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Setting Sail to Cuba: Analyzing the Recent Introduction of Cruise Lines and the Impact on American Tourist Freedoms

Alessandria San Roman*

After President Obama's announcement in early 2015 of increased relations with the Cuban government despite the existing Cuban embargo under the Helms–Burton Act and the Cuban Democracy Act, Carnival Cruise line made history in July of 2015 when it became the first United States cruise line to receive approval from both the United States Department of Treasury and the United States Department of Commerce to offer cruises to Cuba. Since its introduction, there has been wide increase in Cuba's tourism industry. However, Cuban regulations still regulate where and how cruise lines can travel. The increased relations are still in their infancy, leaving uncertainty regarding United States travel to the island and how much liability is imposed on businesses should their passengers violate Cuban laws. As it stands, U.S. passengers and businesses do not fully understand the legal ramifications of possible violations with Cuban law. For this reason, American cruise lines should take preemptive measures such as providing clear instructions prior and during embarkation to better equip Americans citizens abroad.

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Two American passengers aboard an American cruise line eagerly disembark the ship to take in the vast and lively culture Cuba has to offer. With their small backpacks and cameras, they join their guided tour of local restaurants. One passenger veers off the tour and innocently takes a picture of the other posing in front of a graffiti wall featuring Cuban icons. With no warning, a Cuban police officer snatches the camera and detains the passengers for acts contrary to revolution ideology. Are American cruise line passengers afforded any fundamental rights? Who is expected to protect these individuals?

This article is concerned with the introduction of American cruise lines into the Cuban tourism market post recent regulation changes resulting from the embargo the United States placed on Cuba in the 1960s. While the U.S. embargo on Cuba was enacted as a response to the Cuban

government's expropriation of U.S.-owned farmlands without compensation, it became a political movement designed to sever diplomatic relations with communist countries.¹ For a period of over fifty years, relationships between the U.S. and Cuba were minimal at best. In the wake of President Barack Obama's regulations with the Castro regime, attempts to normalize relationships with the communist state, including Carnival Cruise Line's approval to sail to Cuba in July of 2015, seemed promising. Yet, with new regulations and approvals to travel to the island under the Trump administration, current relationships appear strained once again. U.S. passengers are at risk because they may not have a firm understanding of the regulations, which may jeopardize their freedoms when venturing into Cuban territory. This lack of knowledge inadvertently affects American business abroad and may further impose liability on these cruise lines for not providing clear and transparent information. Overall, this article is intended to answer the following questions: Given the unique relationship between the U.S. and Cuba, are U.S. travelers fully equipped to understand tourism regulations and the possible ramifications of violations? More importantly, how can American cruise lines be affected by this lack of travel regulation understanding and what should American cruise lines do to better inform their U.S. travelers of these regulations?

I. THE CUBAN LEGAL SYSTEM AND CONTEMPORARY CUBAN LAW

Cuba's legal system was born from Spanish roots. Cuba was Spain's first important territorial acquisition in the western hemisphere.² After years of struggling to gain independence, Cuba succeeded in 1898.³ However, Cuba fell under U.S. rule when the U.S. imposed a military government from 1899 through 1902 to oversee the establishment of a new government.⁴ It is, therefore, not a surprise that Cuba's legal system derives primarily from Spanish law and the European civil law tradition, as well as some aspects of U.S. law.⁵ The Cuban judicial system was modeled after the Spanish system except for one important aspect stemming from U.S. influence—the creation of constitutional review.⁶

¹ NIGEL D. WHITE, *THE CUBAN EMBARGO UNDER INTERNATIONAL LAW: EL BLOQUEO* 100 (Routledge 2015).

² DEBRA EVENSON, *LAW AND SOCIETY IN CONTEMPORARY CUBA* 3 (Kluwer Law International, 2d ed. 2015).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Moreover, the Cuban Constitution of 1901 created a presidential system of government and the principle of the separation of powers.⁷ Yet, despite the creation of four separate constitutions in 1901, 1934, 1935, and 1940, each providing for a representative government and protection of individual rights, none established a secure democratic system.⁸ Instead, the constitutions were often amended or suspended as a result of political pressures.⁹

United States intervention in Cuban affairs has consistently occurred since the United States military presence began in 1899.¹⁰ Consequently, the Cuban government claimed the U.S. has undermined its legitimacy.¹¹ The United States' power to intrude on Cuban national sovereignty derived from the infamous Platt Amendment of 1903, which provided that the United States may intervene in Cuban affairs.¹² The Amendment was repealed in 1934.¹³ Interference, however, was less of an issue for the Cuban government during this period because the Cuban economy and capitalist class were dependent on the United States.¹⁴ In 1958, the United States, which largely supported Cuban dictator Fulgencio Batista's regime until his defeat, dominated Cuban trade.¹⁵ Thus, strong resentment towards U.S. domination flows heavily through Cuban history both before and after the Cuban revolution.¹⁶

The revolution ignited radical social and economic reform aimed at redistributing wealth and power in Cuba.¹⁷ Today, these socialist ideals run deep in Cuba even though communism continues to plague the country through Cuba's Communist Party.¹⁸ As a result, Cubans today do not enjoy the same freedoms that Americans do. Although researchers claim Cubans are permitted to be openly critical about their government and economy, Cubans, in practice, are expected to limit their criticism to permissible

⁷ *Id.*

⁸ EVENSON, *supra* note 2, at 3.

⁹ *Id.*

¹⁰ WHITE, *supra* note 1.

¹¹ *Id.*

¹² *Id.*; The Platt Amendment became a part of the Cuban Constitution following a treaty between the U.S. and Cuba. The withdrawal of U.S. occupational forces from Cuba was conditioned on the Cuban acceptance of this amendment. Cuba consented that "the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States." The Platt Amendment, ch. 803, 31 Stat. 895, 897 (1901).

¹³ EVENSON, *supra* note 2, at 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *See generally* WHITE, *supra* note 1.

channels, including conferences, neighborhood political meetings, radio talk shows, and mildly satirical literature.¹⁹ The Cuban government states that individuals are welcome to hold their own personal political or religious beliefs.²⁰ However, strong criticism of socialism is not viewed as appropriate, especially in the workplace. An individual voicing his opinion could lead to the end of his career.²¹ “Fearing the system’s repression and the dreaded possibility of long prison terms, Cubans seem resigned to await the end of the Castro era and the beginning of better times . . . [r]esistance and open defiance carries too high a price, a price Cubans are unwilling to pay.”²² Thus, censorship largely limits Cubans’ ability to communicate their beliefs. In addition, the continued loyalty of the armed forces to former Cuban dictator Fidel Castro and Cuban President Raul Castro has been a key element in the regime’s success in maintaining power and control over Cuban nationals.²³ The military’s large degree of professionalism, thorough integration into the political system, and entrusted role in the control of society has been momentous in the communist state.²⁴

In the current Cuban state, there is no freedom of the press or freedom of speech in the American traditional sense. Government statistics, newspapers, radio talk shows, and even judges are infused with biases towards the Cuban communist government.²⁵ According to a Human Rights Watch analysis, “the denial of fundamental freedoms . . . was marked by periods of heightened repression, such as the 2003 crackdown on 75 human rights defenders, journalists, trade unionists, and other critics of the government.”²⁶ These individuals were accused of being “mercenaries” of the United States government and were summarily tried in closed hearings.²⁷ After serving years in inhumane prisons, those found guilty of the alleged crimes were subjected to extended solitary

¹⁹ Hugh Spitzer & Doug Ende, *On Law and Life in Cuba: The Cuban Legal System and Culture Offer Contrast and Surprises*, 66 WASH. ST. B. NEWS 24, 27 (2012).

²⁰ *Id.*

²¹ *Id.*

²² JAIME SUCHLICKI, *CUBA FROM COLUMBUS TO CASTRO AND BEYOND* 238 (Brassey’s, 4th ed. 1997).

²³ *Id.* at 239; Although Fidel Castro died on November 25, 2016, the armed forces remain loyal and committed to the leadership ideology of the Castro brothers.

²⁴ *Id.*

²⁵ *Id.* at 238; *see generally* Jaime Suchlicki, *The U.S. Embargo of Cuba*, INST. FOR CUBAN & CUBAN-AMERICAN STUDIES OCCASIONAL PAPERS, Jan. 1, 2000, at 31.

²⁶ *Cuba: Fidel Castro’s Record of Oppression*, HUMAN RIGHTS WATCH (Nov. 26, 2016), <https://www.hrw.org/news/2016/11/26/cuba-fidel-castros-record-repression/>.

²⁷ *Id.*

confinement and beatings in addition to being denied basic medical care for serious ailments.²⁸

Although there is a standing Cuban constitution, laws are arbitrarily enforced or created to favor Cuban government ideology.²⁹ Overall, the Cuban legal system is complex and not openly accessible to outsiders. Consequently, the intricacies and arbitrary enforcement of Cuban laws ultimately pose genuine concerns for Cubans, American businesses, and potential visitors of the island.

II. BACKGROUND: THE HISTORY OF THE U.S. EMBARGO OF CUBA

A. *A Less than Sweet Deal for Cuba: The Presidential Development of the Embargo*

For the past fifty years, U.S.–Cuba relations have been minimal and oftentimes strained.³⁰ In 1959, after Fidel Castro overthrew the government of dictator Fulgencio Batista, the United States ceased diplomatic relations.³¹ By October 1960, President Dwight Eisenhower placed an embargo on Cuba.³² Castro was the first Cuban dictator of the 20th century who was not backed by the United States.³³ The embargo was put in place pursuant to the Trading with the Enemy Act of 1917, which during its time effectively removed the existing sugar quota the United States had negotiated with Cuba.³⁴ Prior to the Trading with the Enemy Act of 1917, Cuba dominated the world's sugar market by producing one-quarter of the world's sugar.³⁵ This legislation prohibited all exports from the United States to Cuba, excluding food and medicine.³⁶ Furthermore, the Trading with the Enemy Act of 1917 gave the president sole discretion to cease diplomatic relations with enemies or allies of enemies.³⁷ Enemies were identified by either times of war against the United States or by any declaration of the president.³⁸

²⁸ *Id.*

²⁹ *See generally* SUCHLICKI, *supra* note 22, at 239.

³⁰ Spitzer & Ende, *supra* note 19, at 24.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Tim Sablik, *Trading with Cuba*, ECON FOCUS, Third Quarter 2015, at 17.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 50 U.S.C. § 1 (2011).

President Eisenhower's decision to sever diplomatic relations with the island was a response to the Cuban government's expropriation of more than one thousand acres of U.S.-owned farmland.³⁹ Castro confiscated U.S. oil refineries in Cuba, nationalized U.S. and foreign owned properties, and barred numerous U.S. embassy staff members from operating in Cuba.⁴⁰ In April 1961, after the failed Bay of Pigs invasion where CIA operatives attempted to overthrow the Castro regime, President John F. Kennedy signed the Foreign Assistance Act of 1961, which placed a complete embargo on trade with Cuba.⁴¹ Two years later, the 1963 Cuban Assets Control Regulations (the "CACR") were imposed to further regulate any remaining relations with the island.⁴² These were just a few of the countless presidential attempts at exerting control over the embargo through an executive order. More importantly, these tight regulations would further control the ability for American businesses to operate on the island.

Following President Kennedy's assassination, in the late 1960s to the early 1970s, President Lyndon B. Johnson and later President Richard Nixon continued to promote the embargo while encouraging other Latin American countries to turn against Cuba.⁴³ Sure enough, the Organization of American States ("OAS") imposed economic sanctions and cut ties with Cuba.⁴⁴ However, by 1975, a majority of the OAS states adopted a resolution that allowed each member state the "freedom to normalize or conduct their relations with the Republic of Cuba in accordance with their own national policy and interests."⁴⁵ Although the United States came close to lifting the embargo, Cuba's involvement with a Marxist rebel group, known as the Popular Movement for the Liberation of Angola ("MPLA"), prevented the normalization of U.S.-Cuba relations.⁴⁶

In 1977, President Jimmy Carter led the United States to come close once again to ending the embargo. President Carter's administration sought to mend relations in hopes to spread democratic ideology to the island. President Carter amended the Treasury Department's Cuban Assets

³⁹ See generally SABLİK, *supra* note 34.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See generally *Cuban Assets Control Regulations*, FEDERAL REGISTER, (Dec. 3, 2012), <https://www.federalregister.gov/documents/2012/12/03/2012-29100/cuban-assets-control-regulations/>.

⁴³ WHITE, *supra* note 1, at 101.

⁴⁴ *Id.*

⁴⁵ *Id.* at 101-02 (citing The Final Act of the Sixteenth Meeting of Consultation of Ministers of Foreign Affairs, serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OAS Doc. OEA/Ser. F/II. Doc. 9/75 Rev. 2 (1975) (available at <http://oas.org/columbus/docs/16mfa.pdf>)).

⁴⁶ *Id.* at 102.

Control Regulation in 1977 to lift the travel restrictions to Cuba and allow U.S. citizens to spend up to \$100 while visiting Cuba.⁴⁷ The United States and Cuba also drafted an agreement on fishing rights and maritime boundaries and opened an “interests” section in Washington and Havana to perform some diplomatic functions.⁴⁸ However, once again, Cuba’s involvement in Africa and the presence of a Soviet military brigade in Cuba in 1979 led to the dissolution of any embargo–ending prospects.⁴⁹

During the 1980s, President Ronald Reagan’s administration placed great emphasis on cracking “down on communism in Cuba, and attacking leftist governments or movements elsewhere in the hemisphere.”⁵⁰ President Reagan once famously stated, “If we do not act promptly and decisively in the defense of freedom, new Cubas will arise from the ruins of today’s conflicts. We will face more totalitarian regimes, tied militarily to the Soviet Union; more regimes exporting subversion.”⁵¹ The Reagan Administration reinstated travel limitations and set aside any existing agreements put together during the Carter Administration.⁵² Nevertheless, during this period, control over the embargo shifted from the president to Congress.⁵³ The shift was a result of the constant changes in policy under each new president.⁵⁴ With the help of lobbying groups such as the Cuban American National Foundation (CANF), Congress’s focus with the embargo shifted towards broader issues such as trade, economics, and human rights, rather than solely national security.⁵⁵

B. The Transfer of Embargo Power to Congress

After the fall of the Soviet Union in 1991, President George H.W. Bush and his administration no longer viewed Cuba as a national security threat but rather as an opportunity to promote democracy and human rights.⁵⁶ President Bush argued for “free, fair and internationally supervised elections” as conducted by other former eastern–block, socialist states.⁵⁷ This call to action reiterated the United States’ long held foreign policy that the United States will not condone communist ideals. By 1992, the Cuban Democracy (Torricelli) Act closed trade between

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ WHITE, *supra* note 1, at 102.

⁵⁰ *Id.*

⁵¹ *Id.* at 103.

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ WHITE, *supra* note 1, at 67.

⁵⁶ *Id.* at 104.

⁵⁷ *Id.*

foreign subsidiaries of U.S. multinationals and Cuba, making re-entry difficult for ships that had stopped at a Cuban port to return to a U.S. port.⁵⁸ Nevertheless, communication and family visits to Cuba became easier as a way to spread U.S. democratic ideology to Cuban families living under the communist regime. The Act came into effect days before President Bush's presidency ended in 1993 and forced his presidential opponent, Bill Clinton, to endorse the Act to win over the Cuban-American vote.⁵⁹

i. The Enactment of the Helms-Burton Act

The shift in control of the embargo from the president to Congress took place in 1996 when the embargo policy was codified into law through the Helms-Burton Act.⁶⁰ The legislation was officially known as the Cuban Liberty and Democratic Solidarity Act ("LIBERTAD").⁶¹ However, the legislation was better known by its sponsors' names as the Helms-Burton Act. This legislation codified all standards, regulations, and presidential orders passed since 1962.⁶² Thus, the Helms-Burton Act effectively sustained the embargo within our governmental system. Proponents of the legislation felt that by having the embargo enter the United States democratic decision-making process in Congress, the embargo would likely stand rather than permitting the president to make the final decision.⁶³ Prior to this legislation, the president could lift most aspects of the embargo. Today, the president must appeal to Congress to repeal the entire embargo legislation.⁶⁴

The Helms-Burton Act was divided into four titles, which defined U.S.-Cuban relations: "I. Strengthening international sanctions against the Castro government; II. Assistance to a free and independent Cuba; III. Protection of the property rights of United States nationals; and IV. Exclusion of certain aliens." In addition to codifying previous orders, under these four titles, the Helms-Burton Act aimed to undermine foreign investments in Cuba, especially those concerning European, Canadian, and Japanese investments.⁶⁵ The Act also provided that the Cuban

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 105.

⁶¹ WHITE, *supra* note 1, at 105.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* The president must also appeal to Congress to repeal aspects of the embargo legislation. However, as seen in 2015 when President Obama filed a Presidential Policy Directive, there are loopholes for the president to enact executive decisions without Congressional approval. Similarly, President Trump took the same procedural measures as President Obama to restrict financial transactions and travel to Cuba.

⁶⁵ *Id.* at 106.

government could not include any of the Castro brothers as leaders of the country. The U.S. would not recognize any new government “unless compensation was paid to U.S. citizens or Cuban Americans whose property had been nationalized in the immediate post-1959 period.”⁶⁶ The Act even allowed victims of these expropriations to sue any individual or corporation “trafficking in property” belonging to U.S. citizens to Cubans that had become U.S. citizens.⁶⁷

Critics of the Act, including U.S. allies, claimed the Act violated international law by placing an undue burden on Cuban foreign policy specifically relating to foreign investments.⁶⁸ The United States, however, asserted that Cuba violated international law when it expropriated property owned by U.S. residents in the beginning of the revolution without prompt, adequate, and effective compensation.⁶⁹ Despite backlash from the international community, the Act stood firm, though it did not have the effect desired by the United States.

ii. The Use of Executive Powers and the Selective Application of the Act

The end of the Cold War, the lessening of Cuba as a threat to the United States, and the move to codify the embargo reduced the pressure at an international level to deal with Cuban policies.⁷⁰ Instead, as a result of the Helms–Burton Act, the embargo served more as a domestic policy concern. Even if the president proposed to Congress to end the embargo, Cuba did not elect a democratic government that did not include Fidel or Raul Castro in conformance with the embargo restrictions.⁷¹ Yet, President Clinton interpreted his executive powers liberally to allow certain relationships with the island, including allowing U.S. residents to send money to their families in Cuba, allowing them to travel to Cuba to visit their families, and permitting Canadian airliners heading for Cuba to pass through U.S. airspace.⁷² President Clinton also exercised an enforcement waiver over Title III and selectively enforced Title IV.⁷³ This exercise of the enforcement waiver meant that President Clinton was no longer enforcing the protection of U.S. nationals’ property in Cuba, and only

⁶⁶ *Id.*

⁶⁷ RICHARD GOTT, CUBA: A NEW HISTORY 304 (Yale Univ. Press, Yale Nota Bene 2005).

⁶⁸ See Cuban Liberty and Democratic Solidarity Act of 1996 (Helms–Burton Act), Pub. L. No. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091 (2012); NIGEL D. WHITE, THE CUBAN EMBARGO UNDER INTERNATIONAL LAW: EL BLOQUEO 100 (Routledge 2015).

⁶⁹ WHITE, *supra* note 1, at 100.

⁷⁰ *Id.* at 112.

⁷¹ *Id.* at 113.

⁷² *Id.*

⁷³ *Id.*

certain aliens were excluded from entering the United States based on arbitrary rationale. This selective application allowed some leeway in opening relations with Cuba on behalf of the executive branch.⁷⁴ Yet, without Congress's approval, the embargo would remain in place.

Under President George W. Bush, executive branch powers were used to restrict relations with Cuba. President Bush tightened travel restrictions and increased funding of dissidents.⁷⁵ Yet, President Bush also continued the waiver of Title III and allowed limited enforcement of Title IV against non-European countries.⁷⁶ Similar to President Clinton's exercise of this power, President Bush utilized these portions of the act to appease Cuban-Americans in the United States.⁷⁷ These tactics were seen as merely a political move to keep the Cuban-American community pleased with the measures taken against Cuba.⁷⁸

Following the terrorist attacks on September 11, 2001, Cuba was looped in the Bush Administration's rhetoric about nations aiding terrorist nations.⁷⁹ Once again, Cuba was seen as a threat to American freedoms. According to the Arms Control Association, however, there is no credible evidence of Cuba's production or possession of either chemical or biological weapons.⁸⁰ Nevertheless, Cuba continued to be seen as a threat from a foreign policy standpoint. As the President Bush era progressed, there were ebbs and flows in terms of the U.S.-Cuba relationship as restrictions relaxed at some points and tightened at other points. This fluctuation accurately depicts the past half-century of little change overall in U.S.-Cuba relations.

III. THE EMBARGO UNDER RECENT YEARS: FROM PROMISING TO UNFAVORABLE

Within the past few years, efforts to ease restrictions against Cuba demonstrated movement towards positive policy changes despite the Helms-Burton Act and the requirement of a democratic government free of the Castro brothers. In 2008, President Obama entered office with a plan for positive engagement with Cuba.⁸¹ Despite a U.S. Congressional vote to lift restrictions on Cuban Americans visiting and sending remittances to Cuba during President Obama's first term, a more hesitant and unreceptive

⁷⁴ See generally *id.*

⁷⁵ WHITE, *supra* note 1, at 113

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ *Id.* at 113-14.

⁸⁰ *Id.* at 114.

⁸¹ WHITE, *supra* note 1, at 117.

Congress prevented further progress during President Obama's second term.⁸² Nonetheless, in early 2015, President Obama announced a plan for improving relations with the Cuban government despite the existing Cuban embargo under the Helms–Burton Act.⁸³ On April 11, 2015, Presidents Barack Obama and Raul Castro shook hands at the Summit of the Americas in Panama.⁸⁴ This marked the first meeting of American and Cuban leaders since the embargo.⁸⁵ In March 2016, President Obama visited Cuba, making history by being the first president in over eighty–five years to visit the island.⁸⁶

However, since President Donald Trump's inauguration, the prospect of promising relations between the United States and Cuba has drastically dwindled. By June of 2017, President Trump signed a directive that rolled back President Obama's policies to warm relations with Cuba.⁸⁷ On November 8, 2017, the Trump Administration maintained its promises to the American public through regulations that restricted American financial movements and travel to Cuba. Changes in policy include a restriction on individual travel and a list of permitted entities that Americans can financially interact with.⁸⁸ Moreover, while President Trump criticized the Obama Administration for promoting human rights violations on the island, the announced policy changes only demonstrated a partial shift of President Obama's policies.⁸⁹ Nevertheless, these new policy announcements mark the regression towards a chilled atmosphere between the two nations.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Claire Felter & Danielle Renwick, U.S.–Cuba Relations, COUNCIL ON FOREIGN RELATIONS (last updated Jan. 19, 2018), <https://www.cfr.org/backgroundunder/us-cuba-relations/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ National Security Presidential Memorandum on Strengthening the Policy of the United States Toward Cuba, FEDERAL REGISTER (Oct. 20, 2017), <https://www.federalregister.gov/documents/2017/10/20/2017-22928/strengthening-the-policy-of-the-united-states-toward-cuba/>.

⁸⁸ *Frequently Asked Questions Related to Cuba*, U.S. DEPARTMENT OF THE TREASURY OFFICE OF FOREIGN ASSETS CONTROL 1, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last update Nov. 8, 2017).

⁸⁹ *See generally* Paul Guzzo, *Tampa to Havana travel still growing, but for how much longer?*, TAMPA BAY TIMES, <http://www.tampabay.com/news/transportation/tampa-to-havana-travel-still-growing-but-for-how-much-longer/2339140/> (last updated Sept. 29, 2017); Dan Merica, *Trump unveils new restrictions on travel, business with Cuba*, CNN (June 17, 2017, 2:00 PM), <https://www.cnn.com/2017/06/16/politics/trump-cuba-policy/index.html> (last visited Mar 25, 2018).

A. Cuba: The Pearl of the Caribbean

Following the announcement of a plan for improving relations with the Cuban government, President Obama used his presidential powers, permitted under the embargo, to lift certain travel restrictions.⁹⁰ Consequently, President Trump exercised these same powers to reinstate certain travel restrictions to the island. As part of the embargo, the U.S. Department of the Treasury is tasked with the duty to regulate travel to Cuba and oversees the Office of Foreign Assets Control (“OFAC”).⁹¹ The purpose of the OFAC is to “enforce economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy” of the United States.⁹² The OFAC is also charged with regulating the function of the CACR as previously discussed.⁹³

The United States’ fascination with Cuba and Cubans has been at the forefront of national attention since Cuba’s independence from Spain.⁹⁴ The United States viewed Cuba as a “natural, though exotic, appendage of the U.S.”⁹⁵ Although Cuba is viewed as an exotic vacation spot, marked by its antiquities and lavish culture, the U.S.’s romance with Cuba has been anything but functional.⁹⁶ The United States’ relationship with Cuba is unique in comparison to its relationship with other communist countries because the United States holds an embargo against Cuba and the United States is considered home to a vast amount of Cuban-Americans who sought exile from Castro’s communist regime.⁹⁷ In essence, Americans view Cuba as the forbidden fruit in the Garden of Eden; it’s just 90 miles off shore, yet out of sight and out of reach for many American travelers.

In order to travel to Cuba, American travelers must meet one of the CACR’s twelve requirements, which permit travel-related transactions by general license:

⁹⁰ WHITE, *supra* note 1, at 117.

⁹¹ *Office of the Foreign Assets Control – Sanctions Programs and Information*, TREASURY.GOV, <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx> (last visited Feb. 11, 2018).

⁹² *Id.*

⁹³ *Cuban Assets Control Regulations*, FEDERAL REGISTER, (Dec. 3, 2012), <https://www.federalregister.gov/documents/2012/12/03/2012-29100/cuban-assets-control-regulations/>.

⁹⁴ CAMILA FOJAS, ISLANDS OF EMPIRE: POP CULTURE AND U.S. POWER 62 (U. of Tex. Press 2014).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

[S]ubject to the criteria and conditions in each general license: family visits; official business of the U.S. government, foreign governments, and certain intergovernmental organizations; journalistic activity; professional research and professional meetings; educational activities; religious activities; public performances, clinics, workshops, athletic and other competitions, and exhibitions; support for the Cuban people; humanitarian projects; activities of private foundations or research or educational institutes; exportation, importation, or transmission of information or information materials; and certain authorized export transactions.⁹⁸

American travelers who meet one of these twelve categories of authorized travel are not required to apply for a travel license or get prior approval from the U.S. government to visit Cuba.⁹⁹ However, traveling to Cuba for tourist activities is not permitted.¹⁰⁰ Sunbathing on Cuba's infamous Varadero Beach, for example, is not allowed for American travelers. Instead, the CACR requires cultural and artistic exchanges between the two countries to travel to Cuba.¹⁰¹ These activities, including travel for educational purposes, must only occur under the "auspices of an organization that is subject to U.S. jurisdiction and that sponsors such exchanges to promote people-to-people contact."¹⁰² American travelers are only permitted to partake in these activities through group travel.¹⁰³

According to the U.S. Department of the Treasury, the purpose of having these cultural and artistic exchanges is to "enhance contact with the Cuban people, support civil society in Cuba, [and] promote the Cuban people's independence from Cuban authorities[.]"¹⁰⁴ As a result of this requirement, businesses in the tourism industry, such as cruise lines, were

⁹⁸ *Frequently Asked Questions Related to Cuba*, TREASURY.GOV, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last updated Nov. 8, 2017); *see generally* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_20170725.pdf.

⁹⁹ *See generally* *Frequently Asked Questions Related to Cuba*, TREASURY.GOV, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last updated Nov. 8, 2017).

¹⁰⁰ *Id.*

¹⁰¹ Fathom Travel Ltd., *Things to Know* (2015), <https://www.fathom.org/cuba-faq/> [<https://web.archive.org/web/20170228213922/https://www.fathom.org/cuba-faq/>] [hereinafter Fathom].

¹⁰² *See* *Frequently Asked Questions Related to Cuba*, *supra* note 88, at 5.

¹⁰³ *Id.* at 5–6.

¹⁰⁴ *Id.*

required to be innovative to incorporate these cultural and artistic exchanges. Carnival Cruise Line's Fathom was the first cruise line in 2015 to pave the way for Americans to visit Cuba and experience Cuban culture.¹⁰⁵

The introduction of the business industry in U.S. regulations regarding Cuba first made its debut in September of 2015 through an amendment of OFAC's section 515.573.¹⁰⁶ Regulations on how businesses can be established in Cuba and how they can maintain their presence are delineated in this amendment.¹⁰⁷ The OFAC authorizes subsidiaries, branches, offices, joint ventures, franchises, and agency or other business relationships with any Cuban individual or entity to facilitate the provisions of authorized telecommunications and internet-based services, to export goods authorized for export or re-export to Cuba under section 515.533 or section 515.559, to offer mail or parcel transmission services, or to provide cargo transportation services in connection with trade authorized or to those of travel and carrier services.¹⁰⁸ In relation to businesses providing travel and carrier services such as cruise lines, this amendment further emphasizes the need for humanitarian related projects as a component of travel.¹⁰⁹ Moreover, businesses that have a physical presence in Cuba are subject to U.S. jurisdiction as highlighted in this amendment.¹¹⁰

Today, a number of changes have been made to these regulations that impact the cruise line industry. The November 2017 OFAC regulations restrict persons subject to U.S. jurisdiction from engaging in direct financial transactions with entities and subentities identified on the State Department's Cuba Restricted List.¹¹¹ The purpose of this regulation is to ensure that no Americans may do business with Cuban entities related to the "Cuban military, intelligence, or security services."¹¹² As a result, cruise lines have been subject to increased scrutiny on which companies they may contract with on the island.¹¹³ With a ban on doing business with

¹⁰⁵ *Id.*

¹⁰⁶ *Cuban Assets Control Regulations*, *supra* note 42; *Cuban Assets Control Regulations*, FEDERAL REGISTER, (Sept. 21, 2015), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cacr_092015.pdf

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 31 C.F.R. § 515.209 (2017); 31 C.F.R. § 515.421 (2017).

¹¹² *Frequently Asked Questions Related to Cuba*, *supra* note 88, at 14.

¹¹³ U.S.–Cuba Trade and Economic Council, Inc., *Norwegian Cruise Lines Confirms Its Cuba Shore Excursions & Tour Locations Are Not Controlled By Military*, CUBATRADE.ORG (Oct. 2, 2017), <http://www.cubatrade.org/blog/2017/10/2/norwegian-cruise-lines-confirms-its-cuba-shore-excursions-tour-locations-are-not-controlled-by->

the Cuban military, which owns hotels, car rental agencies, restaurants, and shops in ports where cruise vessels dock, the ban could leave cruise lines and their passengers with limited to no options on shore excursions. Nevertheless, cruise lines may continue to allow their passengers to bring on board Cuban merchandise with no monetary value limit so long as the goods are imported as accompanied baggage and are for personal use.¹¹⁴ For now, passengers can continue to enjoy Cuban rum paired with a Cuban cigar.

IV. CURRENT CRUISING LANDSCAPE

According to the International Monetary Fund (“IMF”), Cuba hosts approximately three million visitors a year; 90,000 of these visitors are from the U.S.¹¹⁵ After the easing of travel restrictions, the number of annual visitors from the U.S. nearly doubled to 150,000 American travelers in 2015.¹¹⁶ “In 2015, the Ministry of Tourism of the Republic of Cuba reported 161,233 visitors from the United States.”¹¹⁷ According to the Ministry of Tourism of the Republic of Cuba, “this number excluded individuals of Cuban descent who visited the country.”¹¹⁸ The Cuban government does not consider these individuals Americans.¹¹⁹ In the eyes of the Cuban government, those born in Cuba, even if those individuals no longer reside in Cuba, are Cuban citizens.¹²⁰ The Ministry of Tourism of the Republic of Cuba also reported an 84% increase from January 2016 through June 2016 in the number of visitors from the U.S. The number of American travelers was expected to further increase because as new businesses, including American cruise companies Norwegian Cruise Line and Royal Caribbean International, travel to Cuba.¹²¹ With the three major

military (stating that Norwegian Cruise Lines Holdings “confirmed that its shore excursions and tour locations have been thoroughly evaluated and none are military owned or operated.”).

¹¹⁴ *Cuban Assets Control Regulations*, *supra* note 42.

¹¹⁵ Fathom, *supra* note 101; U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-80, ECONOMIC SANCTIONS: AGENCIES FACE COMPETING PRIORITIES IN ENFORCING THE U.S. EMBARGO ON CUBA 32 (2007).

¹¹⁶ U.S.–Cuba Trade and Economic Council, Inc., *U.S. Visitor Arrivals to Cuba Could Exceed 301,000*, CUBATRADE.ORG (July 7, 2016), <http://www.cubatrade.org/blog/2016/7/7/us-visitor-arrivals-to-cuba-could-exceed-300000-for-2016?rq=cruise/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ U.S.–Cuba Trade and Economic Council, Inc., *United States Companies with a Presence in Cuba Since 17 December 2014*, CUBATRADE.ORG, <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/59fb33de71c10b691313825d/1509635038334/USCompaniesAndCuba.pdf> (last visited February 23, 2018).

cruise lines now offering sailings to Cuba, it is estimated these businesses will bring 110,000 individuals this year.¹²² Moreover, it is estimated that the gross economic impact on Cuba by the overall estimated 301,000 visitors from all travel carriers will exceed \$660 million.¹²³ Yet, Engage Cuba's assessment, following President Trump's directive, predicts that restricting the rights of U.S. citizens to travel and invest in Cuba will now cost the U.S. economy \$6.6 billion this year.¹²⁴ Furthermore, Engage Cuba expects that the new policy changes will hurt new business and will cost 12,295 American jobs.¹²⁵

Carnival Cruise Line made history in July 2015 when it became the first U.S. cruise line to receive approval from both the U.S. Department of Treasury and the U.S. Department of Commerce to offer cruises to Cuba.¹²⁶ Carnival, the world's largest cruise ship company, announced that it would be a provider of cultural exchange programs between the U.S. and Cuba.¹²⁷ Carnival's Fathom line set aside year-round cruises on the *MV Adonia* to Cuba to immerse its passengers in a full cultural experience of the island as required by CACR.¹²⁸ During its period of sailing, the cruise schedule listed Havana, Cienfuegos, and Santiago de Cuba as ports of call for its passengers. Fathom designed its cruises to offer educational and cultural programs both on board and on the island. The brand was focused on "voluntourism" activities, activities that combine volunteer work with tourism, with Cuban partners on the ground.¹²⁹ According to Arnold Donald, president and CEO of Carnival Corporation, as soon as the company realized there might be a future tourism market in Cuba due to the lifting of travel restrictions, the company began conceptualizing the

¹²² U.S.–Cuba Trade and Economic Council, Inc., *It Court. Might Not. That's the Point . . . Create Uncertainty*, CUBATRADE.ORG, (Feb. 24, 2017 – 2018) <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/58b31d2029687f881c7a72b8/1488133411636/TrumpAdministrationCubaPolicyRegulatoryChanges.pdf/>.

¹²³ U.S.–Cuba Trade and Economic Council, Inc., *U.S. Visitor Arrivals to Cuba Could Exceed 301,000 For 2016; US\$660 Million Economic Impact in Cuba*, CUBATRADE.ORG (July 7, 2016), <http://www.cubatrade.org/blog/2016/7/7/us-visitor-arrivals-to-cuba-could-exceed-300000-for-2016?rq=cruise/>.

¹²⁴ Christopher Sabatini, *Trump's Imminent Cuba Problem*, N.Y. TIMES, June 15, 2017, at A23, col.2.

¹²⁵ *Id.*

¹²⁶ Associated Press, *Carnival to become first US cruise company to visit Cuba since 1960s*, THE GUARDIAN (Jul 7, 2015, 3:25 PM) <https://www.theguardian.com/world/2015/jul/07/cuba-cruises-carnival-fathom/>.

¹²⁷ Hannah Sampson, *With U.S. Approval, Carnival Corp. is Bound for Cuba*, THE MIAMI HERALD (Jul. 7, 2015, 4:30 AM), <http://www.miamiherald.com/news/business/tourism-cruises/article26631376.html/>.

¹²⁸ *See id.*; see also *Cuban Assets Control Regulations*, *supra* note 42.

¹²⁹ Sampson, *supra* note 127.

new brand.¹³⁰ The concept focused heavily on creating positive social impact for both travelers and the Cuban people.¹³¹ Thus, the traditional tour excursions and unstructured time off the ship was not available for Fathom passengers.¹³²

Fathom's cruises to Cuba were designed to comply with U.S. laws and regulations permitting travel to Cuba by U.S. citizens. Passengers on Fathom's Cuba cruise had the option of participating in a pre-arranged "Fathom-guided" people to people ("P2P") immersion program, which constitutes authorized, educational activities pursuant to the U.S. Department of Treasury's OFAC regulations.¹³³ This program included learning about Cuban art or taking pictures next to the famous Cuban antique cars.¹³⁴ The objective of "Self-Directed People-to-People" activities is to enhance contact with the Cuban people, support civil society in Cuba, and promote the Cuban people's independence from Cuban authorities.¹³⁵ If passengers chose not to partake in the P2P program, these individuals will be responsible for adhering to a full-time schedule of activities from an authorized category (e.g. educational, religious activities, humanitarian projects, or family visits) and maintaining their own records demonstrating compliance with OFAC requirements.¹³⁶ Individuals were not monitored by Fathom but were required to maintain records related to their travel activities for a period of five years. The monitoring requirement of records included a copy of passengers' travel affidavit and documents evidencing the activities that passengers participated in while in Cuba.

Carnival's Fathom Line served as a model travel carrier as per the OFAC regulations, especially regarding the P2P program. Today, however, Carnival's Fathom line trips have been put to a halt due to low profitability associated with the expensive cost of travel to Cuba via Fathom. Carnival has reworked its itinerary to match those of its competitors, Norwegian Cruise Line and Royal Caribbean Cruise Line. Both Norwegian and Royal Caribbean have set full itineraries for the 2017-2018 year to the island without a designated P2P program or voluntourism approach. This issue has sparked controversial discussions

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *Frequently Asked Questions Related to Cuba*, *supra* note 88, at 4; see also 31 C.F.R. § 515.565(b)(2) (2017).

¹³⁴ Fathom, *supra* note 101.

¹³⁵ Les Carnegie and Andrew Galdes, *Cuba & Trump: What the Changes Mean*, LATINVEX: LATIN AMERICA BUSINESS NEWS & ANALYSIS (June 21, 2017), <https://www.lw.com/thoughtLeadership/cuba-and-trump-what-the-changes-mean/>.

¹³⁶ See *id.*

amongst U.S. government officials.¹³⁷ Yet, there has been no decision on whether these itineraries meet U.S. government expectations, which has forced cruise lines to continue sailing without the mere certainty of continued operations.¹³⁸

V. PACK YOUR BAGS. WE ARE GOING TO CUBA.

When traveling to foreign countries, individuals are often not concerned with learning about the laws and regulations of foreign nations. Yet, when traveling to Cuba, individuals should be aware of some of the relevant Cuban laws and regulations. Aside from being required to travel within one of the twelve categories previously discussed, there are certain requirements that passengers must meet before entering Cuba. All passengers are required to have proper documentation to enter and leave the island.¹³⁹ Non-Cuban born passengers on Carnival's Fathom cruises must obtain a visa, or a tourist card, to enter Cuba.¹⁴⁰ Cuban-born passengers may need a non-tourist visa or a Cuban passport issued by the Cuban government.¹⁴¹ Regardless of nationality, all passengers should travel with their country issued passports to avoid confrontation with the Cuban government.¹⁴² With these tight regulations, individuals often rely on cruise lines to both provide this vital travel information and should there be any violations, incur the liability for an individual's lack of understanding.

VI. SAILING INTO UNCHARTERED WATERS

Once a passenger disembarks the vessel, the laws of the nation's government bind these individuals—as with any cruise. This level of binding, however, is a different scenario in Cuba. Because U.S.–Cuba relations are in constant flux, passengers may be subject to regulations they were not aware of. For example, the new OFAC bans under the Trump administration, which limit vendors that Americans may utilize while traveling abroad on Cuban soil, may place Americans and American

¹³⁷ See U.S.–Cuba Trade and Economic Council, Inc., *supra* note 117.

¹³⁸ *Id.*

¹³⁹ *Cuban Assets Control Regulations*, *supra* note 42.

¹⁴⁰ Fathom, *supra* note 101; *Frequently Asked Questions Related to Cuba*, U.S. DEPARTMENT OF THE TREASURY OFFICE OF FOREIGN ASSETS CONTROL 1, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last updated Nov. 8, 2017).

¹⁴¹ Fathom, *supra* note 101.

¹⁴² *Id.*

businesses in a legal bind.¹⁴³ After all, who is expected to protect American passengers when they are visiting Cuba just 90 miles off American soil? Is it the responsibility of cruise lines to protect and inform its passengers?

Tourism regulations often seem arbitrary and confusing. Although the U.S. government clearly lays out restrictions for traveling to the island, the Cuban government does not adequately advise businesses and the U.S. government of changes in its restrictions. This miscommunication could lead Americans to accidentally commit a travel violation abroad without proper knowledge. The story of Alan Gross is a noteworthy example of how miscommunication and lack of transparency on the part of the Cuban government can directly impact American travelers.

On December 3, 2009, Cuban authorities detained Alan Gross in Havana, Cuba for delivering communications equipment to a Jewish community.¹⁴⁴ He was arrested for “destroying the revolution.”¹⁴⁵ In Cuba, distributing communication satellites is strictly prohibited and thus, Gross was sentenced to fifteen years in prison.¹⁴⁶ His imprisonment came nine months after President Obama’s announcement to loosen restrictions on the ability for Cuban–Americans to visit the island and send money to their family members.¹⁴⁷ Cuban officials stated that in detaining Gross, “they were simply protecting their sovereignty.”¹⁴⁸ However, American officials viewed Gross’s detention and arrest as a clear violation of human rights and the Cuban people’s right to free access of information.¹⁴⁹ This tense debate between both governments lasted approximately five years, costing Gross a loss of one hundred pounds and a few teeth before he was released in December 2014.¹⁵⁰

With virtually no due process of law, passengers should be wary of changes that may lead to an arbitrary and capricious detainment as witnessed in the story of Alan Gross. Information about Cuba’s travel restrictions must be clearly communicated to the passengers before they depart. Given the current uncertainty associated with the cruise landscape, American cruise lines are not fully informing their passengers of the possible legal ramifications that they may encounter while on the island.

¹⁴³ See generally U.S.–Cuba Trade and Economic Council, Inc., *supra* note 113.

¹⁴⁴ *The American Prisoner Alan Gross and Cuban–American Relations*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/world/americas/alan-gross-cuba-and-the-united-states.html>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *The American Prisoner Alan Gross and Cuban–American Relations*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/world/americas/alan-gross-cuba-and-the-united-states.html>.

Moreover, with the U.S. Embassy in Cuba losing nonessential personnel due to the threat of the utilization of mysterious sonic weaponry which has resulted in twenty-two embassy employees suffering from various health issues over the past few months, the United States Government has stated that it has lost all confidence that the Cuban government can adequately protect American personnel from such nefarious, but calculated attacks.¹⁵¹ Consequently, the United States Embassy has issued a travel warning for all American travelers in Cuba.¹⁵² While cruise operations remain intact, the fear and concern of traveling to the island remains. With these circumstances at play, who is going to protect the American travelers in Cuba? Therefore, even a frequently asked questions page (“FAQ”) provided by the cruise line corporations, which is often the only means of conveying this type of information, may not suffice with such important freedoms at stake.

A. *The Problem with No Due Process*

American core values stem from the First Amendment freedoms and the right to due process. This pivotal, key concept of due process embedded in the American system is considered a fundamental right. Yet, Americans often have the misconception that other countries also guarantee these rights for Americans while on foreign soil. However, Americans traveling to other countries are not necessarily entitled to the same due process rights guaranteed in the U.S. This misconception may lead American passengers into deeper waters once they leave American vessels.

American businesses operating on Cuban soil are also subject to the ever-changing Cuban laws and regulations despite having a basis for U.S. jurisdiction under OFAC.¹⁵³ Should an executive, or even an employee, of one of these American businesses make a negative comment about the Cuban government, that individual may be at risk of detainment in the same way Alan Gross was detained for allegedly undermining Cuban sovereignty. As a result, the business may be at risk of not being able to operate on Cuban soil. Should the Cuban government find that the business goes against Cuban values, the Cuban government may prevent the business from operating on Cuban soil or interacting with its

¹⁵¹ See Gardiner Harris and Adam Goldman, *Illnesses at U.S. Embassy in Havana Prompt Evacuation of More Diplomats*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/politics/us-embassy-cuba-attacks.html/>.

¹⁵² *Id.*

¹⁵³ See *Cuban Assets Control Regulations*, *supra* note 42.

nationals.¹⁵⁴ These core Cuban values are embedded in what is referred to as the Cuban Penal Code.¹⁵⁵

i. The Cuban Penal Code and Its Reach

American businesses operating on Cuban soil are working under the scrutiny of the Cuban government's laws. While American businesses are fond of the way American jurisprudence functions through our due process system, these businesses often are not fully informed of the effects of the Cuban government's invisible hand.¹⁵⁶ Sometimes the actions of the Cuban government are seemingly arbitrary to Americans and not found in Cuban legislation, but *most* of the Cuban laws can be located in the Cuban Penal Code. Cuban laws follow Spanish civil code based on Cuba's prior history as a Spanish colony.¹⁵⁷ Cuban laws are often antiquated and have not been revised since the collapse of the Soviet Union.¹⁵⁸ Numerous legal concepts originating from the creation of the legal system continue to be in effect today.¹⁵⁹

One of the many antiquated laws included in the Cuban Penal Code is a criminal law defining "dangerousness."¹⁶⁰ Cuban law defines "dangerousness" (el estado peligroso) as "the special proclivity of a person to commit crimes, demonstrated by conduct that is observed to be in manifest contradiction with the norms of socialist morality."¹⁶¹ According to the Human Rights Watch, if Cuba determines that someone is "dangerous," the Cuban Penal Code allows the state to impose "pre-criminal measures" upon the individual, including surveillance by the National Revolutionary Police and political re-education for a period of one to four years.¹⁶² The state may detain the person during this time

¹⁵⁴ See generally Robert Winslow, *A Comparative Criminology Tour of the World*, SAN DIEGO STATE UNIVERSITY (last accessed February, 2017), <http://www-rohan.sdsu.edu/faculty/rwinslow/namerica/cuba.html> [<https://web.archive.org/web/20170309065834/http://www-rohan.sdsu.edu:80/faculty/rwinslow/namerica/cuba.html>].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* The first drastic change to the Cuban legal system occurred in 1976 to incorporate socialist ideology. Since the fall of the Soviet Union, few changes have been made to Cuban laws. Instead, Cuba laws are arbitrarily enforced with little to no reference to actual concrete Cuban laws.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Human Rights Watch, *Cuba's International Human Rights Obligations*, https://www.hrw.org/legacy/reports/1999/cuba/Cuba996-02.htm#P536_69587 (last visited February 10, 2018); see generally *Cuba: Fidel Castro's Record of Oppression*, HUMAN RIGHTS WATCH (Nov. 26, 2016), <https://www.hrw.org/news/2016/11/26/cuba-fidel-castro-record-repression/>.

¹⁶² Human Rights Watch, *supra* note 161.

without providing any reasoning.¹⁶³ The law also provides for “therapeutic measures,” including detention in a psychiatric hospital, which is continued “until the dangerousness disappears from the subject.”¹⁶⁴ As Human Rights Watch emphasizes, the open-ended nature of this punishment affords the state extraordinary authority to abuse the rights of political opponents and the developmentally disabled.¹⁶⁵ Government authorities have regularly threatened prosecution under this catchall provision. Yet, incidents regarding these actions are not in the hands of the public. Both the U.N. Commission on Human Rights (UNCHR) and the IACHR have vehemently criticized this Cuban law because of its subjectivity, the summary nature of the judicial proceedings employed, the lack of legal safeguards, and the political considerations behind its application.¹⁶⁶ According to the IACHR, the so-called special inclination to commit crimes referred to in the Criminal Code amounts to a subjective criterion used by the Government to justify violations of individual freedoms and the due process of persons who have merely held a view different from the official view.¹⁶⁷

In addition to standard crimes against persons, property, and social order, which American businesses on Cuban soil may be sanctioned with for violating, the Cuban Penal Code enumerates various offenses against socialist organizations.¹⁶⁸ Central among these are misuse of employment in a state business for illegal personal gain (*malversación*), obtaining money or property illegally channeled from some state economic venture (*receptación*), trading in foreign currency (*tráfico de divisas*), slaughter and distribution of livestock outside the socialist distribution system (*sacrificio ilegal*), and attempting to leave the country without complying with formal emigration requirements (*salida ilegal*).¹⁶⁹ Cases involving the violation of these offenses make up a large part of the criminal caseload in Cuba.¹⁷⁰ For American tourists, trading in foreign currency is of particular importance. Should American tourists trade foreign currency without visiting an approved foreign currency exchange vendor, these tourists may be subject to criminal punishment under Cuban laws.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Winslow, *supra* note 154.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

a. The Cuban Get–Out–of–Jail–Free Card

If the Cuban government indicts an American business (i.e. its owners or officers) or American traveler for any arbitrary violation of Cuban laws, its defenses in the Cuban court system are slim to none. Most notably, the Cuban government’s criteria for presenting evidence are subjective and discriminatory.¹⁷¹ Often the sole evidence provided, particularly in political cases, is the defendant’s confession, usually obtained under duress and without the legal advice or knowledge of a defense lawyer.¹⁷² At the very least, Cuban law provides the accused with the right to an attorney although the right is not afforded to those accused immediately.¹⁷³ Contrary to American laws, these individuals may have to wait more than a day to see their attorneys.¹⁷⁴ However, authorities have regularly denied defendants access to their lawyers until the day of the trial.¹⁷⁵ Several dissidents who served prison terms in Cuba reported that they were tried and sentenced without counsel and were not allowed to speak on their own behalf.¹⁷⁶ Moreover, the control that the Cuban government exerts over the livelihood of members of the state–controlled lawyers’ collectives compromises their ability to represent clients, especially when they defend persons accused of state security crimes.¹⁷⁷ Even with the right to an attorney, the odds do not seem to fare well for Americans under the gaze of the Cuban government’s invisible hand. With the large number of cruise line employees operating on the island during sailings and even officers visiting the island for promotional purposes, American businesses and travelers are likely to encounter possible violations of Cuban laws if not properly informed of these laws and their ramifications. Even the smallest violation could cause negative publicity and jeopardize the cruise line’s relations with the Cuban government.

B. What Are Cruise Lines Doing to Protect Themselves and their Passengers?

Of the three American cruise lines that currently have permission to sail to Cuba, only one has dealt with the Cuban legal system—Carnival in 2016 when Cuban–American passengers were not permitted to sail because the Cuban government refused to recognize the U.S. nationality of U.S. citizens who are Cuban–born or are the children of Cuban

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Winslow, *supra* note 154.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

parents.¹⁷⁸ To this day, no federal law mandates cruise line companies to inform current and future passengers of liabilities they may incur during their travels on the island. Yet, all three American cruise companies have provided a FAQ to inform their passengers of important travel regulations. Such regulations include how and where Americans can exchange U.S. dollars into Cuban CUC, whether cigar and rum can be brought back into the U.S., maintaining travel records, and information about touring Cuba through the P2P program.

For these American cruise companies, the safety and wellbeing of its passengers is a number one priority. Although Norwegian and Royal Caribbean plan to set sail to Cuba later this year, future passengers are provided with a FAQ link at their disposal. Plans of providing further information to those passengers who have booked their trip is still unknown. Nevertheless, Norwegian's CEO, Frank Del Rio, a Cuban-born cruise line entrepreneur, understands the danger associated with American passengers traveling to Cuba.¹⁷⁹ It would be no surprise if Norwegian takes further steps in aiding its passengers to better know the legal repercussions of possible violations.¹⁸⁰ Similarly, Royal Caribbean may have future plans. Yet, Royal Caribbean's FAQ page provides ample, if not the most detailed, information regarding, *inter alia*, the illegal purchasing of cigars on the Cuban streets and exchanging U.S. dollars into Cuban CUC at an inappropriate venue.¹⁸¹

Carnival's Fathom line provides only a limited yet helpful FAQ to inform its passengers of crucial information regarding their voyage. Carnival is not the first travel carrier to take passengers to Cuba, but it is the first *American* cruise line company to do such.¹⁸² As a pioneer in the Cuban-American business relation, Carnival's Fathom has set a minimum threshold for other American cruise line companies to adhere by. According to Carnival, should American regulations regarding travel to Cuba change, Carnival would be informed through OFAC of such changes. In contrast, should changes in travel regulations occur on behalf of the Cuban government, such changes are often not communicated formally to those businesses affected. As a result, Carnival is forced to

¹⁷⁸ Nora Gamez Torres, *U.S. Warns Cuban Americans About Risks in Traveling to Cuba*, THE MIAMI HERALD (May 6, 2016), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article76181562.html>.

¹⁷⁹ Fabiola Santiago, *As Carnival Spins on Discrimination Against Cuban-Americans, Norwegian's Example Shines*, THE MIAMI HERALD (Apr. 12, 2016), <http://www.miamiherald.com/news/local/news-columns-blogs/fabiola-santiago/article71439402.html>.

¹⁸⁰ *Id.*

¹⁸¹ *Cuba Travel Requirements*, ROYAL CARIBBEAN INT'L, <http://www.royalcaribbean.com/cuba/faq/> (last visited February 10, 2018).

¹⁸² Gamez, *supra* note 178.

internally monitor changes and rely solely on outside counsel to verify any changes done by the Cuban government.

C. The Embassy's Role in Disseminating Knowledge of Travel Regulation Changes

The U.S. Embassy in Havana, Cuba, is tasked with rendering assistance to American citizens abroad.¹⁸³ Some of these tasks include providing medical assistance, handling arrests, and replacing lost passports.¹⁸⁴ The Embassy understands the strenuous relationship between the two states and has taken the proper steps to facilitate safe travel to Cuba. One such step is referred to as the Smart Traveler Enrollment Program (“STEP”).¹⁸⁵ Through this program, Americans in Cuba will be notified of emergencies ranging from civil unrest to natural disasters.¹⁸⁶ The Embassy also posts messages regarding crucial travel information on its website.¹⁸⁷ However, notice from the Embassy to American businesses regarding changes in travel regulations is informal and infrequent.¹⁸⁸

Since the inaugural sailing of the *MV Adonia*, there has been only one occasion where the U.S. Embassy in Havana has taken initiative to contact American businesses regarding travel regulation changes.¹⁸⁹ In May 2016, the Embassy warned Cuban Americans and businesses operating on the island about risks in traveling to Cuba.¹⁹⁰ Cuban American passengers were warned that their U.S. Passports could be seized and that they themselves, and their children, could be conscripted into the Cuban Armed Forces.¹⁹¹ The Embassy warned, on its website, that the Cuban government “does not recognize the U.S. nationality of U.S. citizens who are Cuban-born or are the children of Cuban parents.”¹⁹² Additionally, the Cuban government stated that these individuals “will be treated solely as Cuban citizens” and that they should enter the island using their Cuban passports rather than their U.S. passports.¹⁹³

¹⁸³ U.S. DEPARTMENT OF STATE, SMART TRAVELER ENROLLMENT PROGRAM: A SERVICE OF THE BUREAU OF CONSULAR AFFAIRS, <https://step.state.gov/> (last visited Dec. 28, 2017).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ U.S. DEPARTMENT OF STATE, SMART TRAVELER ENROLLMENT PROGRAM: A SERVICE OF THE BUREAU OF CONSULAR AFFAIRS, <https://step.state.gov/> (last visited Dec. 28, 2017).

¹⁸⁹ *See generally* Gamez, *supra* note 178.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

‘There have been cases of Cuban–American dual nationals being forced by the Cuban government to surrender their U.S. passports[.] . . .’ The Cuban government’s decision to treat some Cuban Americans as Cubans is paradoxical because the island’s constitution, in Article 32, says that ‘dual citizenship will not be allowed. In consequence, when a foreign citizenship is acquired, the Cuban one will be lost.’ That means Cubans who have become U.S. citizens legally lost their Cuban citizenship and should be able to use their U.S. passports when they return to the island—a long-standing demand by Cuban Americans now highlighted by the controversy sparked by the Carnival cruise ship that sailed from Miami to Cuba.¹⁹⁴

A deliberately arbitrary application of its own Cuban laws demonstrates the danger the Cuban government poses to American passengers. The Embassy recognized there was a real, existential threat to American passengers’ freedoms.

Although the Cuban–American travel restriction was settled after negotiations between Carnival, the U.S. Government, and the Cuban Government, access to consulate services during an arrest may continue to be limited or not readily available for American citizens.¹⁹⁵ It is for this reason that Americans and American businesses need to stay vigilant when operating in Cuba.

D. Reporting Live: The U.S. Media’s Role in Providing Information

With the market to Cuba heating up, the media is flocking to report the latest news on Cuban–American travel regulations. Amongst the numerous stories the media has conjured regarding travel to Cuba, the cruise line industry, specifically, has been a coveted discussion topic of business for American citizens today. With various news outlets available to provide information on the constant ambiguities in understanding Cuban laws, American passengers often obtain both beneficial and detrimental information before embarking on a voyage to Cuba.

Because the United States relationship with the island has been so unclear, there is ambiguity in understanding where this relationship stands between both governments, i.e. understanding there is still an embargo, yet there are new travel regulations being implemented. Today, Americans

¹⁹⁴ *Id.* (internal cites omitted).

¹⁹⁵ Human Rights Watch, *supra* note 161.

turn to social media to obtain up-to-date information regarding the relations with Cuba. Nevertheless, information obtained by American social media and media outlets is often riddled with misinformation and its veracity is questionable at best. While Americans' undue reliance on American media does help them understand the laws and regulations in effect today, it is widely known that media conglomerates distort and misrepresent life in Cuba and the activities of its government.¹⁹⁶ This distortion occurs because the Cuban government has the sole discretion in deciding what information is released and what information is suppressed.¹⁹⁷ Consequently, the Cuban government controls what outsiders see and further represses the media.¹⁹⁸ The risk that misrepresentation can impose is an adverse effect on passengers, which thus affects the reputation of American business both in the U.S. and abroad. For this reason, American businesses must take necessary measures to protect not only themselves, but also its passengers.

E. What Could American Cruise Line Companies Do?

While the current industry standard is to provide cruise line passengers with a FAQ, American cruise line companies should take a step further and provide a legal lesson to passengers on board the vessel before disembarking onto Cuba. These lessons could take place during the federally mandated "muster drills" where the cruise line companies take steps to ensure passengers are familiar with emergency procedures in the event of an emergency.¹⁹⁹ From a business perspective, it is advantageous for the cruise line companies to provide minimal information regarding the plethora of possible legal dilemmas passengers may find themselves in while traveling to Cuba. Including more information on a FAQ may deter passengers from traveling to Cuba; thus, generating less revenue for the American cruise line companies. However, possible detainment and the loss of American passengers' freedoms should outweigh the marginalization of profits for these pioneering cruise line companies. Setting aside the idea that such an incident could serve as negative publicity for the cruise line companies, the thought that the loss of American freedoms could have been prevented with further knowledge on behalf of the cruise lines serves as an American ideological travesty.

¹⁹⁶ See generally Salim Lamrani, *Cuba, the Media, and the Challenge of Impartiality*, (NYU Press, 2015).

¹⁹⁷ Spitzer & Ende, *supra* note 18, at 28; see Lamrani, *supra* note 196.

¹⁹⁸ Spitzer & Ende, *supra* note 18, at 28.

¹⁹⁹ ROYAL CARIBBEAN INT'L, *supra* note 181.

VII. LOOKING FORWARD

Since the January 2015 enactments of new travel and trade regulations allowing U.S. travelers to visit Cuba for specific purposes without first obtaining a government license and to spend money there, new business ventures into the island have emerged.²⁰⁰ Each month, the U.S. Department of Treasury adds new businesses to its approved list to operate in Cuba. Although there are signs of stimulus in this economic sector, American businesses operating in the island must be weary of the risks associated with doing business with the Cuban government. Most pronounced is the political uncertainties that come with doing business in Cuba and how the Cuban regime may arbitrarily promulgate a policy that negatively affects American businesses: “The Cuban Communist Party is a Castro creation and a Castro dominated institution.”²⁰¹ The policy changes, which the Cuban government announced it plans to modify regarding business ventures, may embody communist ideals.

President Obama left an indelible mark in Cuban–American relations with the easing of the aforementioned restrictions for Americans traveling to Cuba. Yet, the Trump administration’s new policy actions and rhetoric has shown a far more stringent approach when dealing with Cuban–American relations.²⁰² According to the president of the U.S.–Cuba Trade organization:

Although the U.S. has outlawed tourism to Cuba, the Treasury Department’s 12 categories for permitted travel include ‘educational activities,’ and the Trump administration says the Obama administration has stretched the definition too far[.] . . . ‘They feel that some of the individuals who are going to Cuba are doing so for purposes of tourism,’ Mr. John Kavulich said. ‘They’re looking at the marketing materials of the travel agents, the cruise lines taking tourists. They are not ideologues; they are taking strict legal viewpoints that there are 12 categories, and tourism isn’t one of them.’²⁰³

These conflicting presidential ideologies in relation to Cuban foreign policy is adversely impacting American travelers and businesses abroad. From a business perspective, based on the conflicting views of the

²⁰⁰ *Id.*

²⁰¹ SUCHLICKI, *supra* note 22.

²⁰² Dave Boyer, *Donald Trump crackdown looms for Cuba as repression continues after Obama outreach*, THE WASHINGTON TIMES (Jan. 2, 2017), <https://www.washingtontimes.com/news/2017/jan/2/donald-trump-crackdown-looms-for-cuba-as-repressio/>.

²⁰³ *Id.*

respective transitioning presidencies, American businesses are forced to reassess their policies, or even their itineraries, to meet both American and Cuban regulations. These assessments are met with confusion at a time where policy decisions have not been officially released. From an American traveler's perspective, these policy changes, both from the business and governmental side, lead to ambiguities jeopardizing their interests in operating in the island.

Ultimately, the true question in this paradox is who bears the onus when it comes to providing adequate information to American travelers today? As it stands, it appears that this is a burden that neither American or Cuban governments nor businesses want to bear. Nevertheless, only Congress's approval to lift the embargo will completely change relationships with the island. This still appears to be eons away.