

**THE PREVIOUS PLAY IS UNDER REVIEW: BASEBALL,
HUMAN TRAFFICKING, AND DIFFERING LEGAL
APPROACHES TO CUBAN BASEBALL IMMIGRATION
IN RECENT US PRESIDENTIAL ADMINISTRATIONS**

JORDAN SMALL*

Introduction 596

I. Background 598

 A. The Obama Administration: Steps Toward
 Normalization in Cuba 598

 B. The MLB Exhibition in Cuba..... 599

 C. Cuban Baseball Immigration..... 600

 D. The Trump Administration: Cuba Reversal 602

 E. The MLB-CBF Agreement and Cancellation 604

II. The OFAC Decision to Cancel the MLB-CBF Agreement 606

 A. Arguments Against the MLB-CBF Agreement’s Legality
 Ignore Real-World Consequences..... 606

 B. Arguments for the Legality of the MLB-CBF Agreement.. 607

III. The Effects of the OFAC Decision: Reversion to the Status
 Quo..... 610

IV. Paths Forward for MLB, the CBF and the Biden Administration . 614

 A. OFAC Under the Biden Administration: An Opportunity
 to Demonstrate Restraint 614

 B. Policies to Safely Transfer Cuban Players Under the
 Current Legal Framework 618

V. Conclusion..... 621

* Jordan Small is a 2022 J.D. Candidate at the University of Wisconsin Law School. He would like to sincerely thank the entire article editing team for their help with this publication and his friends and family for supporting him throughout law school. He would like to especially thank his Dad for instilling in him a love of both baseball and, for better or worse, the Detroit Tigers.

INTRODUCTION

On December 19, 2018, after more than two years of negotiations, Major League Baseball (“MLB”) reached a deal with the Cuban Baseball Federation (“CBF”) whose ramifications were felt far beyond the world of sports.¹ The deal, similar to those that exist between MLB and Korea, Japan, and Taiwan, would allow Cuban baseball players to come to the United States on work visas.² Individual MLB teams would pay the Cuban Baseball Federation a “release fee” for the right to sign those players.³ The proposed deal was set to run from the sign date until October 2021.⁴ The deal struck by MLB and the CBF would potentially grant a safe pathway for Cuban players to migrate to the United States and end the illegal immigration and human trafficking that comprises “the ugliest side of MLB.”⁵

The harrowing defection stories of Cuban players are the rule, not the exception, when it comes to Cuban baseball immigration. Cuban athletes frequently use the dangerous process of defection, a formal abandonment of their citizenship while in another country, to attempt to immigrate to the United States.⁶ The MLB-CBF deal aimed to alleviate the human trafficking and exploitation faced by Cuban baseball players immigrating to the United States illegally.⁷ However, hours after the MLB-CBF deal was signed, it was met with resistance from the Trump Administration, who stated that “it would continue to work to restrict the Cuban regime’s ability to profit from United States businesses.”⁸

¹ Timothy Rapp, *Report: MLB, Cuba Agree to Historic Deal to Let Players Sign Without Defecting*, BLEACHER REP. (Dec. 19, 2018), <https://bleacherreport.com/articles/2811621-report-mlb-cuba-agree-to-historic-deal-to-let-players-sign-without-defecting> [https://perma.cc/6VER-RLAU].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Jeff Passan, *MLB, Cuba Reach Historic Deal to Allow Players to U.S., Hope for Trump Administration Approval*, YAHOO SPORTS (Dec. 19, 2018), <https://sports.yahoo.com/mlb-cuba-reach-historic-deal-allow-players-u-s-hope-trump-administration-approval-205934374.html> [https://perma.cc/3X9P-J5LW].

⁶ See Will Grant, *Cuban Baseball Players Defect During Tournament in Mexico*, BBC (Oct. 4, 2021), <https://www.bbc.com/news/world-latin-america-58748596> [https://perma.cc/8VRC-FM8C].

⁷ Passan, *supra* note 5.

⁸ David Waldstein & Katie Rogers, *Deal to Give Cuban Players Easy Path to M.L.B. Meets Government Resistance*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/sports/baseball/cuba-mlb-posting-system.html> [https://perma.cc/PME4-Y5NX].

The Trump Administration declared the MLB-CBF agreement illegal four months after the deal was reached.⁹ The Office of Foreign Assets Control (“OFAC”) determined that MLB’s payments to the CBF for the release of its players were not authorized because “a payment to the Cuban Baseball Federation is a payment to the Cuban government.”¹⁰ The Trump Administration rejected the CBF’s claim that it was an independent entity from the Cuban central government.¹¹ Reactions to the deal and its cancellation were steeped in language that criticized not only support of Cuba, but Venezuela as well. Just before the deal was declared illegal, national security advisor John Bolton tweeted that, “Cuba wants to use baseball players as economic pawns—selling their rights to Major League Baseball. America’s national pastime should not enable the Cuban regime’s support for Maduro in Venezuela.”¹²

Through OFAC, the Trump Administration determined that the MLB-CBF deal was illegal and ruled that the deal’s structure constituted illegal payments to the Cuban government.¹³ This decision was antithetical to both combatting human trafficking and the normalization of Cuba-US relations. The decision disregarded the practical realities of Cuban baseball immigration and misguidedly chose to take a hardline stance instead of assessing the potential positive ramifications of the deal for not only Cuban baseball players, but Cuba-US relations. While the Trump Administration’s decision had a sound legal basis, the administration should have opted for a *laissez faire* approach to the deal that would have benefitted all parties involved.

Part I of this Comment will analyze the recent history of Cuba-US baseball relations during the Obama and Trump Administrations. Part II will frame both the context and content of the OFAC decision to cancel the MLB-CBF deal. Part III will examine the practical effects of the MLB-CBF agreement’s cancellation, and the reversion to the status quo that elevates an industry of human trafficking. Finally, Part IV will examine

⁹ Karen DeYoung, *Trump Administration Cancels Major League Baseball Deal with Cuba*, WASH. POST (Apr. 9, 2019), https://www.washingtonpost.com/world/national-security/trump-administration-cancels-mlb-deal-with-cuba/2019/04/08/99c7d9be-5a2f-11e9-842d-7d3ed7eb3957_story.html [https://perma.cc/CL2J-75V2].

¹⁰ *Id.*

¹¹ *Id.*

¹² John Bolton (@AmbJohnBolton), TWITTER (Apr. 7, 2019, 4:16 PM), <https://twitter.com/ambjohnbolton/status/1115000294071521280> [https://perma.cc/8UY9-24D3].

¹³ DeYoung, *supra* note 9.

both the Biden Administration's legal authority to reinstate the MLB-CBF agreement and the practical reasons to urge its reinstatement.

I. BACKGROUND

A. THE OBAMA ADMINISTRATION: STEPS TOWARD NORMALIZATION IN CUBA

The Obama Administration took steps towards normalization that contributed to the execution of the MLB-CBF deal. During a 2008 campaign speech to an influential Cuban-American group in Miami, Senator Barack Obama criticized the hardline stance taken by his opponent, Senator John McCain, on US-Cuban relations and called for greater engagement with Cuba.¹⁴ Senator Obama drew a distinction between the incumbent Bush Administration and his own prospective administration, saying that "it is time to pursue direct diplomacy, with friend and foe alike, without preconditions."¹⁵ In 2009, the Obama Administration began to thaw relations, easing travel and remittance restrictions for Cuban Americans with family still in Cuba.¹⁶ Under the set of rules promulgated by the Obama Administration, Americans with family in Cuba were allowed unlimited visits, which the Bush Administration restricted to once every three years.¹⁷

Although it took six years for President Obama to "pursue direct diplomacy" with Cuba, on December 17, 2014, the White House announced that it would restore full diplomatic relations with Cuba.¹⁸ After eighteen months of secret talks that involved Pope Francis, President Obama, and Cuban leader Raul Castro, the parties announced that the countries would take unprecedented steps toward normalization.¹⁹ The normalization of the relationship included the opening of a US embassy in Havana for the first time in more than fifty years, the freeing prisoners on

¹⁴ Jeff Zeleny, *Obama, in Miami, Calls for Engaging with Cuba*, N.Y. TIMES (May 24, 2008), <https://www.nytimes.com/2008/05/24/us/politics/24campaign.html> [https://perma.cc/M36F-FAAF].

¹⁵ *Id.*

¹⁶ Daniel Nasaw, *Obama Eases Restrictions to Cuba*, THE GUARDIAN (Apr. 13, 2009), <https://www.theguardian.com/world/2009/apr/13/barack-obama-cuba-policy-change> [https://perma.cc/JW2L-FWQT].

¹⁷ *Id.*

¹⁸ Peter Baker, *U.S. Will Restore Full Relations with Cuba, Erasing a Last Trace of Cold War Hostility*, N.Y. TIMES, Dec. 18, 2014, at A1.

¹⁹ *Id.*

both sides, and the United States easing of restrictions on remittances and travel to the island.²⁰ Although President Obama's agreement to normalize relations between the two countries was praised by members of his own party, Republican members of Congress voiced their displeasure immediately. Senator Marco Rubio, a Florida Senator with family connections to Cuba, said the deal was "based on an illusion, a lie that more commerce and access to money and goods will translate to political freedom for the Cuban people," and that deal would "give the Castro regime . . . the opportunity to manipulate these changes to perpetuate itself in power."²¹

B. THE MLB EXHIBITION IN CUBA

In the background of normalization talks, MLB worked with the Obama Administration and the CBF to lay a foundation for the MLB-CBF agreement. In February 2016, to show progress toward normalization, the White House announced that President Obama would become the first sitting President to visit Cuba since 1928.²² In December 2015, prior to the President's visit, MLB brought a convoy of officials and players that included Cuban defectors to Havana to conduct a baseball clinic with local children and to also begin discussions on a possible MLB-CBF agreement.²³ A week before the scheduled trip, MLB and CBF outlined the initial framework for an agreement between the two sides.²⁴ To aid the agreement, the Obama Administration announced new Treasury Department measures allowing Cuban players to receive salaries in the United States.²⁵ This created a possible way for Cuban players to play at the highest professional level without having to defect.

President Obama's trip to Cuba took place between March 20 and 22, 2016, and included the President and Cuban President Raul Castro viewing an exhibition baseball game between the Tampa Bay Rays and

²⁰ *Id.*

²¹ *Id.*

²² Jim Acosta, Elise Labott, Nicole Gaouette, Kevin Liptak & Allie Malloy, *Obama Announces Cuba Visit*, CNN (Feb. 18, 2016), <https://www.cnn.com/2016/02/17/politics/obama-cuba-visit/index.html> [<https://perma.cc/R9KU-AZZL>].

²³ Patrick Oppmann, *Obama Engages in Baseball Diplomacy in Cuba*, CNN (Mar. 22, 2016), <https://www.cnn.com/2016/03/22/politics/obama-cuba-baseball-diplomacy/index.html> [<https://perma.cc/JR2X-6SVC>].

²⁴ *Id.*

²⁵ *Id.*

the Cuban National Team.²⁶ Around the baseball world, the exhibition was seen as a sign of progress not only toward an agreement between MLB and Cuba, but towards Cuba-US relations as a whole.²⁷ Jose Abreu, a Cuban defector who played for the Chicago White Sox in MLB, commented that the visit was “something great,” and that witnessing MLB baseball being played in Havana was “very special.”²⁸ The visit by President Obama, with baseball as the background, helped to lay the groundwork for a possible deal between MLB and Cuba. During the trip, Obama officials commented that “work still remained” on negotiating a deal that would allow for MLB teams to sign Cuban players directly.²⁹ Antonio Castro, son of former Cuban leader Fidel Castro and the Vice President of the Cuban Baseball Federation, said after the game that MLB and CBF would “hope to have . . . a better relationship,” in the future.³⁰

C. CUBAN BASEBALL IMMIGRATION

MLB and Cuban officials hoped to improve their relationship with the goal of decreasing the number of players that leave Cuba annually—as many as 150 in 2016—many through the employment of human smugglers and organized criminal syndicates.³¹ Between 2004 and 2016, at least twenty-five Cuban players were brought to the United States by smugglers.³² The 2016 trial of sports agent Bartolo Hernandez highlighted his role helping to smuggle seventeen Cuban players with the goal of securing them as clients and having access to their future earnings.³³ The documents procured from the trial show Cuban players paid more than

²⁶ *Obama Leaves Cuba After Declaring End to ‘Last Remnants’ of Cold War*, CHI. TRIB. (Mar. 22, 2016), <https://www.chicagotribune.com/nation-world/ct-obama-cuba-visit-20160322-story.html> [https://perma.cc/HKH7-LSBZ].

²⁷ Barack Obama, *President Obama: MLB Exhibition in Cuba ‘Something Extraordinary,’* ESPN (Mar. 22, 2016), https://www.espn.com/mlb/story/_/id/15041863/mlb-exhibition-cuba-extraordinary [https://perma.cc/27QG-YEJ5].

²⁸ Dan Hayes, *Jose Abreu in Awe as MLB Returns to Cuba for Exhibition*, NBC SPORTS (Mar. 22, 2016), <https://www.nbcsports.com/chicago/chicago-white-sox/jose-abreu-awe-mlb-returns-cuba-exhibition> [https://perma.cc/A936-4V5F].

²⁹ Oppmann, *supra* note 23.

³⁰ Jesse Sanchez, *Historic Day in Cuba Filled with Thrills*, MLB (Mar. 22, 2016), <https://www.mlb.com/news/historic-rays-cuba-game-filled-with-thrills-c168496904> [https://perma.cc/94DG-EVY9].

³¹ Oppmann, *supra* note 23.

³² Jose Pagilery & Ahiza Garcia, *The Cuban Baseball Smuggling Machine Behind MLB*, CNN MONEY (Dec. 15, 2016), <https://money.cnn.com/2016/12/15/news/mlb-cuban-baseball-main/index.html> [https://perma.cc/4UYR-DUMC].

³³ *Id.*

\$11.4 million of their MLB salaries to their smugglers.³⁴ Cuban defectors commonly sign unfair contracts that name their smugglers as agents and entitle them to a percentage of their MLB earnings, often under the duress caused by their families being held prisoner or under threats of violence.³⁵ Although smuggling rings for Cuban players and Cubans in general have existed throughout the embargo's history, no trafficker had been convicted for smuggling until MLB agent Gustavo "Gus" Dominguez's conviction in 2007 in Florida.³⁶ Smuggling Cuban baseball players is a problem acknowledged by the US government, as both the Department of Justice and the Department of Homeland security recently conducted investigations into the problem.³⁷

Commentators announcing the potential MLB-CBF deal called the dangerous, extortive practices of Cuban defector smugglers "the ugliest side of MLB."³⁸ There is no shortage of stories from MLB players about ugly defections from Cuba. Jose Abreu, a member of the Chicago White Sox and the 2020 American League Most Valuable Player, testified that he was forced to eat a fake passport previously obtained from smugglers as he arrived on his flight to the United States.³⁹ Smugglers provided him with the false passport to aid his initial defection, but if that passport was discovered by American authorities upon his arrival, he would have been at risk of deportation.⁴⁰ Leonys Martin, another MLB defector from Cuba, detailed his frightening immigration process during the federal trial of two men charged with smuggling him.⁴¹ He outlined a story that spanned from Cuba to Cancún, Mexico and involved a kidnapping attempt, an illegal border crossing, and a contract that

³⁴ *Id.*

³⁵ *Id.*

³⁶ Rachel D. Solomon, Note, *Cuban Baseball Players, The Unlucky Ones: United States-Cuban Professional Baseball Relations Should Be an Integral Part of the United States-Cuba Relationship*, 10 J. INT'L BUS. & L. 153, 167 (2011).

³⁷ Robyn C. Schowengerdt, Comment, *You're Out: How OFAC's Regulatory Changeup Enables Cuban Baseball Player Smuggling to the United States*, 72 ADMIN. L. REV. 305, 312 (2020).

³⁸ Passan, *supra* note 5.

³⁹ Jeff Passan, *Jose Abreu Eating His Passport is Just the Latest Awful Story from Cuban Defectors*, YAHOO SPORTS (Mar. 1, 2017), <https://sports.yahoo.com/news/jose-abreu-eating-his-passport-is-just-the-latest-awful-story-from-cuban-defectors-235149563.html> [<https://web.archive.org/web/20170302180700/https://sports.yahoo.com/news/jose-abreu-eating-his-passport-is-just-the-latest-awful-story-from-cuban-defectors-235149563.html>].

⁴⁰ *Id.*

⁴¹ Curt Anderson, 'My Life Was in Danger': Mariners' Leonys Martin Tells of Threats in Cuban Smuggling Trial, SEATTLE TIMES (Feb. 21, 2017), <https://www.seattletimes.com/sports/mariners/my-life-was-in-danger-mariners-leonys-martin-tells-of-threats-in-cuban-smuggling-trial> [<https://perma.cc/7L6T-PWUS>].

obligated Martin to pay 35 percent of his MLB contract to a smuggling ring.⁴² Randy Arozarena, a member of the Tampa Bay Rays and the 2021 American League Rookie of the Year, defected in a “glorified kayak” with himself and roughly eight others on board, traversing the Gulf of Mexico to initiate the first step of his defection.⁴³ Looking back on his journey, Arozarena spoke of the fear many feel from taking the perilous steps to defection, saying “the only thing you could do is hope that you survive.”⁴⁴

D. THE TRUMP ADMINISTRATION: CUBA REVERSAL

In the early stages of his 2016 campaign for the US presidency, Donald Trump diverged from most of the other Republican candidates, saying that he supported President Obama’s decision to normalize relations with Cuba.⁴⁵ Early on in his campaign, Trump stated that the “concept of opening Cuba is fine,” but that the United States “should have made a better deal,” in its normalization with Cuba.⁴⁶ Later in his campaign, Trump reversed course and started to harshly criticize the Obama Administration’s foreign policy with Cuba. Speaking in Florida in September 2016, Trump said that he would reverse President Obama’s deal to restore democratic relations and trade unless the Castro regime met specific demands, including restoring political freedoms to Cubans and releasing political prisoners.⁴⁷ This speech marked the first time on the campaign trail that Trump signaled an intention to reverse Cuban policy measures made by the Obama Administration, saying that the concessions made by President Obama were made through executive order and thus easily reversible if Cuba did not meet his stated demands.⁴⁸

After his victory in the 2016 election, President-elect Trump continued to criticize the quality of the deal that the Obama Administration

⁴² *Id.*

⁴³ Juan Toribio, *‘He Stands Out’: Arozarena’s Star on the Rise*, MLB (Oct. 2, 2020), <https://www.mlb.com/news/andy-arozarena-could-be-rays-star-in-the-making> [<https://perma.cc/JN79-BLP7>].

⁴⁴ *Id.*

⁴⁵ Jeremy Diamond, *Trump Backs U.S.-Cuba Diplomatic Relations*, CNN POL. (Sept. 8, 2015), <https://www.cnn.com/2015/09/08/politics/donald-trump-cuba-diplomatic-opening/> [<https://perma.cc/W5ZF-P655>].

⁴⁶ *Id.*

⁴⁷ Jeremy Diamond, *Trump Shifts on Cuba, Says He Would Reverse Obama’s Deal*, CNN POL. (Sept. 16, 2016), <https://www.cnn.com/2016/09/16/politics/donald-trump-cuba/index.html> [<https://perma.cc/5CR9-MU75>].

⁴⁸ *Id.*

struck in its quest for normalization, tweeting that “if Cuba is unwilling to make a better deal for the Cuban people, the Cuban/American people and the United States as a whole, I will terminate deal.”⁴⁹ The incoming Trump Administration signaled a change from the Obama Administration’s attitude toward Cuba when President-elect Trump hired Mauricio Claver-Carone, a lobbyist and “a harsh critic” of the Obama Administration’s policies towards Cuba.⁵⁰ Claver-Carone argued in an opinion piece in the Miami Herald that the Obama Administration had “made a bad situation worse,” with their Cuba foreign policy.⁵¹

In 2017, the Trump Administration began following through on campaign promises to reverse Obama-era normalization with Cuba. In June 2016, President Trump announced that he would reverse parts of policies put forward by the previous administration, including reinstating travel and commercial restrictions.⁵² After a speech in Miami, President Trump signed a six-page executive directive that installed travel restrictions, but left in place some Obama-era measures.⁵³ In October 2017, the Department of State issued a public notice titled *Strengthening the Policy of the United States Toward Cuba*.⁵⁴ The memorandum outlined the administration’s policy goals for dealing with Cuba and steps toward agency and department head policy implementation.⁵⁵ The policies listed in the memorandum included prioritizing the enforcement of the embargo between the two countries, with the memorandum unequivocally stating that the policy of the executive branch was to support the economic embargo of Cuba.⁵⁶ The memorandum also specifically laid out that it superseded and replaced the Obama Administration’s previous Presidential directives.⁵⁷

⁴⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 28, 2016, 6:02 AM), <https://twitter.com/realdonaldtrump/status/803237535178772481> [<https://web.archive.org/web/20161128231131/https://twitter.com/realdonaldtrump/status/803237535178772481>].

⁵⁰ Damien Cave, Azam Ahmend & Julie Hirschfield Davis, *Trump’s Threat to Close Door Reopens Old Wounds in Cuba*, N.Y. TIMES, Nov. 29, 2016, at A1.

⁵¹ *Id.*

⁵² Julie Hirschfield Davis, *Trump Signs Directive to Undo Obama’s Détente with Cubans*, N.Y. TIMES, June 17, 2017, at A1.

⁵³ *Id.*

⁵⁴ *Strengthening the Policy of the United States Toward Cuba*, 82 Fed. Reg. 48,875 (Oct. 20, 2017).

⁵⁵ *Id.*

⁵⁶ *Id.* at 48,876.

⁵⁷ *Id.* at 48,877.

E. THE MLB-CBF AGREEMENT AND CANCELLATION

With the Trump Administration's reversal of Obama Administration concessions in the background, MLB and CBF continued the open dialogue that began with President Obama's visit to Cuba. On December 19, 2018, MLB, in conjunction with the Major League Baseball Players Union ("MLBPA"), announced an agreement with the Cuban Baseball Federation which would allow Cuban players to sign directly with MLB teams.⁵⁸

The proposed deal between MLB and the CBF would run for three years and create a "posting system" similar to the system utilized by MLB teams to sign players from Japan, South Korea or Taiwan.⁵⁹ The details outlined in the agreement would allow the CBF to release players who were above the age of 25 or had accumulated six years of service time in Cuba.⁶⁰ A key provision of the deal would allow the CBF to receive either 25 percent of a player's signing bonus if he signed a deal in the minor leagues, or 15 to 25 percent if the player was signed to a major league team.⁶¹ The players would also be subject to significantly loosened travel restrictions, allowing them to return to Cuba at will and bring family members to the United States if they chose to do so.⁶²

The public statements celebrating the deal by the parties of the agreement and its advocates explained what the deal could mean for the safe and legal immigration of Cuban players. In a statement released by MLB, Cuban defector Jose Abreu said "dealing with the exploitation of smuggles and unscrupulous agencies will finally come to the end for the Cuban baseball player."⁶³ On the day of the deal's signing, MLB Commissioner Rob Manfred stated that "Major League Baseball has been seeking to end the trafficking of baseball players from Cuba by criminal organizations by creating a safe and legal alternative for those players to sign with Major League clubs," and that "this agreement accomplishes that objective."⁶⁴ Although the Cuban government itself did not immediately voice its support for the deal, Cuba's US Ambassador Jose Ramon Cabanas posted a picture on Twitter of Cuban and American baseball

⁵⁸ Waldstein & Rogers, *supra* note 8.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

players, tweeting, “probably it will take a while until we realize the historical meaning of the agreement signed today by [the CBF and MLB]. But one thing is for sure, it will have a tangible impact for these kids.”⁶⁵

Although the agreement was celebrated by some, it was immediately met with hostility from members of the Trump Administration. In a statement to the New York Times, the White House said that “it would continue to work to restrict the Cuban regime’s ability to profit from United States businesses.”⁶⁶ The White House also contended that the plan replaced one human rights issue—combating the trafficking of Cuban players, with another issue—supporting human rights abuses “carried out by the Cuban government rather than traffickers.”⁶⁷

Four months later, on April 8, 2019, the agreement between MLB and the CBF was declared illegal by the Trump Administration.⁶⁸ The administration specifically noted that the deal violated the US embargo with Cuba, and more specifically the Cuban Asset Control Regulations (“CACR”).⁶⁹ OFAC determined that MLB’s payments to the CBF for the release of its players were not authorized because “a payment to the Cuban Baseball Federation is a payment to the Cuban government.”⁷⁰ A letter from Nikole Thomas, the Assistant Director for licensing at OFAC, to counsel for MLB explained the administration’s opposition.⁷¹ The government objected to the provision in the deal that would give the CBF 25 percent of a player’s minor league signing bonus or between 15 and 25 percent of a major league signing bonus.⁷² A spokesman for the administration’s national security council said the deal would “institutionalize a system by which a Cuban government entity garnishes the wages of hard-working athletes who simply seek to live and compete in a free society.”⁷³ Responding to the agreement’s cancellation, MLB reiterated its stated purpose for the deal saying “[w]e stand by the goal of

⁶⁵ Jose Ramon Cabanas (@JoseRCabanas), TWITTER (Dec. 19, 2018, 3:35 PM), <https://twitter.com/JoseRCabanas/status/1075504840430768134> [<https://perma.cc/9T7W-HM5Y>].

⁶⁶ Waldstein & Rogers, *supra* note 8.

⁶⁷ *Id.*

⁶⁸ DeYoung, *supra* note 9.

⁶⁹ Schowengerdt, *supra* note 37, at 307.

⁷⁰ DeYoung, *supra* note 9.

⁷¹ David Waldstein & Michael Tackett, *Citing Trade Laws, Trump Cancels Deal Between M.L.B. and Cuban Federation*, N.Y. TIMES, Apr. 9, 2019, at B10.

⁷² *Id.*

⁷³ *Id.*

the agreement, which is to end the human trafficking of baseball players from Cuba.”⁷⁴

II. THE OFAC DECISION TO CANCEL THE MLB-CBF AGREEMENT

The misguided decision to cancel the MLB-CBF agreement disregarded the practical realities of Cuban baseball immigration. The Trump Administration’s hardline decision to cancel the deal did not accurately consider the potential positive effects of the deal for both Cuban baseball players and Cuba-US relations. OFAC’s main impetus for cancelling the MLB-CBF agreement was its belief that the release fee payments to the CBF amounted to payments to the Cuban government.⁷⁵ While the idea that the CBF is at least a quasi-governmental organization may be rooted in fact, this determination did not legally require OFAC to cancel the deal. Using the CBF’s status to cancel an agreement that would have had positive ramifications for both Cuban baseball players and US national security was misguided.

A. ARGUMENTS AGAINST THE MLB-CBF AGREEMENT’S LEGALITY IGNORE REAL-WORLD CONSEQUENCES

Although there is considerable evidence that the CBF is at least a quasi-governmental arm of the Cuban state, Cuban governmental control of the CBF is not dispositive for declaring the MLB-CBF agreement illegal. The Trump Administration and OFAC argued the “release fee,” which MLB teams would pay to be granted the rights to sign Cuban players, would be in direct opposition to the long-established purpose of the trade embargo with Cuba.⁷⁶ A “senior administration official” told reporters after the deal was established that MLB’s deal “would institutionalize a system by which a Cuban body garnishes the wages of hard-working athletes who simply seek to live and compete in a free society.”⁷⁷ The Trump Administration admonished the actions of MLB, saying that it did not “condone the actions of any person or entity that contribute to the violation of human rights of Cuban citizens and the

⁷⁴ *Id.*

⁷⁵ DeYoung, *supra* note 9.

⁷⁶ Waldstein & Tackett, *supra* note 71.

⁷⁷ Michael McCann, *How the MLB-FCB Deal Could Face Legal Hurdles, Political Resistance*, SPORTS ILLUS. (Dec. 22, 2018), <https://www.si.com/mlb/2018/12/22/legal-breakdown-mlb-cuba-fcb-deal> [<https://perma.cc/5G57-54R8>].

Cuban regime's schemes to profit from the labor of its people abroad while keeping them in thrall to an oppressive political system."⁷⁸

When it was signed, opponents of the MLB-CBF agreements, including Republican legislators and members of the Trump Administration, spoke out against the Obama Administration's provided legal basis justifying the deal. Florida Senator Marco Rubio tweeted that the legality of the decision under the Cuban Embargo and the CACR rested on the Obama Administration's determination that the CBF was not controlled by the Cuban Government.⁷⁹ He called the Obama-era decision "not just factually incorrect" but also a "farce."⁸⁰ Just before the deal was declared illegal, national security advisor John Bolton tweeted, "Cuba wants to use baseball players as economic pawns — selling their rights to Major League Baseball. America's national pastime should not enable the Cuban regime's support for Maduro in Venezuela."⁸¹

Additionally, voices on the right of the political spectrum urged the Trump Administration to reverse what they thought was a factually incorrect decision by the Obama Administration. Former national security advisor Elliot Abrams wrote an article in *The National Review* titled *Trump Should Veto MLB's Foul Deal with Cuba*.⁸² In the article, Abrams likened the release fee paid by MLB teams for Cuban baseball players to an action in which "they bribe the Cuban regime with part of a player's salary."⁸³ Abrams also echoed the Senator Rubio's rhetoric, stating that the CBF is "a cat's-paw for the regime; money paid to it is entirely at the disposal of the regime because there are no truly independent institutions in a Communist country."⁸⁴

B. ARGUMENTS FOR THE LEGALITY OF THE MLB-CBF AGREEMENT

Even if the CBF is legally determined to be intertwined with the Cuban government, the MLB-CBF agreement can still be legal under the

⁷⁸ *Id.*

⁷⁹ Jim Turner, *Rubio Bashes 'Immoral and Illegal' Baseball Deal with Cuba*, S. FLA. SUN SENTINEL (Dec. 28, 2018), <https://www.sun-sentinel.com/news/politics/fl-ne-nsf-rubio-bashes-cuba-baseball-deal-twitter-20181228-story.html> [<https://perma.cc/W9TD-94BN>].

⁸⁰ *Id.*

⁸¹ DeYoung, *supra* note 9.

⁸² 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/G7NP-XZ2K>].

⁸³ *Id.*

⁸⁴ *Id.*

Cuba Embargo and CACR. Supporters of the deal advanced tenuous arguments about the independence of the CBF from the Cuban government. Proponents of the legality of the agreement pointed to two aspects to support their view: a license granted to MLB by the Obama Administration in 2016 to trade with Cuba and the determination by the International Olympic Committee (“IOC”) that the CBF is independent of the Cuban government. During the Obama Administration, MLB successfully convinced OFAC that the CBF was independent of the Cuban government.⁸⁵ In 2016, MLB, in a letter to John E. Smith, acting director of OFAC, argued that the payments to the CBF were not payments to the Cuban government.⁸⁶ In September 2016, the Obama Administration’s Jeffery Braunger, a chief in the Cuba Licensing Division at OFAC, confirmed the legality of the release fee payments in an email to MLB.”⁸⁷ MLB based its successful argument for the legality of the deal on the previous Olympic eligibility of Cuba’s baseball team.⁸⁸ The IOC requires sports’ governing bodies to be “politically independent” in order for a team to be considered eligible for Olympic competition.⁸⁹

When reporting the Trump Administration’s cancellation of the deal, a spokeswoman for the State Department’s Bureau of Western Hemisphere Affairs said that “additional information” had come to light regarding the CBF’s relationship with the Cuban government, informing the basis for the OFAC decision.⁹⁰ The Trump Administration stated that because it determined the CBF was a governmental enterprise, the only way for the MLB-CBF deal to be achieved legally is to seek a special license under CACR § 515.571(e).⁹¹ The relevant provision forbids an employer from making payments “to the Cuban government in connection with the sponsorship or hiring of a Cuban national.”⁹² OFAC may grant a

⁸⁵ Jared Diamond & Vivian Salama, *Trump Administration Blocks Baseball Players from Cuba*, WALL ST. J. (Apr. 8, 2019), <https://www.wsj.com/articles/trump-administration-set-to-tighten-rules-for-baseball-players-from-cuba-11554747444> [https://perma.cc/A34F-NLU5].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Schowengerdt, *supra* note 37, at 315.

⁹² 31 C.F.R. § 515.571(e) (2022); *see also* Trading with the Enemy Act, 50 U.S.C. § 4303.

special license to authorize economic activity that would otherwise be prohibited under the embargo if it aligns with US government interests.⁹³

Although the IOC does consider the CBF independent from the Cuban government, it is hard to see how it would be considered independent through the lens of the United States trade embargo. The correct basis for determining the legality of the agreement is not how the IOC or other organizations may view the Cuban government, but how it is viewed in relation to US statutes and promulgated regulations prohibiting trade with the country.

The Cuban Assets Control Regulations, issued in 1963 under the Trading with the Enemy Act prohibit certain types of transactions that relate to payments to Cuban nationals.⁹⁴ Section 515.415(a)(6) of the regulations prohibits “any transactions involving, property in which Cuba or any Cuban national has any interest.”⁹⁵ This provision aligns with the goals of the embargo, to cut off payments to what the United States views as a tyrannical regime oppressing its people.

Looking at the leadership that constitutes the organization, it appears that the CBF works directly in concert with the Cuban government, even if it is not technically part of it. The fact that the vice president of the CBF is Antonio Castro, a son of Cuban revolutionary leader and dictator Fidel Castro, suggests a closer relationship between the Cuban government and the CBF than MLB had previously argued.⁹⁶ Antonio Castro is also the nephew of Raul Castro, who was president of Cuba at the time of the negotiation and the signing of the MLB-CBF agreement.⁹⁷ Additionally, Antonio Castro was one of the primary drivers of the negotiations between MLB and the CBF, and was the “de facto host” for President Obama’s baseball delegation during his trip to Cuba in 2015.⁹⁸ Although circumstantial, the fact that a Castro played such a large role in the negotiations and agreement between MLB and the CBF points

⁹³ *Applying for a Specific OFAC License*, U.S. DEPT. OF TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/cuba-sanctions> [<https://perma.cc/DF5N-7SNZ>].

⁹⁴ 31 C.F.R. § 515.415 (2022).

⁹⁵ *Id.* § 515.415(6).

⁹⁶ Ben Strauss, *Antonio Castro Provides Link to Major League Baseball*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/interactive/projects/cp/international/obama-in-cuba/antonio-castro> [<https://perma.cc/TC3R-D7MC>].

⁹⁷ Nicole Acevedo & Carmen Sesin, *Miguel Diaz-Canel Becomes Cuba’s President, Raul Castro Steps Down*, NBC NEWS (Apr. 19, 2018), <https://www.nbcnews.com/news/latino/miguel-d-az-canel-becomes-cuba-s-president-ra-l-n867021> [<https://perma.cc/GBK4-RTF3>].

⁹⁸ Strauss, *supra* note 96.

toward the CBF being closely associated with, if not an outright part of the Cuban government. Detractors of the MLB-CBF agreement acknowledged this fact. In an op-ed in the Wall Street Journal, columnist Mary Anastasia O'Grady called the Obama Administration's 2016 OFAC determination "laughable, especially with Fidel Castro's son Antonio a vice president of the federation."⁹⁹

Although the Trump Administration's view of the CBF may be in line with the letter of the CACR, cancelling the MLB-CBF deal does not align with the regulations' spirit. The inferences that suggest the CBF is affiliated with the Cuban government are stronger than the arguments advanced by MLB and the IOC in support of the CBF's independence. The constitution of its leadership and the role that the CBF and its leaders played in diplomacy suggest a closer relationship to the government than argued by MLB. However, the CBF's status as a governmental organization (in the eyes of the Trump Administration's OFAC) did not have to be a death knell for the MLB-CBF agreement. Although the Trump Administration's decision was legally sound, Part III of this Comment will explain why it did not comport with the overall goals of the US policy toward Cuba and its allies. Part IV will suggest alternative legal means for a deal to be recognized by the incoming presidential administration.

III. THE EFFECTS OF THE OFAC DECISION: REVERSION TO THE STATUS QUO

Although the Trump Administration's decision to cancel the MLB-CBF agreement may have been based in sound legal reasoning, it ignored the practical effects and the lawlessness that would follow from the agreement's cancellation. A reinstatement of the status quo that preceded the MLB-CBF agreement is not only dangerous for the players involved (and potentially enriching for criminal organizations), it is antithetical to the goals of the CACR and to the safety of both Cuba and the United States.

Courts held that the goals of the CACR, and the Act from which the rules are promulgated, the Trading with the Enemy Act ("TWEA") are:

⁹⁹ Mary Anastasia O'Grady, *Baseball Teams Up with Castro*, WALL ST. J.: OP. (Dec. 31, 2018), <https://www.wsj.com/articles/baseball-teams-up-with-castro-11546199739> [<https://perma.cc/99E3-GFX6>].

- (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 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.¹⁰⁰

The first stated goal of the Act and its regulations, “to deny to Cuba or its nationals’ hard currency which might be used to promote activities inimical to the interests of the United States” speaks to the national security interest in the Act. The Act promulgates rules and regulations that further the goals of keeping Americans safe and keeping money out of the hands of those hostile to the United States.

The overall aim of the TWEA is to give the executive power to execute economic embargos on foreign states deemed “enemy nations.”¹⁰¹ The Southern District of Florida upheld the CACR, noting that the TWEA gives the President, “a virtually unqualified grant of authority . . . to regulate foreign commerce with Cuba.”¹⁰² OFAC authorizes the President to set a policy on how to trade with enemy nations by using the almost unlimited discretion granted by the TWEA to grant licenses for trade.¹⁰³

The Trump Administration’s decision to cancel the MLB-CBF agreement does not accomplish the national security goals advanced by the TWEA and the CACR. The decision encourages a status quo of defections and human trafficking that benefits international criminal organizations. With the cancellation of the agreement, the current state of Cuban baseball immigration does more harm to the United States’ national security interests than any payment made from an MLB team to the CBF.

Critical to this point is the fact that the national security atmosphere that surrounds the MLB-CBF deal is vastly different from the one that existed when the Cuba Embargo was first enacted. The Cuba Embargo was announced on February 7, 1962,¹⁰⁴ a time when Cold War tensions were high, and the idea of actual armed conflict between Cuba and the United States was a realistic threat. Although the embargo still

¹⁰⁰ *Miranda v. Sec’y of the Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975)).

¹⁰¹ Eric Beinhorn, Note, *An Uneven Playing Field: The Evolving Legal Landscape of Baseball Relations Between Cuba and the United States*, 43 *FORDHAM INT’L L.J.* 819, 823 (2020).

¹⁰² Schowengerdt, *supra* note 37, at 318.

¹⁰³ *Id.*

¹⁰⁴ *US-Cuba Relations*, COUNCIL ON FOREIGN RELS.: TIMELINE, <https://www.cfr.org/timeline/us-cuba-relations> [<https://perma.cc/2FTT-87H4>].

exists, the Trump Administration's current sanctions regime is not justified by threats of armed conflict between the United States and Cuba. The Trump Administration aimed its sanctions at weakening what National Security Advisor John Bolton named the "Troika of Tyranny," – Cuba, Venezuela, and Nicaragua – and are attempts to curb "human rights abuses, causing regional instability, and embracing communism" in the eyes of the United States.¹⁰⁵

The MLB-CBF agreement was cancelled based on considerations that are more concerned with the Cuba-Venezuela relationship than with the national security goals advanced by the TWEA. After the MLB-CBF agreement was cancelled, MLB commissioner Rob Manfred visited the White House to discuss the cancellation with President Trump.¹⁰⁶ At the meeting, the Trump Administration emphasized to Manfred that it wanted MLB to urge Cuba to reduce its ties with the socialist government of Venezuela as a precondition for revisiting the deal.¹⁰⁷ A White House official told NPR that "[t]he administration looks forward to finding productive ways to work with MLB to help the people of Venezuela, a country that has a rich history with MLB but has been destabilized by Cuba's interference."¹⁰⁸ This meeting, and the rhetoric that emerged as a result, point towards the Trump Administration's refusal to consider national security interests or the purposes of the TWEA and CACR when the MLB-CBF agreement was canceled.

While actual armed conflict with Cuba poses a relatively small threat to Americans, Cuba's political tensions with the United States create a status quo of defections and human trafficking that funds international organized crime and has a direct effect on the safety of US citizens. The MLB-CBF agreement advanced the purpose of the TWEA and CACR, preventing "activities inimical" to the United States, by attempting to end the dangerous human trafficking status quo of Cuban baseball immigration.¹⁰⁹ The Obama Administration illustrated that baseball can be used as a bargaining chip in negotiations with this "enemy" state and may

¹⁰⁵ *Id.*

¹⁰⁶ Franco Ordonez, *Trump Will Play Ball with MLB on Cuban Players if League Helps with Venezuela*, NPR (June 12, 2019), <https://www.npr.org/2019/06/12/731966442/trump-will-play-ball-with-mlb-on-cuban-players-if-league-helps-with-venezuela> [<https://perma.cc/4CWT-HLA2>].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Miranda v. Sec'y of the Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975)).

also be an “optimal starting point for the rebuilding of democratic relations” as a whole.¹¹⁰

In contrast to the supposed Cuban threat, the stories that emerge from the criminal trials of smugglers illustrate the direct threat to American national security posed by human trafficking. The 2017 criminal trials of Bartolo Hernandez and Julio Estrada for conspiracy and human trafficking shed light on how the status quo of Cuban baseball immigration funds international organized crime operations. At the trial, Seattle Mariners outfielder Leonys Martin spoke regarding kidnapping attempts and extortion that occurred during his attempted immigration from Cuba to the United States and play professional baseball.¹¹¹ In his 2012 lawsuit against the smugglers that brought him to the United States, Martin claimed that he had to pay \$1.35 million to “avoid reprisals against his family.”¹¹²

Another player, Yasiel Puig, outlined in his story how infamous Mexican drug cartel, Los Zetas, affected his journey from Cuba to the United States.¹¹³ According to claims in court documents, Puig’s smugglers “belong to a smuggling ring whose interest ranged from human cargo to bootleg yachts to bricks of cocaine,” and who were “in the pocket of Los Zetas.”¹¹⁴ Of his \$42 million contract signed with the Los Angeles Dodgers, Puig allegedly paid more than \$1.3 million to smugglers.¹¹⁵

The Trump Administration’s cancellation of the MLB-CBF agreement contravened the purpose of TWEA, allowing money to flow to “interests inimical to the United States” by way of international organized crime. Although the Trump Administration’s cancellation of the agreement was in line with the CACR, it failed to consider the cancellation’s practical effects and the primary purposes of both the

¹¹⁰ Alyson St. Pierre, *America’s Past-Time and the Art of Diplomacy*, 25 IND. J. GLOB. LEG. STUD. 797, 815 (2018).

¹¹¹ *Human Smugglers, Mexican Drug Cartels and the Perilous Journey from Cuba to Major League Baseball*, CBC RADIO (Mar. 10, 2017), <https://www.cbc.ca/radio/day6/episode-328-cia-secrets-leaked-phyllis-diller-s-gag-file-virtual-indigenous-history-and-more-1.4015018/human-smugglers-mexican-drug-cartels-and-the-perilous-journey-from-cuba-to-major-league-baseball-1.4015033> [https://perma.cc/X6GX-NWXB].

¹¹² Dara Lind, *Major League Baseball’s Human Trafficking Problem*, VOX (Sept. 15, 2014), <https://www.vox.com/2014/9/15/6147663/baseball-players-trafficking-cuba-puig-cartels-smuggling> [https://perma.cc/2ZY6-SBQS].

¹¹³ Jesse Katz, *Escape from Cuba: Yasiel Puig’s Untold Journey to the Dodgers*, L.A. MAG. (Apr. 14, 2014), <https://www.lamag.com/longform/escape-from-cuba-yasiel-puigs-untold-journey-to-the-dodgers/> [https://perma.cc/56GV-8PWT].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

CACR and TWEA. The countless stories from Cuban defectors make clear that money emanating from MLB contracts is directly financing organized crime.¹¹⁶ By cancelling the MLB-CBF agreement, the Trump Administration is enabling this practice to continue and prevents a hopeful resolution that would help defund international crime.

Although the MLB-CBF agreement may be in violation of CACR regulations, alternative solutions to Cuban baseball immigration, or a reinstatement of the special license allowed by TWEA, could accomplish the goal of stopping revenue flowing to “interests inimical of the United States.”¹¹⁷

IV. PATHS FORWARD FOR MLB, THE CBF AND THE BIDEN ADMINISTRATION

The change in presidential administrations offers a new renewed opportunity to assess the MLB-CBF deal. The Biden Administration is not constrained by the harsh sanctions put in place by the Trump Administration. The Biden Administration should look to take action that would reinstate the agreement and start to normalize Cuba-US relations. President Biden has broad executive power to grant MLB a license under the TWEA that would effectively reinstate the MLB-CBF agreement and he should do so to accomplish his campaign goal of combatting human trafficking.

A. OFAC UNDER THE BIDEN ADMINISTRATION: AN OPPORTUNITY TO DEMONSTRATE RESTRAINT

In order to protect Cuban baseball players entering the United States, promote US security interests, and signal normalization towards Cuba, the Biden Administration should support any potential MLB-CBF agreement. OFAC policy towards the MLB-CBF agreement is uniquely positioned as a clear and convincing way that the Biden Administration can demonstrate restraint and consideration for the practical effects of its Cuba policy. The actions of both the Obama and Trump Administrations showed that even though most parts of the Cuba embargo were codified through legislation, significant actions toward rapprochement can be taken

¹¹⁶ See *id.*; CBC RADIO, *supra* note 111; Lind, *supra* note 112.

¹¹⁷ *Miranda v. Sec’y of the Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975)).

through OFAC determinations. This policy of rapprochement could be advanced through either a hands-off policy toward the MLB-CBF agreement or the restatement of Obama-era cooperation with MLB to ensure that the agreement does not run afoul of TWEA or CACR regulations.

President Biden should use the MLB-CBF agreement to reverse the hardline Trump Administration policies that Biden criticized during his campaign and signal towards normalization with Cuba. In the run-up to the 2020 Presidential Election, President Biden harshly criticized the Trump Administration's hardline policies toward Cuba.¹¹⁸ Biden argued that the Trump Administration's harsh stances towards Cuba had not accomplished its goals of advancing democracy and human rights in the country.¹¹⁹ Notably, Biden said that he would ease both travel restrictions to the island and limits on remittances that Cuban Americans could send to their families, two policies that were also advanced by the Obama Administration.¹²⁰

The Biden Administration would be wise to signal a willingness to recognize the legality of an MLB-CBF agreement through OFAC. Early in his administration, President Biden and his advisors signaled a loosening of sanctions that could bring a restatement of the MLB-CBF agreement.¹²¹ Early reporting from the Biden Administration fell in line with the rhetoric from the campaign trail, with reports saying that Biden planned "to bring the U.S. closer to normalized relations with Cuba."¹²² This strategy could include easing restrictions on travel, foreign investment, and remittances that disproportionately affect Cuban Americans and ordinary Cubans.¹²³ Experts on US trade policy predicted that Cuba policy in the Biden Administration would closely resemble that of the Obama Administration, and that there was no doubt that Biden

¹¹⁸ Carmen Sesin, *Biden Slams Trump on "Abject Failure" on Venezuela, as well as Cuba Policies*, NBC NEWS (Sept. 6, 2020), <https://www.nbcnews.com/news/latino/biden-slams-trump-abject-failure-venezuela-well-cuba-policies-n1239356> [<https://perma.cc/K4WV-L5CJ>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Ben Bartenstein, *Biden Plots Cuba Reset in Rebuke of Trump's Sanctions*, BLOOMBERG (Dec. 15, 2020), <https://www.bloomberg.com/news/articles/2020-12-15/biden-plots-cuba-reset-in-rebuke-of-trump-s-sanctions-strategy> [<https://perma.cc/696E-Y6KU>].

¹²² *Id.*

¹²³ *Id.*

would seek to reestablish bilateral commercial relations akin to Obama's trade policy.¹²⁴

The Biden Administration would be misguided to echo the hardline rhetoric and policy of the Trump Administration in relation to Cuba and Venezuela and ignore its negative effects. As discussed above, after the cancellation of the MLB-CBF agreement, President Trump made clear that revisiting any decision on the agreement was dependent on MLB urging Cuba to reduce its long-standing cooperation with Venezuela's socialist government.¹²⁵ Although President Biden has signaled a retreat from the hardline stances of the Trump Administration, the Biden Administration's Cuba policy rhetoric consistently includes language that ties Cuba and Venezuela together.¹²⁶ Biden Administration officials expressed that Cuba's support of the Maduro government in Venezuela is still a "defining issue," for the development of the administration's Cuba policy.¹²⁷ Experts like John Kavulich, president of the U.S-Cuba Trade and Economic Council, expressed that the Biden Administration will still use Venezuela as leverage in talks with Cuba.¹²⁸ The Biden Administration should be proactive in reversing the Trump Administration's hardline Cuba policies that Biden himself attacked on the campaign trail. These rigid policies towards Cuba and Venezuela help keep in place an immigration environment that is both dangerous for Cuban baseball players and counterintuitive towards advancing US national security goals in Latin America.

The Biden Administration's first year demonstrates that the reinstatement of the MLB-CBF agreement and diplomacy with Cuba are not high on the administration's list of policy objectives. When asked

¹²⁴ Edward J. Krauland, Meredith Rathbone, Wendy Wysong, Jack R. Hayes, Nicholas Turner, Peter Jeydel, Evan T. Abrams, Martin Willner, Nicholas Kimbrell & Jordan Cannon, *Sanctions Under the Biden Administration: A Return to 'Smart?'*, STEPTOE (Nov. 24, 2020), <https://www.step toe.com/en/news-publications/sanctions-under-the-biden-administration-a-return-to-smart.html> [https://perma.cc/U58A-29KE].

¹²⁵ Ordonez, *supra* note 106.

¹²⁶ Hatzel Vela, *Experts Provide Clues on Biden's New Policy in Cuba*, WPLG LOC. 10 (Jan. 21, 2021), <https://www.local10.com/news/local/2021/01/21/biden-administration-will-not-go-back-to-obamas-policy-on-cuba-experts-say/> [https://perma.cc/A9BB-SPWU].

¹²⁷ *See id.*; Karen DeYoung, *New Cuba Policy on Hold While Biden Deals with Bigger Problems*, WASH. POST (June 27, 2021), https://www.washingtonpost.com/national-security/biden-cuba-policy/2021/06/27/dde275f6-d0f6-11eb-8014-2f3926ca24d9_story.html [https://perma.cc/EVQ8-2EMA].

¹²⁸ Brin Mathew, *Biden Rapprochement with Cuba Faces Difficult Hurdles*, WEEKDAY TIMES (Jan. 18, 2021), <https://weekdaytimes.com/business/2021/01/18/biden-rapprochement-with-cuba-faces-difficult-hurdles> [https://perma.cc/U3P3-5DQX].

about Raul Castro's decision to step aside as First Secretary of the Cuban Communist Party's, White House spokesperson Jen Psaki said that "[a] shift in Cuba policy" was not among the administration's top foreign policy priorities.¹²⁹ Biden has yet to fulfill a campaign promise to reverse the Trump Administration's hardline policies towards normalization with Cuba, including the OFAC regulations that paved the way for the cancellation of the MLB-CBF agreement.¹³⁰ As of late summer 2021, Biden Administration officials stated that review of the Trump Administration's policies toward Cuba was still ongoing and the administration had not decided on any potential policy changes.¹³¹

Meanwhile, Cuban baseball players and their stories continue to play a large role in both MLB and the sport as a whole. The fraught process of immigration endured by Cuban baseball players is illustrated by eleven members of Cuba's under-23 youth national team defecting during a tournament in Mexico in October 2021.¹³² Cuba responded by blaming not only the players' "weak morals and ethics," but also the US restrictions that "force Cuban players to defect in order to play in the Major Leagues."¹³³ At the same time, Cuban-born Yordan Alvarez of the Houston Astros surged in the MLB playoffs and was named the American League Championship Series' Most Valuable Player. Profiled in the New York Times, Alvarez shared similar sentiments as other Cuban players about his journey to Major League Baseball.¹³⁴ Alvarez stated that he hoped that his parents, who were not allowed in the United States due to the country's restrictions, would one day be able to watch him play professional baseball in person.¹³⁵

¹²⁹ Trevor Hunnicutt & Andrea Shalal, *White House Says Shift in Policy on Cuba Not One of Biden's Top Priorities*, REUTERS (Apr. 16, 2021), <https://www.reuters.com/world/americas/white-house-says-shift-policy-cuba-not-one-bidens-top-priorities-2021-04-16/> [https://perma.cc/DZR5-UK6G].

¹³⁰ Kaitlan Collins, Kate Sullivan & Natasha Bertrand, *Biden's Review of Trump's Restrictive Cuba Policies Still Underway*, CNN (July 13, 2021), <https://www.cnn.com/2021/07/13/politics/biden-cuba-review/index.html> [https://perma.cc/MR5D-D9KQ].

¹³¹ *Id.*

¹³² Patrick Oppmann, *Cuba Lashes Out After Young Baseball Players Defect in Mexico*, CNN (Oct. 3, 2021), <https://www.cnn.com/2021/10/03/americas/cuban-baseball-players-defect-intl/index.html> [https://perma.cc/NES9-7WJ4].

¹³³ *Id.*

¹³⁴ James Wagner, *In a Place He Never Thought He'd Be, and Thriving*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/2021/10/21/sports/baseball/yordan-alvarez-alcs-mvp.html> [https://perma.cc/H8KN-EPCQ].

¹³⁵ *Id.*

B. POLICIES TO SAFELY TRANSFER CUBAN PLAYERS UNDER THE
CURRENT LEGAL FRAMEWORK

President Biden should act to undo the harmful Cuban immigration status quo that props up human trafficking. The Biden Administration should either act in concert with OFAC to unilaterally to suspend the provisions of the TWEA in relation to the MLB-CBF deal or, alternatively, grant MLB a special license to do business in Cuba. The simplest way for a Biden Administration to allow for the transfer of Cuban players in the way prescribed by the MLB-CBF agreement is to act unilaterally and allow OFAC to use a broader interpretation of “interests inimical to the United States,” under the TWEA.

As stated above, the primary goal of the TWEA is “to deny to Cuba or its nationals” hard currency which might be used to promote “activities inimical to the interests of the United States.”¹³⁶ However, the definition of what activities advance “interests inimical to the United States” is determined by the actions of the President and OFAC, as the act gives the President unilateral authority to either restrict or remove trade restrictions with “enemies of the United States,” or to grant special licenses to businesses to conduct trade with those listed enemies.¹³⁷ Under the TWEA, President Biden has the unilateral authority as the executive:

[I]f he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this chapter so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business.¹³⁸

This provision grants the President the authority to act, according to his discretion, “if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war.”¹³⁹ President Obama acted under the

¹³⁶ *Miranda v. Sec’y of the Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975)).

¹³⁷ *Id.*; 50 U.S.C. § 4305(a).

¹³⁸ 50 U.S.C. § 4305(a).

¹³⁹ *Id.*

TWEA in his interactions with Cuba to start the process of normalizing relations between the two countries.¹⁴⁰

President Biden can exercise his authority under the TWEA in a way that would authorize the reinstatement of the previous MLB-CFB agreement or a similar agreement between the two institutions. Although an unlikely option, President Biden could opt to remove Cuba from the purview of the TWEA and effectively suspend the main provisions of the Cuba embargo all together. The TWEA, in prohibiting trade with enemies, defines an “enemy” as “any individual” or “the government of any nation with which the United States is at war.”¹⁴¹ Although Congress never formally declared war with Cuba, the country is still under the purview of the Act, with violators who trade with Cuba facing the possible penalty of significant fines or prosecution.¹⁴² Using his authority under the TWEA to define “enemy,” President Biden could remove Cuba from the list of “enemies” and allow for trade to resume between the two countries, opening a path for the reinstatement of the MLB-CBF agreement. However, early reporting from the Biden Administration suggested that “supporters of the U.S. embargo should not fret.”¹⁴³ Although members of the Biden Administration expressed the desire to advance a policy based on “communication rather than isolation,” they additionally expressed that the “Biden administration will not be rescuing Cuba from problems of its own making.”¹⁴⁴ An effective suspension of Cuban trade embargo provisions similar to the actions of the Obama Administration and a return to true normalization between the two countries would obviously open a path to the reinstatement of the MLB-CBF agreement, but the political reality does not seem to support such an action.

The Biden Administration should act within its power under Section 4305(a) to grant MLB a special license to do business in Cuba, paving the way for the reinstatement of MLB-CBF agreement.¹⁴⁵ OFAC has the authority under the TWEA to control special licenses and approve

¹⁴⁰ Nicole Zaworska, *Striking Out the Cuban Trade Embargo: A Contractual Approach to the Transfer of Cuban Baseball Players to the Big Leagues*, 24 SPORTS L.J. 135, 139 (2017).

¹⁴¹ Matt Peppe, *How Obama Could End the Cuban Embargo*, COUNTERPUNCH (Jan. 12, 2015), <https://www.counterpunch.org/2015/01/12/how-obama-could-end-the-cuban-embargo/> [<https://perma.cc/BPR8-TF68>].

¹⁴² 31 C.F.R. § 501.701 (2022).

¹⁴³ Vela, *supra* note 126.

¹⁴⁴ *Id.*

¹⁴⁵ 50 U.S.C. § 4305(a).

otherwise prohibited activity under the embargo.¹⁴⁶ OFAC also has broad discretion to issue licenses to otherwise prohibited business transactions.¹⁴⁷ Just as policy was able to change between the Trump and Obama Administrations, it is clear that the Biden Administration or other future administrations can set a different policy that prioritizes reducing the trafficking of athletes.¹⁴⁸ The process that ended with the MLB-CBF agreement began in 2015 when MLB applied to the Obama Administration OFAC for a special license to do business in Cuba.¹⁴⁹ The Obama Administration made it clear when weighing whether to grant the license that the President had wide latitude to set the policy for OFAC to follow.¹⁵⁰ The OFAC Acting Director stated in response to MLB's application that OFAC "acts in consultation with the State Department and other relevant U.S. government agencies in determining whether (authorizing transactions) would be consistent with current policy."¹⁵¹ This statement makes transparent that even though OFAC makes the case-by-case decisions, they are made based on broad policy that is set by the presidential administration.

To align with campaign rhetoric on combatting human trafficking, President Biden should acknowledge the current state of Cuban baseball immigration and work towards ending the regime of human trafficking that it contributes to. A Biden Administration decision to reinstate the MLB-CBF agreement would undoubtedly face political pushback from conservatives. Before the Biden Administration took any action on Cuban policy, Republican senators warned against returning to the "failed Obama administration policy of rewarding Raul Castro and Miguel Diaz-Canel with sanctions relief and political legitimacy for decades of repressive behavior."¹⁵² However, those criticisms ignore the practical effects of the MLB-CBF agreement and the sanctions regime that props up an industry

¹⁴⁶ Daniel Trotta, *As MLB Seeks Legal Entry to Cuba, Obama Considers Playing Ball*, REUTERS (Dec. 24, 2015), <https://www.reuters.com/article/us-cuba-usa-baseball/as-mlb-seeks-legal-entry-to-cuba-obama-considers-playing-ball-idUSKBN0U620M20151224> [https://perma.cc/LNR6-GZEU].

¹⁴⁷ Beinhorn, *supra* note 101, at 829.

¹⁴⁸ Cole Burton, *America's Pastime: Human Trafficking, Cuba, and the Road to the Show*, 40 N. ILL. U.L. REV. 286, 310 (2020).

¹⁴⁹ *Id.* at 292–93.

¹⁵⁰ Trotta, *supra* note 146.

¹⁵¹ *Id.*

¹⁵² Marco Rubio, Opinion, *Rubio: A Biden Administration Must Not Repeat Obama's Concessions to Cuba's Regime*, MIA. HERALD (Dec. 10, 2020), <https://www.miamiherald.com/opinion/article247764955.html> [https://perma.cc/K3KS-QNR7].

of human trafficking. The Biden Administration approving the MLB-CBF agreement would create positive practical effects outweighing any potential political pushback. During his candidacy, President Biden said that he intended to prioritize fighting human trafficking if he were elected.¹⁵³ In his statement on human trafficking, President Biden expressed a sentiment that “protecting people from human trafficking should be above politics,” and that upon his election he would “make it a priority to combat this terrible crime,” and protect those vulnerable to trafficking.¹⁵⁴ Both the rhetoric of the parties and the practical realities of the current state of Cuban immigration strongly suggest that the MLB-CBF agreement would be a large step towards eliminating human trafficking in baseball. President Biden should take action through OFAC that aligns with his campaign rhetoric on human trafficking to reinstate the MLB-CBF agreement.

V. CONCLUSION

Since the Cold War and the Cuban embargo, the topic of Cuban baseball immigration has been inextricably wound with legal, political, and practical ramifications. The shared passion for baseball between two supposedly diametrically opposed nations has spawned a complicated and oft-changing immigration reality for Cuban baseball players who wish to play at the highest level of their sport. Domestic and foreign political pressures led US presidents to create inconsistent policies that produced an entire industry where human traffickers profit off the backs of those who hope to become successful MLB players.¹⁵⁵ Before the Trump Administration invalidated the MLB-CBF deal, the agreement provided a significant attempt at combatting the dangerous state of Cuban baseball immigration.¹⁵⁶

The softening of Cold War-era tensions and the authority granted to the President under the TWEA offer a path forward to the restatement of the MLB-CBF agreement and an opportunity to prioritize real-world

¹⁵³ Joe Biden, *My Statement on World Day Against Trafficking in Persons*, MEDIUM (July 30, 2020), <https://medium.com/@JoeBiden/my-statement-on-world-day-against-trafficking-in-persons-7175c75861d2> [https://perma.cc/XY5B-54W2].

¹⁵⁴ *Id.*

¹⁵⁵ See Scott Eden, *No One Walks Off the Island*, ESPN (Apr. 17, 2014), http://www.espn.com/espn/feature/story/_/id/10781144/no-one-walks-island-los-angeles-dodgers-yasiel-puigjourney-cuba [https://perma.cc/E2JY-6LGY].

¹⁵⁶ Beinhorn, *supra* note 101, at 838.

effect over rigid legal construction. The TWEA, under section 4305(a), grants broad latitude for special licenses “compatible with the safety of the United States,” that has been utilized in the past to circumvent the Cuba embargo where U.S. national security would not be harmed.¹⁵⁷ The MLB-CBF agreement and its possible reinstatement offer the Biden Administration the opportunity to directly combat human trafficking and promote U.S. national security pursuant the Act. Contrary to campaign rhetoric, the Biden Administration has not reversed the Trump Administration’s restrictive Cuba policies or worked with OFAC to reinstate the MLB-CBF agreement. President Biden should act under the TWEA to reinstate the MLB-CBF agreement and combat the human trafficking industry endemic to the current reality of Cuban baseball immigration.

¹⁵⁷ Amanda Taub, *Obama Can Limit the Cuba Embargo on His Own. But He Needs Congress to End it*, VOX (Dec. 17, 2014), <https://www.vox.com/2014/12/17/7408829/cuba-embargo-obama-lift> [<https://perma.cc/5UMS-7CRZ>].