

NOTE

AN UNEVEN PLAYING FIELD:

THE EVOLVING LEGAL LANDSCAPE OF  
BASEBALL RELATIONS BETWEEN CUBA AND  
THE UNITED STATES

*Eric Beinhorn\**

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\* J.D. Candidate, 2020, Fordham University School of Law; B.A., 2013, Stony Brook University. I would like to thank Zoe for her unwavering love and encouragement, my family for their consistent support and advice, and the editors and staff of the *Fordham International Law Journal* for their hard work in preparing this Note for publication.

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### I. INTRODUCTION

Stories of Cuban athletes leaving the communist isle for the capitalist pastures of the United States read like a movie script. World-class Cuban baseball players, in pursuit of a better life, have allegedly been “kidnapped, held hostage, forced to sign binding documents at gun- and knifepoint, threatened with mutilation and terrorized by those from some of the world’s most murderous gangs.”<sup>1</sup> But this is no

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1. See Jeff Passan, *10 Degrees: Cuban Trafficking Grows into MLB's Ugly Secret*, YAHOO! SPORTS (Apr. 20, 2014, 11:47 PM), <https://sports.yahoo.com/news/10-degrees—cuban-trafficking-grows-into-mlb-s-ugly-secret-034704407.html> [https://perma.cc/G3TY-G4MT].

movie; every day, Cuban baseball players are sacrificing their lives by traveling to the United States in order to achieve their dream of securing a contract from one of thirty Major League Baseball (“MLB”) organizations.

US economic sanctions and MLB’s implementation of prohibitive rules against Cuba have significantly limited the paths by which Cuban citizens can legally and safely come to the United States to play baseball.<sup>2</sup> Generally, Cuban baseball players have been forced to escape Cuba under false auspices, clandestinely travel to a third country, and hastily obtain questionably legal residency there prior to signing a lucrative contract with an MLB club.<sup>3</sup> Unsurprisingly, this dangerous process known as defection often involves corrupt human trafficking and a multitude of international financial crimes by the players, their representatives, MLB teams, and even MLB itself.<sup>4</sup>

This defection process was the status quo until December 19, 2018, when MLB and the Cuban Baseball Federation (FCB) entered into an agreement (2018 MLB-FCB Agreement) that would purportedly bring an end to defection, the human trafficking of Cuban baseball players, and the international financial criminal violations inherent in the process.<sup>5</sup> The 2018 MLB-FCB Agreement, which President Barack Obama’s Treasury Department made possible through the granting of a general license,<sup>6</sup> and a policy interpretation

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2. See Rachel D. Solomon, *Cuban Baseball Players, The Unlucky Ones: United States-Cuban Professional Baseball Relations Should be an Integral Part of the United States-Cuban Relationship*, 10 J. INT’L BUS. & L. 153, 156-58 (2011) (discussing the economic restrictions on the freedom of Cuban baseball players and MLB’s eligibility rules).

3. *Id.* at 157.

4. See, e.g., Dara Lind, *Major League Baseball’s Human Trafficking Problem*, VOX (Sept. 15, 2014, 11:00 AM), <https://www.vox.com/2014/9/15/6147663/baseball-players-trafficking-cuba-puig-cartels-smuggling> [<https://perma.cc/72PG-3SPR>]; Jeff Passan, *Sources: A Federal Grand Jury is Investigating MLB’s International Dealings, and Officials on all Sides Are Worried*, YAHOO! SPORTS (Sept. 28, 2018, 1:58 AM), <https://sports.yahoo.com/sources-federal-grand-jury-investigating-mlbs-international-dealings-officials-sides-worried-055827471.html> [<https://perma.cc/LTB8-Q9TB>].

5. *MLB, MLBPA Reach Deal with Cuban Federation*, MLB NEWS (Dec. 19, 2018), <https://www.mlb.com/news/mlb-announces-deal-with-cuban-federation-c302036110> [<https://perma.cc/Y63Z-XWS5>] [hereinafter MLB Announcement].

6. Mark Townsend, *OFAC Confirms Stance on Unblocking Cuban Baseball Players*, YAHOO! SPORTS (Jan. 31, 2015, 2:27 AM), <http://sports.yahoo.com/blogs/mlb-big-league-stew/ofac-reaches-out-to-yoan-moncada-othercuban-stars-062132165.html> [<https://perma.cc/VR8E-S7F2>].

that concluded FCB was not a branch of the Cuban government,<sup>7</sup> allowed MLB clubs to safely and legally sign players directly from Cuba.<sup>8</sup> As part of this agreement, a percentage of that player's salary would be funneled into the FCB for the purpose of improving the baseball infrastructure in Cuba.<sup>9</sup>

This historic agreement was short-lived. On April 8, 2019 the Trump Administration moved to strictly reinforce the Cuban embargo in an attempt to “expose the crimes of the Castro regime,” and force democratic change upon a Cuban government which “spread violence and instability in the region.”<sup>10</sup> This strict reinforcement included a complete cancellation of the 2018 MLB-FCB Agreement.<sup>11</sup> In an abrupt reversal, the Trump Administration's Treasury Department determined that the FCB was in fact a branch of the Cuban government, and thus any payment remitted to it through MLB contracts was strictly prohibited under existing sanctions against the communist state.<sup>12</sup> Further, any contract with Cuban defectors would now only be approved through a more restrictive specific license, effectively destroying the 2018 MLB-FCB agreement.<sup>13</sup>

This Note will explore whether the 2018 MLB-FCB Agreement or the Trump Administration's cancellation of said agreement is more in line with the objectives of the United States' sanctions against Cuba. Part II will examine the history of economic sanctions against Cuba through present day. Part III will analyze the exceptions to those sanctions, and the US Treasury's role in granting licenses that circumvent the prohibitive sanctions. Part IV will discuss MLB's role in adhering to the economic sanctions against Cuba. Part V will

7. MLB Announcement, *supra* note 5.

8. *Id.*

9. *Id.*; Andrew Zimbalist, *Trump Administration's Nixing of MLB Player Transfer Deal with Cuba is Bad Policy*, FORBES (Apr. 11, 2019), <https://www.forbes.com/sites/andrewzimbalist/2019/04/11/trump-mlb-cuba/#1b11094a5b19> [<https://perma.cc/CQ9S-3BUX>].

10. Dan Merica, *Trump Unveils New Restrictions on Travel, Business with Cuba*, CNN (June 17, 2017, 2:00 PM), <https://www-m.cnn.com/2017/06/16/politics/trump-cuba-policy/index.html?r=https%3A%2F%2Fwww.google.com%2F> [<https://perma.cc/6L4C-S855>]; Zimbalist, *supra* note 9.

11. Jared Diamond & Vivian Salama, *Trump Administration Blocks Baseball Players From Cuba*, WALL ST. J. (Apr. 8, 2019, 9:45 PM), <https://www.wsj.com/articles/trump-administration-set-to-tighten-rules-for-baseball-players-from-cuba-11554747444> [<https://perma.cc/3AHS-NJML>].

12. *Id.*

13. *Id.*

examine the terms of the 2018 MLB-FCB Agreement and delineate the arguments by the MLB in favor of the agreement, and by the Trump Administration opposing the agreement. Part VI will present a forward-looking analysis, including reasonable solutions on how MLB and the Trump Administration can curb human trafficking and end the crimes inherent in the defection process, while still complying with the strictly enforced embargo.

## II. EVOLUTION OF ECONOMIC SANCTIONS AGAINST CUBA: NATIONAL SECURITY OR POLITICAL RETRIBUTION?

In order to best understand the two sides of the 2018 MLB-FCB Agreement, it is crucial to examine the history of sanctions that have hamstrung United States and Cuba relations. The initial authority for the United States' embargo against Cuba originates from the 1917 Trading with the Enemy Act ("TWEA"), which bans transfers of property between US citizens and enemy nations, unless authorized by the President.<sup>14</sup> The TWEA maintains that, during wartime, the President may:

[I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.<sup>15</sup>

In other words, the TWEA vests the executive with the authority to place economic embargos on enemy nations.<sup>16</sup> In 1933, Congress extended TWEA past its wartime application, to include circumstances of "existing national emergency."<sup>17</sup> The definition of "existing national emergency" has been widely interpreted to vest the President with the power to enforce embargos upon foreign countries irrespective of a

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14. Trading with the Enemy Act, 12 U.S.C. §95a (2010).

15. *Id.* at §95a(1)(B).

16. See Scott M. Cwiartney, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 395-97 (2000).

17. See *id.* at 396 (discussing 40 Stat. 966, March 9, 1933, ch 1, Title I, § 2).

declaration of war, and without even a declarative or specific national crisis.<sup>18</sup>

Under the aforementioned TWEA authority, Congress codified the thrust of the Cuban Embargo in 1963 with the enactment of the Cuban Assets Control Regulations (CACR). The CACR prohibits “transactions incident to travel to, from, and within Cuba” and, most importantly, “payment or transfer” of funds to Cuban Nationals.<sup>19</sup> Before the Communist Cuban Revolution of 1959, the major impetus for these sanctions, over one hundred Cuban nationals played Major League Baseball in the United States and could freely sign with any MLB club.<sup>20</sup> The CACR banned MLB clubs from performing *any* business in Cuba, including scouting or signing players.<sup>21</sup> The United States may criminally prosecute anyone who violates the TWEA or the CACR.<sup>22</sup>

National security was the initial justification for the embargo.<sup>23</sup> In his proclamation announcing the initial restrictions, President Kennedy stated the purpose of the sanctions was to reduce the threat to America and its ideals posed by Cuba’s alignment with communist powers.<sup>24</sup> In other words, Kennedy recognized that national security and democracy were paramount to the enactment and ultimate success of the embargo. The CACR had numerous additional objectives, each aimed at destabilizing the Cuban communist regime and keeping American soil safe. One of the stated goals of the CACR was to “isolate the Cuban government economically and deprive it of U.S. dollars.”<sup>25</sup> Courts have also maintained that the objectives underlying the TWEA and the CACR are: (1) to deny to Cuba or its nationals hard currency which might be used to promote activities inimical to the interests of the United States; (2) to retain blocked funds for possible use to settle

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18. See Solomon, *supra* note 2, at 169; see also Cwiertney, *supra* note 16, at 396-97 (citing *United States v. Fernandez-Pertierra*, 523 F. Supp. 1135, 1137 (S.D. Fla. 1981)).

19. Cuban Asset Control Regulations, 31 C.F.R. § 515.415(a)(1), (6) & (7) (2016).

20. Cwiertney, *supra* note 16, at 391.

21. Matthew Frankel, *Major League Problems: Baseball’s Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L.J. 383, 393-94 (2005).

22. Cwiertney, *supra* note 16, at 397.

23. See *id.* at 395-96.

24. See Proclamation No. 3447, 3 C.F.R. § 26 (Supp. 1962), 27 Fed. Reg. 1085 (Feb. 6, 1962) reprinted in 22 U.S.C. § 2370 (2008).

25. *The US Embargo Against Cuba: Its Impact on Economic and Social Rights*, AMNESTY INT’L 8 (Sept. 2009), <http://www.amnestyusa.org/pdfs/amr250072009eng.pdf> [<https://perma.cc/F2L2-STU5>].

claims against the Cuban government, or to vest to the United States if necessary; and (3) to use blocked funds for negotiation purposes in discussions with the Cuban government.<sup>26</sup>

For thirty years, the CACR served as the primary legislative tool for restricting financial ties between the United States and Cuba. In the early 1990s, in response to decades of communist influence in Cuba and, purportedly, national security concerns after Cuba downed two unarmed US civilian aircrafts,<sup>27</sup> the United States passed the Cuban Democracy Act (“CDA”) of 1992,<sup>28</sup> and the Helms-Burton Act of 1996,<sup>29</sup> which tightened the grip of the Cuban sanctions. The CDA extended the sanctions to include a “ban on conducting business in Cuba to U.S.-owned or controlled business located overseas.”<sup>30</sup> The Helms-Burton Act required the US government to enforce the CACR, doubling down on the ban that restricts MLB clubs from signing and scouting Cuban players.<sup>31</sup> The Helms-Burton Act continues the embargo indefinitely by maintaining all of the CACR restrictions until a democratically elected government is in power in Cuba and by requiring Congressional approval before the US President may lift the embargo.<sup>32</sup> The stated purposes of the CDA and the Helms-Burton Act were, again, national security with the aim of forcing the adoption of a democratically elected government in Cuba.<sup>33</sup>

Through the latter part of the 20th century, the US government’s position toward Cuba remained largely unchanged. The Clinton administration recognized the importance of providing aid to regular

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26. *Miranda v. Secretary of the Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975), *reh’g denied*, 514 F.2d 738 (5th Cir. 1975)).

27. *Civilian U.S. Planes Shot Down Near Cuba*, CNN (Feb. 24, 1996, 12:45 AM), [http://www.cnn.com/US/9602/cuba\\_shootdown/](http://www.cnn.com/US/9602/cuba_shootdown/) [<https://perma.cc/6ZUV-5W3N>]; Tim Weiner, *Clinton Considers Punishing Cubans for Plane Attack*, N.Y. TIMES (Feb. 26, 1996), <https://www.nytimes.com/1996/02/26/world/clinton-considers-punishing-cubans-for-plane-attack.html> [<https://perma.cc/KY2W-62QF>].

28. Cuban Democracy Act of 1992, 22 U.S.C. § 6001 (2009) [hereinafter CDA].

29. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6021 (2009) [hereinafter Helms-Burton Act].

30. CDA, *supra* note 28, at § 6005.

31. See Helms-Burton Act, 22 U.S.C.S. § 6032(c); see also Frankel, *supra* note 21, at 393-94.

32. See Anna Kaminsky, *A Major Smuggle Struggle: It’s Time for Major League Baseball to Step up to the Plate and Alleviate Its Cuban Smuggling Problem*, 24 CARDOZO J. INT’L & COMP. L. 193, 198 (2016).

33. See Solomon, *supra* note 2, at 170.

Cuban citizens,<sup>34</sup> so long as it circumvented the federal government.<sup>35</sup> In fact, in 1999 as a show of good faith toward this policy, President Clinton enabled two exhibition games between the Cuban National Baseball Team and one of the MLB clubs, with a provision that the profits be given only to humanitarian Cuban charities rather than to Castro's regime.<sup>36</sup> Despite these in-roads, Clinton's successor, President George W. Bush, was an ardent advocate of the Cuban embargo and took various actions to visibly enforce its provisions.<sup>37</sup>

The Obama administration achieved significant progress in improving relations with Cuba. The administration passed the Omnibus Appropriations Act of 2009, authorizing the easing of travel and finance restrictions against Cuba.<sup>38</sup> In 2015, President Obama and then-Cuban leader Raul Castro announced that the United States and Cuba would formally re-establish diplomatic relations, in an effort to "promote . . . change in Cuba . . . in line with U.S. national security interests."<sup>39</sup> Prior to 2015, sanctions prevented Cubans who were legally present in the United States from earning stipends and salaries in excess of the individual's living expenses.<sup>40</sup> This relaxation of sanctions permitted Cuban citizens in the United States to receive a

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34. See generally Matthew N. Greller, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14 AM. U. INT'L L. REV. 1647 (1999) (examining the Clinton Administration's efforts to assist the Cuban people during the Castro regime).

35. *Id.*

36. See *id.* at 1650-52.

37. See Solomon, *supra* note 2, at 173 (discussing how Bush wanted to restrict Cuba from the WBC, although he eventually allowed them to participate after Castro promised to donate all of the proceeds to the victims of Hurricane Katrina).

38. See generally Omnibus Appropriations Act, Pub. L. 111-8, 2009 H.R. 1105 (2009); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-951R, U.S. EMBARGO ON CUBA: RECENT REGULATORY CHANGES AND POTENTIAL PRESIDENTIAL OR CONGRESSIONAL ACTION 8, (Sept. 17, 2009) (authorizing the easing of restrictions against Cuba).

39. Peter Baker, *Starting Friday, U.S. Will Ease Restrictions on Travel to Cuba*, N.Y. TIMES (Jan. 15, 2015), <https://www.nytimes.com/2015/01/16/world/americas/us-eases-decades-old-rules-on-travel-to-cuba.html> [<https://perma.cc/V6K2-NTK4>]; see also Bureau of Western Hemisphere, *Fact Sheet: U.S. Relations with Cuba*, U.S. DEP'T OF STATE (July 21, 2015), <http://www.state.gov/r/pa/ei/bgn/2886.htm> [<https://perma.cc/T6CSVEUR>].

40. Merrit Kennedy, *U.S. Eases Sanctions Against Cuba Ahead of Obama's Landmark Visit*, NPR (Mar. 15, 2016, 2:15 PM), <https://www.npr.org/sections/two-way/2016/03/15/470541369/u-s-eases-sanctions-against-cuba-ahead-of-obamas-landmark-visit> [<https://perma.cc/P5PT-NAFB>]; OFAC and BIS Announce Additional Amendments to Cuba Sanctions in Advance of President Obama's Historic Visit to Cuba, BAKER BOTTS LLP (Mar. 17, 2016), <https://www.lexology.com/library/detail.aspx?g=3d0fae1d-beac-4a88-9615-00b822e5bed5> [<https://perma.cc/3M97-JTGH>].

more substantial salary from US companies, so long as the Cuban government did not subject the Cuban national to any special tax assessments in connection with receipt of the salary.<sup>41</sup>

This progress came to an end with the election of President Trump. In 2017, in a notice issued by the State Department, President Trump announced a new policy with regards to Cuba, undoing the Obama-era leniency toward the communist state.<sup>42</sup> The new Trump-era policy restricts US dollars flowing into the Cuban economy by any means.<sup>43</sup> The goal of this policy, as explained by President Trump, is “guided by the national security and foreign policy interests of the United States, as well as solidarity with the Cuban people.”<sup>44</sup>

The administration’s activation of a controversial section of the Helms-Burton Act, which allows Cuban Americans to sue companies “trafficking” in property confiscated during the 1959 revolution in US courts,<sup>45</sup> exhibited this strict stance toward Cuba.<sup>46</sup> This move is proof of renewed executive fervor against Cuba’s attempts to bolster its economy. Further, in April 2017, Former National Security Advisor John Bolton announced that the US Treasury Department will end “U-turn transactions” that allow Cuba to circumvent sanctions and get access to “hard currency and the U.S. banking system.”<sup>47</sup> He also announced new limits on remittances to Cuba of US\$1,000 per person,

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41. 31 C.F.R. § 515.571(a)(5)(i) (2016).

42. Strengthening the Policy of the United States Toward Cuba, 82 Fed. Reg. 48875 (Oct. 20, 2017).

43. *Id.* at 48876.

44. *Id.*

45. See Alex Daugherty & Michael Wilner, *Trump to Allow Cuban Americans to Sue for Confiscated Property in Cuba*, MIAMI HERALD (Apr. 16, 2019), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article229321599.html> [<https://perma.cc/DFL3-R68C>]; Stephen Wicary, *Trump Nears Key Cuba Sanctions Decision Over Support for Maduro*, BLOOMBERG (Feb. 27, 2019), <https://www.bloomberg.com/news/articles/2019-02-27/trump-nears-key-cuba-sanctions-decision-over-support-for-maduro> [<https://perma.cc/K4R2-3QVE>].

46. *Id.*; Sam Kleiner & Lee Wolosky, *Trump Administration’s New Cuba Policy Threatens Discord With U.S. Allies*, JUST SECURITY (Apr. 25, 2019), <https://www.justsecurity.org/63795/trump-administrations-new-cuba-policy-threatens-discord-with-u-s-allies/> [<https://perma.cc/6HPL-Q4WK>].

47. Nick Wadhams & Nikos Chrysoloras, *Trump’s Cuba Reversal on Seized Property Challenged by Allies*, BLOOMBERG (Apr. 17, 2019), [https://www.bloomberglaw.com/product/blaw/document/X8EH752000000?resource\\_id=a6a7ea796f6719464b377a80238b7847&search32=UkJZhb5yYJWsOHkGWzHpEQ%3D%3D\\_YJp\\_KwBSCtt7xiQkVEFLPXYPxYTY2BOOh5ZaUFt97OXbj58aSMBIWtUw9DdVJdg&udv\\_expired=true](https://www.bloomberglaw.com/product/blaw/document/X8EH752000000?resource_id=a6a7ea796f6719464b377a80238b7847&search32=UkJZhb5yYJWsOHkGWzHpEQ%3D%3D_YJp_KwBSCtt7xiQkVEFLPXYPxYTY2BOOh5ZaUFt97OXbj58aSMBIWtUw9DdVJdg&udv_expired=true) [<https://perma.cc/W8F5-4BRS>].

per quarter. In 2017, the State Department estimated that individuals in the United States sent about US\$3.5 billion in remittances to family members in Cuba.<sup>48</sup>

The recent tightening of sanctions is an attempt to pressure Cuba into withdrawing its support from Venezuelan leader Nicolas Maduro, the controversial socialist president who has long supported Cuba's despotic regime.<sup>49</sup> Although the United States has launched economic sanctions against Venezuela, the country is still receiving resources from other countries, including Cuba.<sup>50</sup> On April 30, 2019 President Trump tweeted that he would impose "a full and complete embargo" on Cuba if the island doesn't withdraw its security aid from what he considers to be a tyrannical dictatorship in Venezuela.<sup>51</sup> In October 2019, the Trump Administration prepared a new set of sanctions against Cuba over its continued support for Maduro in Venezuela.<sup>52</sup> The new sanctions specifically targeted Cuba's tourism sector by suspending flights from the United States to nine airports in Cuba in an attempt to "squeeze" Cuba economically.<sup>53</sup> US policy toward Cuba is highly volatile, changing on a day-to-day basis, and it remains to be seen how the Trump Administration will respond to the crisis in Venezuela amid Cuba's involvement.<sup>54</sup>

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48. *Id.*

49. *Id.*

50. *Id.*

51. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 30, 2019, 5:09 PM), <https://twitter.com/realdonaldtrump/status/112333350807899750> [<https://perma.cc/EG7L-2UA6>].

52. See Jessica Campisi, *U.S. Imposes New Sanctions on Cuba Over Human Rights, Venezuela*, THE HILL (Oct. 18, 2019), <https://thehill.com/homenews/administration/466550-us-imposes-new-sanctions-on-cuba-over-human-rights-venezuela> [<https://perma.cc/Q734-3XTB>]; Matt Spetalnick & Luc Cohen, *Exclusive: As Trump Grows Frustrated on Venezuela, U.S. to 'Squeeze' Cuba, Scrutinize Russia*, REUTERS (Oct. 9, 2019), <https://www.reuters.com/article/us-usa-venezuela-exclusive/exclusive-as-trump-grows-frustrated-on-venezuela-us-to-squeeze-cuba-scrutinize-russia-idUSKBN1WO2CL> [<https://perma.cc/9MPX-EYFF>].

53. *Id.*; see also Zach Montague, *Trump Administration Cuts Flights to Most Cuban Airports*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/us/politics/flights-cuba-trump.html> [<https://perma.cc/9ACZ-PQQC>].

54. This Note does not consider events past October 31, 2019.

III. OFAC LICENSING: TO REVIEW OR NOT TO REVIEW THE  
EXCEPTIONS TO THE SANCTIONS

The TWEA gives authority to the President to control all transactions between the United States and any covered nation under the TWEA, including Cuba.<sup>55</sup> However, the TWEA gives the Secretary of the Treasury the authority to promulgate regulations enforcing the aims of the TWEA.<sup>56</sup> As part of this enforcement, the US Treasury's Office of Foreign Asset Control ("OFAC") has authority under the CACR to grant specific and general licenses exempting certain individuals and enterprises from the reach of the omnibus sanctions.<sup>57</sup>

OFAC can authorize a license to enable an individual or a business entity to conduct business in Cuba with Cuban citizens or to unblock a restricted Cuban national.<sup>58</sup> The US Treasury Department defines a license as an "authorization from OFAC to engage in a transaction that otherwise would be prohibited."<sup>59</sup> There are two types of licenses: specific licenses and general licenses. A specific license is a formal written document issued by OFAC on a case-by-case basis, authorizing a particular transaction on a limited basis and only in response to a written application.<sup>60</sup> A general license, on the other hand, authorizes a particular type of transaction for a broader class of persons without the need to continually apply for a license.<sup>61</sup>

OFAC has broad discretion in deciding when to issue licenses that authorize otherwise prohibited business dealings.<sup>62</sup> OFAC may amend or rescind existing licenses at any time as long as the decision is reasonably related to foreign policy concerns, and courts typically

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55. Trading with the Enemy Act, 12 U.S.C. §95a (2010).

56. 31 C.F.R. § 515.802 (1999).

57. 31 C.F.R. § 515.505 (2016) (prohibiting, among other things, the "withdrawal from the United States of . . . currency" to Cuba without the authorization of the Secretary of the Treasury); see also Lynn R. Coleman & Thomas R. Graham, *The Stars and Stripes Wherever: The Impact of Unilateral U.S. Economic Sanctions on the International Petroleum Industry*, 35 ALTA. L. REV. 334, 338 (1996).

58. 31 C.F.R. § 515.505 (2016).

59. U.S. DEP'T OF THE TREASURY, RES. CTR. (2019), [https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq\\_general.aspx](https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_general.aspx) [<https://perma.cc/432G-5CV4>].

60. *Id.*

61. *Id.*

62. See Court E. Golumbic & Robert S. Ruff III, *ARTICLE: Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions*, 38 N.C.J. INT'L L. & COM. REG. 729, 783-85 (2013) (analyzing OFAC's lack of transparency in the licensing process as a means to maintain its discretion in granting or not granting licenses).

interpret these decisions with great deference to OFAC.<sup>63</sup> OFAC's interpretation of its own regulations receives *Auer* deference, which calls for OFAC's own interpretation to be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.<sup>64</sup> Interestingly enough, OFAC does not issue opinions, explain its reasoning, or discuss individual license applications and denials thereof with the media.<sup>65</sup> OFAC decisions are not immune from judicial review under the Administrative Procedure Act ("APA")—however, OFAC decisions that are based on substantial evidence and that are not arbitrary or capricious *must* be affirmed by the reviewing court.<sup>66</sup> Further, any regulatory announcement by OFAC is merely a policy decision that can easily be reversed or narrowed.<sup>67</sup> OFAC can revisit a license proclamation and reinterpret it or reverse it, often based on pressure from the executive branch.<sup>68</sup>

There is extensive evidence of this OFAC action in the past decade through its relationship with MLB. In 2012, MLB formally announced the requirement that Cuban players must receive a specific license from OFAC before they could sign with an MLB franchise.<sup>69</sup> Under this policy, teams were not able to sign Cuban nationals until OFAC had issued a specific license to that player, effectively slowing the license application process to a standstill and restricting access to the United States for these players.<sup>70</sup> To acquire a specific license, a Cuban-born player would have to establish residency in a third-party country, where a team would then have to individually request that the

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63. See *Walsh v. Brady*, 927 F.2d 1229, 1238 (D.C. Cir. 1991) (upholding OFAC's authority to deny a license to travel to Cuba is reasonable when considered in light of foreign policy concerns).

64. See *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 702 (D.C. Cir. 1994) (stating OFAC interpretation of Sanctions Regulations accords greater judicial deference because such regulations are OFAC regulations).

65. See generally 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).

66. See John O'Brien, *Political Balk: Opening the Door for U.S.-Cuba Policy Reform via Diplomatic Blunder at the World Baseball Classic*, 15 JEFFREY S. MOORAD SPORTS L.J. 135, 161-62 (2008).

67. *Id.*

68. *Id.* at 160-62.

69. See Aaron Klein & Jake E. Marcus, *United States-Cuba Normalized Relations and the MLB Influence: The Baseball Coalition Committee*, 47 U. MIAMI INTER-AM. L. REV. 258, 285 (2016).

70. *Id.* at 285.

specific player be “unblocked” by OFAC before being able to sign the player to a contract.<sup>71</sup> MLB’s attempts to quell human trafficking violations where smugglers were falsifying passports and other residency documents triggered this rule change.<sup>72</sup> By sending all unblocking residency paperwork to OFAC, the league could defer to a governing body more equipped to handle immigration processes and verification.<sup>73</sup> The specific license application process requires evidence that the player established permanent residence in a third country and that the player never intends to return to Cuba.<sup>74</sup>

That policy rapidly changed thereafter, with President Obama’s 2014 announcement regarding the expansion of general licenses for individuals and businesses wishing to conduct financial transactions in Cuba or with Cuban nationals.<sup>75</sup> This sweeping change permitted businesses in the United States to more readily obtain general licenses, which are required in order to negotiate with and hire Cuban nationals, as long as no funds are paid to the Cuban government in connection with the hire. MLB obtained a general license to contract with all Cuban defectors, eliminating the cumbersome specific license process.<sup>76</sup> For example, when Cuban outfielder Yoan Moncada became the first player to apply to OFAC for a specific license following the announcement,<sup>77</sup> OFAC responded by stating that it “will not grant a specific license to Cuban nationals who are already unblocked via the general license.”<sup>78</sup> In other words, because Moncada met the prerequisites of MLB’s general unblocking license—he possessed at least two permanent residency documents from a third country—he need not apply for a specific license after the Obama proclamation.<sup>79</sup> This significantly eased the requirements for Cubans to play baseball

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71. See Drew M. Goorabian, *Baseball’s Cuban Missile Crisis: How the United States and Major League Baseball Can End Cuban Ballplayer Trafficking*, 20 UCLA J. INT’L L. FOREIGN AFF. 425, 441 (2016).

72. *Id.*

73. *Id.* at 442.

74. *Id.*

75. 31 C.F.R. § 515.505. Under the new general license in Section 515.505 of Treasury’s Cuban Asset Control Regulations, Cuban nationals can become *unblocked* if they take up permanent residence outside of Cuba, obtain required residence documentation and show they are not a prohibited Cuban government official or member of the Cuban Communist Party.

76. Klein & Marcus, *supra* note 69, at 303.

77. See *id.*

78. Townsend, *supra* note 6.

79. See *id.*

in the major leagues. Because all defectors were now covered under the general license, all that was required of the players at the time was to defect, obtain legal residency in a third country, and sign a statement saying that they had abandoned their Cuban citizenship forever.<sup>80</sup> They no longer needed to wait through a lengthy and uncertain approval process for a specific license.<sup>81</sup> However, many, including the new OFAC department in the Trump Administration, see the Obama-era general license relaxation as an endorsement or clear stimulus to unsafe defection, human trafficking, and illegal payments to the Cuban government.<sup>82</sup>

#### *IV. THE NECESSITY OF DEFECTION: MLB'S INTERACTION WITH THE CUBAN SANCTIONS*

In 1961, Fidel Castro abolished professional baseball in Cuba, instituting an amateur-only league, with players receiving minuscule wages in conformance with the paradigm of national ideals over free enterprise.<sup>83</sup> The average Cuban player makes the equivalent of roughly US\$40 per month.<sup>84</sup> On the other hand, the average MLB salary is close to US\$300,000 per month.<sup>85</sup> Cubans, especially Cuban athletes with a chance to earn substantially more money outside of the communist regime, began defecting in significant numbers.<sup>86</sup>

Initially, MLB took a very hard stance against Cuban nationals, in-line with the strict adherence to the CACR at the time. In 1977, MLB Commissioner Bowie Kuhn issued a directive, which was updated in 1991, and then again as recently as 2016, to enforce the prohibition on “[team’s] discussion or negotiation with anyone in Cuba regarding the signing of any player in Cuba.”<sup>87</sup> In other words, MLB fully intended

80. *Id.*

81. *See id.*

82. *Id.*

83. Frankel, *supra* note 21, at 390.

84. Michael Powell, *For Cuban Players, No Embargo on Dream*, N.Y. TIMES (Dec. 23, 2014), <https://www.nytimes.com/2014/12/24/sports/baseball/in-cuba-no-embargo-on-hope-as-baseball-players-say-take-me-to-america.html> [<https://perma.cc/B5LR-3WPJ>]. In 2014, “[t]he Cuban government pays the baseball players, who make, on average, \$40 a month.” *Id.*

85. *See* Jim Woodruff, *How Much Money do Baseball Players Make?*, CHRON (June 29, 2018), <https://work.chron.com/much-money-baseball-players-make-14452.html> [<https://perma.cc/JQ9F-LC5D>] (stating that the average Major League Baseball Player earned US\$4.38 Million in 2018).

86. *See generally* Solomon, *supra* note 2.

87. Frankel, *supra* note 21, at 397; *see also* Greller, *supra* note 34, at 1664-65.

to cooperate with the restrictions of the CACR and enforce any violations of the CACR by member teams.<sup>88</sup> Thus, Cuban players had virtually no legal route to the United States and the major leagues. However, teams and agents saw that this directive created a dangerous loophole that MLB teams and human traffickers exploited.<sup>89</sup> A player would defect to a third country, obtain residency, and enter the United States stripped of their Cuban citizenship and able to sign with any MLB club for a substantial salary without violating the CACR or the MLB rules enforcing it.<sup>90</sup>

MLB rules indicate that any resident of the United States or Canada or any student enrolled in high school or college in the United States who has never before signed a major league or minor league contract is subject to the amateur draft – a lottery process by which teams are allowed to select and sign players to their clubs for close to amateur salary.<sup>91</sup> However, international players are not subject to the amateur draft, and may sign with any club they choose as “free agents,” typically for a much higher salary.<sup>92</sup> That is, of course, except Cuban international players who, if they safely defect *directly* to the United States, are the only international born players forced to participate in the less lucrative amateur draft.<sup>93</sup> Therefore, if a Cuban player defects to a third country and establishes legal residency there, that player is not subject to the general amateur draft rule, which limits the amount of money the player can make as well as team flexibility and additional MLB options.<sup>94</sup> Instead, these players bypass the draft and sign a contract with a team of their choice as free agents, usually for much more money.<sup>95</sup>

American jurisprudence and MLB policy substantiated this loophole when, in 2001, Cuban ballplayer Rolando Viera defected directly to the United States from Cuba, receiving refugee status on his visa, meaning the Cuban pitcher would be subjected to the amateur

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88. See generally Greller, *supra* note 34.

89. Cwiertney, *supra* note 16, at 412.

90. See generally Cwiertney, *supra* note 16.

91. See Frankel, *supra* note 21, at 397.

92. *Id.*

93. *Id.*

94. See Cwiertney, *supra* note 16, at 412-13.

95. *Id.* at 413-14.

draft.<sup>96</sup> Viera filed a motion for emergency injunctive relief, trying to prevent MLB from interfering with his ability to act as a free agent. He argued that the difficulties in defecting and the salary restrictions inherent in the draft were discriminatory towards Cuban players.<sup>97</sup> MLB successfully opposed these motions, which effectively strengthened the defection regime and actually encouraged the third country residency path toward free agency, legitimizing these dangerous loopholes.<sup>98</sup> Since 1991, over two hundred Cuban ballplayers have attempted defection, with only a small fraction being awarded a lucrative contract by an MLB club.<sup>99</sup>

#### V. *THE 2018 MLB-FCB AGREEMENT: DETAILS AND ANALYSIS*

Largely in response to the loophole in CACR-MLB enforcement, MLB and the FCB reached the 2018 MLB-FCB Agreement, which allowed for the safe and legal signing of Cuban nationals to MLB clubs.<sup>100</sup> MLB and the FCB announced the three-year deal on December 19, 2018.<sup>101</sup> Its stated objective was to “end the dangerous trafficking of Cuban players who desire to play professional baseball in the United States.”<sup>102</sup> MLB cited similarly structured deals with the Japanese league, the Korean Baseball Organization, and the Chinese Professional Baseball league as precedent for success of this type of financial model.<sup>103</sup> The 2018 MLB-FCB Agreement required the FCB to release all players under contract who are at least twenty-five years old and have six or more years of playing experience for free agency.<sup>104</sup> From there, the players are free to negotiate and sign with any MLB club without leaving Cuba, and may return to Cuba during the off-season<sup>105</sup>—a sharp reversal from decades of tightly enforced

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96. See Andrea Kupfer Schneider, *Baseball Diplomacy*, 12 MARQ. SPORTS L. REV. 473, 482 (2001).

97. See Evan Brewster, *Cuban Baseball Players in America: Changing the Difficult Route to Chasing the Dream*, 5 MISS. SPORTS L. REV. 215, 225 (2016).

98. *Id.* at 225 (citing *Viera v. Major League Baseball Enters.*, No. 8:01-CV-1037-T-27MAP, 2001 U.S. Dist. LEXIS 26155 (M.D. Fla. June 4, 2001)).

99. Klein & Marcus, *supra* note 69, at 271.

100. MLB Announcement, *supra* note 5.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

restrictions on negotiating with Cuban nationals. An existing general license granted by OFAC at the tail end of the Obama Administration made the 2018 MLB-FCB Agreement possible.<sup>106</sup> OFAC's determination that the FCB was independent of the central Cuban government was also crucial in enabling this agreement.<sup>107</sup>

However, there is a significant wrinkle in the 2018 MLB-FCB Agreement that sent shockwaves through policymakers' offices in Washington. An MLB club that signs a player released by the FCB pursuant to this agreement would be forced to pay the FCB a "release fee."<sup>108</sup> This is permitted by the OFAC license and determination, as well as an agreement from the Cuban government not to charge the players "any special tax" beyond that assessed on any other Cuban national who works abroad.<sup>109</sup> Despite OFAC's determination regarding the FCB's independence from the Cuban Government, many lawmakers were not convinced.<sup>110</sup>

Cuban Ambassador Jose Ramon Cabanas expressed his government's support for the deal—fueled in part by the Vice President of the FCB, Antonio Castro—the youngest son of Fidel Castro—a fact certainly not lost upon opponents of the 2018 MLB-FCB

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106. Jordan Kobritz, *An Analysis of What the Deal Between MLB and the Cuban Baseball Federation Means to the Sport*, SPORTS LAW EXPERT (Dec. 24, 2018), <https://sportslawexpert.com/2018/12/24/exclusive-an-analysis-of-what-the-deal-between-mlb-and-the-cuban-baseball-federation-means-to-the-sport/> [<https://perma.cc/QK9Z-TCX7>] ("MLB believes the proposed arrangement is permitted under provisions of a general license it received from the Treasury Department's Office of Foreign Assets Control (OFAC) in 2016").

107. Diamond & Salama, *supra* note 11.

108. *Id.* The Release Fee owed to the FCB by the MLB Club that signs an FCB Player is calculated using the same formula embodied in MLB's agreements with the NPB, KBO, and CPBL (i.e., between fifteen percent and twenty percent of the total guaranteed value for Major League contracts, and twenty-five percent of the signing bonus for Minor League contracts. In addition, Supplemental Release Fees may be owed if a contract with an FCB Player contains bonuses, escalators, or options that are later triggered. The Release Fee (and any Supplemental Release Fee) paid by the MLB Club is in addition to the compensation agreed to by the MLB Club to the FCB Player in the player's contract, which will be paid by the MLB Club directly to the FCB Player.

109. *Id.*

110. See generally Alison Peck, *Did MLB Clubs Violate RICO?*, INT'L TRADE L. PROF. BLOG (Nov. 17, 2018), <https://lawprofessors.typepad.com/inttradelaw/2018/11/did-mlb-clubs-violate-rico.html> [<https://perma.cc/N55L-6BAE>]. Mimi Whitefield, *MLB, Cuban Baseball Federation Sign Agreement to Limit Defections, Trafficking of Players*, WLRN (Dec. 19, 2018), <https://www.wlrn.org/post/mlb-cuban-baseball-federation-sign-agreement-limit-defections-trafficking-players> [<https://perma.cc/KDW9-XLK8>].

Agreement.<sup>111</sup> However, proponents point to the fact that the International Olympic Committee recognizes the FCB as independent of the central government.<sup>112</sup> Amidst these disagreements, in April 2019, the Trump Administration invalidated the 2018 MLB-FCB Agreement.<sup>113</sup> Nikole Thomas, OFAC's acting assistant director of licensing, wrote in a letter to MLB's counsel that "a payment to the Cuban Baseball Federation is a payment to the Cuban government."<sup>114</sup>

#### *A. MLB's Position*

There are two opposing approaches to the sanctions against Cuba with regard to the 2018 MLB-FCB Agreement. On one hand, supporters of the 2018 MLB-FCB Agreement, including MLB, argue that the agreement is necessary to combat human trafficking and that the release fee is not a payment to the Cuban government. On the other hand, opponents argue that the 2018 MLB-FCB Agreement is a threat to national security and illegally stimulates the Cuban economy. This Section and the following Section will examine each side's primary arguments in support of their position.<sup>115</sup> Finally, this Note will determine which side's interpretation is more in line with the objectives of the Cuba sanctions and what next steps MLB and the Trump Administration should take to eliminate the risk of human trafficking and persistent international financial crime.

#### 1. The 2018 MLB-FCB Agreement Would End the Defection Norm and Significantly Curb Human Trafficking

First, MLB's stated purpose for the implementation of the 2018 MLB-FCB Agreement was the hope of reducing defection,<sup>116</sup> which is not only dangerous but requires the involvement of human traffickers and potential government corruption and bribery.<sup>117</sup> There have been several instances in which MLB has turned a blind eye toward human

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111. Diamond & Salama, *supra* note 11.

112. See Kobritz, *supra* note 106; Zimbalist, *supra* note 9.

113. Diamond & Salama, *supra* note 11.

114. *Id.*

115. See *infra* Sections V.A. & V.B.

116. MLB Announcement, *supra* note 5.

117. See *supra* Part IV.

trafficking. The 2018 MLB-FCB agreement sought to eliminate these instances.

MLB has recognized the burden that the current defection system places on Cuban players, but has long been silent, and even complicit, in the persistence of the human trafficking of Cuban-born baseball players.<sup>118</sup> MLB Deputy Commissioner Dan Halem acknowledges that Cuban players are “often forced to contract with criminal smuggling gangs and pay a fair amount of money from their signing bonuses to smugglers.”<sup>119</sup> The loopholes created by MLB rules and adherence to the CACR, which encourage defection, have allowed Cuban defectors to sign a combined US\$300+ million in contracts in MLB since 2009, and provide an undeniable financial incentive for human traffickers to profit off of MLB’s leniency.<sup>120</sup> Often, smugglers are able to capitalize on these loopholes to traffic Cuban players without committing a material violation of the law.<sup>121</sup>

In 2011, Cuban national Leonys Martin signed a contract with the Texas Rangers of MLB worth US\$15.5 million, including a US\$5 million signing bonus.<sup>122</sup> Whereas a typical MLB agent will glean three to five percent commission from that deal, Martin paid thirty-five percent.<sup>123</sup> However, the money was not paid to an agent for the procurement of a contract, as is typical; Martin paid Eliezer Lazo, a notorious human trafficker who smuggled Martin out of Cuba.<sup>124</sup>

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118. See Ahiza Garcia & Jose Pagliery, *MLB Accused of Ignoring Cuban Player Smuggling*, CNN MONEY (Dec. 15, 2016, 3:31 PM), <https://money.cnn.com/2016/12/15/news/mlb-cuban-baseball-players-smuggled/index.html> [<https://perma.cc/7Z98-NYGS>]; Lind, *supra* note 4.

119. Whitefield, *supra* note 110.

120. See generally Goorabian, *supra* note 71.

121. *Id.*

122. Richard Durrett, *Rangers Sign Leonys Martin*, ESPN (May 4, 2011), <http://www.espn.com/dallas/mlb/news/story?id=6478110> [<https://perma.cc/B5XJ-T8MS>]; Aaron Gleeman, *Rangers Finalize \$15.5 Million MLB Deal with Cuban Outfielder Leonys Martin*, NBC SPORTS (May 4, 2011, 12:20 PM), <https://mlb.nbcsports.com/2011/05/04/rangers-finalize-15-5-million-mlb-deal-with-cuban-outfielder-leonys-martin/> [<https://perma.cc/7YU7-3V66>].

123. Nick Bond, *Eliezer Lazo Pleads Guilty to Extortion of Cubans, Including Leonys Martin*, SBNATION (Aug. 22, 2014, 8:19 PM), <https://www.sbnation.com/mlb/2014/8/22/6058205/eliezer-lazo-guilty-plea-extortion-leonys-martin-cuba> [<https://perma.cc/TDA2-WF5W>]. Drew Davison, *Rangers’ Martin Says he was Held Captive in Mexico After Defecting*, FORT WORTH STAR-TELEGRAM (Dec. 25, 2013, 5:27 PM), <https://www.star-telegram.com/sports/mlb/texas-rangers/article3840783.html> [<https://perma.cc/5PZ4-VE4L>].

124. *Id.*

Federal prosecutors charged Lazo with conspiring to smuggle, kidnap, and extort Cuban Baseball Players. He was sentenced to over fourteen years in federal prison for his role running a human-trafficking ring that smuggled Cubans into Mexico, where they were held prisoner until ransom payments were made under the threat of withholding the processing of residency documents that would enable the players to sign with MLB teams.<sup>125</sup> This scenario with Martin and Lazo was commonplace among Cuban ballplayers, and the 2018 MLB-FCB Agreement was designed to eliminate these criminal enterprises entirely.<sup>126</sup>

In 2017, a federal jury in Miami found a baseball agent, Bart Hernandez, guilty of smuggling Cuban ballplayers into the United States.<sup>127</sup> The government alleged a scheme of coercing players, falsifying documents, and carrying out illegal border crossings in order to collect large percentages of the contracts that Cuban players eventually signed with MLB clubs.<sup>128</sup> After arranging with boat captains to extract top baseball players from Cuba, the traffickers allegedly set up the players in Mexico, Haiti, and the Dominican Republic with handlers and fixers who helped the players establish residency in third countries through fraudulent means.<sup>129</sup> They then helped the players apply to be “unblocked” by the OFAC so the players could become MLB free agents.<sup>130</sup> Players were then forced by individuals like Hernandez into signing over between twenty and thirty-five percent of their lucrative contracts with MLB teams, often through threats against the players’ families and livelihoods if the player chose not to comply with the smugglers.<sup>131</sup>

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125. *See id.*

126. *See supra* note 102 and accompanying text.

127. Mike Oz, *MLB Agent Found Guilty of Smuggling Cuban Baseball Players into the U.S.*, YAHOO SPORTS (Mar. 15, 2017, 5:37 PM), Arthur Weinstein, *Men Who Smuggled Cuban Baseball Prospects to U.S. Sentenced to Prison*, SPORTING NEWS (Nov. 2, 2017), <https://www.sportingnews.com/us/mlb/news/agent-trainer-smuggled-cuban-baseball-prospects-united-states-sentenced-prison/atennt2w598h18ggfo4vkw8rw> [<https://perma.cc/M38C-LKEE>].

128. Alison Peck, *Trump, Trade, Jose Abreu, and a Heineken: Trafficking in Cuban Baseball Players*, INT’L TRADE L. PROF. BLOG (Apr. 27, 2017), <https://lawprofessors.typepad.com/inttradelaw/2017/04/trump-trade-jos%C3%A9-abreu-and-a-heineken.html> [<https://perma.cc/2JN8-DBGJ>]. Oz, *supra* note 127.

129. *Id.*

130. *Id.*

131. *Id.*

Given the high-profile nature of these cases, MLB was under immense pressure to address these human trafficking concerns. The 2018 MLB-FCB Agreement, which MLB claims eliminates the need for agents to pay smugglers for residency in third party countries, will dry up the market and ultimately serve as an impetus to remove human traffickers from the Cuban immigration process entirely. However, MLB is a non-state actor and therefore not a party to any international treaty, nor technically obligated under international human trafficking law.<sup>132</sup> Nonetheless, MLB is at risk of violating two related laws—Racketeer Influenced and Corrupt Organizations Act (“RICO”) and the Foreign Corrupt Practices Act of 1977 (“FCPA”)—if the 2018 MLB-FCB Agreement remains invalidated.<sup>133</sup> The league is acutely aware of the risks of violating these laws, and it argues that an invalidation of the 2018 MLB-FCB Agreement will only contribute to an unwanted increase in criminal enterprises.<sup>134</sup>

## 2. The 2018 MLB-FCB Agreement Would Prevent RICO Violations by MLB and its Teams

The first of these laws under which MLB risks violation is RICO. RICO prohibits the investment of proceeds of a pattern of racketeering in an enterprise; the acquiring or maintaining of an interest in an enterprise through a pattern of racketeering; participating in an enterprise through a pattern of racketeering; or conspiring to do any of the above.<sup>135</sup> To prove a RICO violation, prosecutors would have to prove that the defendants (MLB or its teams) committed certain predicate offenses, specifically enumerated in the definition of racketeering activity.<sup>136</sup> These include identify fraud,<sup>137</sup> forgery or

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132. See MATH NOORTMANN ET AL., *NON-STATE ACTORS IN INTERNATIONAL LAW* 77 (2015). Under international law, unless the treaty was created with the express intention to bind the third-party non-state actor, and unless that third party non-state actor has consented with signature, the third-party non-state actor is not technically bound to the treaty’s obligations.

133. See *infra* Sections V.A.2. & V.A.3.

134. See Peck, *supra* note 110.

135. 18 U.S.C. § 1962 (1988).

136. 18 U.S.C. § 1961 (2016).

137. 18 U.S.C. § 1028 (2006) (outlining criminal penalties not just for people who hold or use fake IDs, but also for anyone who “knowingly transfers an identification document . . . or a false identification document” if the person knew it was stolen or unlawfully produced).

false use of passports,<sup>138</sup> misuse of passports,<sup>139</sup> and “any act or threat involving murder, kidnapping, . . . robbery, bribery, extortion.”<sup>140</sup> RICO violations call for federal prosecution and criminal penalties.<sup>141</sup> “Any person injured in his business or property by any reason of a violation of [RICO]” may bring civil lawsuits as well.<sup>142</sup> One example of a potential RICO violation arises when law abiding sports agents in the United States are locked out from representing Cuban players by smugglers like Lazo and Hernandez, who coerce Cuban players to retain them as agents as a result of the current corrupt defection system.<sup>143</sup>

In order to be guilty of participation in an enterprise through a pattern of racketeering, prosecutors or plaintiffs must prove that the defendant conducted or participated in the “operation or management” of the enterprise.<sup>144</sup> As applied, this can be very difficult to prove, depending on the structure of the organization and its activities.<sup>145</sup> However, case law dictates that MLB and the individual clubs likely constitute “enterprises” that would be “separate from the individuals participating in them” for purposes of a RICO section 1962 claim.<sup>146</sup> Further, multiple illegal signings or player representations within a ten-year period may show the requisite pattern of acts to prove “part of an ongoing entity’s regular way of doing business.”<sup>147</sup> Many MLB clubs that feature multiple Cuban players may already be in violation of this section. Also, team or MLB employees may have conducted or participated in activities related to these questionable signings. The definition of “operation or management” stretches quite far and often

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138. 18 U.S.C. § 1543 (2002) (providing for fines or imprisonment for “whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any . . . false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport”).

139. 18 U.S.C. § 1544 (2002) (covering any entity who “willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another person than the person for whose use it was originally issued and designed”).

140. 18 U.S.C. § 1961 (2016).

141. *See id.*

142. *Id.*

143. *See* Peck, *supra* note 110.

144. *Id.*

145. *Id.*

146. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (holding that “The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status”).

147. *See, e.g.,* United States v. Busacca, 936 F.2d 232, 238 (6th Cir. 1991).

attaches to anyone in the chain of command responsible for the facilitation of illegally obtained players and residency papers.<sup>148</sup>

If the 2018 MLB-FCB Agreement remains invalidated and this system continues, there is no doubt that MLB, its teams, or its representatives will violate the predicate offenses to a RICO breach. In fact, MLB and the DOJ are already aware of one very high-profile potential violation. As part of the trial against Bart Hernandez, Cuban defector and current MLB player Jose Abreu testified that he was ordered to falsify a passport by his smugglers in order to safely obtain entry into the United States from Haiti, the nation that he defected to in order to obtain third-country residency.<sup>149</sup> Abreu was given a passport in Haiti containing his photo, but with a false name and birth date, that he was told to destroy in order to not raise suspicions about his entry into the United States.<sup>150</sup> In a shocking revelation, Abreu testified that he had no choice but to eat the page containing the false name before his plane landed in Miami if he hoped to remain in the United States.<sup>151</sup> “Little by little I swallowed that first page of the passport. I could not arrive in the United States with a false passport,” he said.<sup>152</sup> Given MLB’s alleged complicity in these smuggling operations, it is not hard to imagine that MLB was aware that Abreu was arriving with falsified documents, and intentionally did not inquire into the details behind such falsification. This harrowing, infamous revelation is further evidence that without a safe and legal deal in place between MLB and Cuba, racketeering activity and RICO violations will continue. Thus, to avoid RICO prosecution, and to curb the manipulation of international law for financial gain by its teams and representatives, MLB and its member teams have a very strong incentive to reimplement the 2018 MLB-FCB Agreement.

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148. See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (“outsiders” may violate RICO if they are “associated with” an enterprise and participate in the conduct of its affairs).

149. Associated Press, *Jose Abreu Ate Part of his Fake Passport Before U.S. Arrival*, SPORTS ILLUSTRATED (Mar. 1, 2017), <https://www.si.com/mlb/2017/03/01/jose-abreu-ate-fake-passport-chicago-white-sox-0> [<https://perma.cc/4JMM-WC9D>]; Paula McMahon, *White Sox’s Jose Abreu to Jury: I Ate Fake Passport on Way to U.S.*, CHICAGO TRIBUNE (Mar. 1, 2017, 3:26 PM), <https://www.chicagotribune.com/sports/white-sox/ct-jose-abreu-ate-passport-smuggling-trial-20170301-story.html> [<https://perma.cc/JW5S-FFNG>].

150. *Id.*

151. *Id.*

152. *Id.*

### 3. The 2018 MLB-FCB Agreement would Alleviate Liability for Current and Future FCPA Violations

Perhaps most significantly, MLB's desire to implement the 2018 MLB-FCB Agreement is in direct response to the threat of FCPA prosecution. Congress enacted the FCPA for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.<sup>153</sup> The FCPA at its core is an anti-bribery and anti-corruption law, applying to payments made both in the United States and abroad.<sup>154</sup> Specifically, MLB franchises may be liable based on scouting and signing activities conducted on their behalf by third parties in Cuba and other countries. FCPA liability attaches if the covered party gives anything of value to any other person while knowing that this third party will make an improper payment to a foreign official.<sup>155</sup> The standard for knowledge is low—the covered party can face liability for having mere awareness that the unlawful conduct has a high probability of occurring.<sup>156</sup> The absence of an actual knowledge requirement ensures that a covered party, like MLB, cannot escape FCPA liability by being willfully blind to facts and circumstances that would tend to indicate unlawful conduct.<sup>157</sup> In other words, if a scout gives something of value to a member of a foreign government, or to a “buscone”<sup>158</sup>—international handlers or smugglers like Lazo and Hernandez—who contracts with a foreign government to clear the way for a player's signing, that could be an FCPA violation.<sup>159</sup> From the perspective of MLB, or its member teams, any payments or kickbacks to buscones and any payments made to achieve the falsification of papers for an athlete, including age records or drug

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153. 15 U.S.C. §§ 78dd-1, et seq. (2010).

154. David Peet & David Mindell, *The Other Moneyball: Professional Sports Leagues and the Foreign Corrupt Practices Act*, 30 ENT. SPORTS LAW. 11, 11-12 (2014).

155. *Id.* at 12.

156. *Id.*

157. *Id.*

158. *Buscone*, BASEBALL REFERENCE, <https://www.baseball-reference.com/bullpen/Buscone> [<https://perma.cc/C4RQ-XALX>] (last visited Jan. 16, 2020) (defining “buscone” as people who peddle young baseball players to scouts for teams from Major League Baseball. Buscones identify promising players, train them, and then pocket a share of the player's signing bonus).

159. Peet & Mindell, *supra* note 154, at 13.

testing records, would almost certainly fit within the broad definition of business purpose.<sup>160</sup>

MLB is currently in the midst of a FCPA investigation.<sup>161</sup> In September 2018, authorities announced that a federal grand jury was looking into MLB teams' international dealings and has issued subpoenas to club officials and other personnel involved in human trafficking of Latin American, and primarily Cuban, athletes.<sup>162</sup> Specifically, the DOJ is targeting potential violations of the FCPA in relation to the bribing of government officials for better access to these valuable Cuban players.<sup>163</sup> The probe is particularly concerned with investigating buscones, who typically bribe local government officials in order to facilitate the legal residency paperwork for the Cuban defector.<sup>164</sup> In many cases, a buscone will arrange for an illegal and dangerous defection out of Cuba and then when a player lands in the Dominican Republic, Haiti or another country, the buscone will try to arrange for residency, perhaps in unlawful ways.<sup>165</sup> The Justice Department is likely interested in the role of American agents in negotiating with buscones, and holding teams liable for giving direction to these negotiations.

The dossier given to the FBI as part of this investigation suggests the extent to which some MLB personnel are aware of—and brazenly discuss—this unscrupulous culture and the potential for corruption.<sup>166</sup> One particularly remarkable document shows that in 2015, a team's executives went so far as to develop a database that measured the perceived “level of egregious behavior” displayed by fifteen of their

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160. *Id.* at 12.

161. *See* Passan, *supra* note 4.

162. *See* Passan, *supra* note 4.

163. *Id.*

164. *See id.*

165. Michael McCann, *How the MLB-FCB Deal Could Face Legal Hurdles, Political Resistance*, SPORTS ILLUSTRATED (Dec. 22, 2018), <https://www.si.com/mlb/2018/12/22/legal-breakdown-mlb-cuba-fcb-deal> [<https://perma.cc/48G7-NWHM>]; Jon Wertheim, *The Evidence that Persuaded U.S. Department of Justice to Investigate MLB Recruitment of Foreign Players*, SPORTS ILLUSTRATED (Oct. 2, 2018), <https://www.si.com/mlb/2018/10/02/fbi-investigation-mlb-atlanta-braves-los-angeles-dodgers> [<https://perma.cc/7LPG-AL6U>].

166. Dayn Perry, *Department of Justice Reportedly Looking into Corruption in International Baseball Market by Dodgers, Others*, CBS SPORTS (Oct. 3, 2018, 8:03 PM), <https://www.cbssports.com/mlb/news/department-of-justice-reportedly-looking-into-corruption-in-international-baseball-market-by-dodgers-others/> [<https://perma.cc/68RD-4QWM>]. *See also* Wertheim, *supra* note 165

own employees in Latin America.<sup>167</sup> That is, using a scale of “innocent bystander” to “criminal,” front-office executives assessed their own staff’s level of corruption. Documents show that five employees earned a “criminal” rating.<sup>168</sup> Internal team communications show concerns about what team officials called a “mafia” entrenched in their operations, including a key employee who dealt “with the agents and buscones” and was “unbelievably corrupt.”<sup>169</sup> The FBI suspected other team personnel were tied to “altered books” or “shady dealings,” according to the documents.<sup>170</sup> The dossier also appears to describe efforts to circumvent federal laws and MLB rules requiring Cuban players to establish residency in another country before negotiating and signing with a team.<sup>171</sup> Among those efforts to circumvent, the dossier includes a transcript of a text message conversation between two Dodgers executives in which they discuss the need to “shred” a contract signed with a player before MLB had approved the document.<sup>172</sup> There are also indications that dates on other official documents were doctored before they were forwarded to the MLB office.<sup>173</sup>

If reinstatement of the 2018 MLB-FCB Agreement fails, MLB is at risk of numerous FCPA violations. Without a safe and legal route for Cuban baseball players to gain access to MLB free agency, teams and their representatives will continue to “brib[e] clerks or immigration officials to change dates of birth on identification documents, or to fabricate false identity documents,” in violation of the FCPA.<sup>174</sup> If the DOJ brings these potential violations to light as part of its grand jury probe, it will shine a spotlight on MLB’s alleged complicity in human trafficking and international crime. Thus, to avoid FCPA prosecution, and to curb the corrupt culture that has sprung out of the complicity toward the defection regime, MLB and its member teams have a significant interest in reimplementing the 2018 MLB-FCB Agreement.

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Andrew S. Boutros et al., *Batter Up: The FCPA Takes a Swing at Major League Baseball*, SEYFARTH (Oct. 11, 2018), <https://www.laborandemploymentlawcounsel.com/2018/10/batter-up-the-fcpa-takes-a-swing-at-major-league-baseball/> [<https://perma.cc/B2ZH-2LNW>].

4. The 2018 MLB-FCB Agreement is Consistent with the Original National Security Objectives of TWEA and CACR

Supporters of the 2018 MLB-FCB Agreement feel that there is no harm to national security interests through any interaction between the United States and the FCB, and believe that excluding sports, like baseball, from the sanctions is actually a way to benefit the Cuban people.<sup>175</sup> Supporters of the agreement argue that the sanctions have only harmed the Cuban people while propping up the communist rulers in the nation.<sup>176</sup> The American Association for World Health issued a report indicating that the embargo “has dramatically harmed the health and nutrition of large numbers of ordinary Cuban citizens. As documented by [our] report, it is our expert medical opinion that the United States embargo has caused a significant rise in suffering-and even deaths-in Cuba.”<sup>177</sup>

Some point to the “release fee” portion of the 2018 MLB-FCB Agreement and argue that Cuba would use such money to fund violations of human rights and endanger US national security.<sup>178</sup> However, the release fees are nominal, and the revenue will be used for baseball purposes, including improving baseball stadiums and fields, and purchasing equipment for youth leagues.<sup>179</sup> Putting aside the debate over whether the FCB is an arm of the Cuban government, the deal specifically calls for funds to remain independent of any national

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175. Kaminsky, *supra* note 32, at 207.

176. See Jeff Passan, *White House Scuttles MLB's Cuban Agreement*, ESPN (Apr. 8, 2019), [https://www.espn.com/mlb/story/\\_/id/26472986/white-house-scuttles-mlb-cuban-agreement](https://www.espn.com/mlb/story/_/id/26472986/white-house-scuttles-mlb-cuban-agreement) [https://perma.cc/HZ7Z-R3D5]; Zimbalist, *supra* note 9.

177. *The Impact of the U.S. Embargo on Health and Nutrition in Cuba*, AM. ASS'N FOR WORLD HEALTH (Apr. 14, 2014), [https://medicc.org/ns/documents/The\\_impact\\_of\\_the\\_U.S.\\_Embargo\\_on\\_Health\\_&\\_Nutrition\\_in\\_Cuba.pdf](https://medicc.org/ns/documents/The_impact_of_the_U.S._Embargo_on_Health_&_Nutrition_in_Cuba.pdf) [https://perma.cc/ESU8-KU76].

178. See, e.g., Elliot Abrams, *Trump Should Veto MLB's Foul Deal with Cuba*, NAT'L REV. (Dec. 27, 2018), <https://www.nationalreview.com/2018/12/mlb-cuba-deal-payoff-to-communist-regime/> [https://perma.cc/SYM9-4TR4]; Louis Casiano, *Marco Rubio Calls MLB Deal with Cuba 'a farce' that needs to be 'overruled'*, FOX NEWS (Dec. 29, 2018), <https://www.foxnews.com/politics/sen-marco-rubio-vows-to-stop-deal-allowing-cuban-players-to-sign-with-mlb> [https://perma.cc/ZH9B-QKF6].

179. Fernando Cutz, *Major League Baseball's Deal with Cuba Will Fight Human Trafficking*, MIAMI HERALD (Jan. 31, 2019), <https://www.miamiherald.com/opinion/op-ed/article225304760.html> [https://perma.cc/74DC-SLC9]; *Cuban Baseball Federation Stresses Legitimacy of Release Fee for their Players*, CUBASI (Jan. 5, 2019), <http://cubasi.com/sport/item/16430-cuban-baseball-federation-stresses-legitimacy-of-release-fee-for-their-players> [https://perma.cc/9LZ7-2J2A].

security implementation.<sup>180</sup> The funds are to be inserted into a quasi-non-profit model that, at least according to MLB, will be used only for the growth of youth baseball in Cuba.<sup>181</sup> Further, US\$2 million is a drop in the bucket from Cuba's US\$62.11 billion annual budget, or the US\$3 billion annual revenue generated from tourism to the island.<sup>182</sup> US airline, financial and telecommunications companies have legally made payments to the Cuban government in excess of US\$100 million in recent years, with no recognition of national security concerns from the Executive Branch.<sup>183</sup> The benefits that the 2018 MLB-FCB Agreement provide are tangible and plenty, and the risk to national security is miniscule. In fact, by fighting human trafficking head on, this deal indirectly *promotes* national security, by preventing millions of dollars a year from ending up in the hands of violent gangs, smugglers, and narco-traffickers.

### *B. Trump Administration Position*

#### 1. The 2018 MLB-FCB Agreement is a Threat to National Security and Illegally Stimulates the Cuban Economy

In contrast to MLB's position, the Trump Administration and the Treasury Department emphatically assert that a payment to the FCB is a payment to the Cuban government, and that *any* payment to the Cuban government is a threat to national security.<sup>184</sup> Opponents of the 2018 MLB-FCB Agreement in the Trump administration contend that it would betray the core and longstanding purpose of the embargo; to prevent money from reaching Cuba, thus destabilizing the Cuban economy and the Cuban government.<sup>185</sup> They allege this agreement would give credibility and legitimacy to the Cuban government's

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180. See Zimbalist, *supra* note 9.

181. *Id.*

182. *Id.*

183. *Id.*

184. See, e.g., McCann, *supra* note 165 (explaining that White House officials contend that the agreement "betray[s] the core and longstanding purpose of the embargo: to prevent money from reaching Cuba, thus destabilizing the Cuban economy and the Cuban government that plans it"); Diamond & Salama, *supra* note 11 ("Nikole Thomas, OFAC's acting assistant director of licensing, wrote in a letter to MLB's counsel that 'a payment to the Cuban Baseball Federation is a payment to the Cuban government'").

185. McCann, *supra* note 165.

leadership, which goes against the core fundamentals of the TWEA, the CACR, and broad foreign policy with regards to Cuba.<sup>186</sup>

The Trump Administration's broad crackdown on the "Troika of Tyranny"—the alliance of Cuba, Venezuela, and Nicaragua—is evidence of the hard stance toward Cuban relations.<sup>187</sup> The Trump Administration has criticized Cuba for supporting Nicolás Maduro, the Venezuelan despot who the United States opposes as an illegitimate leader. Maduro has cut off humanitarian and financial assistance to any of his dissidents in Venezuela and around the world.<sup>188</sup> Cuba has remained a firm ally of Maduro, receiving Venezuelan oil in exchange for doctors and other specialists and intelligence, which has helped Maduro remain in power despite demands from Washington and more than fifty other governments that he end his tyrannical rule.<sup>189</sup> The Trump Administration is essentially asserting that any supplement to the Cuban economy, even in the form of release fees paid to the FCB, indirectly supports the illegitimate regime of Maduro in Venezuela. Support of this regime would be, in effect, harming the country's national security by sacrificing American values of freedom and democracy.

## 2. The Obama-Era OFAC Determination that the FCB is Independent of the Cuban Government was Factually Incorrect

Republican legislators have vehemently pushed back on the Obama-era OFAC determination that FCB is not part of the Cuban government. Marco Rubio, a Cuban-American congressman, called this determination "factually incorrect" and a "farce."<sup>190</sup> He argued that essentially, the 2018 MLB-FCB Agreement is legalizing bribery from

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186. *Id.*

187. Diamond & Salama, *supra* note 11.

188. *Id.*

189. See Vivian Salama, *U.S. Expands Sanctions Against Venezuela Into an Embargo*, WALL ST. J. (Aug. 5, 2019), <https://www.wsj.com/articles/u-s-expands-sanctions-against-venezuela-into-an-embargo-11565053782> [<https://perma.cc/KMJ2-MK57>]; *Those Cuban Ballplayers? They Won't Be Coming Here*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/opinion/trump-cuba-baseball.html> [<https://perma.cc/74GF-LDSW>].

190. Marco Rubio (@Marcorubio), TWITTER (Dec. 27, 2018, 10:00 AM), [https://twitter.com/marcorubio/status/1078304735189450753?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1078304735189450753&ref\\_url=https%3A%2F%2Fsports.yahoo.com%2FRepublicans-taking-aim-mlb-cuba-162529941.html](https://twitter.com/marcorubio/status/1078304735189450753?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1078304735189450753&ref_url=https%3A%2F%2Fsports.yahoo.com%2FRepublicans-taking-aim-mlb-cuba-162529941.html) [<https://perma.cc/37AN-3YEN>].

MLB clubs to Cuban government officials since the FCB's finances are entirely at the disposal of the governing regime.<sup>191</sup> Rubio went on to compare the deal to a ransom paid to the Cuban government, i.e., a payment to facilitate legalized human trafficking.<sup>192</sup> John Bolton, President Trump's former national security adviser, agrees with Rubio, and explained that "Cuba wants to use baseball players as economic pawns—selling their rights to Major League Baseball."<sup>193</sup>

The Trump administration provided some precedent for Rubio and Bolton's concerns regarding OFAC's determination that the FCB is part of the Cuban government.<sup>194</sup> The Trump administration prohibited trade with much of the tourism industry in Cuba on the grounds that Cuban military and intelligence interests owned substantial hidden shares of those businesses.<sup>195</sup> But if a hotel with an international brand is part of the Cuban government for purposes of the embargo, it is hard to see how the FCB—which was led by the son of Fidel Castro and is one of the most prominent organizations in the country—is not. The Obama-era OFAC relied on the fact that the Olympic Committee treats FCB as a nongovernmental organization.<sup>196</sup> However, the relevant question is whether the FCB is part of the Cuban government as defined in the embargo statutes and regulations, not under Olympic Committee policies.<sup>197</sup>

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191. Scott McDonald, *Yankee Pitcher Aroldis Chapman, Senator Marco Rubio React to Trump Administration Rescinding Deal Between MLB And Cuban Baseball*, NEWSWEEK (Apr. 8, 2019), <https://www.newsweek.com/trump-administration-rescinds-obama-era-deal-between-major-league-baseball-1389984> [<https://perma.cc/TJK6-WZTK>].

192. *Id.*

193. *Id.*

194. Diamond & Salama, *supra* note 11.

195. See Alison Peck, *Major League Baseball Can Help Cuban Players Without Helping Cuba*, MIAMI HERALD (Jan. 7, 2019), <https://www.miamiherald.com/opinion/op-ed/article224037590.html> [<https://perma.cc/A5EH-U3NE>]; Sarah Marsh & Roberta Rampton, *New U.S. Government Rules Restrict Travel and Trade with Cuba*, REUTERS (Nov. 8, 2017, 9:09 AM), <https://www.reuters.com/article/us-usa-cuba/new-u-s-government-rules-restrict-travel-and-trade-with-cuba-idUSKBN1D81XN> [<https://perma.cc/398J-SULY>]; Vanessa Romo, *Trump Administration Clamps Down on Travel to Cuba, Bans Cruise Ships*, NPR (June 4, 2019, 8:45 PM), <https://www.npr.org/2019/06/04/729825471/trump-administration-clamps-down-on-travel-to-cuba-bans-cruise-ships> [<https://perma.cc/AC46-PZLX>].

196. *Id.*

197. *Id.*

### 3. The 2018 MLB-FCB Agreement was Merely an Attempt to Circumnavigate Continued Criminal Violations

Opponents of the 2018 MLB-FCB Agreement criticize its timing, alleging that MLB is simply trying to save face as more details of its complicity in the human trafficking of Cuban players and FCPA violations are revealed.<sup>198</sup> Convicted smuggler Gilberto Suarez claims that MLB tolerates—knowingly or unknowingly—a criminal enterprise transporting players to the United States.<sup>199</sup> He claims that MLB clubs, which are not allowed to scout in Cuba, are always traveling wherever the Cuban teams go, communicating with agents and smugglers simultaneously to get intel on when a player will be available to sign.<sup>200</sup> MLB’s concern was never with the conditions of their future player’s defection or whether his passport and residency documents were compliant with the applicable law—only whether his residency was facially “legal.”<sup>201</sup> In fact, certain investigators on the matter even believed that MLB teams were conspiring with human traffickers to bring specific players out of Cuba.<sup>202</sup> Thus, the Trump Administration sees the 2018 MLB-FCB Agreement as less of a means of curbing human trafficking, and more of an attempt to save face before criminal and civil penalties are officially levied.

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198. Abrams, *supra* note 178; McCann, *supra* note 165.

199. See Scott Eden, *Federal Investigations into Cuba Smuggling, Major League Baseball Slow*, ABC NEWS (Aug. 7, 2015, 1:43 PM), <https://abcnews.go.com/Sports/federal-investigations-cuban-smuggling-major-league-baseball-slow/story?id=32949775> [<https://perma.cc/3Z9S-PC2L>]; see also Jose Pagliery & Ahiza Garcia, *MLB Accused of Ignoring Cuban Baseball Player Smuggling*, CNN (Dec. 15, 2016), <https://money.cnn.com/2016/12/15/news/mlb-cuban-baseball-players-smuggled/index.html?iid=EL> [<https://perma.cc/79ZK-5KWT>].

200. *Id.*

201. See Eddie Dominguez, *Cuban Players, Human Trafficking; and MLB*, THE SUNDAY LONG READ (Sept. 16, 2018), <https://sundaylongread.com/2018/09/16/baseball-cop-book-excerpt-cuba/> [<https://perma.cc/42ET-8ZV3>].

202. *Id.*

*VI. RECOMMENDATIONS FOR MLB AND THE TRUMP  
ADMINISTRATION TO END THE CRIMES INHERENT IN THE  
DEFECTION PROCESS WHILE COMPLYING WITH ECONOMIC  
SANCTIONS*

*A. MLB Should Implement a Worldwide Draft*

The baseball community has long explored the idea of implementing a worldwide draft, with the main benefit being the elimination of the lucrative free agency status of international players, specifically targeting Cuban defectors.<sup>203</sup> A worldwide draft would put every domestic and international player on an even playing field. It would eliminate the need for defection, and in turn eliminate the dangers and crimes related to human trafficking, because there would be no financial incentive to obtain residency in a third country before coming to the United States. It would also reduce the incentive for smugglers, because they would receive only a fraction of the finder's fee (draft salaries are much lower than free agency salaries)<sup>204</sup> they currently obtain by coordinating defection and residency approval in a third country. This change to the MLB rules, as applied, could comply with the CACR and the Trump administration's crackdown of the omnibus sanctions, while achieving MLB's desired goal of eliminating human trafficking and providing a safe route for foreigners to play baseball in the United States.

However, a worldwide amateur draft is unlikely to solve the problem facing Cuban baseball players and MLB is unlikely to adopt this proposal. For one, it would require MLB to repeal the Kuhn directive, because the league currently prohibits scouting in Cuba.<sup>205</sup> Additionally, it is not entirely clear if this policy would comply with the CACR. In theory, it is still a CACR violation if the Cuban national does not denounce his citizenship, is drafted into MLB, and is paid a special, taxable salary, even if it is a miniscule salary in comparison to a potential free agency deal. Further, the Major League Baseball Players Association ("MLBPA") and various MLB officials, teams, and player agents oppose a draft, because it lowers salaries across the league and thus gives the owners an advantage in the balance of

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203. Cwiartney, *supra* note 16, at 426.

204. *See id.*

205. Solomon, *supra* note 2, at 181.

bargaining power.<sup>206</sup> Because of this opposition and uncertainty, a draft is unlikely until the sanctions are lifted, or at the very least, weakened.<sup>207</sup>

*B. Use International Free Agency within MLB's Discretion*

The collective-bargaining agreement between MLB and its players already gives the MLB Commissioner discretion to determine the residency of a player for purposes of international free agency eligibility.<sup>208</sup> The commissioner could use that discretion to say that a Cuban player who comes directly to the United States will not be treated as a resident of the United States for a limited period, perhaps one year. This would essentially legalize defection directly to the United States, but still promote the open market free agency for Cuban players.

The MLBPA has no reason to object, because salaries for Cuban players would be determined on the open market and not through the international draft.<sup>209</sup> But this solution would not entirely end trafficking, and Cuban baseball players would still have to escape from Cuba to play in MLB. Furthermore, given the current border crisis and crackdown on immigration in the United States,<sup>210</sup> there is no guarantee that this process would be acceptable to the current administration. Despite these drawbacks, allowing players to come directly to the United States and sign as free agents would give federal and local law enforcement much more power to investigate and prosecute crimes of extortion, confinement, and violence against players.<sup>211</sup> MLB club owners might need to negotiate harder and pay a bit more for players in such a free market, but this solution could protect the next generation

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206. Frankel, *supra* note 21, at 420.

207. See Solomon, *supra* note 2, at 155.

208. Peck, *supra* note 195.

209. Cutz, *supra* note 179.

210. See, e.g., Nina Lakhani, *More Cubans Seek Asylum in Mexico Amid Clampdown on Legal Path to US*, GUARDIAN (Sept. 3, 2019), <https://www.theguardian.com/world/2019/sep/03/more-cubans-seek-asylum-in-mexico-amid-clampdown-on-legal-path-to-us> [https://perma.cc/LZK3-95SR]; Mary Beth Sheridan, *Cubans Were Once Privileged Migrants to the United States. Now They're Stuck at the Border, Like Everyone Else*, WASH. POST (Nov. 5, 2019), [https://www.washingtonpost.com/world/cubans-were-once-privileged-migrants-to-the-united-states-now-theyre-stuck-at-the-border-like-everyone-else/2019/11/04/65f1a4ea-fa60-11e9-9e02-1d45cb3dfa8f\\_story.html](https://www.washingtonpost.com/world/cubans-were-once-privileged-migrants-to-the-united-states-now-theyre-stuck-at-the-border-like-everyone-else/2019/11/04/65f1a4ea-fa60-11e9-9e02-1d45cb3dfa8f_story.html) [https://perma.cc/6GST-M5WJ].

211. Cutz, *supra* note 179.

of Cuban players from trafficking without supporting the Cuban government. This option is also available to MLB now, under its own rules, and would not be subject to legal restriction or political whim.

Unfortunately, MLB deputy commissioner and Chief Legal Officer Dan Halem has rebuffed this solution. “There’s simply no evidence that making that change would prevent human trafficking,” says Halem. “In fact, it’s my understanding that it’s actually harder to enter the U.S. than many other countries. So, such a rule change may result in more sophisticated smuggling of Cuban players to bring them directly to the United States.”<sup>212</sup>

*C. MLB Should Agree to Increased Monitoring through Independent Audits*

Because implementation of the aforementioned solutions is highly unlikely, MLB must find a way to stay in compliance with the sanctions while changing its international signing policies enough to curb human trafficking and the international financial criminal violations. In response to the proliferation of these crimes, professional leagues and their member franchises should closely examine high-risk interactions with officials of foreign governments. MLB should remain particularly sensitive to interactions that involve third parties acting on behalf of the league or one of its teams. MLB should adopt standard operating procedures specifically directed at corruption and bribery concerns for league and team employees, as well as third parties. MLB should also consider establishing a regular training schedule for these employees and licensed team agents in order to ensure awareness of league-wide anticorruption policies. Additionally, MLB should consider following the advice of federal regulators by implementing an effective compliance program, which includes due diligence of any prospective foreign agents that receive payments, either from the league or one of its member teams.<sup>213</sup> Teams should consider having their operations periodically audited by an independent third party to evaluate FCPA and RICO compliance.

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212. Tim Padgett, *Does Baseball Deal Help Cuban People or Cuban Regime?*, WLRN (Jan. 14, 2019), <https://www.wlrn.org/post/does-baseball-deal-help-cuban-people-or-cuban-regime-trump-may-decide> [<https://perma.cc/MP3H-DP4P>].

213. *See generally* Peet & Mindell, *supra* note 154.

*D. The Trump Administration Should Reinstate the 2018 MLB-FCB Agreement*

Perhaps the most obvious recommendation is to simply reinstate the 2018 MLB-FCB Agreement. The agreement would have allowed Cuban baseball players to sign freely with any MLB team, would have allowed Cuban players to live in or visit Cuba, and would have provided for MLB scouts to travel to Cuba and sign players without the need for defection, buscones, or the violation of any international law.<sup>214</sup> In exchange for this access, the FCB would garnish the wages of its former players who sign MLB contracts.<sup>215</sup> The garnished funds were to be used to stimulate baseball infrastructure in Cuba.<sup>216</sup>

Reinstating the 2018 MLB-FCB Agreement is likely the most comprehensive solution to curb human trafficking while still adhering to the goals of the omnibus economic sanctions, but reinstatement is highly unlikely. In 2016, MLB received a license from OFAC confirming that FCB was not a part of the Cuban government.<sup>217</sup> Just as OFAC abruptly reversed course when it scuttled the agreement with its determination that FCB was actually part of the communist government, it could just as quickly re-interpret the FCB's independence along International Olympic guidelines and confirm that FCB is once again, not an arm of the communist regime. However, this reversal is not likely to occur under the current administration for two specific reasons. First, even if MLB were to challenge OFAC's determination that the FCB is part of the Cuban government, judicial review of OFAC's decisions are "highly deferential," even if the decision is "of less than ideal clarity."<sup>218</sup> Second, the Trump Administration's hardline stance against direct financial support to Cuba, especially in the context of Cuba's allegiance to Maduro of Venezuela,<sup>219</sup> is likely to stonewall any chance of reinstatement of the 2018 MLB-FCB Agreement. Despite the unlikelihood of reinstatement

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214. Zimbalist, *supra* note 9.

215. *Id.*

216. *Id.*

217. Diamond & Salama, *supra* note 11.

218. Epsilon Elecs., Inc. v. United States Dep't of the Treasury, 429 U.S. App. D.C. 195, 857 F.3d 913 (2017); *see also supra* Part III.

219. Margaret Talev, *Trump Demands End to Maduro Regime in Broad Attack on Socialism*, BLOOMBERG (Feb. 18, 2019), <https://www.bloomberg.com/news/articles/2019-02-18/trump-courts-2020-hispanic-vote-in-miami-with-venezuela-remarks> [<https://perma.cc/F9L7-JEL5>].

under the current administration, there are lobbyists putting pressure on the Trump administration to consider reinstating the agreement.<sup>220</sup> These groups should continue to promote the merit of the agreement and its anti-human trafficking provisions in hopes that a future US presidential administration prioritizes the improvement of US-Cuba relations through the reinstatement of the 2018 MLB-FCB Agreement.

### VII. CONCLUSION

The 2018 MLB-FCB Agreement will not restore democracy in Cuba; nor will it end the human rights abuses that take place daily on the island. However, normalization of US and Cuba relations through baseball diplomacy would represent a small but immensely positive step that aligns with the objectives of the Cuba sanctions. Will the 2018 MLB-FCB Agreement collaterally benefit the Cuban government? Potentially. There is no real way of knowing if the FCB is part of the central communist government. Is the agreement worthwhile in the context of preventing human trafficking and international criminal activity? Absolutely. The dollars that potentially flow into Cuba from this agreement will have a miniscule impact and will not substantially stabilize the communist regime, threaten national security, or harm democracy. In fact, there is no risk to national security by allowing Cuban baseball players to achieve their dream of playing Major League Baseball safely and legally. The value of the 2018 MLB-FCB Agreement in curbing human trafficking, FCPA violations, and RICO violations far outweighs any stimulus to the Cuban government that this agreement potentially provides. Thus, the 2018 MLB-FCB Agreement would not violate the original objective of the TWEA and the CACR and should be reimplemented with responsible and enforceable monitoring requirements.

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220. See Raymond Arke, *Ballard Partners to Pinch Hit for MLB as it Lobbies Trump for Deal with Cuba*, OPEN SECRETS (May 13, 2019), <https://www.opensecrets.org/news/2019/05/ballard-partners-to-pinch-hit-for-mlb/> [https://perma.cc/6VFH-HBK4]; see also Brian Schwartz, *MLB Hires Trump-allied Lobbying for Guidance on 'Trafficking' of Cuban Baseball Players*, CNBC (May 13, 2019, 6:49 PM), <https://www.cnbc.com/2019/05/13/mlb-hires-trump-allied-lobbying-firm-over-cuban-baseball.html> [https://perma.cc/UG9N-KJTA].