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The Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy

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NOTES & COMMENTS

THE NEED FOR A WORLDWIDE DRAFT:
MAJOR LEAGUE BASEBALL AND ITS
RELATIONSHIP WITH THE CUBAN EMBARGO
AND UNITED STATES FOREIGN POLICY

I. INTRODUCTION

A favorite saying in Cuba is “todos los niños nacen con un guante en
sus manos,” which means, “all boys are born with a baseball glove in
their hands.” Incredibly, at least ten percent of all Cubans play baseball in
some type of organized league. Before the establishment of the Cuban
embargo, approximately 110 Cuban baseball players played Major League
Baseball in the United States. In 1991, Rene Arocha was the first Cuban
baseball player to defect to the U.S. since the Communists took power in
Cuba in 1959. When asked about the baseball talent in Cuba, Arocha
stated all twenty players on the Cuban national team, as well as several
others, could successfully play in Major League Baseball (“MLB”).
However, for approximately thirty-eight years this talent pool has been
unavailable to MLB teams because of the Cuban embargo and MLB rules.

1. Kevin Baxter & Fernando Dominguez, Baseball Si, Cuba No, SPORTING NEWS, Mar. 21,
1994, at 12, 12.
2. See id.
3. See infra Part III.
4. See Baxter & Dominguez, supra note 1, at 14. Cuban players such as Minnie Minoso,
Camilo Pascual, Dolph Luque, and Pedro Ramos played in the Major Leagues before Castro
banned professional sports in 1960. See id.
6. See Baxter & Dominguez, supra note 1, at 14. The talent level in Cuba is believed to be
four players deep at each position. See id.
(1994). See generally Steve Fainaru, LA Loses Minor Leaguers: Dodgers Punished for Holding
Secret Tryouts, BOSTON GLOBE, June 28, 1999, at D1. MLB rules prohibit teams from scouting
in Cuba. See id.
The obvious desire of MLB teams to obtain this talent, coupled with Cuban players' desire for "liberty," have resulted in defections from Cuba.\(^8\)

In June of 1999, the Los Angeles Dodgers became the first baseball team caught scouting in Cuba, a violation of MLB rules.\(^9\) As a result of this violation, the Los Angeles Dodgers lost their contractual rights to two Cuban-born minor league players, Josue Perez and Juan Carlos Diaz.\(^10\) The Dodgers were also fined $200,000.\(^11\) The Dodgers helped the players defect to the Dominican Republic, which, under MLB rules, allowed the Cubans to sign as free agents with the Dodgers.\(^12\) If the Cubans had come directly to the U.S., either on their own or with illegal help from the Dodgers, the two players would have been subject to the amateur draft.\(^13\) They would have then been available to any MLB team with a higher draft pick than the Dodgers and all of the Dodgers' covert actions would have been for naught.\(^14\) This exemplifies how the current MLB rules encouraged the Dodgers to violate the embargo just to contract a player.

This Comment argues MLB rules must be changed in order to avoid giving teams an incentive to violate U.S. foreign policy. Part II discusses the Dodgers' unprecedented actions in Cuba and examines the details of the first time a major league team scouted in Cuba in direct contravention of Major League rules. Part III focuses on the Cuban Embargo, specifically the history of the embargo and its recent developments. Part IV discusses whether the Dodgers could be charged with violating the federal embargo implementing provisions. Part V examines the evolution of MLB rules regarding the recruiting and signing of Cuban players. In addition, Part V shows how the "loophole"\(^15\) in MLB rules encourages teams to violate the Cuban embargo and encourages agents to disrupt foreign relations between Cuba and the United States.

8. See Baxter & Dominguez, supra note 1, at 13. When describing why he left Cuba, Rene Arocha explained the main reason he left was to "look for liberty." Id. Alexis Cabreja defected in 1992 and stated "[his] main objective, above all, [was] to have the liberty [that he] didn't have [in Cuba] to play baseball...." Id. Other factors prompting defection include the weak Cuban economy and the inspiration prior defectors have given to players still in Cuba. See id.

9. See Fainaru, supra note 7.

10. See id.

11. See Hal Bodley, Selig's Signing Ban Punishes Dodgers, USA TODAY, July 2, 1999, at 8C.

12. See Fainaru, supra note 7.

13. See infra Part V.B.1–2; see also infra notes 239–40 and accompanying text.

14. See infra Part V.B.1–2; see also infra notes 239–40 and accompanying text.

Cuba and the U.S., Costa Rica, the Dominican Republic and the Bahamas. Finally, Part VI describes recent legislative and presidential action regarding the U.S. embargo against Cuba and how this could affect MLB and its rules. This part also suggests changes to MLB rules that may avoid another incident similar to that created by the Dodgers.

II. THE DODGERS RECRUITMENT IN CUBA VIOLATED MAJOR LEAGUE BASEBALL RULES

In 1999, for the first time, MLB granted free agency to two of the Los Angeles Dodgers' minor league baseball players to penalize the Dodgers for scouting in Cuba. Never before had a MLB team been caught scouting in Cuba. First baseman Juan Carlos Diaz and outfielder Josue Perez disclosed the Dodgers held secret tryouts in Cuba and arranged their defections in violation of MLB rules. Pablo Peguero, an official scout of the Dodgers' baseball academy in the Dominican Republic, held the tryouts when he traveled to Cuba in 1996 and 1997 pretending to be a tourist. During these two trips, Peguero met with numerous Cuban players, including Diaz and Perez.

When disclosing the Dodgers' illegal actions, Diaz told the MLB Commissioner's Office that Peguero had videotaped Diaz in a tryout outside of Havana, Cuba in 1996. Perez reported he tried out for Peguero in Cuba in 1997. Peguero allegedly implemented a plan, for both Diaz and Perez, whereby the players could obtain visas to leave Cuba for the Dominican Republic. Under the plan, two women, one of whom was Peguero's cousin, posed as the players' girlfriends from the Dominican

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16. See Baxter, supra note 15, at 21. Osvaldo Fernandez defected with sports agent Joe Cubas' help in 1995. See id. at 20. Furthermore, Fernandez's family also left Cuba, but Fernandez will not disclose how. See id.

17. See Fainaru, supra note 7. The Dodgers lost all contractual rights to the professional services of Diaz and Perez, as well as time and money invested in improving these players' skills. See id. These players, as free agents, were allowed to negotiate with other Major League teams for their services. See id.; see also Joe Christensen, Dodgers Lose Two Cubans; MLB Says the Team Violated Rules Prohibiting Scouting Players in the Country, PRESS-ENTERPRISE (Riverside, Cal.), June 29, 1999, at C1, available in 1999 WL 18895090.

18. See Fainaru, supra note 7.

19. See id.; see also Christensen, supra note 17.

20. See Fainaru, supra note 7.

21. See id.

22. See id.

23. See id.

24. See Christensen, supra note 17.
Republic. The "girlfriends" lied by insisting to Cuban immigration officials they had invited Diaz and Perez to visit the Dominican Republic. The plan worked, and Diaz and Perez were authorized to travel to the Dominican Republic. Moreover, after helping them obtain the visas, Peguero apparently purchased airline tickets to the Dominican Republic for the players.

Once the two players were in the Dominican Republic, the two women disappeared and the players were placed into Campo Las Palmas Baseball Camp, the Dodgers Dominican baseball academy. Without prior negotiations and without the players having an opportunity to be represented by agents, Peguero signed the players to free agent baseball contracts. Diaz signed for $65,000 while Perez signed for $40,000. The players were then told to lie about their background. If asked how they came to the Dominican Republic, the players were to respond that they were in fact born in Cuba but had traveled to the Dominican Republic with their girlfriends.

After this incident was revealed, the Commissioner's office fined the Dodgers $200,000, $50,000 less than the maximum allowable fine. The office also restricted the Dodgers from signing any foreign player for six months as a result of their conduct.

Although these violations occurred in 1996 and 1997, they were not exposed until almost two years later, when Diaz and Perez discovered their signing bonuses were significantly lower than the millions of dollars other Cuban players were making in MLB. Diaz and Perez were further

25. See Fainaru, supra note 7.
26. See id.
27. See id.
29. See Fainaru, supra note 7.
30. See Plaschke, supra note 28.
31. See Fainaru, supra note 7.
32. See id.
33. See Plaschke, supra note 28.
34. See id.
35. See Bodley, supra note 11.
36. See Thumbs Down, SEATTLE TIMES, July 11, 1999, at D9; see also Bodley, supra note 11. There was an exception for two players with whom the Dodgers were negotiating at the time. See id.
37. See Fainaru, supra note 7.
38. See Christensen, supra note 17. Dominguez, now the agent for the two players, believes the Dodgers took advantage of the Cuban players: "[The Dodgers] thought that they were bigger than baseball, and they're not." Id.; see also Baxter, supra note 15, at 19. Orlando Hernandez, a
disillusioned by the fact the Dodgers had told the two players the franchise would help their families defect, but this never occurred.39

III. THE CUBAN EMBARGO

The U.S. implemented the initial stages of the Cuban embargo in 1962.40 Throughout the thirty-eight years it has been in place, the embargo has undergone considerable modification. As it stands today, “persons subject to the jurisdiction of the United States,” meaning not only persons in the United States and American citizens, but also entities anywhere that are controlled by American persons, are prohibited from engaging in virtually all types of transactions with Cuba unless they have received a specific license from the U.S. Treasury Department’s Office of the Foreign Assets Control.41

A. Early Origins of the Cuban Embargo

The Cuban embargo is based upon the Trading With the Enemy Act (“TWEA”),42 implemented in 1917. The TWEA was a “war measure” promulgated six months after the U.S. entered into World War I.43 Section 5(b) of the TWEA stated the President of the U.S. may, by means of instructions, licenses, or otherwise:

investigate, regulate, . . . 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 transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect

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39. See Plaschke, supra note 28.
40. See Proclamation No. 3447, 3 C.F.R. 26 (Supp. 1962), reprinted in 22 U.S.C. § 2370 (1994). President Kennedy stated the purpose of the embargo was to ensure safety in the western hemisphere by “isolating the present Government of Cuba and thereby reducing the threat posed by its alignment with the communist powers.” Id.
to any property, subject to the jurisdiction of the United States . . . 44

The text of the TWEA originally stated it was also applicable "[d]uring ... any ... period of national emergency declared by the President."45 This language gave the President the authority to impose embargoes against foreign countries, regardless of whether or not there was a wartime emergency.46

Section 5(b) gives authority to the President, or his designee, to control all transactions between the U.S. and any nation under the aim of the TWEA.47 The Secretary of the Treasury is given the authority to promulgate regulations with the goal of enforcing the TWEA.48 Under the authority of the Secretary of the Treasury, the Office of Foreign Assets Control ("OFAC") implements and enforces the Cuban Assets Control Regulations ("CACR").49 In 1963, the OFAC codified the embargo that previously had been implemented under the TWEA.50 The codified CACR also included new economic sanctions on Cuba.51 The goals 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 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.52

Federal regulations promulgated to achieve these goals, "prohibit[] ... the transfer, sale or other disposition of assets in which the Cuban government or Cuban nationals have an interest."53 Furthermore, any transfer that violates the CACR is "null and void."54 Under the

47. See Fernandez-Pertierra, 523 F. Supp. at 1137.
50. See Havana Club Holding, 961 F. Supp. at 500 (stating the original embargo was a U.S. response to "alleged Cuban efforts to destabilize Latin American Governments").
51. See Regan, 468 U.S. at 226 n.4.
52. 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)).
53. Miranda, 766 F.2d at 4 (citing 31 C.F.R. § 515.201 (1984)).
TWEA, the U.S. may criminally prosecute anyone who violates the TWEA or the CACR.55

Alternative authority granted to the President for the implementation of the CACR is found in the Foreign Assistance Act ("FAA"),56 which declares a broad embargo on all trade with Cuba.57 The FAA also states that no aid may be given to the government of Cuba58 and gives the President the authority to "establish and maintain" an embargo between the U.S. and Cuba.59

Section 5(b) of the TWEA was amended on December 28, 1977, in order to limit the President's TWEA authority to times of war.60 The same bill developed the International Emergency Economic Powers Act ("IEEPA").61 The IEEPA continued the President's exercise of emergency economic powers during times of peace.62 However, instead of requiring the President to declare a new national emergency against Cuba, the amendment to the TWEA retroactively carried over those peacetime "national emergency" authorities to the President that he was exercising with respect to Cuba on July 1, 1977, under § 5(b) of the TWEA.63 The amendment also provided "[t]he President may extend the exercise of such authorities for one-year periods upon determination for each such extension that the exercise of such authorities with respect to [Cuba] for another year is in the national interest of the United States."64 Therefore, the CACR were not affected by the 1977 amendment and the embargo remained in force.65

55. See Fernandez-Pertierra, 523 F. Supp. at 1138.
57. See id. § 2370(a)(1).
58. See id. ("No assistance shall be furnished under this chapter to the present government of Cuba.").
59. See id. ("As an additional means of implementing and carrying into effect the policy... the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.").
62. See id. Although through the International Emergency Economic Powers Act ("IEEPA") the President retains his peacetime power, it can only be used, "to deal with [an] unusual and extraordinary threat." See 50 U.S.C. § 1701(a). The President, though, is required to consult with Congress before exercising his power under the IEEPA. See 50 U.S.C. § 1703.
63. See Trading With the Enemy Act, § 101(b), 91 Stat. at 1625 (codified at 50 U.S.C. app. § 5 note (1994)).
64. Id.
65. See Fernandez-Pertierra, 523 F. Supp. at 1138.
B. Recent Developments of the Cuban Embargo

The Cuban Democracy Act of 1992 modified the existing sanctions under the Cuban embargo. The Cuban Democracy Act extends the prohibition against doing business in Cuba to U.S.-owned or controlled companies located abroad. Under the Act, no licenses may be issued to American firms for listed transactions involving the exportation and importation of goods of Cuban origin. Congress gave responsibility for enforcement of the Cuban Democracy Act to the Secretary of the Treasury, reaffirming the secretary's role in the implementation of the Cuban embargo. Another important provision allows the President to sanction any foreign country that assists Cuba.

Most recently, the Cuban Liberty and Democratic Solidarity Act of 1996, also known as the Helms-Burton Act, further extended the reach of the embargo. The Helms-Burton Act requires the Cuban government to adhere to specific conditions and the President receive Congressional approval before the U.S. President may lift the embargo. 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.

68. See 22 U.S.C. § 6005 (permitting the issuance of specific licenses to a limited number of U.S. companies for transactions described in 31 C.F.R. § 515.559 (1999)).
69. See 31 C.F.R. § 515.559.
71. See 22 U.S.C. § 6003. Section 6003 allows the President to bar a country’s eligibility for aid from the U.S. under the Foreign Assistance Act of 1961 or the Arms Export Control Act, if that country provides assistance to Cuba. See id. Furthermore, any country that assists Cuba “shall not be eligible, under any program, for forgiveness or reduction of debt owed to the United States Government.” Id. Assistance is defined as financial assistance and does not include the donation of food or the exportation of medicine. See id. § 6003(b)(2).
73. See Coleman & Graham, supra note 41, at 338. The act is often referred to by the names of its two principal sponsors, Senator Jesse Helms (R-N.C.) and Representative Dan Burton (R-Ind.). See id.
75. See generally 22 U.S.C. §§ 6061–6066. Such requirements include Cuban legalization of all political activity and organization of free and fair elections. See id. § 6065. Congressional approval must be by joint resolution of the two houses of Congress. See 22 U.S.C. § 6064.
This provision dispenses with the TWEA amendment requiring the President to declare each year the embargo is in the nation's interest. Thus, the Helms-Burton Act shifts the power to Congress to modify or lift the embargo, a power that previously resided with the President.

C. The Power of the Cuban Assets Control Regulations

The CACR effectively control who may travel to Cuba. The OFAC, which promulgates the CACR, has broad discretion in deciding when to issue specific licenses that authorize otherwise prohibited transactions or travel. The CACR also codify OFAC's authority both to make changes to the CACR licensing regulations and to amend or rescind existing licenses at any time. Courts interpret the regulations with great deference to the President and OFAC's decisions to deny American citizens the right to travel to Cuba.

In *Regan v. Wald*, American citizens challenged a provision of the CACR as violative of their Constitutional Fifth Amendment due process right to travel. Although the 1977 amendment to the TWEA limited the statute to war-time application, the amendment "grandfathered" those powers that the President was exercising at the time of the amendment's passage, July 1, 1977. The Supreme Court held the "grandfather" provision, when read in conjunction with the TWEA, provided sufficient statutory authority for the President to regulate travel to and from Cuba.

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77. See Coleman & Graham, supra note 41, at 339.
78. See id.
81. See Havana Club Holding, 961 F. Supp. at 500–01 (describing the effect of 31 C.F.R. § 515.801(b)(6)).
82. See Havana Club Holding, 961 F. Supp. at 501 (describing OFAC's authority pursuant to 31 C.F.R. § 515.805). See *Regan v. Wald*, 468 U.S. 222, 242 (1984) (upholding the President's authority to restrict travel to Cuba over a Fifth Amendment claim); Walsh v. Brady, 927 F.2d 1229, 1239 (D.C. Cir. 1991) (upholding the authority of the Secretary of the Treasury to deny a license to travel to Cuba if reasonable when considered in light of foreign policy concerns).
83. 468 U.S. 222.
84. The provision challenged was 31 C.F.R. § 515.560(g) (1999) (proscribing transactions involving tourist travel to Cuba).
85. U.S. CONST. amend. V.
87. See *Regan*, 468 U.S. at 232, 235.

Since the authority to regulate travel-related transactions was among those "authorities conferred upon the President" by §5(b) of the TWEA "which were
The Wald Court addressed the due process argument next. Relying on an earlier case, Zemel v. Rusk, the Wald Court concluded the denial of the right to travel to Cuba was justified "by weighty concerns of foreign policy." In Zemel, the Court upheld the Secretary of State’s refusal to validate passports of American citizens who wished to travel to Cuba. This refusal worked to impose a general ban on travel to Cuba in 1961.

In Zemel, the plaintiffs alleged both First Amendment and Fifth Amendment violations. Although the Zemel Court agreed the Secretary’s decision not to issue passports for travel to Cuba resulted in a fettered flow of information, the Court found the First Amendment does not confer the unbridled right to freely gather information. The Wald Court held the considerations underlying the Fifth Amendment right to travel did not trump the foreign policy concerns in preventing travel to Cuba. Based on the Court’s approval of the CACR in Wald, OFAC can constitutionally impose broad restrictions on travel to Cuba.

The CACR restrict "travel-related transactions to, from, and within Cuba . . . by persons subject to United States jurisdiction." However, the CACR do allow persons subject to U.S. jurisdiction to obtain general licenses to travel to Cuba for family visits, official business of "the U.S. government, foreign governments, . . . certain intergovernmental organizations," "journalistic activities" or "professional research." All other travel activities require a specific license that must be obtained being exercised" with respect to Cuba on July 1, 1977, it seems to us to follow from a natural reading of the grandfather clause that the authority to regulate such transactions "may continue to be exercised" with respect to Cuba after that date.

Id. at 235 (citing Trading With the Enemy Act, § 101(b), 91 Stat. at 1625 (codified at 50 U.S.C. app. § 5 note (1994)).

88. See Regan, 468 U.S. at 240.
89. 381 U.S. 1 (1965).
90. Regan, 468 U.S. at 242.
91. See Zemel, 381 U.S. at 3.
92. See id.
93. See id. at 16.
94. See id.
95. See id. at 17.
96. See Regan, 468 U.S. at 242. The Court explained, "[w]e see no reason to differentiate the travel restrictions imposed by the President in the present case and the passport restrictions imposed by the Secretary of State in Zemel." Id.
97. See id. at 244; see also supra notes 82–92 and accompanying text.
99. Id. § 515.561.
100. Id. § 515.562.
101. Id. § 515.563.
102. Id. § 515.564.
through OFAC, which evaluates travel inquiries on a case-by-case basis. Specific licenses to travel to Cuba may be available for the following: "educational activities," "religious activities," "public performances . . . [including] athletic and other competitions," "support of the Cuban people" and "humanitarian projects."

IV. THE LOS ANGELES DODGERS VIOLATED THE CUBAN EMBARGO

The Dodgers' scouting activities in Cuba are among the types of actions regulated by the CACR. Evidence exists that the Dodgers' violations included both traveling to Cuba to scout and making contacts with individual Cuban baseball players.

A. Peguero Violated the Cuban Embargo

The CACR provide for specific situations where a general license for travel to Cuba will be issued. Any other travel requires the application for, and grant of, a specific license. Most importantly, the regulations expressly prohibit the issuance of a specific or general license to a person subject to U.S. jurisdiction for tourist travel to Cuba. Pablo Peguero,
an official with the Dodgers' baseball academy in the Dominican Republic, entered Cuba as a tourist.\footnote{115} As such, Peguero was not eligible for either a general license or a specific license.\footnote{116}

The professional research exception of the CACR also does not protect Peguero's travel to Cuba.\footnote{117} Under this exception, only a full-time professional traveling to Cuba for professional research is eligible for a general license.\footnote{118} Furthermore, the research must be of a "noncommercial, academic nature."\footnote{119} Peguero's presence in Cuba was for the sole purpose of signing Cuban players,\footnote{120} a purely economic activity. Thus, Peguero's activities do not fit under this research exception and his unauthorized travel to Cuba violated the license regulations.\footnote{121} However, it is unclear whether Peguero violated the CACR, and § 515.415 specifically which prohibits transactions in connection with transportation of any Cuban national from Cuba to the U.S.\footnote{122} It is also unclear whether Peguero violated the Cuban Democracy Act of 1992.\footnote{123}

Peguero may be guilty of assisting a Cuban national to travel from Cuba to the U.S. without a visa.\footnote{124} Section 515.415 of the CACR prohibits "transactions incident to travel to, from, or within Cuba,"\footnote{125} as well as the "payment of port fees, ... fuels, meals, [and] lodging."\footnote{126} Also prohibited are the "receipt or acceptance of any gratuity, grant, or support in the form of meals, lodging, fuel, payments of travel or maintenance expenses, or establish any branch or agency in Cuba, or transferring or agreeing to transfer any property to Cuba, except transfers by or on behalf of individual or group travelers authorized pursuant to his part.\footnote{115} See Fainaru, supra note 7. "An estimated 24,000 Americans will travel illegally to Cuba each year through flights out of Jamaica, Mexico, and the Bahamas" for tourism alone. See All Aboard the Flight to Havana, Chi. TRIB., Aug. 5, 1999 (located in Chicago Sports Final Edition at 20).\footnote{116} See supra notes 99–102, 104–08 and accompanying text.\footnote{117} See 31 C.F.R. § 515.564 (1999).\footnote{118} See id.\footnote{119} Id. (stating issuance of a general license requires the research (i) be of a noncommercial, academic nature; (ii) comprise a full work schedule in Cuba; (iii) have a substantial likelihood of public dissemination; and (iv) not fall within the categories prohibited by other paragraphs of this section).\footnote{120} See Fainaru, supra note 7.\footnote{121} See supra notes 99–102, 104–08, and accompanying text; see also Fainaru, supra note 7.\footnote{122} See 31 C.F.R. § 515.415(a) (1999).\footnote{123} See 22 U.S.C. §§ 6001–6021 (1994).\footnote{124} See 31 C.F.R. § 515.415(a).\footnote{125} Id. § 515.415(a)(1) (1999).\footnote{126} Id. § 515.415(a)(7) (1999).
otherwise, in connection with travel to or from Cuba or travel or maintenance within Cuba. It is uncertain whether Peguero's alleged purchase of airplane tickets for Perez and Diaz to fly from Cuba to the Dominican Republic violated § 515.415.

If § 515.415 is interpreted literally so as to only cover travel directly between the U.S. and Cuba, Peguero may not have violated this section because Perez and Diaz did not travel directly to the U.S. Rather, they first traveled to the Dominican Republic so they could sign as free agents with the Dodgers. Then, the Dodgers paid for both players to travel to the U.S. from the Dominican Republic for their minor league careers.

Major league agents who represent players want Cuban players to reside in a country other than Cuba or the U.S so teams can sign the players as free agents when they move to the U.S. The ability to avoid conviction under § 515.415 by having the players become residents of another country before signing with a major league team is a good illustration of why MLB rules should be reformed.

It is also uncertain whether Peguero and the Dodgers could be convicted for violating the Cuban Democracy Act of 1992. This Act expressly prohibits transactions between U.S.-owned or controlled firms and Cuba. The Dodgers Campo Las Palmas Baseball Camp is owned and controlled by the Dodger Organization. Peguero was an official of the Los Angeles Dodgers Organization and a representative of the Campo Las Palmas Baseball Camp. The Dodgers, as a U.S.-owned firm, could not obtain a specific license for travel to Cuba because the section prohibits the "importation of goods of Cuban origin into countries in the authorized trade zone." Although the Cuban Democracy Act may not appear to

128. See Plaschke, supra note 28. It is speculated Peguero or the Dodgers bought airplane tickets so the players could travel to the Dominican Republic. See id.
129. See 31 C.F.R. § 515.415; Plaschke, supra note 28.
130. See Fainaru, supra note 7.
131. See Plaschke, supra note 28.
135. See Plaschke, supra note 28.
137. 31 C.F.R. § 515.559 (1999); see also 31 C.F.R. § 515.322 (1999). Section 515.322 states that "authorized trade territory includes all countries except those countries subject to
extend to professional services between a Cuban national and an American firm, a broad reading of this section suggests a different interpretation.

In addition, while the CACR may not seem to prohibit American firms from assisting Cuban nationals to enter an authorized trade zone country, they can be interpreted broadly to prohibit such action. CACR § 515.559(b) does allow for the issuance of specific licenses for U.S.-controlled firms for certain enumerated transactions with Cuba. However, Section (d) states:

specific licenses do not authorize any person within the United States to engage in, participate in, or be involved in a licensed transaction with . . . Cuban nationals. Such involvement includes . . . assistance or participation by a U.S. parent firm, . . . or employee thereof, in negotiation or performance of a transaction which is subject to a license application.

This provision prohibits U.S.-owned or controlled businesses from participating in any travel-related transaction for which a specific license must be issued and in which the parent firm is involved.

Peguero’s transactions in Cuba were permissible only if he obtained a specific license under § 515.559(b). Peguero did not obtain, and presumably would never have been eligible to obtain a specific license under the Cuban Democracy Act of 1992. U.S.-owned or controlled firms may not obtain a specific license for this type of transaction when a parent firm participates in the transaction. Peguero represented the Dodger Organization when he held a tryout in Cuba and when he negotiated baseball contracts with Cuban nationals. These contracts

sanctions pursuant to this chapter.” 31 C.F.R. § 515.322. Therefore, by definition, the Dominican Republic is an “authorized trade territory.”

138. See 31 C.F.R. § 515.559.

139. See id. § 515.559(d) (1999).

140. See id. § 515.559(b) (1999) (“Specific licenses will be issued in appropriate cases for certain categories of transactions between U.S.-owned or controlled firms in third countries and Cuba . . . .”).

141. Id. § 515.559(d); see also id. § 515.330(3) (stating a “person within the United States” includes any corporation organized under the laws of the U.S. or under the laws of any state).

142. See 31 C.F.R. § 515.559(d). “To be eligible for a [specific] license under this section, the affiliate must be generally independent, in the conduct of transactions of the type for which the license is being sought, in such matters as decision-making, risk-taking, negotiation, financing or arranging of financing, and performance.” Id.

143. See id.

144. See id.

145. See id.

146. See Plaschke, supra note 28.
benefited the Dodger Organization and were signed under its authority. Peguero did not act independently from the Dodgers and, as a result, his travel to Cuba without a specific license violated the Cuban Democracy Act.

Peguero probably did not apply for a license to travel to Cuba because he knew the OFAC would deny his request. As a result, Peguero violated the CACR. While his failure to obtain a license to travel was a violation of the CACR, it is questionable whether prohibitions against travel in the Cuban Democracy Act of 1992 and in the CACR apply as clearly to these specific facts. The inability to predict the outcome of this situation bolsters the need for a modification of MLB rules. As indicated, the CACR do not fully cover Peguero’s travel to Cuba and his transactions with Cuban baseball players.

B. Peguero Violated the Cuban Embargo by Doing Business in Cuba

Prior to 1999, a MLB team had never been caught doing business in Cuba. Because courts have never faced this situation before, the likely outcome can best be predicted by analogizing to fact patterns where courts have found defendants violated the Cuban embargo.

1. Specific Intent Required

In determining whether a violation of the CACR occurred, courts look for specific intent to violate the embargo and examine the nature of the offending activity that took place in Cuba. The TWEA, requires specific intent as an element of any criminal violation of the regulations. "Because the regulations proscribe activity that is not generally perceived

147. See id. Ralph Avila, a Dodger Organization official, authorized Pablo Peguero’s actions. See id.
148. See id.
149. See 22 U.S.C. §§ 6001–6021. This interpretation of the Cuban Democracy Act of 1992 at 31 C.F.R. § 515.559, and 31 C.F.R. § 515.415 is not necessarily the interpretation a judge would make when examining these facts. Judges deciding cases under § 515.415 have found violations only when the travel occurred directly from Cuba to the U.S. See generally United States v. Fernandez-Pertierra, 523 F. Supp. 1135 (S.D. Fla. 1981). Research has not proffered any case that considered facts similar to those presented in this comment.
150. See 31 C.F.R. § 515.560(g).
151. See supra notes 99–102, 104–08 and accompanying text; see also 31 C.F.R. § 515.560(g).
152. See Fainaru, supra note 7.
to be wrong, [courts] have held that ‘willfulness’ in this context requires a finding of specific intent to violate the trade provisions." To show a defendant acted with the requisite specific intent, the U.S. Government must prove the defendant knew of the embargo against Cuba and the defendant intentionally violated it.\footnote{155}{\textit{Macko}, 994 F.2d at 1532.}

In \textit{United States v. Macko},\footnote{156}{\textit{See id.} at 1533.} the defendant Michael Macko was accused of violating the CACR and the TWEA by conducting business activity in Cuba.\footnote{157}{994 F.2d 1526.} Macko had shipped several cigarette-packaging machines to Cuba.\footnote{158}{\textit{See id.} at 1527.} Once the machines arrived, Macko traveled to Cuba to install them.\footnote{159}{\textit{See id.} at 1529.} While there, Macko attended business meetings with officials and other Cubans regarding the cigarette industry.\footnote{160}{\textit{See id.}}

The court of appeals held the evidence against Macko adequately supported a finding of specific intent to violate the embargo.\footnote{161}{\textit{See id.}} This evidence included the fact that Macko had misled his supplier several times about the ultimate destination of the equipment and goods.\footnote{162}{\textit{See id.}} In addition, Macko had traveled to Cuba through Panama and obtained special clearance from Cuban authorities to enter the country so his passport would not be stamped in Cuba.\footnote{163}{\textit{See id.}} Furthermore, Macko was found to be in possession of Department of Treasury brochures that explained the embargo.\footnote{164}{\textit{See id.}} Finally, Macko initially lied to U.S. Customs agents about traveling to and conducting transactions in Cuba.\footnote{165}{\textit{See id.}}

The court relied on \textit{31 C.F.R. § 515.201(b)(1)} in analyzing Macko’s conduct under the second prong of the test for embargo violations, the nature of the defendant’s activities.\footnote{166}{\textit{See id.}} This section of the CACR prohibits transactions that involve property in which a Cuban national has any interest whatsoever.\footnote{167}{\textit{See Macko, 994 F.2d} at 1533.} Such transactions include, but are in no way limited to, transactions involving any “payment or transfer”\footnote{168}{\textit{See 31 C.F.R. § 515.201(b)(1) (1999).}} to Cuba or a Cuban.
In interpreting the regulation broadly, the court stated that it "does not apply only to certain goods or activities, but states a broad prohibition against transactions with Cuba or Cuban nationals." The court of appeals reversed the district court's post-verdict judgment of acquittal and found Macko’s actions had violated this regulation. Macko’s illegal actions included travel to Cuba, business discussions with Cubans and shipment to and installation of machinery inside Cuba. The court also found Macko had violated the law by sending an invoice to an official at the Cuban embassy in Panama. Based on all of this evidence, the court determined a jury could find beyond a reasonable doubt that Macko had willfully violated the embargo, so the court upheld the jury’s guilty verdict.

United States v. Fuentes-Coba also involved a prosecution for a violation of the Cuban embargo. "Fuentes-Coba was tried for his role in the shipment of goods to Cuba." The court of appeals upheld the defendant’s conviction of conspiracy to violate the TWEA and the CACR, his one-year prison sentence and the $10,000 fine. Here too, the court applied the broad language of § 515.201 of the CACR to transactions in which Cuba or Cuban nationals have an interest. On appeal, Fuentes-Coba argued there was no evidence of specific intent. The court disagreed and based its holding on evidence that the defendant had hidden items for shipment in his own duffel bag and he usually loaded or supervised the loading of the illegal goods onto his aircraft himself. Furthermore, Fuentes-Coba disclosed in conversation the goods were subject to the trade embargo.

170. See id. §§ 515.305 (1999), 515.309(a).
171. Macko, 994 F.2d at 1534.
172. See id. at 1535.
173. See id.
174. See id.
175. See id. at 1535–36.
176. 738 F.2d 1191 (11th Cir. 1984).
177. Id. at 1194.
178. See id. at 1194, 1198.
179. See id. at 1193–94.
180. See id. at 1196.
181. See id.
182. Fuentes-Coba, 738 F.2d at 1196.
2. Peguero Had Specific Intent

In light of *Macko* and *Fuentes-Coba*, the activities of the Dodgers’ are indicative of specific intent to violate the Cuban embargo. First, Peguero posed as a tourist when entering Cuba.\(^{183}\) Peguero’s failure to obtain a specific license from OFAC is similar to Macko’s traveling to Cuba through Panama. These covert actions served to deceive the U.S. federal government and contravened the spirit of the regulations. Second, Peguero instructed Diaz and Perez to lie about how they traveled to the Dominican Republic.\(^{184}\) Directing the Cuban players to lie demonstrates Peguero knew a violation was taking place. Similarly, in *Macko*, the defendant lied to U.S. customs agents.\(^{185}\) The defendant also concealed his travel and shipment of packaging machines to Cuba.\(^{186}\) The court in *Macko* declared, “[a] jury could reasonably conclude that the defendants’ secrecy about [a] single fact resulted from their knowledge of the Cuban embargo.”\(^{187}\)

In *Fuentes-Coba*, the defendant had several conversations in which he acknowledged the items he was shipping were in violation of the Cuban embargo.\(^{188}\) In analogizing these two cases to the Dodgers situation, it is significant the Cuban players and Peguero orchestrated a lie about the players’ travel to the Dominican Republic.\(^{189}\) Their lies are a clear acknowledgment that Peguero’s activities constituted wrongdoing. Finally, and most importantly, MLB rules prohibit teams from scouting in Cuba.\(^{190}\) In *Macko*, the defendant possessed a brochure that explained the embargo.\(^{191}\) Although Peguero was not found with the major league rules in his possession, he could almost certainly be charged with constructive knowledge of this rule. The totality of the circumstances suggests Peguero specifically intended to violate the Cuban embargo.

The next step in the analysis is an examination of the nature of Peguero’s actions. First, Peguero traveled to Cuba. As the court held in *Macko*, the act of traveling to Cuba without first obtaining a license is a factor in determining whether a violation of § 515.201 has occurred.\(^{192}\) Second, Peguero met with and scouted Diaz and Perez and many other

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184. See *id*.
185. See *Macko*, 994 F.2d at 1533.
186. See *id*.
187. See *id* at 1535.
188. See *Fuentes-Coba*, 738 F.2d at 1196.
190. See *id*.
191. See *Macko*, 994 F.2d at 1533.
192. See *id* at 1535.
baseball players in Cuba. Peguero discussed holding a tryout for Diaz and Perez and at least one of the tryouts was videotaped by Peguero. The discussion arranging the tryouts is comparable to Macko's business discussions with his Cuban customers because both dealt with future transactions that would occur between the parties. Finally, the Dodgers or Peguero allegedly bought plane tickets for both players to go to the Dominican Republic. Altogether, there is enough evidence to conclude Peguero's activities within Cuba constituted a violation of the Cuban embargo.

3. Peguero and the Dodgers Are Subject to Severe Penalties for Their Violations of the Cuban Embargo

Because Peguero had specific intent to violate the embargo and his actions were of the nature proscribed by the embargo, the U.S. government may levy heavy fines on Peguero and the Dodgers. The Commissioner of Baseball may also levy fines because the Dodgers' actions violated Major League rules.

Section 515.701(a)(3) of the CACR provides a civil penalty for violations of the regulations. This penalty does not require a finding of specific intent. Under this section, the Secretary of the Treasury may impose a maximum fine of $55,000 for each violation.

Section 515.701(a)(1) of the CACR creates a criminal cause of action against "[p]ersons who willfully violate any provision of TWEA or any license, rule, or regulation." "Person" under this regulation means "an individual, partnership, association, corporation, or other organization.

Pursuant to this section, the federal government may fine the Dodger Organization as much as $1,000,000. Because Peguero was acting in his capacity as an agent of the Dodgers, his actions created liability on the part

193. See Fainaru, supra note 7.
194. See id.
195. See Macko, 994 F.2d at 1535.
196. See Plaschke, supra note 28.
197. See 31 C.F.R. § 515.701(a)(1)–(3) (1999) (providing for civil and criminal fines of varying amounts up to $1,000,000).
199. See 31 C.F.R. § 515.701(a)(1).
200. See id.
201. See id.
202. Id. § 515.701(a)(1).
203. Id. § 515.308 (1999).
204. See id. § 515.701(a)(1).
of the franchise. Also, an officer or agent of any corporation who knowingly violates the regulations may be fined up to $100,000 or imprisoned for up to ten years. The government would likely pursue criminal prosecution under § 515.701(a)(1) against Peguero and the Dodgers because strong evidence of specific intent exists.

In United States v. Fernandez-Pertierra, the defendant was charged with conspiracy to engage in transactions in connection with the transportation of Cuban nationals to the U.S. without a license from the OFAC. The defendant was also charged with involvement in the actual transportation of the Cuban nationals. She was not, however, charged with traveling to Cuba herself. The government focused its case on the defendant’s formulation of the plan and conspiracy to transport Cuban nationals. By the same rationale, any Dodger official who helped arrange or who funded Peguero’s travel could also be subject to criminal liability.

At the time of the violation, article I, section 3 of the Major League Agreement authorized the Commissioner of Baseball to fine any major league club up to $250,000 if the club’s conduct was “deemed by the Commissioner not to be in the best interests of [b]aseball.” The Commissioner could only fine individuals up to $25,000. More importantly, the Commissioner has the power to withhold “the benefit of any or all [of] the [m]ajor [l]eague [r]ules,” which includes the right to sign and retain free agents. In fact, the Commissioner fined the Dodgers

205. The Dodgers’ liability would be based on the theory of respondeat superior. The doctrine of respondeat superior makes an employer or principal liable for the actions of its employees or agents if the actions of the employee or agent are in the scope of the employment. See BLACK’S LAW DICTIONARY 1313 (7th ed. 1999). Peguero is an officer of the Los Angeles Dodgers Organization. See Chass, supra note 136.

206. See 31 C.F.R. § 515.701(a)(1).

207. See supra notes 183–90 and accompanying text.


209. See id. at 1135–36.

210. See id. at 1136.

211. See id. at 1137 n.3.

212. See id.

213. Major League Agreement art. I, § 3; see also Ross Newhan, In Bud They Trust, L.A. TIMES, Jan. 26, 2000, at D1 [hereinafter In Bud They Trust]. A new amendment to the Major League Agreement allows the Commissioner to fine a team up to $2 million dollars. See id.

214. See Major League Agreement art. I, § 3(e) (1999); see also In Bud They Trust, supra note 213. A new amendment to the Major League Agreement allows the Commissioner to fine an owner, officer or employee up to $500,000. See id.


216. See id.
$200,000 and denied the team the right to sign any foreign player for six months. 217

The Dodgers’ penalty could have been more severe, but it is nevertheless quite stringent. It is worth noting the two Cuban baseball players who were the subject of the Dodgers’ unlawful actions were not even considered top prospects by the Dodgers Organization. 218 The Dodgers took a giant gamble, which they ultimately lost.

V. EVOLUTION OF MAJOR LEAGUE BASEBALL RULES REGARDING THE SIGNING OF CUBAN PLAYERS AND THE LOOPHOLE IN MAJOR LEAGUE BASEBALL RULES

Major League Baseball’s rules regarding the signing of Cuban players have been evolving since 1977. 219 The Commissioner of Baseball has played a central role in declaring major league policy towards Cubans and their place in MLB. 220

A. The Commissioner of Baseball and His Office Have the Power to Implement Rules and Regulations Regarding Cuban Players

The Commissioner of Baseball has “nearly unbridled power” over the game of baseball. 221 The Major League Agreement gives the Commissioner the power “[t]o investigate . . . any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of [b]aseball.” 222 Where the Commissioner finds such acts, transactions or practices, he has the power to determine what “preventive, remedial or punitive action is appropriate.” 223 Some limitations are imposed on the Commissioner, but the Major League Agreement expressly states no limitation shall have the force of restricting the Commissioner’s

217. See Bodley, supra note 11. The Dodgers were allowed, however, to sign two foreign players with whom they had already begun negotiations. See id.
218. See Plaschke, supra note 28. After approximately two years, Juan Carlos Diaz had a .303 batting average with nine home runs in sixty-six games at the Dodgers class AA affiliate San Antonio. See Fainaru, supra note 7. Perez was batting an average of .279 with fourteen stolen bases at the Dodgers class A Vero Beach. See id.
219. See Baxter & Dominguez, supra note 1 at 13–14.
220. See generally id.
222. Major League Agreement art. I § 2(b) (1999).
223. Id. § 2(c) (1999).
authority to "act on any matter that involves the integrity of, or public confidence in, the national game of [b]aseball."224

B. The Evolution of Major League Baseball Rules Regarding the Draft Status of Cuban Baseball Players

In 1977, Bowie Kuhn was the first Commissioner of Baseball to give a direct order to all major league teams regarding Cuban players.225 In 1990, the Commissioner updated that order when he released a memo that forbade "the discussion or negotiation with anyone in Cuba regarding the signing of any player in Cuba."226 This broad statement prohibits MLB teams from scouting in Cuba and from helping Cuban baseball players defect.227

1. The Emergence of a "Loophole" in Major League Baseball Rules.

The first Cuban baseball player defected to the U.S. in 1991.228 Since then, MLB rules regarding Cuban players have been in a constant state of flux. The emergence of the "loophole" is evidence of this.

Rene Arocha was the first Cuban baseball player to defect to the U.S.229 Manuel Hurtado, a former Cuban National Team pitching coach who had defected a couple of years earlier, set up a special tryout for Arocha with eight MLB teams that were all pursuing him.230 Never having faced this situation before, Major League Baseball came up with an interesting solution. In order to decide which team would sign him, a special lottery was formed.231 The name of each team was placed in a hat

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225. See Baxter & Dominguez, supra note 1, at 13.
226. See id. (citing memorandum from the Commissioner of Baseball to MLB teams regarding Cuban Players). It is the usual practice for the Commissioner to implement such rules through memos and letters sent to the offices of major league teams. See, e.g., Selig to Conduct Review of Detroit’s Hiring Process (Oct. 14, 1999) <http://www.majorleaguebaseball.com/u/baseball/mlbcom/news/oct99/prreleasel01599.htm>. The Baseball Commissioner, Allan H. (Bud) Selig, issued a statement to all teams requiring them to consider minority candidates for all hiring of high-level operating positions. Id. Commissioner Bud Selig implemented this affirmative action rule simply through a statement to all teams. See id.
227. See generally Christensen, supra note 17.
228. See generally Wulf, supra note 5, at 60.
229. See id.
230. See id.
231. See id.
and the winner was selected at random.\textsuperscript{232} The Saint Louis Cardinals won the right to sign Arocha as a free agent.\textsuperscript{233}

In October of 1994, three Cuban baseball players, Alexis Cabreja, Osmani Estrada and Ivan Alvarez defected to Mexico and then immediately entered the U.S.\textsuperscript{234} In violation of the law, they did not report their entry to the U.S. immigration office.\textsuperscript{235} The three players argued they should be free agents, but the Commissioner of Baseball mandated no major league team could negotiate with them because they were in the U.S. illegally.\textsuperscript{236} Even though the three players agreed to meet with immigration officials, the Commissioner's Office refused to hold a lottery like the one held for Arocha.\textsuperscript{237} Instead, the Commissioner's Office made the three players participate in the yearly amateur draft.\textsuperscript{238} This is now the general rule whenever a Cuban baseball player defects directly to the U.S.\textsuperscript{239}

The general amateur draft rule, however has a loophole.\textsuperscript{240} If a Cuban player defects to the Dominican Republic, the Bahamas, Costa Rica or any nation other than the U.S., and establishes legal residency there, he is not subject to the general amateur draft rule.\textsuperscript{241} Instead, players who defect to

\begin{enumerate}
\item \textsuperscript{232} See id.
\item \textsuperscript{233} See id.
\item \textsuperscript{234} See Baxter & Dominguez, supra note 1, at 14.
\item \textsuperscript{235} See id.
\item \textsuperscript{236} See id.
\item \textsuperscript{237} See id.
\item \textsuperscript{238} See id.
\item \textsuperscript{239} Major League Rule 3(a)(1)(A) provides:
A player who has not previously contracted with a Major or Minor League Club, and who is a resident of the United States or Canada, may be signed to a contract only after having been eligible for selection in the Rule 4 draft. A player shall be considered a “resident of the United States” if the player enrolls in a United States high school or college or establishes a legal residence in the United States on the date of the player’s contract or within one year prior to that date.

Major League Rule 3(a)(1)(A) (1999) (emphasis added); see also Baxter & Dominguez, supra note 1, at 14. If a Cuban player comes directly to the U.S. and gains political asylum, he is forced by MLB to enter the June amateur draft under Rule 3(a)(1)(A). See Baxter & Dominguez, supra note 1, at 14.
\item \textsuperscript{240} See Major League Rule 3(a)(1)(B) (1999).
\item \textsuperscript{241} Major League Rule 3(a)(1)(B) provides:
A player who has not previously contracted with a Major or Minor League Club, who is not a resident of the United States or Canada, and who is not subject to the High School, College, Junior College or American Legion Rules, may be signed to a contract if the player:
(i) is at least 17 years old at the time of signing, or
(ii) is 16 at the time of signing, but will attain age 17 prior to either the end of the effective season for which the player has signed or September 1 of such effective season, whichever is later.
\end{enumerate}
these other nations are free agents.\textsuperscript{242} As a result, such players may bypass the draft and sign a contract with the team of their choice, usually the team that is the highest bidder for the players' services.\textsuperscript{243}

It is this exception that encouraged the Dodgers to violate the embargo. The Dodgers understood if the Cuban players, Diaz and Perez, could defect from Cuba and establish residency outside the U.S., the Dodgers would then have free agent rights to the players.\textsuperscript{244} Diaz and Perez attained this free agent status when they defected to the Dominican Republic,\textsuperscript{245} obtained visas and established residency there.\textsuperscript{246} Furthermore, the Dodgers used the loophole to impose low-paying contracts on Diaz and Perez by not giving the players the opportunity to retain agents.\textsuperscript{247}

On the other hand, if Diaz and Perez had defected to the U.S., with or without the Dodgers' help, they would have been forced to enter the amateur draft.\textsuperscript{248} In this scenario, the Dodgers would not have been able to obtain free agent contracts with the players.\textsuperscript{249} The Dodgers could then have only obtained the players through the amateur draft.\textsuperscript{250} Whether the Dodgers could have acquired the players through the draft would have depended on the Dodgers' priority in the draft selection process.\textsuperscript{251}

\textsuperscript{242} See Major League Rule 3(a)(1)(B). Rule 3(a)(1)(B), which is applied to non-U.S. residents, does not require that players be eligible for selection in the Rule 4 draft (amateur draft) unlike Rule 3(a)(1)(A), which applies to U.S., Canadian, and Puerto Rican citizens. See id. Therefore, players under Rule 3(a)(1)(B) can sign as free agents. See generally Baxter, supra note 15, at 20.

\textsuperscript{243} See Friends Get Visas, supra note 15.

\textsuperscript{244} See supra text accompanying notes 239–42.

\textsuperscript{245} See supra note 7.

\textsuperscript{246} See Plaschke, supra note 28; see also Fainaru, supra note 7.

\textsuperscript{247} See supra text accompanying notes 239–42.

\textsuperscript{248} See Major League Rule 3(a)(1)(A).

\textsuperscript{249} See supra note 7.

\textsuperscript{250} See id. Players who defect to the U.S. from Cuba are "officially untouchable [from free agency signing] as far as Major League Baseball is concerned." See Baxter & Domínguez supra note 1, at 14.

2. The Loophole at Work for the Cuban Pitcher “El Duque”

The opportunity of the loophole led sports agent Joe Cubas to help Cuban players who were stuck in refugee detention centers quickly obtain visas. Once the players were out of detention, Cubas used his own money to transport his new clients to the Dominican Republic and the Bahamas. He has also used his finances to feed and house his new clients in their new countries while their applications for residency were pending. Cubas exerted this effort and expended his resources so the players could enter MLB as free agents.

On December 26, 1997, Orlando Hernandez, a Cuban pitcher known by the nickname “El Duque,” left Cuba for the U.S. in a twenty-foot sailboat with seven of his friends. Four days later, they were forced to land in the Bahamas because their crippled ship could not continue the journey. The Bahamian government placed El Duque in the Carmichael Road Detention Center while deciding whether to send him back to Cuba. While El Duque was in the Bahamas, Bud Selig, the Commissioner of Baseball, ordered no major league team could meet with him. Joe Cubas immediately went to the Bahamas and urged El Duque to seek refuge in a third country because it was uncertain whether the Bahamas would grant El Duque refuge or send him back to Cuba. Cubas arranged with Costa Rican President Jose Maria Figueras for the issuance of an indefinite, temporary visa for El Duque. Cubas chartered a flight to Costa Rica for El Duque so he could begin workouts and achieve “baseball million dollar free agent deal with the Yankees. See id. If Peña had been in the amateur draft, many believe he would have been a top three pick. See id. The Yankees picked 30th in the draft and would otherwise not have been able to sign Peña. See id. The Dodgers may have been unable to sign Diaz and Perez through the draft without violating major league rules.

253. See id. at 20.
254. See id.
255. See id.
256. See San Martin, supra note 132.
258. See Baxter, supra note 15, at 18; Branigin & Asher, supra note 257, at A1.
259. See Hernandez Not Ready to Leave Friends, TAMPA TRIB., Jan. 2, 1998, at 3 [hereinafter Not Ready]. Al Avila, the Florida Marlins’ director of Latin American operations, stated, “[t]he [C]ommissioner will tell each club when they can see him and when they can negotiate. Right now, you couldn’t go and negotiate with him, his agent or anybody. That would be illegal.” Id. However, interaction with Joe Cubas was allowed under major league rules. See id.
260. See id.
261. See Friends Get Visas, supra note 15.
shape” for a tryout with major league teams before the 1998 spring training which was to begin the following month.262 El Duque signed a 6.6 million-dollar contract as a free agent with the New York Yankees.263

Much like the Dodgers, Cubas has taken serious risks in order to bypass major league rules through the loophole.264 Before El Duque went to Costa Rica, the American State Department offered El Duque a special humanitarian visa, expecting it would lead him to join his brother, Livan, in South Florida.265 El Duque turned down the humanitarian visa.266 Cubas advised this action even though many believed it would be detrimental to El Duque’s life and career.267

Cubas took a big risk when he helped El Duque because El Duque’s talent was uncertain. In the same fashion, the Dodgers risked violating the Cuban embargo for Diaz and Perez.268 In Cuba, El Duque had been working for a psychiatric hospital and earning ten dollars a month as a sports trainer.269 El Duque last pitched in 1996, when he played for the hospital team in an amateur baseball game.270 Finally, many professional scouts believed El Duque was in fact closer to thirty-five years-old than the twenty-eight El Duque claimed.271 The risks Cubas and the Dodgers took will never outweigh the benefit of free agent access to an undiscovered Cuban baseball player.

262. See For Hernandez, supra note 241.
263. See Baxter, supra note 15, at 18.
264. See generally id. at 20.
265. See Not Ready, supra note 259. The U.S. gave El Duque special treatment because of the way the Cuban government had treated him. See id. Cuba had banned El Duque from baseball after his brother Livan defected from Cuba. See id. Furthermore, the Cuban-American community organized and urged the U.S. government to allow El Duque and the other defectors to enter the U.S. as soon as possible. See Branigin and Asher, supra note 257, at A1. The Cuban-American community believed that El Duque would be punished in Cuba if the Bahamian government returned him there. See id.
266. See Not Ready, supra note 259.
267. See San Martin, supra note 132. Manny Hillman, attorney for Livan Hernandez, El Duque’s brother, stated, “[t]his is what he asked for .... Now if he says, '[t]hanks, but no thanks, I'm going to Costa Rica,' there are going to be a lot of angry people in Washington. And they may not let him back in.” Id.
268. See Plaschke, supra note 28. Neither Diaz nor Perez were considered top prospects in the Dodger Organization. See id.
269. See Branigin & Asher, supra note 257.
270. See San Martin, supra note 132. When asked how he performed in that game, Hernandez said he struck out eleven or twelve batters. See id.
271. See id.
C. American Baseball Has Strained Reparation Treaties Between Cuba and Several Countries Including the United States, the Dominican Republic and the Bahamas

While Cubas' fast action helped Orlando Hernandez, the agent caused many problems for other Cuban refugees in the process. Most importantly, Joe Cubas' actions strained refugee treaty agreements between Cuba and the governments of the Costa Rica, the Dominican Republic and the Bahamas. The Dodgers' actions in Cuba also violated U.S. policy regarding Cuban migrants.

1. The United States and Its Treaty with Cuba

The U.S. and Cuba first entered into an agreement to regulate the flow of Cubans into the U.S. on September 9, 1994. The agreement announced the U.S. would increase the total number of legal Cuban entrants per year to 20,000. In return, Cuba made a commitment to reduce the number of migrants entering from the country. Furthermore, on September 9, 1994, President Clinton declared persons fleeing from Cuba could qualify for assistance pursuant to the Migration and Refugee Assistance Act of 1962.

On May 2, 1995, the U.S. and Cuba modified their co-existing agreement. First, the modified agreement recognized the U.S. could give humanitarian parole to Cubans "beyond those eligible for parole under the existing criteria." The U.S. grants a total of 20,000 humanitarian paroles per year. Paroles can be given to Cubans who have been unfairly treated in Cuba. The U.S. can use up to 5,000 of the "extended criteria" humanitarian paroles out of the 20,000 Cubans allowed to enter the U.S. as
required by the September 9, 1994 agreement. As previously noted, humanitarian parole was offered to Orlando Hernandez, but he turned it down. Second, the two countries agreed to prevent unsafe departures from Cuba. The United States Coast Guard has actively enforced this U.S.-Cuban repatriation treaty. When the Coast Guard returns refugees to Cuba, U.S. officials in Cuba explain to the would-be migrants how to apply for legal admission into the U.S. Finally, the modified agreement ensured the Cuban government would not persecute those Cubans returned to Cuba by the U.S. Coast Guard.

The loophole in major league rules and the recent actions of the Dodgers and Joe Cubas undermined the established U.S. policy towards Cuban immigrants. El Duque’s decision to decline a humanitarian visa served to ignore and destroy efforts made by the U.S. government to fulfill its agreement with the Republic of Cuba. Furthermore, this decision completely disregarded the help offered by the U.S., which stood for his own livelihood.

Similarly, the actions by the Dodgers not only violated the embargo but also skirted the United States’ immigration policy. From the beginning, Diaz and Perez planned to emigrate to the U.S. Diaz and Perez bypassed all of the documentation requirements of the treaty.

283. See Joint Statement, supra note 279.
284. See San Martin, supra note 132.
285. See Joint Statement, supra note 279; Press Briefing, supra note 276 (“Effective immediately, Cuban migrants intercepted at sea, attempting to enter the United States ... will be taken to Cuba ...”).
286. See Coast Guard Migrant Interdiction Operations: Hearing on H.R. 238 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. (1999). U.S. Coast Guard Captain Anthony S. Tangeman stated “most migrants interdicted by the Coast Guard are not brought into the U.S. and are repatriated to the country from which they originally departed.” Id.
287. Press Briefing, supra note 276 (“U.S. consular officers will assist those who wish to apply to come to the United States through already-established mechanisms. Cubans must know that the only way to come to the United States is by applying in Cuba. ... Cuba is one of only three countries in the world in which the United States conducts in-country processing for refugees.”).
288. See Joint Statement, supra note 279; see also Press Briefing, supra note 276 (“The government of Cuba has committed to the government of the United States that no one will suffer reprisals, lose benefits or be prejudiced in any manner, either because he or she sought to depart irregularly, or because he or she has applied for refugee status at the United States interest section.”).
289. See Not Ready, supra note 259.
290. See id. The U.S. offered the humanitarian parole, expecting him to join his brother Livan. See id.
291. See generally Plaschke, supra note 28.
292. See id.
The major league loophole directly conflicts with one of the major goals established by the U.S.-Cuban treaty, namely, safe travel.\textsuperscript{293} "Safety of life at sea" is a common interest of the U.S. and Cuba.\textsuperscript{294} Because Fidel Castro enjoys baseball and does not want to lose players to the U.S.,\textsuperscript{295} Cuban baseball players deciding to defect must do so in complete secrecy.\textsuperscript{296} Understandably, Cuban baseball players that recognize the benefits of the loophole, like El Duque, will try to take advantage of it. Unfortunately, most will not be as lucky as he.\textsuperscript{297} Boats used by Cubans to travel from Cuba to the U.S. are often poorly made, overloaded and unsafe.\textsuperscript{298} Attempts to travel to the U.S. often end in death.\textsuperscript{299} The loophole does not encourage safe sea travel and is contrary to policy decisions of the U.S.

2. The Bahamas, the Dominican Republic and Their Treaties with Cuba

In 1996, the Bahamas followed the lead of the U.S. by signing a repatriation treaty with Cuba.\textsuperscript{300} On June 19, 1998, the Bahamas and Cuba amended their agreement to accelerate the repatriation process by mandating the Bahamas notify Cuba within seventy-two hours of the arrival of any Cuban migrant in the Bahamas.\textsuperscript{301} In return, Cuba allows the immigrant to return within fifteen days of the immigrant’s arrival.\textsuperscript{302} Janet Bostwick, the Bahamian Minister of Foreign Affairs, explained their agreement is equivalent to Cuba’s agreements with the United Kingdom, Cayman Islands, Jamaica and the U.S.\textsuperscript{303} The Dominican Republic also has a repatriation agreement with Cuba.\textsuperscript{304}

\textsuperscript{293} See Joint Statement, \textit{supra} note 279.
\textsuperscript{294} See id.
\textsuperscript{295} See generally Baxter & Dominguez, \textit{supra} note 1, at 13.
\textsuperscript{296} See generally Serge F. Kovaleski, \textit{Cubans Rescued by Fishing Crew in Nick of Time}, \textit{WASH. POST}, Mar. 24, 1998, at A12. Nine men, of whom four were baseball players and one was a baseball coach, hid in the basement of a house for several days waiting for weather to clear before they set sail from Cuba. \textit{See id.}
\textsuperscript{298} See id.
\textsuperscript{299} See id.
\textsuperscript{302} See id.
\textsuperscript{303} See id.
\textsuperscript{304} See Baxter, \textit{supra} note 15, at 21.
In addition to interfering with U.S. foreign policy, Joe Cubas has caused unwanted problems in the Bahamas, the Dominican Republic and Costa Rica. The Dominican Republic strengthened its agreement with Cuba after Joe Cubas established two training camps in the Dominican Republic for defectors.305

The Cuban government's breach of its agreement with the Bahamas arguably turned out to be the greatest consequence of El Duque's defection.306 Embarrassed and angered by the handling of this situation, Cuba refused to accept repatriated refugees from the Bahamas.307 As a consequence, the populations at the Bahamian camps grew uncontrollably.308

As a result of another baseball-related event that occurred three months after El Duque left the Bahamas for Costa Rica,309 the Bahamian and Costa Rican governments changed their practices toward Cuban refugees.310 Once again, Joe Cubas was involved with four Cuban baseball players who fled Cuba for the Bahamas.311 However this time, Cubas was unsuccessful in helping the players.312

First, Costa Rica refused to help Cubas when he requested 151 visas for the players and the other refugees to travel from the Bahamas to Costa Rica.313 Presumably, the Costa Rican officials denied the visa request because they believed Cubas was abusing the system. Cubas was under immense pressure from humanitarian groups to request the visas, which were intended for Cuban refugees who had rioted when Cubas visited the camp to help the five baseball players.314 The rioters knew the baseball players were receiving preferential treatment.315

Likewise, the Bahamian government took a stronger stance toward Cubas and the Cuban players because it did not want the Bahamas to

305. See id.
306. See generally Plane Home, supra note 300.
307. See id.
308. See id.
309. See Kovaleski, supra note 296.
311. See Kovaleski, supra note 296. The players were first baseman Jorge Luis Toca, catcher Angel Lopez, second basemen Jorge Diaz Olano, shortstop Michael Jova and coach Enrique Chinea. See id. The players had been banned from baseball in Cuba because they were suspected of wanting to defect. See id.
312. See generally Baxter, supra note 15, at 19, 21; Bahamas Returns Refugees to Cuba, STAR TRIB. (Minneapolis), May 22, 1998, at 6A [hereinafter Bahamas Returns].
313. See Baxter, supra note 15, at 19, 21.
314. See id. at 19.
become a way station for Cubans trying to enter the U.S.\textsuperscript{316} The Bahamian government stated it would no longer allow any Cuban refugee in the Bahamas to go to another country offering emergency visas.\textsuperscript{317} Three of the players were eventually deported back to Cuba even though Nicaragua had granted them visas.\textsuperscript{318} The three players were among sixty-five people returned to Cuba on May 18, 1998.\textsuperscript{319} The Bahamas’ new policy culminated in the amendment of its agreement with Cuba on June 19, 1998.\textsuperscript{320} Joe Cubas successfully closed one of the few escape routes for Cubans.\textsuperscript{321}

VI. THE UNITED STATES GOVERNMENT AND MAJOR LEAGUE BASEBALL CAN REMEDY THIS DAMAGING SITUATION

A. A Solution Can Be Instituted by the United States Government

Recently, Cuba and the U.S. have made great strides toward improving their relationship. In January 1999, President Clinton reestablished direct mail with Cuba and began allowing Americans to send money to individual Cubans who are not family members.\textsuperscript{322} In August 1999, President Clinton authorized charter flights to Cuba from Los Angeles and New York for the first time since 1982.\textsuperscript{323}

Another important step toward better relations with Cuba has been through baseball. In the spring of 1999, President Clinton allowed the Baltimore Orioles to play the Cuban National Baseball Team in Cuba.\textsuperscript{324} This game was aimed at promoting “people-to-people contacts.”\textsuperscript{325} The

\begin{itemize}
  \item \textsuperscript{316} See Bahamas Returns, supra note 312; Plane Home, supra note 300.
  \item \textsuperscript{317} See Bahamas Returns, supra note 312.
  \item \textsuperscript{318} See id.; see also Cuban Defector Takes Japan’s Asylum Offer, CHI. TRIB., Apr. 3, 1998, at 12 [hereinafter Cuban Defector]. Jorge Luis Toca qualified for a visa from Japan because his wife was Japanese. \textit{See id.} He originally turned down the offer because he was waiting for the Costa Rican visa. \textit{See id.} Once he realized Costa Rica was not going to offer a visa, he asked for reconsideration of the Japanese offer. \textit{See id.}
  \item \textsuperscript{319} See Bahamas Returns, supra note 312.
  \item \textsuperscript{320} See supra Part V.C.2.
  \item \textsuperscript{321} See Plane Home, supra note 300.
  \item \textsuperscript{323} See id.; see also Baby Step in Easing Cuba Policy, L.A. TIMES, Aug. 5, 1999, at B8.
  \item \textsuperscript{324} See Golden, supra note 74.
  \item \textsuperscript{325} See 31 C.F.R. § 515.567(b)(1)(ii) (1999) (“All profits from the [athletic] event after costs are donated to an independent nongovernmental organization in Cuba or a U.S.-based charity, with the objective, to the extent possible, of promoting people-to-people contacts or otherwise benefiting [sic] the Cuban people.”).
\end{itemize}
White House plans to promote more sporting events between the two nations in the future.\(^3\) Yet, because the Helms-Burton Act of 1996 gives Congress complete power to amend the Cuban embargo, Presidential action can only go so far.\(^2\)

On September 12, 1995, H.R. 2311, entitled “A Bill to Waive Certain Prohibitions With Respect to Nationals of Cuba Coming to the United States to Play Organized Professional Baseball,” was introduced in the House of Representatives.\(^3\) If it had passed, section one of H.R. 2311 would have prevented the Cuban embargo from regulating or prohibiting the entrance of a Cuban national into the U.S. on a visa issued for the purpose of playing baseball.\(^3\) Section two of the Bill would have allowed Cuban nationals to receive visas valid for the duration of a baseball season.\(^3\) As long as a Cuban player had a valid contract with an American professional baseball team, he would not have to renew the visa each season.\(^3\) Although this Bill did not progress very far in the legislative process,\(^3\) it indicates a limited number of U.S. legislators understand the high quality baseball talent in Cuba.

H.R. 2311 was proposed prior to the enactment of the Helms-Burton Act of 1996.\(^3\) The Bill has recently been re-introduced as the Baseball Diplomacy Act.\(^3\) Today, as H.R. 262,\(^3\) it is clearly within congressional authority.\(^3\) Nevertheless, the Bill will not deter teams and agents from violating the Cuban embargo. Besides this inherent problem, Congress’ five-year reluctance to pass this bill indicates congressional action is unlikely to resolve the issue.\(^3\) Even if Congress was willing to

\(^{326}\) See Golden, supra note 74. Unfortunately, the State Department has rejected new proposals because it has not decided how the U.S. can participate in an event without generating revenue for Cuba. See id.


\(^{328}\) See H.R. 2311, 104th Cong. § 1 (1994).

\(^{329}\) See id. § 1(a)(1) (1994).

\(^{330}\) See id. § 2 (1994).

\(^{331}\) See id. § 2(2) (1994).

\(^{332}\) See H.R. 2311. The bill was referred to the Subcommittee on Immigration and Claims on October 2, 1995, but failed to go any further in the legislative process. See id.

\(^{333}\) See id.


\(^{335}\) See id.


\(^{337}\) In 1999, this bill did not pass the sub-committee process and there were only 22 co-sponsors for the bill. See H.R. 262. But see Matthew N. Greller, Note and Comment, 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. J. INT’L L. REV. 1647, 1709 (1999). Greller advocates for the passage of H.R. 262, enabling “Baseball Diplomacy” to unite the U.S. and Cuba. See id. However, Congressional reluctance to
compromise, the task of mending the wounds inflicted by members of the Major League Baseball Organization should be the job of that organization. MLB is in a much better position to rectify the problems because their efforts to implement any proposal they accept would be more quick and efficient than a congressional remedy. This is due to the plenary power of the Commissioner. In addition, MLB could tailor a remedy that is in the best interests of baseball.

B. Major League Baseball Has Been Aware of Problems But Has Taken No Action to Resolve Them

This Comment has pointed out some of the many infirmities of MLB rules that encompass the signing of international players, specifically Cubans. Unfortunately, there are many more. Officials in the Dominican Republic have disclosed only three major league teams comply with local Dominican rules. These rules require major league teams to report contract signings and provide proper birth certificates whenever they sign Dominican players in the Dominican Republic.

As recently as December 1999, the Dodgers were punished for signing Adrian Beltre, a baseball player from the Dominican Republic. The penalty included a one-year closure of the Campo Las Palmas Baseball Camp in the Dominican Republic, the same camp Diaz and Perez attended.

change the embargo makes passage of this bill unlikely. Therefore, MLB must step to the forefront and change their rules unilaterally.

338. See In Bud They Trust, supra note 213. Owners significantly increased the Commissioner’s authority by authorizing him to “take such action as he deems appropriate to ensure an appropriate level of long-term competitive balance.” Id. Most often, the big-budget teams like the Dodgers and Yankees attain free-agent rights to Cuban players who enter the league through the loophole. See Madden, supra note 251. It is possible the Commissioner could use this new power as an excuse to resolve the problems between MLB and Cuban players.

339. See Chass, supra note 136.

340. See id. The birth certificates are needed because no foreign player can be signed until he is sixteen years-old. See Major League Rule 3(a)(1)(B)(ii) (1999).

341. See Ross Newhan, Beltre Investigation Could Last a While, L.A. TIMES, Nov. 16, 1999, at D6; see also Ross Newhan, Lasorda Says Many Players Sign Illegally, L.A. TIMES, Nov. 17, 1999, at D1 [hereinafter Lasorda Says]. Adrian Beltre learned the Dodgers violated the rule in a discussion with his agent in the summer of 1999. See id. His agent, Scott Boras, said the birth certificate given to the Dodgers showed he was only fifteen at the time of signing. See id. Scott Boras requested the Commissioner of Baseball declare Beltre a free agent. See id. Interestingly, Pablo Peguero, the same man who violated the Cuban embargo, signed Adrian Beltre. See Tim Brown, Dodger Penalty is Far-Reaching, L.A. TIMES, Dec. 22, 1999, at D1.

342. See Brown, supra note 341. Because of the Beltre incident, the Dodgers were fined $50,000, ordered to pay Beltre $48,500 and were banned from scouting or signing in the
In addition to concern over the pattern of wrongful conduct by the Dodgers, Dominican officials are concerned about the existence of makeshift training camps in the Dominican Republic. These camps have been developed to train players with the goal of selling them to major league teams. Both the public and MLB have been aware of these problems as early as March, 1998.

Moreover, some have argued the minimum age limit imposed by the Major League Rules discriminates against American, Puerto Rican and Canadian baseball players. U.S. players can sign their first contract only if they are eligible for the amateur draft and are chosen by a major league team. Unlike foreign players, U.S. players cannot become free agents when first entering into the MLB. This reduces American players' bargaining power.

Clearly, the loophole and other MLB rules have caused numerous problems. The Dodgers would not have violated the Cuban embargo if there had been no resulting benefit. The Dodgers understood if they helped get the players out of Cuba, the team could sign them as free agents for a bargain basement price. Arguably, agents like Joe Cubas would not disrupt the foreign policy of the U.S., the Dominican Republic, the Bahamas and Costa Rica if not for the lucrative benefits posed by the loophole.

Members of the baseball community have accused Cubas of

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343. See supra note 136.
344. See id. Ironically, Pablo Peguero, after hearing these stories, was quoted as saying he was going to send a letter of complaint to the American Bar Association regarding the agents who were working in the Dominican Republic without a proper work permit. See id.
345. See id. (These problems were first reported when this article was published in March, 1998).
347. See Madden, supra note 251. Major League Baseball Players Association (“MLBPA”) counsel Gene Orza stated, “[y]ou have a situation now where a player who lives in Texas has less rights than a player born in Italy.” Id.; see also supra note 346 and accompanying text.
348. See Madden, supra note 251.
349. See Major League Rule 3(a)(1)(A) (1999) (“A player who . . . is a resident of the United States or Canada, may be signed to a contract only after having been eligible for selection in the Rule 4 draft.”).
350. See supra notes 244–50 and accompanying text.
351. See Plaschke, supra note 28.
352. See generally Baxter, supra note 15, at 18.
breaking major league rules and the embargo. It is clear the price is too high for these actions to continue and the solution has always been simple. MLB can prevent further embarrassments in the future and regain its respect as America's pastime simply by amending the rules.

C. Solutions for Major League Baseball to Resolve the Problems Created by the Loophole

Even if the loophole remains in place, baseball does have power to stop the problems that are occurring. The Major League Baseball Players Association ("MLBPA") has the authority to regulate baseball agents. The MLBPA has the authority to suspend an agent's certification or to take other disciplinary action if the agent is found to be "[e]ngaging in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other conduct which reflects adversely on his fitness as a Player agent." The broad language of this provision could be adapted to suspend agents who violate the Cuban embargo, falsify birth certificates or act as an agent without a license. If no action is taken to modify the loophole, the Commissioner's Office must urge the MLBPA to enforce this section with the goal of preserving the integrity of the game.

In addition, the Commissioner of Baseball has the right to cite teams that engage in conduct that is not in the best interest of baseball. But fines are not enough in an era where teams are owned by multi-million dollar corporations such as the Fox Entertainment Group and the Walt Disney Company. Baseball must modify the loophole.

353. See Lasorda Says, supra note 341. Tommy Lasorda explained the Dodgers did the same thing as Joe Cubas when the Dodgers illegally signed the two Cuban players. See id. Lasorda stated:

Cubas brings these guys in and says they were left on a raft for 14 days. But these [Cubans] never lost an ounce of weight from the time they left Cuba. They pick 'em up two miles out of the limit, get them on a yacht, take them to the Bahamas, put them in a suite, feed them like kings, and these [Cubans] said they were on a raft for 14 hours [sic], fighting sharks, and landed in the wrong place.

Id.


356. See Major League Agreement art. I, § 3 (1999); see also In Bud They Trust, supra note 213. The new amendments to the Major League Agreement allow the Commissioner to fine a team up to $2 million dollars and an owner, officer or employee up to $500,000. See In Bud They Trust, supra note 213. The author of this comment still believes this is not enough of an effective deterrent for those who wish to break the rules.
The proper solution is the implementation of a "world-wide draft." This would include the complete elimination of free agent status for any foreign player. Thus, all amateur players, no matter what nationality, would have to participate in the amateur draft. American, Canadian and Puerto Rican born players would receive the same type of compensation and treatment as the foreign players with the exception of the age requirement. Major league teams would be forbidden to sign players independently. Even if they were not forbidden to sign talent, they would have little or no incentive to help defectors or other foreign players because teams would only have the right to negotiate with players they selected through the draft.

The proposal is not as foolproof when applied to agents, but it is still workable. Simply put, an agent wants to represent players. An agent will want to help a Cuban player defect so the player will use the agent’s services. Although this would not change under the proposal, agents would not be as eager to help a defector obtain political asylum once the player left Cuba because the player would not become a free agent. Consider El Duque’s situation under this proposal. The U.S. offered him humanitarian parole, but El Duque turned it down because Cubas, his agent, had set up an arrangement with Costa Rica. Under this worldwide draft proposal, Cubas would have no incentive to make such an arrangement because El Duque could never be a free agent. El Duque would have had to accept the United States’ offer in order to play baseball, and U.S. foreign policy would have prevailed.

In addition, under this proposal, any agent violating the Cuban embargo would be dismissed as a player’s agent under the MLBPA regulations and criminally prosecuted under the CACR. If caught interfering in the political asylum process, agents would be reprimanded as well. MLB and the MLBPA will have to take a much more active stance against this type of action than they are currently taking.

357. See Madden, supra note 251. Madden discusses a different type of a worldwide draft, one in which more than one team could draft players so that each team interested could negotiate with the player. See id. This is one proposal the MLBPA would endorse. See id. However, it would still give too much incentive to major league teams to go out and recruit players unlawfully. See Greller, supra note 337, at 1704. Greller proposes a draft that includes Cuban players but not other foreign players, such as those from the Dominican Republic. See id. All foreign players should be placed in a worldwide draft because of the documented problems that have occurred in the Dominican Republic.

358. See supra text accompanying note 266.

359. See MLBPA Regulations Governing Player Agents art. IV, § 3(B)(12).

Under this proposal, players would declare themselves eligible for the draft by simply submitting a letter of intent and a birth certificate, when possible, to the Major League Baseball Commissioner’s Office. The age limit could then be maintained at sixteen for all foreign players because MLB will have placed itself in a better position to regulate the age limitation. Even if no birth certificate were available or if the one presented was questionable, MLB officials would still be in a better position to judge the maturity and capacity of an individual through interviews and evaluations.

Most importantly, this proposal would potentially allow Cubans to defect on their own, if they chose to take such a risk. The U.S. government, with help from MLB, could intervene in appropriate situations, after the defection has occurred. The U.S. could then grant these players humanitarian parole, in accordance with the U.S. treaty with Cuba. Most players who have defected have done so because they were banned from Cuban baseball. In these instances, humanitarian parole will be offered. Those who have not been banned might also be able to receive humanitarian parole from the U.S. because it is likely if they are returned to Cuba the players will be banned from baseball, and banned from earning a livelihood. If the player has received humanitarian parole pursuant to U.S. policy, then MLB could invite the player to participate in the world-wide draft.

This proposal reduces the conflict between baseball and the U.S. policy towards Cuban refugees. Under this proposal major league teams would have little or no incentive to violate the Cuban embargo, and agents would have little or no incentive to interfere with the process of players gaining political asylum.

361. But see Major League Rule 3(a)(1)(B) (1999). “Proof of age in the form of a birth certificate or other appropriate documentation, issued by an appropriate government agency, shall accompany the filing of such player’s first professional contract.” Id. (emphasis added). This rule should be amended such that the birth certificate is offered before the draft allowing MLB time for a screening process because players using false documentation has been common in the past.

362. See supra text accompanying note 283.

363. See supra text accompanying note 265. El Duque was banned from Cuban baseball. See id.; see also Kovaleski, supra note 296. Three months after El Duque left the Bahamas, all five players Cuba attempted to help had subsequently been banned from baseball in Cuba. See generally id.

364. See supra text accompanying note 265.
VII. CONCLUSION

The Dodgers violated the Cuban embargo and Major League Baseball rules because baseball’s loophole gave them an incentive to do so. Violating the embargo undermines almost forty years of U.S. foreign policy, and the loophole encourages agents to ignore U.S. immigration policy for the purpose of monetary gain. The lure of money always has and always will outweigh the risks of taking advantage of the loophole. The damaging effect of the loophole is present and real. Nations and their citizens are being exploited. This Comment proposes a worldwide draft as a solution to the problem. The cost of implementing this solution is small in comparison to the harm that has already been inflicted. Major League Baseball needs to regain respect as America’s pastime which can only be accomplished if the Commissioner of Baseball and major league teams take responsibility and amend their rules.

Scott M. Cwiertny*

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