

POLITICAL BALK: OPENING THE DOOR FOR U.S.-CUBA
POLICY REFORM VIA DIPLOMATIC BLUNDER AT
THE WORLD BASEBALL CLASSIC

I. INTRODUCTION

The Official Rules of Major League Baseball delineate thirteen distinct ways a pitcher can commit a balk,¹ which generally occurs when a pitcher makes an unusual or errant motion in delivering the ball to the batter.² Although used only a handful of times during the roughly half-million pitches thrown in a Major League season,³ the balk rule prevents the pitcher from intentionally deceiving a base runner or batter.⁴ The balk rule equalizes opponents – batter and pitcher – by requiring consistent mechanics and allowing pitchers with superior, yet legal, pick-off moves to maintain a defensive edge, because base runners are less inclined to steal.

Distinct parallels exist between Major League Baseball's balk rule and the "rules" of international foreign policy governing sovereign states,⁵ though "[t]he relationship of sport to political ideology is . . . rarely subjected to convincing proof."⁶ Ideology is "a systematic scheme or coordinated body of ideas or concepts, especially about human life or culture."⁷ States with differing ideological foundations view cultural tenets, such as sport, with variance: "interpretations of sport and the athletic body vary according to the ideological position from which they are viewed."⁸

1. See The Official Site of Major League Baseball: Official Info: Official Rules of Major League Baseball – Rule 8.05, http://mlb.mlb.com/mlb/official_info/official_rules/pitcher_8.jsp (last visited June 29, 2007) [hereinafter Official Rules] (reviewing pitch process that constitutes balk and stipulating penalties for balk).

2. See *id.* (describing various scenarios constituting balk).

3. Assuming 30 teams playing 81 games (or 15 teams playing 162 games), with two pitchers per team and an average pitch count of 100 pitches per game per pitcher, 486,000 pitches would occur in a major league baseball season. See Major League Baseball – Standings, <http://sports.espn.go.com/mlb/standings> (last visited June 29, 2007) (listing teams and games per season).

4. See Official Rules, *supra* note 1 (describing purpose behind balk rule).

5. See JOHN M. HOBERMAN, *SPORT AND POLITICAL IDEOLOGY* 1-3 (1984) (describing procedural similarities of politics and sport).

6. *Id.* at 1.

7. *Id.* at 3 (quoting *Webster's Dictionary*). "Such a category easily encompasses ideas about sport, its cultural benefits, and its baneful effects on society." *Id.*

8. *Id.* at 7.

Much like the batter and pitcher, national leaders prefer a consistent script that allows a degree of predictability. In most cases, political relations between States typically remain procedurally predictable;⁹ however, as in baseball, the potential for a political balk between differing State ideologies remains.

The United States committed one such errant political move early in 2006, during the initial stages of the inaugural World Baseball Classic (“WBC”),¹⁰ by attempting to prevent Cuba’s participation in the event. The WBC was the brainchild of Major League Baseball (“MLB”) commissioner Bud Selig, in cooperation with the Major League Baseball Players’ Association (“MLBPA”).¹¹ The tournament was modeled after soccer’s World Cup and sought to create a truly “World” Series by featuring round-robin play amongst teams from sixteen countries.¹² Every participating team was guaranteed one percent of the profits, if any, to be used for youth baseball in each team’s home country; however, if Cuba won, it was to receive ten percent of any profits.¹³ “World Baseball Classic, Inc., is the organizing entity of the tournament, which is jointly governed by MLB and the MLBPA. The entity was established to oversee and administer all transactions and operations involving the tournament.”¹⁴

Prior to the 2006 political standoff between the U.S. and Cuba, U.S. President George W. Bush’s administration pursued the enforcement of forty-year-old economic sanctions on Fidel Castro’s communist nation with renewed vigor.¹⁵ Faced with the possibility of Cuban participation in the predominantly U.S.-hosted event, the Bush administration imposed a political blockade upon the Caribbean dictatorship’s participation, only to be countered by an

9. Although contemporary international political issues would appear to negate such a laissez faire mentality, a broader inquiry shows that billions of dollars of international trade and commerce as well as millions of individuals transcend national borders almost seamlessly on a daily basis. This expansive interaction between nations defines the era of post Cold War globalization.

10. See George Vecsey, *Sports of the Times; A Shutout of Cuba Would Be a Loss for the United States*, N.Y. TIMES, Jan. 8, 2006, at 811 (discussing World Baseball Classic (“WBC”) logistics).

11. See *id.* (describing evolution of WBC); see also World Baseball Classic - About, <http://ww2.worldbaseballclassic.com/2006/about/index.jsp?sid=wbc> (last visited June 29, 2007) (detailing corporate organizing structure of WBC).

12. See Vecsey, *supra* note 10, at 811 (noting concept behind WBC).

13. See *id.* (detailing WBC’s contract).

14. World Baseball Classic - About, <http://ww2.worldbaseballclassic.com/2006/about/index.jsp?sid=wbc> (last visited June 29, 2007).

15. See Sheryl L. Lutjens, *Cuba and the Security Frame*, LATIN AMERICAN PERSPECTIVES, Sept. 2006, at 3, available at <http://lap.sagepub.com/cgi/reprint/33/5/3> (describing reframed U.S. foreign policy following September 11, 2001).

equally savvy political move from Castro, who promised that tournament proceeds would be donated to U.S. victims of Hurricane Katrina.¹⁶

Interestingly, the baseball diamond did not present an unfamiliar venue for either leader during such political posturing, as Bush and Castro both share professional baseball backgrounds: Castro was a former pitcher,¹⁷ while President George W. Bush led an investment group that bought Major League Baseball's Texas Rangers.¹⁸ Furthermore, both leaders previously used baseball for political gain: "'massive sport' is seen as 'one of the fundamental objectives of the [Castro-led Cuban] revolution,'"¹⁹ and Bush cited his success with the Rangers "in his 1999 [Texas gubernatorial] campaign biography."²⁰

Ultimately, the U.S. conceded and Cuba took the field, finishing second to Japan.²¹ Although the games went seamlessly, forty years of international and administrative policy bubbled to the surface due to the U.S. balk. With the next WBC scheduled for 2009²² and the United States vying for hosting privileges for the 2016 Summer Olympic Games,²³ the narrow issue of Cuban participation in athletic events held on U.S. soil demands present attention.²⁴

16. See Kevin Baxter & Pablo Bachelet, *World Baseball Classic*, MIAMI HERALD, Mar. 24, 2006, at A8 (noting Castro's political short-circuit of OFAC denial by promising winnings as donations to U.S. victims of Hurricane Katrina).

17. See Murray Chass, *World Baseball Classic*, HOUSTON CHRON., Mar. 21, 2006, at 1 (describing Castro's baseball background).

18. JOHN W. DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* 26 (2004) (discussing Bush's involvement in purchase of Texas Rangers).

19. JAMES A. R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 78 (1988).

20. DEAN, *supra* note 18, at 27.

21. See Baxter & Bachelet, *supra* note 16, at A8 (reviewing Japan's victory over Cuba in WBC finale).

22. See Editorial, *A Real World Series: Baseball's Best Launch an International Classic*, PITTSBURGH POST-GAZETTE, Mar. 24, 2006, at B6 (mentioning scheduling of next WBC for 2009).

23. See Philip Hersh, *Chicago's Big Olympic Plans*, CHI. TRIB., July 13, 2006, available at <http://www.chicagotribune.com/news/local/chi-0607130188jul13,0,7545525.story?coll=chi-news-hed&?track=sto-relcon> (discussing Chicago's bid to host 2016 Olympic Games).

24. See Ronald Blum, *Pound Strikes Out at Decision; Banning Cuba from Baseball Classic Could Threaten Olympic Bids*, HAMILTON SPECTATOR (Ontario, Canada), Dec. 16, 2005, at 2 (discussing necessary inquiry into licensing procedure and subsequent implications). In emphasizing the importance of the initial administrative decision to bar Cuban participation in the WBC, Blum states, "Baseball officials said they had asked lawyers at Morgan Lewis & Bockius to attempt to have the Bush administration reverse the decision by the Treasury Department's [OFAC], which by law must issue permits for certain transactions with Fidel Castro's communist country." *Id.*

Moreover, because of the inevitably politicized history that Cuban participation in the WBC implicates, the broader constitutional issues surrounding foreign policy and administrative powers warrant critical inquiry as well.²⁵

Using the example of the initial blunder at the WBC, this Comment explores prospective changes in United States foreign policy toward Cuba and discusses how sport can facilitate a renewed diplomatic cordiality between these two hemispheric neighbors. Politically, Cuba and the United States have lived worlds apart for the last fifty years, despite separation by only a ninety-mile expanse of the Gulf of Mexico. Perhaps baseball can ignite a unifying political diplomacy.

This topic is additionally pertinent when considering the seeming inevitability of regime change within Cuba, with the political standoff surrounding the WBC serving as both an entry point and a focal point in developing this policy discussion.²⁶ Furthermore, the administrative decision-making behind Cuba's participation engages an exploration of checks and balances on executive powers, including the power of appointment and the appealability of administrative orders. Accordingly, a critical analysis of the conflicting discourse between the U.S. and Cuba facilitates reconciliation of the misaligned sovereign voices.

In order to fully engage in a dialogue concerning legal issues surrounding the U.S. political balk during the planning stages of the WBC, the following foundational areas must first be explored: a review of modern entanglements between sport and politics, a summary of the current black-letter law of U.S.-Cuba relations, and a specific focus on the special licensing provisions at issue during the WBC.

Section II of this Comment will provide the necessary background for an informed discussion on reshaping U.S.-Cuba relations, discussing the Trading With the Enemy Act, the Cuban Assets

25. See Oscar Corral & Pablo Bachelet, *Cuba's Powerhouse Baseball Team Got the Sign to "Play Ball,"* MIAMI HERALD, Jan. 21, 2006, at A1 ("[D]espite the resolution to the baseball issue, tensions between the two nations are likely to continue dogging Cuba's participation in U.S. sporting events.").

26. See Dr. Sanjay Gupta, *Hunting for Clues to Castro's Health*, <http://www.cnn.com/HEALTH/blogs/paging.dr.gupta/2007/01/hunting-for-clues-to-castros-health.html> (last visited June 29, 2007) (describing poor health of Fidel Castro); Caren Bohan, *Bush Predicts Change is Near for Cuba*, Reuters.com – News – World, <http://uk.reuters.com/article/worldNews/idUKN2836751820070428> (last visited June 29, 2007) ("President [George W.] Bush took fresh aim on Saturday [April 28, 2007] at Cuba's communist government, calling it a 'cruel dictatorship' and predicting that democratic change was near.").

Control Regulations, the International Emergency Economic Powers Act, the Cuban Democracy Act, and the Cuban Liberty and Democracy Solidarity Act.²⁷ The current U.S. presidential administration's policy will also be reviewed,²⁸ followed by a history of political conflicts in modern sport,²⁹ and the specific licensing process for Cuban athletes participating in U.S.-hosted events.³⁰

Section III will examine the appealability of decisions administered by the U.S. Treasury Department's Office of Foreign Assets Control, and criticize the watered-down authority of vital governmental offices via executive appointment.³¹ Furthermore, this section will revisit *Regan v. Wald*, the U.S. Supreme Court case that provides the determinative reading of the International Emergency Economic Powers Act in a historical context of political controversy and upheaval.³² In addition, Section III will discuss the contraposition of Presidents Bush and Castro, reading their exchanges - both direct and indirect - throughout the WBC controversy within an ideological lens.³³ Finally, this section will describe potential positive advancements in U.S.-Cuba policy that could be facilitated with international sporting events such as the WBC,³⁴ demonstrating that, although the U.S. treatment of Cuba may be constitutional, it is no longer pragmatic in a modern, post-communist context.

Finally, Section IV of this Comment provides concluding remarks and attempts to homogenize a complicated history of diplomatic peaks and valleys while offering some hope for improved future relations between the U.S. and Cuba in the contemporary economic context of globalization and the martial context of terrorism.³⁵

27. For a further discussion of these acts, see *infra* notes 40-94 and accompanying text.

28. For a further discussion of current presidential policy, see *infra* notes 95-104 and accompanying text.

29. For a further discussion of the history of political conflict in modern sport, see *infra* notes 105-20 and accompanying text.

30. For a further discussion of the licensing process of Cuban athletes, see *infra* notes 121-32 and accompanying text.

31. For a further discussion of Office of Foreign Assets Control ("OFAC") decisions, see *infra* notes 133-98 and accompanying text.

32. For a detailed discussion of *Regan v. Wald*, see *infra* notes 199-227 and accompanying text.

33. For a further discussion of the contraposition of President Bush and Fidel Castro, see *infra* notes 228-61 and accompanying text.

34. For a further discussion of possible advancements in U.S.-Cuba relations, see *infra* notes 262-79 and accompanying text.

35. For a further discussion of the concluding remarks of this Comment, see *infra* notes 280-88 and accompanying text.

II. BACKGROUND

To analyze the legal issues surrounding the Office of Foreign Assets Control's ("OFAC") licensing power for foreign participation in domestically-held international sporting events, an initial discussion of contextual elements is mandatory.³⁶

A. History of U.S. Legislation Regarding Cuba

Some inquiry into the influence of historical climate is required to comprehend the contextual political climate surrounding a decision made by the current administration.³⁷ As stated by Peter Goodrich, "[t]he commands and the judgments traditionally obeyed as 'the law' within a given community must 'come from' somewhere. . . ."³⁸ Although this article does not analyze the entirety of the contemporary political context surrounding each developmental stage of U.S.-Cuban policy, some backdrop regarding the origins of current law facilitates an analysis of the modern political environment,³⁹ as it is impossible to understand the current policy status without knowing something of its derivation.

1. *Trading With the Enemy Act*

The United States Congress first promulgated the Trading With the Enemy Act ("TWEA") on October 6, 1917 in response to World War I.⁴⁰ TWEA prohibits property transfers between United States citizens and enemy nations, unless licensed by the President.⁴¹ Although originally enacted for use exclusively during

36. Avoiding overly-expansive discussion, this paper does not explain and analyze the legality of the contemporary political circumstances that led to the current legislation. It only analyzes the administrative powers' limitation of Cuba's modern participation in international sporting events held within the United States.

37. See PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 5 (Blackwell Publishers 1986) (describing notion of "source of law" underlying current law and entry point for legal criticism).

38. *Id.*

39. A truly in-depth exploration of modern U.S.-Cuba relations would analyze the contemporary environment of each legislative development, assuming no neutrality at any stage of precedent. This article must assume some degree of historical soundness in the creation of prior legislation because a full inquiry into the record is beyond its scope.

40. See *Regan v. Wald*, 468 U.S. 222, 226 n.2 (1984) ("[The Trading With the Enemy Act ('TWEA')] was first passed in 1917, six months after the United States entered World War I."); see also Act of Oct. 6, 1917, ch. 106, 40 Stat. 411, 411 ("To define, regulate, and punish trading with the enemy, and for other purposes.").

41. See 50 U.S.C. app. § 3 (2007) ("It shall be unlawful—(a) For any person in the United States, except with the license of the President . . . to trade . . . with knowledge or reasonable cause to believe that such other person is an enemy . . .").

times of war, the scope of presidential authority under TWEA later expanded to cover instances of “existing national emergency.”⁴² In 1942, President Franklin D. Roosevelt delegated licensing authority under TWEA to the Secretary of the Treasury.⁴³ Two years prior to President Roosevelt’s transfer of licensing authority to the Treasury, he created the Office of Foreign Funds Control (“OFFC”) to exercise section 5(b) of TWEA.⁴⁴ OFAC evolved out of the OFFC,⁴⁵ “created in December 1950, following the entry of China into the Korean War, when President Truman declared a national emergency under TWEA in response to the threat of international communism and blocked all Chinese and North Korean assets subject to U.S. jurisdiction.”⁴⁶ As originally drafted, “TWEA gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war.”⁴⁷

2. *Cuban Assets Control Regulations*

In February, 1962, President John F. Kennedy “imposed an embargo on all transactions with Cuba”⁴⁸ pursuant to the Foreign Assistance Act of 1961, which confers authority upon the President “to establish and maintain [such] a total embargo upon all trade between the United States and Cuba.”⁴⁹ On July 9, 1963, President

42. See Act of Mar. 9, 1933, ch. 1, 48 Stat. 1, 1 (“(b) During time of war or during any other period of national emergency declared by the President . . .”); see also *Regan*, 468 U.S. at 226 n.2 (discussing statutory history behind TWEA and corresponding evolution of presidential authority).

43. See 7 Fed. Reg. 1,409-03 (Feb. 25, 1942) (“Memorandum to the Secretary of the Treasury: All power and authority conferred upon me by Sections 3 (a) and 5 (b) of the [TWEA], as amended, are hereby delegated to the Secretary of the Treasury.”).

44. See 68 Fed. Reg. 4,422-01, 4,423 (Jan. 29, 2003) (discussing creation of Office of Foreign Funds Control).

45. See *id.* (delineating evolution from Office of Foreign Funds Control into OFAC).

46. *Id.*

47. *Regan*, 468 U.S. at 225-26 (noting initially broad scope conferred upon President by sec. 5(b) of TWEA).

48. Ignacio M. Sarmiento, Comment, *Traveling to Cuba? Sorry, It’s Closed*, 29 NOVA L. REV. 287, 291 (2005) (noting Presidential Proclamation No. 3447 began Cuban embargo).

49. 22 U.S.C. § 2370(a)(1) (1961). Title 22, sec. 2370, Subsection (a)(1) of the U.S. Code states:

(a) Cuba; embargo on all trade

(1) No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.

Kennedy's Cuban Import Regulations were revoked and replaced with the Cuban Assets Control Regulations ("CACR") in the Code of Federal Regulations.⁵⁰ TWEA conferred presidential authority to enact CACR.⁵¹

On October 15, 1962, the Secretary of the Treasury delegated the authority conferred to him by the President via TWEA to OFAC.⁵² To this day, OFAC "administers and enforces economic and trade sanctions."⁵³ The official government website for OFAC summarizes its duties with the following:

The Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against *targeted* foreign countries, *terrorists*, international *narcotics traffickers*, and those engaged in activities related to the proliferation of *weapons of mass destruction*. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under US jurisdiction.⁵⁴

The role of OFAC increased in recent decades under the leadership of Director Richard Newcomb, who stepped down in 2004.⁵⁵

Id.

50. See Cuban Assets Control Regulations, 28 Fed. Reg. 6,974, 6,974 (July 8, 1963) (to be codified at 31 C.F.R. pt. 515) (adopting regulations to control financial and commercial transactions involving Cuba).

51. See *Regan*, 468 U.S. at 225 (discussing legislative history behind Regulation 201(b) and TWEA); see also 31 C.F.R. § 515.201(b) (1997) (prohibiting transactions with designated foreign countries). "Alternative statutory authority for the Cuban Assets Control Regulations was found in the Foreign Assistance Act of 1961" *Regan*, 468 U.S. at 225 n.1.

52. See Treas. Dep't Order No. 128 (Rev. 1, Oct. 15, 1962); see also *Regan*, 468 U.S. at 226 n.2 (citing 50 U.S.C. app. § 5(b) (1963)).

53. Office of Foreign Assets Control v. Voices in the Wilderness, 329 F. Supp. 2d 71, 74 (D.D.C. 2004) (defining OFAC's role in "the Department of the Treasury.>").

54. U.S. Treasury: Office of Foreign Assets Control, <http://www.treasury.gov/offices/enforcement/ofac/> (last visited June 29, 2007) (emphasis added) (providing OFAC mission statement).

55. See David Ivanovich, *Case Puts Agency in Spotlight*, HOUSTON CHRON., Feb. 26, 2006 ("Today's OFAC is largely the creation of Richard Newcomb, who headed the agency for 17 years before stepping down in 2004 During Newcomb's tenure, OFAC's responsibilities mushroomed as the United States employed economic sanctions more frequently as a foreign policy tool.").

3. *The International Emergency Economic Powers Act*

In 1977, Congress amended section 5(b) of TWEA to specifically limit presidential power under TWEA to times of war.⁵⁶ Simultaneously, Congress enacted the International Emergency Economic Powers Act (“IEEPA”), which granted the President the authority to use emergency economic powers in times of peacetime crises.⁵⁷ The IEEPA states, in relevant part:

Any authority granted to the President by section 1702 of this title may be exercised to deal with any *unusual and extraordinary threat*, which has its source in whole or substantial part outside the United States, *to the national security, foreign policy, or economy* of the United States, *if the President declares a national emergency* with respect to such threat.⁵⁸

Prior to exercising authority conferred by IEEPA, the President must consult Congress, if possible.⁵⁹ Nevertheless, Congress reserves the right to enact a joint resolution into law, terminating a president’s declaration of a national emergency.⁶⁰

To facilitate the use of the presidential IEEPA authority to continue embargoes, “Congress decided to grandfather existing exercises of the President’s ‘national emergency’ authorities.”⁶¹ Under the grandfather clause, any presidential authority exercised as a result of a national emergency declared by a President prior to July 1, 1977 may continue to be exercised, regardless of the amendment to TWEA.⁶² Annual extension of the declared “national emergency”

56. See *Regan*, 468 U.S. at 227; see also S. REP. No. 95-466, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. 4540, 4541 (“The purpose of the bill is to revise and delimit the President’s authority to regulate international economic transactions during wars or national emergencies.”).

57. See *Regan*, 468 U.S. at 227-28 (granting authority similar to authority granted by TWEA).

58. 50 U.S.C. § 1701(a) (1977) (emphasis added).

59. See 50 U.S.C. § 1703(a) (1977) (“(a) Consultation with Congress: The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.”).

60. See 50 U.S.C. § 1622(a)(1) (1976) (detailing procedure for congressional joint resolution).

61. *Regan*, 468 U.S. at 228.

62. See Trading With the Enemy Act, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977). Section 101(b) reads:

(b) Notwithstanding the amendment made by subsection (a), the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President

authority must be in the national interest of the U.S.⁶³ Since IEEPA's enactment in 1977, however, every U.S. President - Carter,⁶⁴ Regan,⁶⁵ George H.W. Bush,⁶⁶ Clinton,⁶⁷ and George W.

before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

Id.

63. *See id.* (noting requirement of national interest).

64. *See* Determination Extending the Exercise of Certain Authorities Under the Trading With the Enemy Act, 43 Fed. Reg. 40,449 (Sept. 12, 1978), Determination Extending the Exercise of Certain Authorities Under the Trading With the Enemy Act, 44 Fed. Reg. 53,153 (Sept. 13, 1979), Determination Concerning the Exercise of Certain Authorities Under the Trading With the Enemy Act, 45 Fed. Reg. 59,549 (Sept. 10, 1980).

65. *See* Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 46 Fed. Reg. 45,321 (Sept. 10, 1981), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 47 Fed. Reg. 39,797 (Sept. 8, 1982), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 48 Fed. Reg. 40,695 (Sept. 7, 1983), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 49 Fed. Reg. 35,927 (Sept. 11, 1984), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 50 Fed. Reg. 36,563 (Sept. 5, 1985), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 51 Fed. Reg. 30,201 (Aug. 20, 1986), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 52 Fed. Reg. 33,397 (Aug. 27, 1987), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 53 Fed. Reg. 35,289 (Sept. 8, 1988).

66. *See* Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 54 Fed. Reg. 37,089 (Aug. 28, 1989), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 55 Fed. Reg. 37,309 (Sept. 5, 1990), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 56 Fed. Reg. 48,415 (Sept. 13, 1991); Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 57 Fed. Reg. 43,125 (Aug. 28, 1992).

67. *See* Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 58 Fed. Reg. 51,209 (Sept. 13, 1993), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 59 Fed. Reg. 47,229 (Sept. 8, 1994), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 60 Fed. Reg. 47,659 (Sept. 8, 1995); Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 61 Fed. Reg. 46,529 (Aug. 27, 1996), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 62 Fed. Reg. 48,729 (Sept. 12, 1997), Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 63 Fed. Reg. 50,455 (Sept. 11, 1998), Presidential Determination on Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 64 Fed. Reg. 51,885 (Sept. 10, 1999), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 65 Fed. Reg. 55,883 (Sept. 12, 2000).

Bush⁶⁸ - has deemed the one-year extension of presidential national emergency authority against Cuba to be in the U.S.'s national interest.

In *Regan v. Wald*, the United States Supreme Court addressed the interaction of TWEA and IEEPA via the grandfather clause.⁶⁹ Donald Regan, Petitioner, served as Secretary of the Treasury under President Ronald Reagan.⁷⁰ Respondents, Ruth Wald, et al., were a group of American citizens seeking an injunction against a 1982 amendment to the 1977 IEEPA, which banned travel to Cuba.⁷¹ The U.S. Court of Appeals for the First Circuit concluded that the 1982 amendment lacked statutory authority and remanded the case to the District Court of Massachusetts "with instructions to issue the preliminary injunction."⁷² Although the majority, in a five-four opinion, upheld the 1982 amendment banning licensed travel to Cuba, Justice Blackmun penned a strong dissent. Justices Brennan, Marshall, and Powell joined. The dissent criticized the expansion of presidential authority under the IEEPA and, via the grandfather clause, the TWEA, noting the congressional desire to limit such executive authority that stood behind the enactment of the IEEPA and the corresponding amendment of the TWEA.⁷³

OFAC's response to the WBC licensing request for the Cuban national team, coupled with the Bush administration's heightened enforcement of foreign policy regarding Cuba, engenders a new analysis of the legislative intent behind the IEEPA and its grandfather clause; thus reopening the conflicting opinions of the *Regan* decision.

68. See Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 66 Fed. Reg. 47,943 (Sept. 12, 2001), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 67 Fed. Reg. 58,681 (Sept. 13, 2002), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 68 Fed. Reg. 54,325 (Sept. 12, 2003), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 69 Fed. Reg. 55,497 (Sept. 10, 2004), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 70 Fed. Reg. 54,607 (Sept. 12, 2005), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 71 Fed. Reg. 54,399 (Sept. 13, 2006), Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 72 Fed. Reg. 53,409 (Sept. 13, 2007).

69. See generally *Regan v. Wald*, 468 U.S. 222 (1984) (interpreting International Emergency Economic Powers Act ("IEEPA") grandfather clause).

70. See *id.* at 222.

71. See *id.* at 224.

72. *Id.* at 225.

73. See *id.* at 244-45 (Blackmun, J., dissenting) ("TWEA emergency authority operated as a one-way ratchet to enhance greatly the President's discretionary authority over foreign policy.").

4. *Cuban Democracy Act*

Congress enacted the Cuban Democracy Act in 1992.⁷⁴ The Cuban Democracy Act “called explicitly for regime change in Cuba;”⁷⁵ however, the Clinton administration’s approach toward Cuba “conced[ed]. . . authority over sanctions regulations to Congress,” and was marked by a belief in “people-to-people exchange as the means to bring change to Cuba.”⁷⁶ The Cuban Democracy Act, although codified, only purports to recommend a U.S. policy regarding Cuba.⁷⁷ Although critical of Fidel Castro’s unyielding power, the Cuban Democracy Act sought to bring humanitarian aid to Cuba through food donations,⁷⁸ provision of medical supplies,⁷⁹ and the introduction of a postal infrastructure.⁸⁰ The Cuban Democracy Act delegated enforcement authority to the Secretary of the Treasury.⁸¹

5. *Cuban Liberty and Democracy Solidarity Act*

In 1996, the Cuban military attacked two U.S. civilian aircrafts, resulting in the loss of four American lives.⁸² This incident prompted rapid legislation of economic restrictions by the U.S.⁸³ President Clinton reactively signed the Cuban Liberty and Democracy Solidarity Act of 1996 (“LIBERTAD”) into law, seeking to strengthen economic sanctions against Cuba.⁸⁴ The LIBERTAD legislation responded to the national emergency declared by Presi-

74. See 22 U.S.C. §§ 6001-6010 (1992) (establishing Cuban Democracy Act).

75. Lutjens, *supra* note 15, at 7 (reviewing U.S. policy on Cuba); see also 22 U.S.C. § 6002 (1992) (setting forth ten policy statements toward Cuba).

76. Lutjens, *supra* note 15, at 7.

77. See 22 U.S.C. § 6002 (1992) (prefacing policy with “[i]t should be the policy of the United States . . .”).

78. See 22 U.S.C. § 6004(b) (1992) (“Nothing in this or any other Act shall prohibit donations of food to nongovernmental organizations or individuals in Cuba.”).

79. See 22 U.S.C. § 6004(c) (1992) (“Exports of medicines or medical supplies, instruments, or equipment to Cuba shall not be restricted . . .”).

80. See 22 U.S.C. § 6004(f) (1992) (“The United States Postal Service shall take such actions as are necessary to provide direct mail service to and from Cuba, including, in the absence of common carrier service between the 2 countries, the use of charter service providers.”).

81. See 22 U.S.C. § 6009(a) (1992) (“The authority to enforce this chapter shall be carried out by the Secretary of the Treasury. The Secretary of the Treasury shall exercise the authorities of the Trading With the Enemy Act [50 App. U.S.C.A. § 1 et seq.] in enforcing this chapter.”).

82. See Remarks on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 32 WEEKLY COMP. PRES. DOC. 478 (Mar. 12, 1996) (stating reasons for signing bill into law).

83. See *id.* (reviewing rationale of legislation).

84. See 22 U.S.C. §§ 6021-6091 (1996) (establishing LIBERTAD).

dent Clinton against Cuba in March 1996.⁸⁵ Section 1621(a) of the National Emergency Act (“NEA”) provides the President with authority to declare a national emergency.⁸⁶ Similar to the IEEPA, emergencies declared under the NEA terminate after one year, unless renewed by the President.⁸⁷ Since the 1996 emergency declaration, both Presidents Clinton⁸⁸ and George W. Bush⁸⁹ have consistently renewed the emergency every year; thus, since 1996, the U.S. has effectively had a national emergency declared against Cuba. That is, for the last eleven years, Cuba has engendered “[a] state of national crisis or a situation requiring immediate and extraordinary national action” upon the United States.⁹⁰

LIBERTAD “continued the Cuban embargo indefinitely and effectively suspended the IEEPA’s requirement that the President

85. See 61 Fed. Reg. 8,843 (Mar. 1, 1996) (declaring national emergency following Cuban military attack on U.S. civilian aircraft).

86. See 50 U.S.C. § 1621(a) (1976) (detailing process for presidential declaration of emergency). Subsection (a) of § 1621 states:

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

Id.

87. See 50 U.S.C. § 1622(d) (1976). Subsection (d) of sec. 1622 states:

(d) Automatic termination of national emergency; continuation notice from President to Congress; publication in Federal Register

Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.

Id.

88. See Continuation of the National Emergency Relating to Cuba, 62 Fed. Reg. 9,347 (Feb. 27, 1997); Continuation of the National Emergency Relating to Cuba, 63 Fed. Reg. 9,923 (Feb. 25, 1998); Continuation of the National Emergency Relating to Cuba, 64 Fed. Reg. 9,903 (Feb. 24, 1999); Continuation of the National Emergency Relating to Cuba, 65 Fed. Reg. 10,929 (Feb. 25, 2000).

89. See Continuation of the National Emergency Relating to Cuba, 66 Fed. Reg. 12,841 (Feb. 27, 2001); Continuation of the National Emergency Relating to Cuba, 67 Fed. Reg. 9,387 (Feb. 26, 2002); Continuation of the National Emergency Relating to Cuba, 68 Fed. Reg. 9,849 (Feb. 27, 2003); Continuation of the National Emergency Relating to Cuba, 69 Fed. Reg. 9,513 (Feb. 26, 2004); Continuation of the National Emergency Relating to Cuba, 70 Fed. Reg. 8,919 (Feb. 18, 2005); Continuation of the National Emergency Relating to Cuba, 71 Fed. Reg. 2,133 (Jan. 10, 2006); Continuation of the National Emergency Relating to Cuba, 72 Fed. Reg. 9,231 (Feb. 26, 2007).

90. BLACK’S LAW DICTIONARY 1046 (7th ed. 1999) (defining “national emergency”).

revisit the basis for the American Cuban embargo each year.”⁹¹ LIBERTAD essentially “codified the regulations implementing the Cuban embargo.”⁹² Nevertheless, U.S. Presidents annually renew the national emergency status as to Cuba under the authority conferred by the IEEPA.⁹³ The combination of presidential national emergency authority under the NEA and IEEPA results essentially in dual-coverage of emergency status for Cuban relations.⁹⁴

6. *The Bush Administration and U.S.-Cuba Policy*

The administration of George W. Bush, most notably the second administration, has vigorously pursued enforcement of sanctions on Cuba.⁹⁵ In addition to the administration’s initial denial of the MLB’s license request for Cuban participation in the WBC, the Bush administration returned fifteen Cubans to Cuba upon a strict “interpretation of current ‘wet foot/dry foot’ standards,”⁹⁶ (which was later ruled by a federal judge to be wrongful);⁹⁷ denied visas to fifty-four of the fifty-eight “Cuban scholars scheduled to participate in the Twenty-sixth International Congress of the Latin American Studies Association;”⁹⁸ and, prompted the expulsion of “a group of [sixteen] Cuban businessmen who were meeting with U.S. oil company representatives [in a Mexican hotel] to discuss possibilities for offshore drilling.”⁹⁹ Most recently, Oscar-winning film director and outspoken critic of President Bush, Michael Moore came under investigation by OFAC in relation to his film *Sicko*, in which he takes U.S. citizens suffering from 9/11-related illnesses to Cuba for treatment.¹⁰⁰

91. *United States v. Brodie*, 403 F.3d 123, 127 n.1 (3d Cir. 2005) (reviewing history of U.S. foreign policy regarding Cuba).

92. *Havana Club Holding v. Galleon*, 203 F.3d 116, 120 (2d Cir. 2000) (reviewing legislative background of Cuban embargo for determination of intellectual property rights).

93. For a discussion of the annual renewal of IEEPA presidential authority as to Cuba, see *supra* notes 64-68 and accompanying text.

94. For a discussion of the annual renewal of national emergency presidential authority as to Cuba under the NEA, see *supra* notes 88-89 and accompanying text.

95. See Lutjens, *supra* note 15, at 4 (reviewing Bush administration’s “zealous pursuit of potential violations” of Cuban embargo, most notably in early 2006).

96. See *id.* at 3-4.

97. See *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343, 1348 (S.D. Fla. 2006) (holding that Cuban migrants who landed on bridge had “dry feet” for purpose of seeking political asylum).

98. Lutjens, *supra* note 15, at 4.

99. *Id.*

100. See *Michael Moore on the Hot Seat for Film’s Cuba Trip*, CNN.com, <http://www.cnn.com/2007/SHOWBIZ/TV/05/10/film.michaelmoore.ap/index.html> (on file with author) (“The Treasury Department’s [OFAC] notified Moore in a

As early as 2001, President Bush called for an increase in OFAC power to restrict licensing.¹⁰¹ Then, in May 2002, President Bush announced his Initiative for a New Cuba (“INC”), explaining that the United States would promote humanitarian aid to Cuba, while upholding economic restrictions on the island nation until it demonstrated “free and fair” elections and began “to adopt meaningful market-based reforms.”¹⁰² Interestingly, Bush’s remarks, from the East Room of the White House, were demonstrably polarized, resembling “trash talk” between competing athletes. Bush described Castro as a “tyrant” with “bankrupt vision” who is surrounded by “his cronies.”¹⁰³ Furthermore, the “you first” basis that underlies President Bush’s INC presumes a power structure between the nations: “*If Cuba’s Government. . . and if Cuba also. . . only then I will work. . . .*”¹⁰⁴

B. Modern Politics, International Sports and the U.S.

Although the modern Olympic Games were envisioned as the “‘free trade of the future,’ [where] [n]o nation would regulate [for]. . . its political advantage,” the Olympic Games and other international athletic competitions have become routine grounds for political standoff.¹⁰⁵ In an era of global conflict and global sport, the two arenas inevitably overlap.¹⁰⁶ Since the “first postwar Games were held in London” in 1948, political strategizing resulted in the ban or refused participation of dozens of nations in international competitions.¹⁰⁷ Germany and Japan’s Axis alliance in World War

letter dated May 2[.2007] that it was conducting a civil investigation for possible violations of the U.S. trade embargo restricting travel to Cuba.”).

101. See Statement: Toward a Democratic Cuba, 37 WEEKLY COMP. PRES. DOC. 1036 (July 13, 2001) [hereinafter Statement] (“I have asked the Treasury Department to enhance and expand the enforcement capabilities of the [OFAC] It is important that we uphold and enforce the law to the fullest extent with a view toward preventing unlicensed and excessive travel”).

102. Remarks Announcing the Initiative for a New Cuba, 38 WEEKLY COMP. PRES. DOC. 853 (May 20, 2002) [hereinafter Remarks Announcing] (reviewing necessary changes on part of Cuba prior to U.S. lessening economic sanctions).

103. *Id.* at 852-53.

104. *Id.* at 853 (emphasis added).

105. NAFZIGER, *supra* note 19, at 49 (quoting Baron Pierre de Coubertin, founder of modern Olympics). Nafziger notes, however, that “considering the course of twentieth century history,” politics and sports have remained distinct “[t]o a remarkable extent.” *Id.*

106. See *id.* (“Simply stated, the international sports arena is also a political arena.”). “Sports and the arts are too often forced to carry the burden of failed diplomacy.” Vecsey, *supra* note 10, at 811.

107. See NAFZINGER, *supra* note 19, at 50 (reviewing examples of nation exclusion from international competitions).

II resulted in their ban from the 1948 Olympics.¹⁰⁸ Additionally, conflict with Palestine also banned Israel from the 1948 Olympics.¹⁰⁹ East Germany declined participation in the 1952 Olympics due to a statehood recognition conflict with the International Olympic Committee.¹¹⁰ “Several national teams boycotted the 1956 Games in Melbourne to protest the Soviet invasion of Hungary, the British-French seizure of the Suez Canal, and. . . the participation by a Taiwanese team. . . .”¹¹¹ The 1968 Olympic Games are noted for the demonstration of “Black Power” by “two American sprinters.”¹¹² Politics continued to play an important role in the 1972 Olympic Games in Munich after Israeli athletes died in a terrorist attack.¹¹³ Finally, in 1980, U.S. President Carter organized a boycott of the Moscow Olympic Games.¹¹⁴

The United States gradually began to use sports as a political tool in the 1970s.¹¹⁵ Despite the extensive regulatory clamp on U.S.-Cuba relations, the United States permitted Cuban participation in several U.S.-hosted international sporting events.¹¹⁶ In 1987, the U.S. allowed Cuban athletes to participate in the Pan-American Games in Indianapolis, Indiana.¹¹⁷ Cuba also competed in the 1996 Summer Olympic Games in Atlanta, Georgia, without political conflict.¹¹⁸ The Clinton administration permitted the Cuban national baseball team to play an exhibition game against the

108. *See id.* (describing post-WWII international relations and athletic competitions).

109. *See id.* (describing political conflicts at 1948 Olympics).

110. *See id.* (explaining East Germany’s political protestation of Olympics as means of prompting international recognition).

111. *Id.*

112. *See* NAFZINGER, *supra* note 19, at 50.

113. *See id.* (detailing tragedy at Munich Olympics).

114. *See id.* (describing politics’ role in 1980 Games).

115. *See id.* at 53 (noting reversal of relative U.S. modesty in sport-politics upon realization “that governmental involvement in sports may help promote the national interest . . .”). “The more immediate motivations for a foreign sports policy included public disenchantment with the management and quality of participation by the United States team in the 1972 (Munich) Olympic Games and the public’s shock of witnessing terrorism there.” *Id.*

116. *See* The Associated Press, *U.S. Government Shuts Cuba Out of World Baseball Classic*, PITT. TRIB. REV., Dec. 16, 2005, at Sports (reviewing Cuban participation in international sporting events hosted by United States).

117. *See* NAFZINGER, *supra* note 19, at 92-93 (1988) (“In 1987 the United States issued visas to a large delegation of athletes from Cuba, with which the United States did not maintain diplomatic relations, to enable them to participate in the Pan-American Games in Indianapolis.”).

118. *See* Stephen Wilson, *Rogge Wants No Trouble over Cuba if U.S. Bids for 2016*, HAMILTON SPECTATOR, Jan. 19, 2006, at 13 (noting International Olympic Committee President Jacques Rogge’s comments regarding lack of entry restrictions upon Cuban teams at 1996 Olympic Games in Atlanta); *see also* The Associated Press,

Baltimore Orioles at Camden Yards in 1999.¹¹⁹ In the summer of 2005, “Cuba’s national soccer team was allowed to come to the United States for the [Confederation of North, Central American and Caribbean Association Football] Gold Cup, the championship of North and Central America and the Caribbean.”¹²⁰

International sports, though ideally not associated with politics, have developed a consistent pattern of diplomatic entanglements and protestations. Cuba, though economically and ideologically separated from the United States, was allowed to compete in U.S.-hosted sporting events, with increasing frequency, prior to the WBC.

C. Special License for Cuban Participation in Athletic Competitions With the Potential of Earnings

Currently, U.S. policy requires a special license, via OFAC, for Cuban participation in a U.S.-hosted sporting event, if the event offers financial gain.¹²¹ OFAC is a division of the United States Department of the Treasury (“Treasury”),¹²² and the Treasury is a component of the executive branch.¹²³ Because the discretion is vested in OFAC via the Treasury, and the Treasury’s power is, in turn, vested via the current U.S. presidential administration,¹²⁴ the Code of Federal Regulations (“CFR”) serves as the preliminary gov-

supra note 116, at Sports (reviewing history of Cuban participation in U.S.-held events).

119. See The Associated Press, *supra* note 116, at Sports (“In 1999, the U.S. government allowed Cuba’s national team to play an exhibition game against the Baltimore Orioles at Camden Yards, the second leg of a home-and-home series.”). In 1999, prior to the relocation and renaming of the Montreal Expos to the Washington, D.C. Nationals, Baltimore was the geographically closest venue to the U.S. capital for such an exhibition against a Major League Baseball team.

120. *Id.*

121. See 31 C.F.R. § 501.801(b) (2003) (governing specific licensing procedures); see also 31 C.F.R. § 515.501 (2003) (referring to 31 C.F.R. § 501.801 for licensing procedures specific to Cuban Assets Control Regulations (“CACR”).

122. See U.S. Treasury – Office of Foreign Assets Control, <http://www.treasury.gov/offices/enforcement/ofac/> (last visited June 29, 2007) (stating that “the [OFAC] of the US Department of the Treasury administers” U.S. economic sanctions).

123. See 31 U.S.C. § 301(a)-(b) (2003) (defining Treasury Department). Subsections (a) and (b) of § 301 state:

(a) The Department of the Treasury is an executive department of the United States Government at the seat of the Government.

(b) The head of the Department is the Secretary of the Treasury. The Secretary is appointed by the President, by and with the advice and consent of the Senate.

Id.

124. For a discussion of the bestowing of authority upon the Secretary of the Treasury and, in turn, upon OFAC, see *supra* notes 40-47 and accompanying text.

erning doctrine for OFAC.¹²⁵ Chapter V, Part 500 of the CFR, entitled “Foreign Assets Control Regulations,” promulgates the administrative laws enforced upon nations designated by the current U.S. President.¹²⁶ More particularly, Section 500.101 of Title 31, Subsection b, stipulates that licensing transactions are only authorized by means of the TWEA, the Foreign Assistance Act, “or any proclamation, order, regulation or license issued pursuant thereto.”¹²⁷

OFAC permits two forms of licensing for transactions with countries sanctioned by the TWEA: general and specific licenses.¹²⁸ Part 515 of Chapter V, entitled “Cuban Assets Control Regulations” (“CACR”), deals expressly with OFAC’s power to enforce the U.S. embargo on Cuba.¹²⁹ Subsection 201 prohibits the “withdrawal from the United States of. . . currency” to Cuba without the authorization of the Secretary of the Treasury.¹³⁰ Although the CACR specifically addresses licensing for U.S. citizens and residents to travel to Cuba for participation in athletic competitions,¹³¹ no corollary regulation exists for Cuban residents traveling to the United States for sporting events.¹³²

125. *See generally* 31 C.F.R. § 500 (2006) (introducing sanction regulations).

126. *See id.*

127. 31 C.F.R. § 500.101 (2006) (authorizing transactions via TWEA). Section (b) states:

No license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction prohibited by any law other than the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as amended, the Foreign Assistance Act of 1961, 22 U.S.C. 2370, or any proclamation, order, regulation or license issued pursuant thereto.

Id.

128. *See* 31 C.F.R. §501.801 (2001) (defining general and specific licenses). General licenses are those “issued authorizing under appropriate terms and conditions certain types of transactions which are subject to the prohibitions contained in [Title 31, Chapter V of the C.F.R.]” *Id.* Specific licenses are those “not authorized by general license.” *Id.*

129. *See generally* 31 C.F.R. § 515 (1997) (regarding CACR).

130. *See* 31 C.F.R. § 515.201(a)(3) (1997) (prohibiting transfer of currency from United States). 31 C.F.R. § 515.201(a) prohibits the transactions specifically enumerated in Subsections (a)(1)-(3) to “a foreign country designated under this part.” 31 C.F.R. § 515.201(a) (1997). 31 C.F.R. § 515.201(d) specifically lists Cuba as a “foreign country designated under this part.” 31 C.F.R. § 515.201(d) (1997).

131. *See* 31 C.F.R. § 515.567 (2001) (regulating licenses for U.S. residents traveling to Cuba).

132. Licensing for the authorization of Cuban travel to the United States is governed by 31 C.F.R. § 515.571 (2001), which regulates travel-related transactions for Cuban nationals in the United States. *See* 31 C.F.R. § 515.567 (2001) (directing the reader to “[s]ee § 515.571 for the authorization of certain transactions related to the activities of nationals of Cuba traveling in the United States.”).

III. ANALYSIS

The Treasury Department's initial license denial to the Cuban national baseball team, and later revocation of that denial, raised both microcosmic and macrocosmic political-legal issues in regard to U.S.-Cuba relations. Appropriately, the unique standoff surrounding the WBC allows for a multi-faceted inquiry into the structural foundations of constitutional and administrative law that yield the authority behind OFAC licensing decisions and the political consequences of those decisions as they play out in international relations. Additionally, a critical analysis of the discursive structures displayed by both the United States and Cuba during the political exchange resulting from the OFAC licensing denial highlights the absurdity of the contemporary U.S.-Cuba rift.

A. Checks on Executive Authority; Appealability of OFAC Decisions

Because the founders of American democracy had experienced oppressive tyranny resulting from an overseas monarchy, they were not concerned with political efficiency as much as limiting authority when establishing a new system of government.¹³³ Therefore, in order "to preserve the liberties of the people from excessive concentrations of authority,"¹³⁴ the founders structured the U.S. Constitution to divide the federal government into a tripod of branches, each with mutual checks and balances.¹³⁵ Likewise, parallel systems of government between the several states and the federal branches instilled additional checks and balances upon power,¹³⁶ thereby reinforcing "principles. . . of our dual and combined polity [that] are indispensable to the harmonious and beneficial working of the system."¹³⁷ Removed from the tyranny of an

133. See *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 545 (1949) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)) ("Even the Government—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution. The designers of that system distributed authority among the three branches 'not to promote efficiency but to preclude the exercise of arbitrary power.'").

134. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 91 (1947). "Checks and balances were established in order that this should be 'a government of laws and not of men.'" *Myers*, 272 U.S. at 292.

135. See Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 *Tex. L. Rev.* 1181, 1182 (2000) (reviewing Constitutional format of U.S. democracy).

136. See *Amy v. The Supervisors*, 78 U.S. 136, 138 (1870) (describing system of checks and balances).

137. *Id.*

overseas monarchy, the founders constructed American democracy to limit government power by distributing it: “[b]y these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority.”¹³⁸ For the founders, democracy was not concerned with efficiency as much as limiting authority.¹³⁹

Based on this separation of power, foreign policy decisions have generally been reserved for the executive branch under the political question doctrine, without subjection to judicial scrutiny.¹⁴⁰ Although not all foreign policy decisions are outside the realm of judicial review,¹⁴¹ because the Supreme Court has recognized congressional limitations in foreign policy and foreign affairs,¹⁴² when the President does act within the scope of

138. *Mitchell*, 330 U.S. at 91. “Checks and balances were established in order that this should be ‘a government of laws and not of men.’” *Myers*, 272 U.S. at 292.

139. *See Am. Fed’n of Labor v. Am. Sash & Door Co.* 335 U.S. 538, 545 (1949) (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting)) (discussing rationale of checks and balances).

140. *See Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (defining political question doctrine).

The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch As *Baker* [369 U.S. 186 (1962)] plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.

Id.

141. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) (“It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

142. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”). In *Hamdan*, the Court failed to find the dissenting opinions of Justices Thomas, Scalia and Alito persuasive in dealing with the habeas relief claim of a Guantanamo detainee. *See id.* at 2749 (stating holding). Justice Thomas argued in dissent that in times of conflict between foreign nations, such as the war on terrorism, “[the Court’s] duty to defer to the Executive’s military and foreign policy judgment is at its zenith.” *Id.* at 2825 (Thomas, J., dissenting). Thomas, without persuading the Court, went on to state that military and foreign policy judgments:

are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

congressionally conferred authority, his actions are given wide latitude.¹⁴³

In addition, the nondelegation doctrine, which stems from the separation of powers and constitutional structure of checks and balances, “recognizes that the coordinate branches must be allowed a certain degree of discretion in carrying out legislation” and, accordingly, “requires that legislation provide intelligible principles to guide the exercise of discretion.”¹⁴⁴ In turn, “intelligible principle[s]” allow a reviewing Court “to determine ‘whether the will of Congress has been obeyed’ or whether a statute’s ‘absence of standards for. . . guidance’ essentially grants de facto legislative authority to a coordinate branch.”¹⁴⁵

In the spectrum of foreign relations, the U.S. government is largely unchecked and unbalanced,¹⁴⁶ with “the Court allow[ing] Congress to defer greatly to the discretion of the president. . . .”¹⁴⁷ As a result, “the separation of powers doctrine in the foreign affairs arena is left to the determination of Congress and the president.”¹⁴⁸ Furthermore, even though the IEEPA narrowed the scope of presidential authority solely to times of war, it still lacked “intelligible principles to guide the discretion of the president in choosing which powers to use.”¹⁴⁹

In particular, the grandfather clause of the IEEPA stands as the marquis example of guidance of presidential power that lacks an intelligible principle.¹⁵⁰ Indeed, even the Supreme Court struggled to define the extent of presidential power conferred by the grandfather clause, coming only to a five-four decision in *Regan*.¹⁵¹ In addi-

Id. (Thomas, J., dissenting) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 582-83 (2004)).

143. *See id.* at 2824 (Thomas, J., dissenting) (citing *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)) (“When ‘the President acts pursuant to an express or implied authorization from Congress,’ his actions are ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.’”).

144. *See* Luong, *supra* note 135, at 1183-84 (describing nondelegation doctrine).

145. *Id.* at 1184.

146. *See id.* at 1186-87 (“It is no longer accurate to characterize our government, in matters of foreign relations, as one of separated powers checked and balanced against each other.”).

147. *Id.* at 1187.

148. *Id.*

149. *See id.* at 1190 (applying nondelegation doctrine to IEEPA).

150. *See* *Regan v. Wald*, 468 U.S. 222, 244 (1984) (Blackmun, J., dissenting) (disagreeing with majority’s conferral of presidential power under IEEPA grandfather clause).

151. *See id.* (debating IEEPA guidance or lack thereof throughout).

tion, presidential treatment of the IEEPA grandfather clause corroborates its unintelligibility. For example, between the passage of the IEEPA and the Supreme Court decision in *Regan*, each President renewed the U.S. national emergency status with respect to Cuba, a practice which continued even after *Regan*.¹⁵²

Moreover, the delegation of authority engenders an additionally relevant legal issue in light of the federal government's inadequate performance in the aftermath of Hurricane Katrina, namely the potential of nepotism in executive appointments.¹⁵³ Article II, section 2 of the U.S. Constitution assigns the President the power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint . . . all other Officers of the United States."¹⁵⁴ Under the definition set forth by the U.S. Supreme Court, the OFAC director is one such officer of the United States.¹⁵⁵ "[A] vast array of complementary or lesser war powers short of the use of military force. . . are granted to the president, but [the] use [of those powers] is not as prominent and not as open to public scrutiny [as war powers]."¹⁵⁶

During the Cuban licensing denial, the position of OFAC director was held by Robert Werner, who replaced long-time director Richard Newcomb in 2004.¹⁵⁷ Werner held the position for only

152. For a discussion on the renewal of the national emergency with respect to Cuba, see *supra* notes 64-68 and accompanying text.

153. See David Oshinsky, *Hell and High Water*, N.Y. TIMES, July, 9, 2006, at 71 (reviewing prevalent administrative cronyism made public in the wake of Hurricane Katrina). "Michael Brown, director of the Federal Emergency Management Agency, personified the cronyism that had corrupted FEMA in recent years. Following Brown's behavior during the crisis — his broken promises about sending buses and supplies, his private concerns about looking stylish and eating well — is an ordeal." *Id.*

154. U.S. CONST. art. II, sec. 2, cl. 2.

155. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) ("We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."). Moreover, the President is further granted "a vast array of complementary or lesser war powers short of the use of military force, . . . but [the] use [of those powers] is not as prominent and not as open to public scrutiny [as war powers]." See Luong, *supra* note 135, at 1181 (reviewing lesser known presidential authorities).

156. Luong, *supra* note 135 at 1181.

157. See Luxner News, Inc., *Publishers, Authors Blast OFAC Regulations as 'Censorship,' Bob Werner to head OFAC*, CUBA NEWS, Oct. 1, 2004, at 4 ("On Oct. 1[, 2004], Robert Werner replaced Richard Newcomb as director of Treasury's [OFAC].").

Werner, who was the Treasury's assistant general counsel for enforcement and intelligence, previously served in the Justice Department's Office of Legal Counsel. He was also a federal prosecutor in Connecticut, and once headed that state's gaming regulatory agency. In the private sector, Werner was a partner at Bingham Dana LLP (now Bingham McCutchen) and an officer at The Phoenix Home Life Mutual Insurance

two years;¹⁵⁸ he “now serves as the Director of the Treasury’s Financial Crimes Enforcement Network (FinCEN).”¹⁵⁹ Barbara Hammerle replaced Werner on an interim basis.¹⁶⁰ Hammerle then ceded authority to OFAC’s current director, Adam Szubin,¹⁶¹ who was named to the position on August 1, 2006.¹⁶² As a result, over a 26-month period, four unelected officials—Newcomb, Werner, Hammerle, and Szubin—were all delegated the authority to carry out forty-year-old embargo laws against Cuba, blanketed in a national foreign policy that features a President-renewed national emergency.¹⁶³

Moreover, although the IEEPA powers of economic regulation conferred upon the president are seemingly necessary for emergencies, it is inherently problematic that the president also possesses the authority to declare emergency status, thus triggering the economic regulatory powers.¹⁶⁴ The IEEPA attempts to limit this authority by requiring congressional consultation, if possible; however, the Cuban regulations transcend the IEEPA through the

Company (now The Phoenix Companies). Newcomb, who in August announced his intent to leave OFAC after heading the agency for 17 years, will work for the Washington law firm of Baker Donelson.

Id.; see also Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, <http://www.bakerdonelson.com/ContentWide.aspx?NodeID=32&PersonID=5958> (last visited June 29, 2007) (listing countries Newcomb “was responsible for implementing economic sanctions and asset controls against [such as] Burma, Cuba, Iran, Liberia, Libya, Sudan, Zimbabwe, . . . Colombia, and . . . Syria [as well as] Serbia, Angola, the Taliban, Haiti, South Africa, Panama, Vietnam, North Korea and Cambodia”).

158. See Luxner News, Inc., *supra* note 157 (detailing Werner’s career).

159. U.S. Treasury Press Releases, *Adam Szubin Named New OFAC Director*, <http://www.ustreas.gov.press/release.hp39.htm> (last visited June 29, 2007).

160. See *id.* (noting Hammerle “served as Acting OFAC Director since Werner’s departure”).

161. According to his biography on the U.S. Treasury website:

Szubin came to the Treasury from the Department of Justice, where he served as Counsel to the Deputy Attorney General, coordinating the Department’s efforts to combat terrorism financing. Prior to assuming that position, he worked as a trial attorney in the Civil Division of the Justice Department, serving as a member of the Terrorism Litigation Task Force. Szubin clerked for Judge Ronald Gilman on the U.S. Court of Appeals for the Sixth Circuit. He graduated from Harvard Law School, cum laude, and Harvard College, magna cum laude, and was a Fulbright scholar.

U.S. Treasury – Biography of Adam J. Szubin – Director of OFAC, <http://www.treasury.gov/organization/bios/szubin-e.html> (last visited June 29, 2007).

162. See *id.*

163. For a discussion on the historical background of the CACR, see *supra* notes 48-51 and accompanying text; for a discussion on the annual renewal of national emergency status under IEEPA presidential powers with respect to Cuba, see *supra* notes 64-68 and accompanying text.

164. See Luong, *supra* note 135, at 1212 (illustrating inherent conflict involved in IEEPA presidential authority).

grandfather clause, thus making such a requirement unclear. Furthermore, any consultation requirement becomes moot if Congress yields itself as an executive rubber stamp, since “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”¹⁶⁵

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court warned of such unbounded presidential authority, stating, “[b]y his prestige as head of state and his influence upon public opinion [the President] exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”¹⁶⁶ Although *Youngstown* technically dealt with the domestic use of executive powers, foreign policy implicated by the Korean War, Cold War, and Red Scare defined the contemporary political climate.¹⁶⁷ As such, significant parallels exist between *Youngstown* and the Cuba licensing situation in that both featured delegated executive authority, carried out domestically, in a martial political context in the absence of congressionally declared war.

What democratic channels were present for World Baseball Classic, Inc. after OFAC’s initial denial of a special license for the Cuban national team? Assuming, *arguendo*, that OFAC’s initial denial was not self-reversed, the question arises of the Cuban national team’s available remedies. OFAC’s initial denial of MLB’s licensing application for Cuban participation in the WBC did not preclude MLB from submitting an additional application for a specific license.¹⁶⁸ In fact, MLB took advantage of this opportunity and applied for specific licensing of Cuban participation, leading to OFAC’s reversal.¹⁶⁹

Agency decisions, such as OFAC’s denial of Cuban participation in the WBC, generally remain undisturbed if they are reasona-

165. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).

166. *Id.* at 653-54 (Jackson, J., concurring).

167. See Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 151-53 (1993) (citing Alan F. Westin, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958)).

168. See 31 C.F.R. § 501.801(b)(4) (2001) (“The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.”).

169. See The Associated Press, *Cuba Will Be Included in Classic U.S. Treasury Says Play Ball*, AUGUSTA CHRON., Jan. 21, 2006, at C07 (“Baseball’s first application was denied in mid-December by the Treasury Department’s [OFAC], but the commissioner’s office and the players’ association reapplied after Cuba said it would donate any profits it receives to victims of Hurricane Katrina.”).

ble.¹⁷⁰ “An agency decision is reasonable ‘so long as it is not arbitrary, capricious, or clearly contrary to law.’”¹⁷¹ In *Consarc Corp. v. U.S. Treasury Dep’t, Office of Foreign Assets Control*, the U.S. Court of Appeals for the District of Columbia Circuit dealt with an interpretation of the Iraqi Sanctions Regulations and found equity arguments unpersuasive considering the broad deference given to OFAC in interpreting its own statutes.¹⁷² By the standard established in *Consarc*, a challenge to OFAC’s interpretation of the governing statute “must either demonstrate that the statute clearly forbids [OFAC’s] interpretation or that the interpretation is unreasonable.”¹⁷³ As the administrative agency authorized to grant licenses for Cuban travel, OFAC decisions are subject to such review.

The Supreme Court set out a new standard for judicial review of a statute in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷⁴ *Chevron* dealt with the Court’s review of an Environmental Protection Agency interpretation of a congressional act.¹⁷⁵ The *Chevron* Court held:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.¹⁷⁶

170. *See Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343, 1347 (S.D. Fla. 2006) (stating procedure for agency review).

171. *Id.* (quoting *Cook v. Wiley*, 208 F.3d 1314, 1319 (11th Cir. 1991)) (reviewing “varying levels of deference due to agency decisions” set out by Supreme Court).

172. *See* 71 F.3d 909, 915 (D.C. Cir. 1995) (interpreting Iraqi Sanctions Regulations).

173. *Id.* at 914.

174. 467 U.S. 837 (1984).

175. *See id.* at 837 (stating facts of case).

176. *Id.* at 842-43.

The *Chevron* Court went on to state that “[w]e have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations ‘has been consistently followed by the Court. . . .’”¹⁷⁷

OFAC’s interpretation of its own regulations “receives ‘an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation.’”¹⁷⁸ Interestingly, however, OFAC does not discuss individual license applications or denials with the media.¹⁷⁹ In fact, Molly Millerwise, a spokeswoman for the Treasury Department, said “that it was against policy to comment on individual applications.”¹⁸⁰ Seemingly in contrast with OFAC policy, the Freedom of Information Act requires that agencies publish final opinions and decisions.¹⁸¹ Nonetheless, grounds for OFAC’s denial of Cuban licensing for the WBC were never publicly released.

OFAC decisions are not immune to review.¹⁸² For appeal purposes, an OFAC decision on a license “constitute[s] final agency

177. *Id.* at 844.

178. *Consarc*, 71 F.3d at 915 (quoting *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 702 (D.C. Cir. 1994) (stating OFAC interpretation of Iraqi Sanctions Regulations accords greater judicial deference because such regulations are OFAC regulations)).

179. See Jack Curry, *Baseball; New effort by MLB to include Cuba in World Classic*, N.Y. TIMES, Dec. 3, 2005, at D3 (reviewing MLB’s revised application for OFAC special license permitting Cuban participation).

180. *Id.* (quoting email of Millerwise).

181. See 31 C.F.R. § 501.805(a) (2003). Section 501.805(a) of Title 31 declares:

The records of the Office of Foreign Assets Control which are required by the Freedom of Information Act (5 U.S.C. 552) to be made available to the public shall be made available in accordance with the definitions, procedures, payment of fees, and other provisions of the regulations on the Disclosure of Records of the Departmental Offices and of other bureaus and offices of the Department of the Treasury issued under 5 U.S.C. 552 and published at 31 CFR part 1.

Id. Furthermore, the Freedom of Information Act states that:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . .

5 U.S.C. § 552(a)(2)(A)-(B) (2002).

182. See *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1343, 1347 (S.D. Fla. 2006) (reviewing Coast Guard decision). Because the Coast Guard is an agency, similar to OFAC, if its Coast Guard decisions are reviewable, it follows that OFAC’s decisions are also reviewable.

action.”¹⁸³ Although the Administrative Procedure Act (“APA”) governs judicial review of government agency decisions,¹⁸⁴ because OFAC rules deal with foreign policy issues, they are generally not subject to the APA.¹⁸⁵ Despite the inapplicability of the APA, Federal Courts have held OFAC decisions, regarding the IEEPA, to APA standards for judicial review.¹⁸⁶ Thus, OFAC decisions that are

183. 31 C.F.R. § 501.802 (2003) (“[OFAC] will advise each applicant of the decision respecting filed applications. The decision of the [OFAC] acting on behalf of the Secretary of the Treasury with respect to an application shall constitute final agency action.”).

184. See 5 U.S.C. § 706 (1966) (delineating scope of judicial review of government agency decisions). 5 U.S.C. § 706 states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.

185. See 31 C.F.R. § 501.804 (2003). The Code of Federal Regulations deals with the applicability of the Administrative Procedure Act to OFAC rulemaking:

(a) All rules and other public documents are issued by the Director of the Office of Foreign Assets Control. In general, rulemaking by the Office of Foreign Assets Control involves foreign affairs functions of the United States, and for that reason is exempt from the requirements under the Administrative Procedure Act (5 U.S.C. 553) for notice of proposed rulemaking, opportunity for public comment, and delay in effective date.

(b) Any interested person may petition the Director of the Office of Foreign Assets Control in writing for the issuance, amendment, or repeal of any rule.

Id.

186. See *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (applying 5 U.S.C. § 706 standard of review to OFAC determination that charitable foundation was “Specifically Designated Global Terrorist”); see also *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846, 851 n.2 (E.D. La. 1992) (noting IEEPA and APA, 5 U.S.C. § 701, allow for judicial review of OFAC decisions). The Court in *Holy Land* went on to state “if the OFAC’s actions were not

based on substantial evidence and are not arbitrary or capricious must be affirmed by the reviewing court.¹⁸⁷

This history of OFAC review engenders the question of the reviewability of the WBC licensing denial. One U.S. Circuit Court of Appeals determined the congressional intent behind the Cuban embargo was “to prevent any Cuban national or entity from attracting hard currency into Cuba *by selling, assigning, or otherwise transferring rights subject to United States jurisdiction.*”¹⁸⁸ Arguably, under this definition, the granting of prize money from an international competition does not fall under the embargo’s intended scope.¹⁸⁹ Only to the extent that the embargo seeks to limit transactional economic activity and not currency conferred by means of reward, could a liberal OFAC execution of the embargo have been construed.

OFAC’s initial denial of MLB’s licensing application for Cuban participation in the WBC can be viewed as arbitrary because the determination was made by an individual rather than by rules and procedures. Moreover, the decision was arguably founded in prejudice rather than in fact.¹⁹⁰ The existence of alternative political-economic motivations for the reversal of the licensing denial suggests the initial denial was arbitrary.¹⁹¹

The puzzles of U.S. policy toward Cuba in 2006 are striking. . . . Responding to pressure from the Puerto Rican government, the International Baseball Federation, and the International Olympic Committee (which warned that violation of Olympic standards of inclusion of all athletes might jeopardize future U.S. bids to host the games), OFAC reconsidered and granted Cuba the license. . . .¹⁹²

arbitrary and capricious, and were based on substantial evidence, we must affirm.” 333 F.3d at 162.

187. See *Holy Land*, 333 F.3d at 162. In *Holy Land*, the Court upheld the Treasury’s authority to define property interests under the IEEPA as broadly as “an interest of any nature whatsoever, direct or indirect.” *Id.* (quoting 31 C.F.R. § 500.311-312 (1990)).

188. *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir. 2000) (emphasis added) (declaring congressional intent behind embargo and stating “[t]he CACR make this clear, and the LIBERTAD Act, by codifying the CACR, provides *unmistakable* evidence of congressional purpose.” (emphasis added)).

189. See generally 31 C.F.R. §§ 500.201-204 (1967) (detailing economic sanction regulation).

190. See BLACK’S LAW DICTIONARY 110 (7th ed. 1999) (defining “arbitrary” as “founded on prejudice or preference rather than on reason or fact.”).

191. See Lutjens, *supra* note 15, at 3-4 (reviewing suspicious grounds for denial and reversal of decision).

192. *Id.* at 3.

Venezuela also offered to host the WBC after the U.S. denied Cuba the necessary licensing.¹⁹³ “The International Baseball Federation. . . notified Major League Baseball that it [would] withdraw its sanction of the Classic without the presence of. . . defending Olympic champion [Cuba], and rightfully so.”¹⁹⁴ Additionally, “Florida is a swing state in presidential elections,” lending the significant population of vociferous, anti-Castro Cuban-Americans within its borders considerable political clout.¹⁹⁵ Almost humorously, the U.S. government pays hard currency to Cuba in the form of an annual \$4,000 rent check for the U.S. military facility at Guantanamo Bay.¹⁹⁶ The lease agreement for Guantanamo stems from 1903, when Theodore Roosevelt “leased it from the newly formed Republic of Cuba as a naval base and coaling station.”¹⁹⁷ Furthering the political posturing, Fidel Castro refuses to cash the U.S. checks.¹⁹⁸ All these factors lend support to the argument that the agency decision was arbitrary.

B. *Regan v. Wald* Revisited

The decision by the United States Supreme Court in *Regan v. Wald* serves as the seminal interpretation of the IEEPA grandfather clause.¹⁹⁹ The 1977 Treasury Department regulations adjusted the TWEA so as to limit presidential authority to times of war, and eliminating presidential authority in times of national emergency.²⁰⁰ In *Regan*, the Court read the IEEPA’s grandfather clause as allowing the President to continue exercising national emergency power “in order to continue existing economic embargoes, such as that against Cuba,” without having to “declare a new national emergency.”²⁰¹ Because “the ‘authority’ to regulate all property transac-

193. See The Associated Press, *Venezuela Proposes Hosting Part of World Baseball Classic*, WASH. POST, Dec. 28, 2005, available at http://www.usatoday.com/sports/baseball/2005-12-28-venezuela_x.htm.

194. Vecsey, *supra* note 10, at 811.

195. See *Laughter in Havana Decades-old U.S. Embargo Hurts Everyone but Fidel Castro*, FRESNO BEE, Mar. 9, 2006, at B8 (noting political value of Florida).

196. See BRANDT GOLDSTEIN, *STORMING THE COURT* 19-20 (2005) (describing ongoing U.S. lease of land for Guantanamo Bay from Cuba).

197. *Id.* at 19.

198. See *id.* at 19-20 (“[A] disgusted Fidel Castro . . . refused to cash it.”).

199. See 468 U.S. 222, 222 (1984) (addressing 1982 amendment to 1977 Treasury Department regulations dealing with Cuban property transactions).

200. See *id.* at 227-28 (discussing curtailment of TWEA).

201. *Id.* at 228. The 1982 amendment in question in *Regan* curtailed travel to Cuba. See *id.* at 222. As a result, a group of U.S. citizens seeking to travel to Cuba brought an action against the government. See *id.* (discussing procedural history of case).

tions with Cuba. . . was being ‘exercised’ on July 1, 1977,” the grandfather clause of the IEEPA preserved the President’s ability to exercise national emergency authority without declaring annual national emergencies.²⁰² In a five-four opinion, the majority upheld the 1982 amendments, which restricted travel to Cuba.²⁰³ Seemingly failing to separate “heightened tensions” from “war,” the Court stated: “Eliminating the President’s authority to modify existing licenses in response to heightened tensions with Cuba would have sparked just the sort of controversy the grandfather clause was designed to avoid.”²⁰⁴

Three justices joined Justice Blackmun’s dissent,²⁰⁵ finding the grandfather clause did not “encompass[] the exercise of Presidential power” required to enforce the 1982 restrictions on travel-related transactions.²⁰⁶ By granting the President broad authority through the TWEA to determine when a national emergency began and ended, the clause “operated as a one-way ratchet to enhance greatly the President’s discretionary authority over foreign policy.”²⁰⁷ Likewise, contemporary members of the House Subcommittee “believed that some of the actions taken by the Executive Branch under the TWEA had, at most, a shaky foundation in actual emergency situations.”²⁰⁸

The political background during the IEEPA’s passage reflected a congressional intent to limit executive power,²⁰⁹ as “a series of events, including the Watergate scandal and. . . the Vietnam War, prompted Congress to pass legislation constraining the President’s foreign policy authority.”²¹⁰ As a result, “to curtail the discretionary authority over foreign affairs that the President had accumulated because of past ‘emergencies’ that no longer fit Congress’ concep-

202. *See id.* at 232 (detailing mechanics of IEEPA grandfather clause).

203. *See id.* at 244 (“[B]ased on an analysis of the language of the grandfather clause as well as its purpose and legislative history, that the grandfathered authorities of § 5(b) of TWEA provide an adequate statutory basis for . . . restricting the scope of permissible travel-related transactions with Cuba and Cuban nationals.”).

204. *Regan*, 468 U.S. at 223.

205. *See id.* at 244 (joining Justice Blackmun’s dissent were Justices Brennan, Marshall and Powell).

206. *See id.* (Blackmun, J., dissenting) (“I would affirm the judgment of the United States Court of Appeals for the First Circuit.”).

207. *Id.* at 245 (Blackmun, J., dissenting). At the time the TWEA was amended in 1977, the United States remained under four President-determined states of national emergency: one by Franklin Roosevelt, one by Harry Truman, and two by Richard Nixon. *See id.* at 245-46 (Blackmun, J., dissenting).

208. *Id.* at 247 (Blackmun, J., dissenting).

209. *See Luong, supra* note 135, at 1188 (reviewing historically contemporary political climate influencing passage of IEEPA).

210. *Id.*

tion of that term. . . . Congress amended the TWEA and enacted the IEEPA.”²¹¹

The IEEPA, without the grandfather clause, removed the President’s national emergency authority under TWEA and replaced it with authority for “unusual and extraordinary threat. . . if the President declares a national emergency.”²¹² Under the IEEPA, the President’s use of national emergency power was limited to “congressional consultation, review and termination.”²¹³ The grandfather clause, however, still dealt with regulations enacted under TWEA prior to the passage of the IEEPA,²¹⁴ such as the Cuban Assets Control Regulations.²¹⁵

In debating whether to let existing regulations expire under the IEEPA or to institute the grandfather clause, members of Congress argued “[i]t would have been incongruous. . . for Congress to force the President to declare new emergencies in nonemergency situations simply to avoid having to end restrictions that, for negotiating reasons, the President had concluded should not be ended unilaterally.”²¹⁶ In addition, “many of the grandfathered restrictions had no real basis in an emergency situation.”²¹⁷ By requiring the President to annually renew declarations of a national emergency, IEEPA “avoided perpetuating the ‘phony character’ of the national emergencies under which . . . exercises of [TWEA] sec. 5(b) power were promulgated.”²¹⁸

To summarize, the IEEPA sought to limit presidential power in times of national emergency.²¹⁹ “[T]he primary purpose of the Act was to curtail ‘future uses’ of precisely that residual [TWEA] authority.”²²⁰ Regardless of the outcome of the grandfather clause of the IEEPA, the legislative motivation behind the IEEPA itself was to

211. *Regan*, 468 U.S. at 248 (Blackmun, J., dissenting).

212. *Id.* at 228 (quoting 50 U.S.C. §1701(a)).

213. *Id.* at 249 (Blackmun, J., dissenting).

214. *See id.* (explaining purpose of grandfather clause). The “(IEEPA) was enacted to cover the President’s exercise of emergency economic powers in response to peacetime crises, . . . essentially the same authorities . . . as those in § 5(b) of TWEA.” *Id.* at 222.

215. For a discussion on the CACR, see *supra* notes 48-55 and accompanying text.

216. *Regan*, 468 U.S. at 250 (Blackmun, J., dissenting).

217. *Id.* at 254 (Blackmun, J., dissenting).

218. *Id.* (Blackmun, J., dissenting).

219. *See id.* at 259 (Blackmun, J., dissenting) “Congress had no hesitation about restricting the President’s authority to exercise the emergency powers that he possessed but had not yet exercised.” *Id.*

220. *Id.* (Blackmun, J., dissenting).

limit presidential power.²²¹ The majority opinion in *Regan*, upholding a wide interpretation of the IEEPA grandfather clause powers, struck down a restrictive view of presidential powers.²²²

Following a period of administrative deference to Congress carrying out the Cuban embargo regulations,²²³ the current administration has been typified by congressional deference to executive power.²²⁴ Ironically, the bilateral approach to U.S. Cuba policy under the previous administration lulled the legislative drive of the previous political era, symbolized by the passage of the IEEPA.²²⁵ Consequently, the executive authority that awaited its fate before the 1984 Supreme Court in *Regan v. Wald* has been reinvigorated, exemplified by the board's expansive enforcement of minute foreign policy regulations.²²⁶ Now, twenty years after the *Regan v. Wald* decision, the issue of the President's authority in enforcing the Cuban embargo arose once again in response to OFAC's denial of a license that would have permitted the Cuban national team to participate in the WBC.²²⁷

C. Reading the Bush and Castro Dialogue Ideologically

The U.S.-Cuba, Bush-Castro conflict that arose during preparation for the WBC contains a strong ideological undercurrent.²²⁸ The dialogue underlying President Bush's 2002 Initiative for a New Cuba – “a beautiful island [turned] into a prison” – seemingly inculcates OFAC's 2006 actions denying Cuba a participatory license

221. See *Regan*, 468 U.S. at 246 n.1 (Blackmun, J., dissenting) (discussing passage of National Emergencies Act one year prior to IEEPA, which terminated President-declared national emergencies after two years).

222. See *id.* at 255 (Blackmun, J., dissenting) (“The Court rejects this narrow interpretation in favor of one that loses all sight of the general legislative purpose of the IEEPA and the clear legislative intent behind the grandfather clause.”).

223. See Lutjens, *supra* note 15, at 7 (noting congressional inclusion in Cuban embargo enforcement under Clinton administration).

224. See *id.* (stating Congress has exhibited substantial deference to presidential power under Bush Administration).

225. See Luong *supra* note 135, at 1188-92 (discussing political context surrounding IEEPA and Congress' subsequent desire to limit presidential authority).

226. See Lutjens, *supra* note 15, at 7 (listing slew of recent enforcement of Cuban policy concerns by OFAC and executive branch); see also MARK P. SULLIVAN, CUBA: ISSUES FOR THE 109TH CONGRESS, CRS REPORT FOR CONGRESS, at 1-6 (2006) (reviewing recent developments in U.S.-Cuba policy).

227. For a discussion on the licensing of the Cuban national team and OFAC's original denial, see *supra* notes 121-32.

228. See HOBBERMAN, *supra* note 5, at 3 (describing ideology as “[a]ny systematic set of attitudes and beliefs, whether about . . . political policy [and] appeal[s] to economic factors, reason or emotion . . .” (quoting L.B. Brown, *Ideology*, 10)).

for the WBC.²²⁹ Ironically, by refusing Cuban athletes' travel into the United States, OFAC only reinforced the "prison"-like nature of Cuba. Unlike the Clinton administration, which sought to bring democratic change to Cuba through "people-to-people exchange," the hard-line stance of the George W. Bush administration has furthered the "Cuba as prison" mentality.²³⁰ In fact, even the George H.W. Bush administration allowed the U.S. to participate in the 1991 Havana-held Pan American Games.²³¹

President Castro's challenge of the OFAC license denial parallels and foreshadows the physical challenge of baseball.²³² The uniqueness of athletic competition – uniting the "[s]peed, force [and] dexterity" of the human specimen with social display and theatricality – creates a unique "drama for which an ideology of dynamism in the service of human self-expression becomes the ultimate value."²³³ Castro's emphasis on the Cuban national team as a mechanized unit – "Cuba" – coincides with the Marxist background of the nation.²³⁴ Although Marxist doctrine disavows "political athleticism" because of its inherent narcissism and emphasis on "intrinsic human qualities,"²³⁵ Castro's adversarial responses to OFAC's license denial simultaneously denote Cuba as a team, a State, and an oppositional force to American bureaucracy and reinforced that "Castro is a rare phenomenon who presents the most charismatic image of the statesman-athlete since Mussolini: his physical charisma and passionate interest in sport are legendary."²³⁶

Particularly, Cuban national sport represents its national political ideology.²³⁷ Cuba illustrates "[t]he social equation which brings the closest interrelationship between culture, sport and politics

229. See Remarks Announcing, *supra* note 102, at 852 (depicting Castro's rule).

230. See Lutjens, *supra* note 15, at 7 (delineating differences between U.S.-Cuba policy under current and previous administrations).

231. See Paula J. Pettavino & GERALYN PYE, *Sport in Cuba: Castro's Last Stand*, in SPORT IN LATIN AMERICA AND THE CARIBBEAN 148 (Joseph L. Arbena & David G. LaFrance eds., 2002) (noting United States' second place finish to host nation Cuba at 1991 Pan American Games).

232. See Curry, *supra* note 179, at D3 (stating that Cubans "view themselves, rightfully so, as world champions and the Olympic champions . . ." (quoting Paul Archey, MLB's senior vice president for international matters)).

233. See HOBBERMAN, *supra* note 5, at 7-8 (exploring distinctive aspects of athletics).

234. See *id.* at 71 (explaining Marxism's influence on Castro's view of Cuba's national team).

235. See *id.* (discussing foundational tenets of Marxism as applied to sport).

236. *Id.* at 70.

237. See BENJAMIN LOWE, DAVID B. KANIN & ANDREW STRENK, SPORT AND INTERNATIONAL RELATIONS V (1978) (discussing importance of sports in Cuban culture).

. . . [beginning] [i]n 1967, [with] the Cuban government announc[ing] that sport was to be seen as an inseparable element of education, culture, health, defence [sic], happiness and the development of the people.”²³⁸ Similarly, “[a]t the 1962 Caribbean Games in Jamaica, . . . Castro sent his Cuban team on their way with the message that their mission was to win and thereby demonstrate that socialism was superior to capitalism.”²³⁹

Upon Cuba’s return from a second-place finish at the WBC, the nation met the team with a parade to celebrate its – and the country’s – victory over the U.S.’s attempt to exclude them.²⁴⁰ “The team of amateurs who returned to the island having outlasted everyone but Japan received a hero’s welcome at home. Many thousands of Cubans lined the streets to cheer them on. Castro personally greeted each player”²⁴¹ As a result, “the image of the [athlete] has led a double life: first, as a metaphor of the political leader and, second, as a metaphor of the body politic.”²⁴²

Through sport, Cuba presents a singularity of nationhood to the international community.²⁴³ “Since taking power in 1959, the Castro regime has been driven to restructure the island’s sports culture by several motives: ideological principles, creation of the ‘new man,’ military preparedness, gender and racial equity, public health improvement, recreation and entertainment, domestic pride in the nation, and international prestige.”²⁴⁴ At the 1996 Summer Olympics in Atlanta, Georgia, Cuba won nine gold medals and twenty-five medals overall.²⁴⁵ At the 2000 Olympics in Sydney, Australia, Cuba won eleven gold medals and twenty-nine medals overall.²⁴⁶ For Cuba, international sports competitions symbolize an “embattled and isolated” national political struggle.²⁴⁷

238. *Id.*

239. *Id.* at 203. Unexpectedly, several of the national athletes defected while in Jamaica. *See id.* (noting defection of several athletes after tournament).

240. *See* Latin American Institute, *Cuba Thwarts U.S. Policy to Play in World Baseball Classic, but is Barred from Donating Winnings to Katrina Victims*, *Noticen: Cent. Am. & Caribbean Aff.*, Mar. 30, 2006 (noting ties between performance at international athletic competitions and nationalism).

241. *Id.*

242. HOBERMAN, *supra* note 5, at 54 (developing theory that athletics symbolizes political economy of state).

243. *See* Pettavino & Pye, *supra* note 231, at 145 (describing various motivations behind Cuba’s cultural exuberance of sport).

244. *Id.*

245. *See id.* (reviewing past success at international competitions).

246. *See id.* (noting Cuban success at 2000 Olympics).

247. *See id.* at 158 (portraying future of Cuban sports).

In contrast to the uniform, communist voice of Cuba, the United States' political discourse throughout the licensing incident has been markedly multi-faceted, symbolic of a democratic bureaucracy.²⁴⁸ Paralleling Cuba, the U.S. WBC team faced problems representative of its own political system and cultural composition: major league all-stars with dual-citizenship and varying heritage faced the dilemma of choosing what team to play for while other players worried about contract clauses and their own professional careers.²⁴⁹

On the face of the discourse between the U.S. and Cuba during the licensing debacle, and, more latent, within the respective sport cultures of each nation, clear differences exist. The repetitive dialogue of bipolarization – “democracy” against “communist regime” – trickled down through the administration into OFAC's original license denial.²⁵⁰ By ultimately granting the Cuban national team a special license to participate in the WBC, however, OFAC facilitated cultural interaction.²⁵¹ During the WBC, the Cuban team stayed at a five-star hotel and took a charter bus to practices, which were held in a stadium more luxurious than Cuba's.²⁵² The team took time to visit Habitat for Humanity, and, according to a team translator: “They are absorbing everything. They are so

248. See The Associated Press, *U.S. Government Shuts Cuba out of World Baseball Classic*, PITT. TRIB. REV., Dec. 16, 2005, at Sports (quoting White House spokesman Scott McClellan: “We want people in Cuba to participate in freedom.”); Curry, *supra* note 179 (reviewing statements by Treasury spokeswoman Molly Millerwise).

249. See generally Tyler Kepner, *Baseball: Yankees' Notebook; The World Classic: No; The World Series: Yes*, N.Y. TIMES, Feb. 17, 2006, at D8 (depicting various perceptions of MLB players and owners on participating in WBC).

250. See Murray Chass, *On Baseball; Pitching Judgment Has Been Spotty for the Yankees*, N.Y. TIMES, Dec. 18, 2005, at 85 (describing original denial of license to Cuba).

Just when baseball thought it was done with political interference (steroids), politics has reared its ugly head and blocked Cuba's participation in the inaugural World Baseball Classic. The Treasury Department has informed Major League Baseball that Cuba cannot compete. In 1999, the Cuban national team played a home-and-home series with the Baltimore Orioles with the blessing of the Clinton administration. But the Bush administration has a different view of Cuba. It can be seen clearly from the statement of a Treasury Department spokeswoman, Molly Millerwise, in commenting on the rejection of a license for Cuba to play. She referred to “the desperate and repressive Castro regime” and the “ordinary Cubans who are forced to live in oppression under Castro's rule.”

Id.

251. See Jesse Sanchez, *Cuba Enjoys Truly Unique Experience* (Mar. 19, 2006), http://ww2.worldbaseballclassic.com/2006/news/article.jsp?ymd=20060319&content_id=1355926&vkey=wbc_news&fext=.jsp&sid=wbc (describing experiences of Cuban national team during their stay in San Diego).

252. See *id.* (reviewing Cuban athletes' experience in U.S. during WBC).

happy. Look at their faces. I am so happy they can experience this city.”²⁵³

Despite requiring full democracy in Cuba as a prerequisite for normalized relations,²⁵⁴ the Bush administration initially attempted to block Cuba’s baseball team from witnessing U.S. democracy first-hand.²⁵⁵ “[A]llowing Cuba into the tournament seemed a logical way for the United States to improve ties with the Cuban people that might bear fruit for democracy later.”²⁵⁶ President Bush has continuously noted that the choice resides with Fidel Castro to improve diplomatic relations with the U.S.²⁵⁷ and President Bush regularly invokes an “us vs. them” mentality:²⁵⁸ “If Mr. Castro refuses our offer, he will be protecting his cronies at the expense of his people.”²⁵⁹ Although labeling his policy an initiative, President Bush’s doctrine for a democratic Cuba ironically requires nearly all initiative not to be on the U.S., but on Cuba. President Bush’s vision of Cuba has become increasingly bleak: his 2004 renewal of the 1996 national emergency with respect to Cuba declares it to be “a state-sponsor of terrorism” and warns that “entry of any U.S.-registered vessels into Cuban territorial waters could result in . . . loss of life . . . due to the potential use of . . . deadly force . . . by the Cuban military”²⁶⁰

While the political side-stepping and sound-byte remarks of the Bush administration typify a U.S. bureaucratic ideology, the challenging, abrasive remarks from Cuban leader Fidel Castro are demonstrative of a communist body politic.²⁶¹ Political progress requires displacement of these destructive communications and the wavelength of democracy is the logical candidate to initiate a dialogue. The political exchanges between the U.S. and Cuba in response to the WBC exemplify a misalignment of two unilateral discourses. Bush’s indirect refusal of Cuban participation in the

253. *Id.*

254. *See* Remarks Announcing, *supra* note 102, at 853 (“Full normalization of relations with Cuba . . . will only be possible when Cuba has a new government that is fully democratic . . .”).

255. *See A Diamond in March When Cuba’s Team Comes to Bat in the Free World*, DAYTONA NEWS-JOURNAL CORP., Jan. 28, 2006, at 04A [hereinafter *A Diamond in March*] (remarking on illogical stance of Bush’s administration).

256. *Id.*

257. *See* Remarks Announcing, *supra* note 102, at 854 (“[T]he choice rests with Mr. Castro.”).

258. *See id.* (discussing Bush’s attitude towards Cuba).

259. *Id.* (quoting President Bush).

260. Proclamation 7757, 40 WEEKLY COMP. PRES. DOC. 297 (Feb. 26, 2004).

261. *See* HOBERMAN, *supra* note 5, at 58 (“The fascist leader is, in short, an athlete [H]e takes pride in the act of mastery itself.”).

WBC signifies a democratic discourse that seeks to bury the misplaced rationale in an ambiguous clump of generations-old regulations; Castro's invocation of Hurricane Katrina tropes the democratic failures of the Bush administration while simultaneously denying the capitalist-base for the U.S. licensing refusal. Cuba seeks athletic competition to physically communicate its national strength; the U.S. seeks to deny Cuba economic prosperity related to such competition in an effort to declare its hegemonic power. Although both leaders' statements surrounding the WBC symbolize their respective political systems, both fall on deaf ears.

The arena of sport potentially unites such otherwise divergent discourses. Regardless of political setting or ideological language, the game of baseball unites both entities under a singular framework of rules: the rules of baseball. Although Castro's desire to play in the WBC and Bush's desire to remove Cuba's opportunity to play have differing political backgrounds, the actual act of playing itself could go a long way toward aligning U.S. and Cuban discourse.

D. Future Implications For U.S. policy Via Sport

"Politics and sports don't mix."²⁶² Although sport "has no intrinsic political value,"²⁶³ it is an expressive product "of that sociocultural system in which it occurs."²⁶⁴ Sport pervades cultures throughout space and time;²⁶⁵ thus, engagement in international sport engenders engagement in international culture.

In the wake of the Cold War, the U.S. undertook sport exchange programs to produce cultural understanding and pacify political tensions.²⁶⁶ The programs "served the broad interests of the United States in its relations with other countries."²⁶⁷ The interaction between opposing nations "increased mutual understanding."²⁶⁸ In its reports on the sport exchange programs, the State Department remarked: "We believe that what is good for a new or

262. Guillermo I. Martinez, *Castro's Iron Grip Reaches Into Puerto Rico*, S. FL. SUN-SENTINEL, Mar. 16, 2006, at 23A (quoting event promoter at Puerto Rico-based Cuban baseball game).

263. LOWE, KANIN & STRENK, *supra* note 237, at v.

264. *Id.* at 23 (describing connection between sport and culture).

265. *See id.* at 11, 23 (reviewing sport in Greek culture, social structure of Hopi Indians, Timbira tribe of Brazil and America, including Illinois subcultures).

266. *See id.* at 421-22 (reviewing cultural sports exchange programs).

267. *Id.* at 421 (quoting U.S. Advisory Commission on International Educational and Cultural Affairs: A Beacon of Hope – The Exchange-of-Persons Program, 28 (1963)).

268. *Id.*

developing country is good for the peace and stability of the world.”²⁶⁹

In the 1970s, the U.S. State Department founded its cultural programs under a functionalism doctrine.²⁷⁰ The philosophy of functionalism “postulates a basic and growing interdependence in the world” and views “contacts between nations . . . as being more important than their governmental structures.”²⁷¹ In a functionalist system, dependence on the state decreases as interdependence on foreign networks increases.²⁷² As contact between nations increases, and interdependence increases, economic, cultural and physical bonds are formed.²⁷³ As the number and strength of bonds between nations increase, it becomes more costly for nations to sever bonds through acts of violence and war.²⁷⁴ It follows, that contact through international sports competitions “contributes to international peace and understanding” because it builds international bonds.²⁷⁵ Although “[s]ports can create conflict as well as dissipate it . . ., [sports] may also rechannel conflict from higher levels of confrontation in politics and armaments, to playing fields, where it can be better regulated and controlled.”²⁷⁶

By creating the WBC, the MLB and the MLBPA renewed the functionalist spirit that invigorated international sports during the 1960s and 1970s.²⁷⁷ Unfortunately, OFAC was slower to get on the functionalism bandwagon.²⁷⁸ “One small bridge. One less sanction. One more chance for the two neighbors to play ball.”²⁷⁹

IV. CONCLUSION

Considering the deteriorating health and inevitable aging of Fidel Castro,²⁸⁰ the present time offers an unprecedented opportu-

269. *Id.* at 422 (quoting Nicholas Rodis, *The State Department's Athlete: A New Look to Foreign Policy*, AMATEUR ATHLETE, August 1964).

270. *See id.* at 472 (describing impact of functionalism on U.S. State Department cultural programs of 1970s).

271. *Id.* (describing philosophy of functionalism).

272. *See id.* at 472 (assessing costs and benefits of functionalist system).

273. *See id.* (analyzing how bonds are formed between nations)

274. *See id.* at 473 (analyzing functionalism's impact on war).

275. *See id.* (examining how sports help build relationships between nations).

276. *Id.*

277. *See* Latin American Institute, *supra* note 240 (describing WBC as “the real World Series”).

278. *See A Diamond in March*, *supra* note 255, at 04A (illustrating political downside to license denial).

279. *Id.*

280. *See* CNN.com, *Castro Makes TV Appearance from Bed*, <http://www.cnn.com/2006/WORLD/-americas/08/14/castro.cuba/index.html> (on file with au-

nity to the U.S. to foster diplomatic relations with Cuba to further the forty-year goal of bringing democracy to the island nation.²⁸¹ Using sports as a bargaining chip in the game of international politics has historically been an unsuccessful maneuver.²⁸² Furthermore, political opposition to a single nation's participation in an international event is futile without sufficient power.²⁸³ "Athletics should be a field of sportsmanship and friendship, not a forum for bullying and political one-upsmanship."²⁸⁴

The U.S. does not possess the requisite multinational diplomatic backing in its stance on Cuba that it once did.²⁸⁵ U.S. policy regarding Cuba may actually invert what was intended: the U.S. may be isolated from international political support instead of Cuba.²⁸⁶ Nor does U.S. policy regarding Cuba possess the democratic gusto of the era of its political inception.²⁸⁷ Although Cuba's national team was permitted to participate upon reapplication for licensing by World Baseball Classic, Inc.,²⁸⁸ the grant of permission was prompted not by judicial review of the OFAC decision, but by public forecast of political fallout resulting from the initial denial.²⁸⁹ The political balk between the U.S. and Cuba surrounding the WBC pierced the shroud of unchecked administrative authority that encompasses U.S. foreign policy. As with a balk in baseball, a political balk brings forth consequences.²⁹⁰ The controversy sur-

thor) (noting Castro's recovery from surgery and celebration of eightieth birthday).

281. See Statement, *supra* note 101, at 1036 (reviewing decades-long struggle for Cuban democracy).

282. See NAFZIGER, *supra* note 19, at 62 (reviewing general futility of economic boycotts and relating economic boycotts to sports boycotts).

283. See *id.* at 61 ("Power is a driving force of policy.").

284. Editorial, *Squeeze Play on Cuban Team*, DENV. POST, Dec. 19, 2005, at B07 (reviewing negative opinion of strong-arm U.S. policy regarding Cuba).

285. See Lutjens, *supra* note 15, at 7 ("[T]he United Nations General Assembly has voted against U.S. economic sanctions on Cuba since 1992, yet the sanctions continue."); Pettavino & Pye, *supra* note 229, at 152 (noting U.N. disapproval of Cuban Democracy Act). "59-3 vote of the United Nations General Assembly for the resolution calling for an end to the embargo." *Id.*

286. See Pettavino & Pye, *supra* note 231, at 152 (discussing possible consequence of U.S. policy towards Cuba).

287. See generally Suanne C. Milligan, Comment, *Another Inning in Cuban-United States Relations*, 2 Ind. Int'l & Comp. L. Rev. 281, 286-88 (1991) (describing political climate of 1960s during institutionalization of CACR).

288. See generally Latin American Institute, *supra* note 240 (reviewing final grant of permission for Cuban national team participation).

289. For a discussion on the alternative motivations for OFAC's reversal and the potential political and economic fallout avoided by granting Cuba permission, see *supra* notes 188-98 and accompanying text.

290. See Official Rules, *supra* note 1 (defining balk).

rounding the WBC forced not only a national introspection upon the current security of our foundational system of checks and balances, but also upon our own national ideological dialogue. In attempting to shut the door on Cuban participation in the WBC, OFAC revealed the policy-making process of the executive branch. The U.S. political balk resulting from the Bush administration's hard-line stance against Cuban participation in the WBC was another event in our post-9/11 era demonstrating the need to review the current status of our foundational system of checks and balances. Furthermore, the politicized diatribe between Bush and Castro shows that true diplomatic progress occurs through cultural diffusion, typified by such international interactions as the WBC. Perhaps our national ideology can progress through the window of international sport, since the doorways to diplomatic political exchange seemingly remain closed, perhaps now more than ever.

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