa processing, players could not use visa delays as a reason to seek third-country residency or defection options.

Another option would be to refocus legislative advocacy away from sweeping change and toward incremental reform. Repealing LIBERTAD, CDA, and other legislation codifying the embargo would require significant political will.²⁶² In contrast, legislation like the Baseball Diplomacy Act focuses on a limited exemption rather than total repeal.²⁶³ The Act specifically targets U.S.–Cuba baseball player travel and MLB salary money transfer.²⁶⁴ Framing the bill as a smaller, less risky option makes its passage more politically feasible.

CONCLUSION

More than 250 Cuban nationals—including Sanchez, Moncada, Hernandez, Cubas, Arocha, and Puig—have risked their lives to professionally play a sport beloved by Americans and Cubans alike.²⁶⁵ Many Cuban baseball players arrived in the United States during a period of strong support for Cuba sanctions.²⁶⁶ On a wave of Cuba normalization during the

258. 82 Fed. Reg. at 48,875–76; *Taking a Stand*, *supra* note 46.

259. *MLB Press Release*, *supra* note 13.

260. See 8 U.S.C. § 1201(a)(1) (2018) (stating that consular officers may issue immigrant and nonimmigrant visas when a proper application is filed); see also U.S. CITIZENSHIP & IMMIGRATION SRVS., *supra* note 66, at 17–19 (listing P-1A and O-1A visa requirements).

261. See Rivero, *supra* note 42, at 5 (describing the difficulty of obtaining a visa at the U.S. Embassy in Havana after “sonic attacks” on personnel beginning August 2017).

262. See Leogrande, *supra* note 18 (describing power of “Cuba Lobby”); 116TH CONGRESS, *supra* note 21, at 25–28 (discussing competing views on achieving Cuba policy goals).

263. Baseball Diplomacy Act of 2019, H.R. 213, 116th Cong. (2019).

264. See *id.* (explaining how bill’s provisions are a limited exemption to Cuba sanctions).

265. Kaminsky, *supra* note 8, at 194; see *supra* Parts I–II (detailing smuggling stories).

266. See *supra* Part I (explaining pre-2010s Cuban ballplayer migration to the United States).

2010s, the December 2018 MLB–CBF deal aimed to directly address Cuban baseball player smuggling.²⁶⁷ However, the Trump-era OFAC cancelled the deal in April 2019.²⁶⁸ A judicial review challenge by MLB is possible, but would likely not succeed.²⁶⁹ Outside of judicial review, OFAC could use its regulatory interpretation authority to better align with NSPM-5’s Cuba goals.²⁷⁰ However, the Agency is unlikely to issue guidance due to concerns about human rights and national security.²⁷¹ Without lifting the embargo, the current best course of action is to allow ballplayers to receive visas in Cuba and use legislation like the Baseball Diplomacy Act to turn the tide on smuggling solutions.²⁷²

267. See *supra* Part II.A (detailing attempts to combat player smuggling).

268. OFAC Response, *supra* note 15.

269. See *supra* Part IV.A (stating how *Chevron* deference applies to MLB license decision).

270. See *supra* Part IV.B (assessing how *Kisor* deference applies to MLB license decision).

271. See *supra* Part IV.B (analyzing how NSPM-5 links Cuba to national security concerns).

272. See *supra* Part IV.C (discussing solutions outside of the courts).