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New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992

In an attempt to promote democratic change, the Cuban Democracy Act of 1992¹ extended the existing prohibition of trade with Cuba.² The Act purports to prohibit transactions with Cuba or its nationals by firms, wherever organized or doing business, that are owned or controlled by United States residents or nationals.³ The nations within which these firms are located have expressed their opposition to this extraterritorial prohibition.⁴ They claim it is a violation of the sovereignty and equality of states under principles of international law.

Part I of this comment examines the Cuban Democracy Act and the regulations it modifies. Part II addresses whether the United States has the authority under international law to prohibit trade between Cuba and United States owned or controlled firms organized and operating in third countries. Finally, Part III addresses whether the United States has the authority to do so under United States law, considering particularly the Constitution and the role of international law in the United States legal system.

I. THE CACR AND THE CUBAN DEMOCRACY ACT

Under the authority of the Trading With the Enemy Act of 1917 (TWEA),⁵ the Treasury Department issued the Cuban Assets Control Regulations (CACR)⁶ in 1963. The CACR prohibits all "transactions

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1. Pub. L. No. 102-484, §§ 1701-1712, 106 Stat. 2575 (1992).

2. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1992).

3. *Id.* § 515.329.

4. David C. Scott, *The World From Mexico City*, Christian Science Monitor, Oct. 28, 1992, at 3 (Officials from Mexico, Uruguay, Venezuela, Argentina express their opposition to the Cuban Democracy Act); Pascal C. Fletcher, *Cuba Says U.S. Trade Squeeze Could Backfire*, Reuter Library Report, Oct. 23, 1992 (Britain, Canada, and EC express opposition to the Cuban Democracy Act).

5. Ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. § 1-44 (1988)). *Regan v. Wald*, 468 U.S. 222, 225-26, 104 S. Ct. 3026, 3029 (1984). "[In 1963, the] TWEA gave the President broad authority to impose comprehensive embargoes on foreign countries as one means of dealing with both peacetime emergencies and times of war."

In 1963, § 5(b) of TWEA provided:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe,

involv[ing] property in which [Cuba], or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect”⁷ by “any person subject to the jurisdiction of the United States.”⁸ The term “person subject to the jurisdiction of the United States” is defined as including:

(a) Any individual, wherever located, who is a citizen or resident of the United States;

by means of instructions, licenses, or otherwise—

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.

(3) As used in this subdivision the term “United States” means the United States and any place subject to the jurisdiction thereof: *Provided however*, That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. . . . As used in this subdivision the term “person” means an individual, partnership, association, or corporation.

50 U.S.C. app. § 5(b) (1958) (*quoted in Regan*, 468 U.S. at 226 n.2, 104 S. Ct. at 3029-30 n.2).

The President has delegated his authority under TWEA to the Secretary of the Treasury. Executive Order No. 9193, 3 C.F.R. 1174-1177 (1942) (*cited in Regan*, 468 U.S. at 226 n.2, 104 S. Ct. at 3029-30 n.2).

In 1977 Congress amended section 5(b) of TWEA limiting the President’s power to times of war, but grandfathered until 1978 the President’s national emergency authority being exercised under TWEA. Additionally, the Act now allows the President to extend the exercise of such authority for one year periods upon a determination that such extension is in the national interest. Pub. L. No. 95-223 § 101(b), 91 Stat. 1625 (1977). *See also* note following 50 U.S.C. app. § 5 (1988). For the Presidential extensions *see* 57 Fed. Reg. 43,125 (1992), 56 Fed. Reg. 48,415 (1991), 55 Fed. Reg. 37,309 (1990), 54 Fed. Reg. 37,089 (1989), 53 Fed. Reg. 35,289 (1988), 52 Fed. Reg. 33,397 (1987), 51 Fed. Reg. 30,201 (1986), 50 Fed. Reg. 36,563 (1985), 49 Fed. Reg. 35,927 (1984), 48 Fed. Reg. 40,695 (1983), 47 Fed. Reg. 39,797 (1982), 46 Fed. Reg. 45,321 (1981), 45 Fed. Reg. 59,549 (1980), 44 Fed. Reg. 53,153 (1979), 43 Fed. Reg. 40,449 (1978).

Concerning “excessive” delegation, the Court has recognized that in the international field Congress may “accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 221 (1936).

Congress originally adopted the CACR to deal with the peacetime emergency created by Cuban attempts to destabilize governments throughout Latin America. *See* Presidential Proclamation No. 3447, 3 C.F.R. 157 (1959-1963).

6. 31 C.F.R. pt. 515 (1992).

7. *Id.* § 515.201(b).

8. *Id.* § 515.201(b)(1).

- (b) Any person within the United States . . .;
- (c) Any corporation organized under the laws of the United States or of any State, territory possession or district of the United States; and
- (d) Any corporation, partnership, or association, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c)⁹

Substantial civil and criminal penalties are provided for violations of the CACR.¹⁰

Section 515.559 of the CACR, however, provided an exception to the broad prohibition on trade with Cuba. Section 515.559 allowed licensing for certain transactions of "U.S.-owned or controlled firms in third countries"¹¹ if law or policy in the third country required or favored trade with Cuba. The Cuban Democracy Act revokes this exception to the prohibition, stating that "no license may be issued for any transaction described in section 515.559."¹² Thus, the Cuban Democracy Act effectively prohibits trade between Cuba and overseas firms owned or controlled by United States residents or nationals.

II. INTERNATIONAL LAW

A. *Relevant Fundamentals*

The primary function of international law is to regulate the relations between international states.¹³ The international legal system has no formal, central legislature, complete judiciary, or disinterested enforcer.¹⁴

9. *Id.* § 515.329.

10.

(a) Whoever shall willfully violate any of the provisions of this Act . . . or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act . . . shall, upon conviction, be fined not more than \$50,000, or, if a natural person, imprisoned for not more than ten years, or both

(b)(1) The Secretary of the Treasury may impose a civil penalty of not more than \$50,000 on any person who violates any license, order, rule, or regulation issued under this Act.

50 U.S.C. app. § 16 (1988), as amended by the Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1710, 106 Stat. 2580-2581 (1992). See 31 C.F.R. § 515.701 (1992).

11. 31 C.F.R. § 515.559 (1992).

12. Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1706, 106 Stat. 2578 (1992).

13. Clive Parry, *The Function of Law in the International Community*, in *Manual of Public International Law 1* (Max Sorenson ed. 1968).

14. Werner Levi, *Contemporary International Law 3* (2d ed. 1991).

The collective power normally vested in these bodies in municipal law systems remains diffused horizontally among the individual international states, and each state is obligated to comply with the rules and principles of the system.¹⁵ A state violating an obligation of international law is required to terminate the violation and make reparation. Substantial international political consequences also may arise from the violation.

There are two primary sources of the rules and principles of international law: international agreements and international custom.¹⁶ International agreements are binding, as such, only upon the states consenting to them. What is agreed to in these instruments, however, may ultimately become customary international law.

"International custom results from similar and repeated acts by states — repeated with the conscious conviction of the parties that they are acting in conformity with law."¹⁷ Thus, there are two factors in the formation of custom: "(1) a material fact—the repetition of similar acts by states, and (2) a psychological element usually called the *opinio juris sive necessitatis*—the feeling on the part of the states that in acting as they act they are fulfilling a legal obligation."¹⁸ Customary law is generally binding upon all states. A rare exception is recognized when a state has consistently "asserted its refusal to follow the practice from which the rule has developed."¹⁹

Consideration is given to three factors in determining the existence of a rule of customary international law: the writings of scholars, state pronouncements that are not seriously challenged by other states, and the judgments and opinions of both international and domestic courts.²⁰

B. Traditional Bases of Jurisdiction

1. Territoriality

"The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations"²¹ Two principal corollaries of the sovereignty and equality of states are: "(1) a jurisdiction, *prima*

15. *Id.* at 2.

16. Barry E. Carter & Phillip R. Trimble, *International Law* 77 (1991).

17. Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 *British Year Book of Int'l L.* 127, 129 (1937).

18. *Id.*

19. D.W. Greig, *International Law* 18 (2d ed. 1976).

20. Restatement (Third) of Foreign Relations Law of the United States § 103 (Am. Law Inst. 1986) [hereinafter Restatement (Third)]. The "Restatement represents the opinion of The American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law." *Id.* Introduction, at 3.

21. Ian Brownlie, *Principles of Public International Law* 280 (2d ed. 1973).

facie exclusive, over a territory and the permanent population living there; and (2) a duty of non-intervention in the area of exclusive jurisdiction of other states.”²² Thus, territoriality is the primary basis of jurisdiction, and a state violates international law by prescribing or enforcing a rule for which it lacks jurisdiction.²³ The principle of territoriality recognizes the state’s authority to prescribe rules of law attaching legal consequences to conduct within its territory and relating to the status of persons or things present within its territory.²⁴

The Cuban Democracy Act’s prohibition of trade between Cuba and United States owned or controlled firms organized and located overseas attaches legal consequences to conduct occurring *outside* United States territory. Thus, the principle of territoriality does not provide a basis of jurisdiction for the Cuban Democracy Act.

The related principle of objective territoriality recognizes the authority of the state to prescribe a rule of law attaching consequences to conduct which occurs outside its territory but causes a substantial effect within its territory. The principle requires that at least one element of the offense occur within the state.²⁵ The objective territorial principle is well accepted “with respect to acts such as shooting or even sending libelous publications across a boundary.”²⁶ It is also generally accepted with respect to liability for injuries resulting from products made outside the state and introduced into the prescribing state’s stream of commerce.²⁷ But, application of the objective territorial principle is controversial regarding legislation attaching consequences to economic effects in a territory, particularly anti-trust laws.²⁸

The Cuban Democracy Act attaches consequences to extraterritorial trade activities. Considering that trade by overseas United States subsidiaries with Cuba was \$700 million in 1990²⁹ and that these firms are owned or controlled by United States nationals or residents, there may be a substantial effect in the United States. But, it is an economic effect, which has been controversial as a basis for jurisdiction. More importantly, no element of the offense occurs in the United States. Thus, the principle of objective territoriality does not provide a basis of jurisdiction for the Cuban Democracy Act.

22. *Id.*

23. Restatement (Second) of Foreign Relations Law of the United States § 8 (Am. Law Inst. 1965) [hereinafter Restatement (Second)].

24. Restatement (Third), *supra* note 20, § 402.

25. See Restatement (Second), *supra* note 23, § 18; Levi, *supra* note 14, at 146.

26. Restatement (Third), *supra* note 20, § 402 cmt. d.

27. *Id.*

28. *Id.*

29. *Bush Signs Anti-Cuba Law, Courts Cuban-American Votes*, Agence France Presse, Oct. 23, 1992 [hereinafter *Bush signs anti-Cuban Law*].

2. Customary Exceptions to Exclusive Territorial Jurisdiction

Although territorial jurisdiction is *prima facie* exclusive, concurrent jurisdiction is possible. Customary international law recognizes four bases of jurisdiction that provide exceptions to exclusive territorial jurisdiction: (1) the nationality principle, (2) the universality principle, (3) the protective principle, and (4) the passive personality principle.³⁰

The nationality principle is the most widely accepted exception to exclusive territorial jurisdiction. Under this principle, a state may prescribe the conduct of its nationals either within or outside its territory.³¹ Under international law, an individual has the nationality of the state that confers the nationality.³² However, other states may reject this nationality when a genuine link between the individual and the conferring state is absent.³³ Birth in the state's territory (*ius soli*) or birth to parents who are nationals (*ius sanguinis*) are generally accepted as genuine links.³⁴ Permanent residence within the state also indicates a genuine link.³⁵ A state is not required to recognize a nationality imposed by another state on an unwilling individual;³⁶ indeed, a state may violate international law by imposing its nationality on an unwilling individual.³⁷ A corporation, a legal creation of the state, is considered a national of the state of incorporation.³⁸ As with individuals, other states may reject the nationality of a corporation when a genuine link between the corporation and the conferring state is absent.³⁹

Applying the nationality principle to the Cuban Democracy Act, the principle provides a basis of jurisdiction for the United States over nationals owning or controlling a corporation organized and operating in a third country. But it does not provide the United States a basis of jurisdiction over the corporations which United States nationals or residents own or control, unless these corporations were incorporated in the United States. Thus, the nationality principle does not provide the United States a basis of jurisdiction over corporations organized and operating in third countries, even though the corporations are owned or controlled by United States residents or nationals.

30. Brownlie, *supra* note 21, at 291-97.

31. Greig, *supra* note 19, at 213-14.

32. Restatement (Third), *supra* note 20, § 211.

33. *Id.*

34. Levi, *supra* note 14, at 140; Restatement (Third), *supra* note 20, § 211 cmt. c.

35. Restatement (Third), *supra* note 20, § 211 cmt. c.

36. *Id.* § 211 cmt. d.

37. *Id.* See Levi, *supra* note 14, at 141.

38. Restatement (Third), *supra* note 20, § 213; Restatement (Second), *supra* note 23, § 27; Greig, *supra* note 19, at 397.

39. Restatement (Third), *supra* note 20, § 213 cmt. c.

The universality principle provides all states with jurisdiction over offenses contrary to the interest of the international community.⁴⁰ Piracy and war crimes are well accepted examples of such offenses.⁴¹ Slave trade, hijacking of aircraft, genocide, and certain acts of terrorism are also fairly well accepted as offenses contrary to the international community.⁴² However, this principle does not provide a basis of jurisdiction for the Cuban Democracy Act's prohibition of trade with Cuba because, generally, trading acts are not recognized as offenses contrary to the international community.

The protective principle provides a state jurisdiction over an alien's extraterritorial acts directed against the security of the state or the integrity of its function.⁴³ Examples of acts supporting jurisdiction are espionage, counterfeiting of the state currency or seal, and falsification of official documents.⁴⁴ Because the acts prohibited by the Cuban Democracy Act are not directed against the security or integrity of the United States, the protective principle does not provide a basis of jurisdiction for the Cuban Democracy Act's prohibition of trade.

The passive personality principle is the least accepted basis of jurisdiction. It permits a state to exercise jurisdiction over aliens who commit crimes against its nationals outside the state's territory.⁴⁵ "The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality."⁴⁶ The Cuban Democracy Act does not address aliens' crimes against United States nationals outside the United States; instead, it addresses aliens' trade with Cuba and Cuban nationals. Thus, the passive personality principle does not provide a basis of jurisdiction for the Cuban Democracy Act.

The five traditional bases of jurisdiction do not provide support for the authority of the United States to prohibit trade between Cuba and United States owned or controlled firms organized and operating in third countries. Thus, the Cuban Democracy Act violates international law. Indeed, late last year the United Nations General Assembly passed a resolution implying such.⁴⁷

40. Joseph G. Starke, *Introduction to International Law* 234 (1989).

41. *Id.*

42. Restatement (Third), *supra* note 20, § 404.

43. Greig, *supra* note 19, at 213-14.

44. Restatement (Third), *supra* note 20, § 402 cmt. f.

45. Levi, *supra* note 14, at 145.

46. Restatement (Third), *supra* note 20, § 402 cmt. g.

47. On November 24, 1992, the United Nations General Assembly passed a resolution proposed by Cuba expressing concern over "the promulgation and application by member states of laws and regulations whose extraterritorial effects affect the sovereignty of other

C. *The United States' Position and Restatement § 414*

The United States State Department takes the position that the traditional principles of jurisdiction are not exclusive.⁴⁸ Its position is that international law imposes

a threshold requirement that a state have a sufficient nexus with the matter to justify an assertion of jurisdiction. The traditional categories of jurisdiction . . . [are] seen as the principal kinds of nexus generally considered sufficient, but the sufficiency or basic reasonableness of other kinds of connections . . . [can] not be excluded *a priori*.⁴⁹

The State Department is not alone in its contention. The Restatement (Third) of Foreign Relations similarly recognizes certain situations where jurisdiction is justified under international law other than by the five traditional bases.⁵⁰ The "Restatement represents the opinion of The American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law."⁵¹ Section 414 of the Restatement concerns the issue presented by the Cuban Democracy Act—jurisdiction over corporations owned or controlled by nationals, but organized and operating in foreign states. Section 414 states:

§ 414. Jurisdiction with Respect to Activities of Foreign Branches and Subsidiaries

(1) . . . a state may exercise jurisdiction to prescribe for limited purposes with respect to activities of foreign branches of corporations organized under its laws.

states and the legitimate interests of entities or persons under their jurisdiction." *UN Votes Against U.S. on Embargo of Cuba*, Chi. Trib., Nov. 25, 1992, § 1, at 10 (quoting the resolution's preamble). The resolution specifically mentioned "the recent promulgation of measures of that nature aimed at strengthening and extending the economic, commercial and financial embargo against Cuba." *U.N. Denounces New U.S. Embargo Against Cuba*, St. Petersburg Times, Nov. 25, 1992 (quoting the resolution's preamble). The resolution calls on states to "refrain from promulgating and applying' such laws and measures 'in conformity with their obligations under the Charter of the United Nations and international law' and it urges states that have such laws to repeal them." *UN Votes Against U.S. on Embargo of Cuba, supra*.

The resolution may be as much a political statement as a legal one. United Nations General Assembly resolutions are not legally binding. Additionally, although the resolution passed by a vote of 59 to 3, there were 71 abstentions and representatives of 42 nations failed to attend the vote. Stanley Meisler, *U.N. Rebuffs U.S. on Cuba Embargo*, L.A. Times, Nov. 25, 1992, at A1.

48. David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 Law & Contemp. Probs. 283, 290-93 (1987).

49. *Id.* at 292 (emphasis added).

50. Restatement (Third), *supra* note 20, § 414 cmt. a.

51. *Id.* Introduction, at 3.

(2) A state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state. However . . . it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities

(a) by direction to the parent corporation in respect of such matters as uniform accounting, disclosure to investors, or preparation of consolidated tax returns of multinational enterprises; or;

(b) by direction to either the parent or the subsidiary in exceptional cases, depending on all relevant factors, including the extent to which

(i) the regulation is essential to implementation of a program to further a major national interest of the state exercising jurisdiction;

(ii) the national program of which the regulation is a part can be carried out effectively only if it is applied also to foreign subsidiaries;

(iii) the regulation conflicts or is likely to conflict with the law or policy of the state where the subsidiary is established.

(c) In the exceptional cases referred to in paragraph (b), the burden of establishing reasonableness is heavier when the direction is issued to the foreign subsidiary than when it is issued to the parent corporation.⁵²

An application of Restatement § 414 does not recognize the authority of the United States under international law to prohibit trade between Cuba and United States owned or controlled corporations in third countries.

The Restatement fails to provide guidance as to what is an "exceptional case."⁵³ Although situations in which the regulating state is at war may present an exceptional case,⁵⁴ the meaning of the term is not clear. The Cuban Democracy Act cites the Castro regime's "consistent disregard for internationally accepted standards of human rights."⁵⁵ The Act also states that "the evident inability of Cuba's economy to

52. *Id.* § 414.

53. *Id.* § 414(2)(b).

54. *Id.* § 213 cmt. d.

55. Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1702, 106 Stat. 2575 (1992).

survive current trends, provide[s] the United States . . . with an unprecedented opportunity to promote a peaceful transition to democracy in Cuba."⁵⁶ These observations may be true, but the situation in Cuba is not as exceptional as the United States' involvement in warfare. Although unfortunate, this situation does not seem more exceptional than many normally encountered in foreign affairs; thus, arguably this is not an exceptional case.

But, assuming the Cuban situation presents an exceptional case under Section 414, an analysis of the reasonableness of the jurisdiction is necessary.⁵⁷ Because the direction to cease trading is issued to the subsidiary, the United States bears a heavier burden of reasonableness to justify the jurisdiction.⁵⁸ Three factors are suggested to assess the reasonableness of jurisdiction: (1) the extent to which the extension of jurisdiction is essential to further a major national interest, (2) the extent to which the national program could be carried out effectively only if applied to subsidiaries, and (3) the extent to which the regulation conflicts or is likely to conflict with the law or policy of the state where the subsidiary is located.⁵⁹

First, to what extent is the extension of the prohibition of trade with Cuba essential to further a major national interest? The United States does have an interest in preventing human rights abuses and in the promotion of democracy in third countries. But, the interest here seems less national in scope than a situation directly involving the rights of the United States or its citizens, as in times of war or hostage situations. And with the apparent collapse of the Soviet Union and its lessened economic and political support of the Cuban government, Cuban destabilization of Latin American governments seems less of a threat. At the least, the United States' interest would be less than before the downfall of the Soviet Union.

Second, to what extent can the national prohibition of trade with Cuba be carried out effectively only if also applied to subsidiaries? If the prohibition were not extended to subsidiaries, the congressional goal of denying Cuba the goods, technology, and capital of the United States market could be frustrated or easily avoided. In fact, according to the United States Treasury Department, trade between overseas United States subsidiaries and Cuba was \$700 million in 1990.⁶⁰ Though this amount is concededly less than probably would be generated if direct trade from

56. *Id.*

57. Restatement (Third), *supra* note 20, § 414(2).

58. *Id.* § 414(2)(c).

59. *Id.* § 414(2)(b).

60. *Bush Signs Anti-Cuba Law*, *supra* note 29.

the United States was permissible, \$700 million is still a substantial amount of trade and a substantial frustration of Congress' intent.

Finally, to what extent is the extension of the embargo to foreign subsidiaries likely to conflict with the law or policy of the state of the subsidiaries? This factor weighs heavily against the reasonableness of the jurisdiction because the Cuban Democracy Act effectively prohibits trade by United States owned or controlled firms in precisely those states whose policy or law requires or promotes trade with Cuba.⁶¹ The protest by third states to this asserted jurisdiction indicates the third states' perception of the severity of this conflict between their own laws and the prohibition.⁶²

Considering the heavy burden the United States must meet to justify jurisdiction, the application of the three factors bearing on reasonableness, and the general restrictive language of the section as a whole, the exercise of jurisdiction does not seem reasonable. In light of the unreasonableness of jurisdiction and the doubtfulness that this is an exceptional case, Section 414 does not support the jurisdiction of the Cuban Democracy Act. Thus, the exercise of jurisdiction over United States owned or controlled firms located in third countries is not recognized as proper under international law by Restatement § 414.

Because the extraterritorial jurisdiction asserted by the CACR and the Cuban Democracy Act are not recognized as valid by either the traditional bases of jurisdiction or Restatement § 414, they violate international law. The next question is how this jurisdictional violation of international law affects the validity of the Cuban Democracy Act in the United States legal system.⁶³

III. UNITED STATES LAW

A. *The Role of International Law in the United States Legal System*

As a state in the international community, the United States is subject to customary international law. Indeed, customary international law is recognized as part of our federal law. It is well settled that "[i]nternational law is part of our law, and must be ascertained and administered by the courts . . . of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their de-

61. See Cuban Democracy Act of 1992, Pub. L. No. 102-484, § 1706, 106 Stat. 2578 (1992); Cuban Assets Control Regulations 31 C.F.R. § 515.559 (1992).

62. See *supra* note 4.

63. It seems likely that the United States' assertion of jurisdiction would not be looked upon favorably by a *foreign* or *international* court in an enforcement proceeding or a challenge to such. See Judgment of May 22, 1965 (Fruehauf Corp. v. Massardy), Cours d'appel, 1965 J.C.P. II, No. 14,274 bis (Fr.).

termination."⁶⁴ As federal law, it is subject to modification or repeal by subsequent legislative acts. Otherwise, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"⁶⁵ A United States court cannot look beyond United States law.⁶⁶ Thus, an international obligation incorporated into United States law which is modified or repealed, will not be given effect as United States law, although the international legal obligation of the United States remains.

Two rules of statutory construction particularly concern the modification or repeal of international custom as federal law. First, legislation is presumed to apply only territorially unless clearly indicated otherwise.⁶⁷ Second, if fairly possible, a statute is to be construed so as not to conflict with international law.⁶⁸

The intent that the CACR prescribe conduct extraterritorially seems clearly indicated. Under authority of the TWEA,⁶⁹ the CACR contains the sweeping prohibition of all "transactions involv[ing] property in which . . . [Cuba], or any national thereof, has . . . any interest [in] whatsoever, direct or indirect."⁷⁰ It applies to any "person subject to the jurisdiction of the United States."⁷¹ The broad definition of this term indicates unambiguously the intent that the prohibition apply extraterritorially, thus defeating the contrary presumption. The Cuban Democracy Act's disallowal of licensing for "firms in third countries" to trade with Cuba, leaving these firms subject to the continuing CACR prohibition, reaffirms this intent.

Because there is no basis of jurisdiction validating the CACR and the Cuban Democracy Act, international law prohibits their regulation of trade between Cuba and United States resident or national-owned or controlled firms organized and located in third countries.⁷² Yet, the Cuban Democracy Act and the CACR clearly express the contrary intent to control these activities. Thus, it is not possible to fairly construe these acts to comply with international law.

64. *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900).

65. *Id.*, 20 S. Ct. at 299.

66. *Edye v. Robertson*, 112 U.S. 580, 599, 5 S. Ct. 247, 254 (1884); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

67. *E.E.O.C. v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575, 577 (1949); *Blackmer v. United States*, 284 U.S. 421, 437, 52 S. Ct. 252, 254-55 (1932).

68. *Restatement (Third)*, *supra* note 20, § 114.

69. Ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. §§ 1-44 (1988)).

70. 31 C.F.R. § 515.201(b) (1992).

71. 31 C.F.R. § 515.201(b)(1) (1992). See definition of the term "person subject to the jurisdiction of the United States" *supra* in text accompanying note 9.

72. See *supra* text accompanying notes 20-57.

Because the Cuban Democracy Act and the CACR are intended to apply extraterritorially, and the expressed intent conflicts with international law, the statutes should be construed to apply extraterritorially, thus overriding international law principles of jurisdiction as United States law.

B. The Constitution and Judicial Treatment of Extraterritorial Legislation

Under our system of Federalism, the federal government possesses the powers delegated to it by the Constitution.⁷³ But these delegated powers of the federal government are limited by constitutionally guaranteed individual rights, such as those contained in the Bill of Rights.⁷⁴ It is well established that a federal court has the power to refuse to give effect to executive and legislative acts if they are inconsistent with the Constitution.⁷⁵ This power of refusal can extend even to acts which affect international relations like the CACR and the Cuban Democracy Act.

But surprisingly, there has been little judicial analysis of the constitutionality of the extraterritorial application of federal law.⁷⁶ A leading case, *United States v. Aluminum Co. of America*,⁷⁷ concerned the ap-

73. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. *But see* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18, 57 S. Ct. 216, 219-20 (1936).

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . [T]he investment of the federal government with the powers of external sovereignty did not depend on affirmative grants of the Constitution.

74. This is also true for the possibly *extra-constitutional* powers inherent in sovereignty recognized in *Curtiss-Wright*, 299 U.S. 304, 57 S. Ct. 216. *See also* *Perez v. Brownell*, 356 U.S. 44, 58, 78 S. Ct. 568, 576 (1958), *overruled on other grounds* by *Afroyim v. Rusk*, 387 U.S. 253, 87 S. Ct. 1660 (1967).

Broad as the power in the National Government to regulate foreign affairs must be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

76. *Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1219 n.12 (1992).

77. 148 F.2d 416 (2d Cir. 1945). *See also* *Lea Brilmayer, An Introduction to Jurisdiction in the American Federal System* 305 n.87 (1986) "[The case] was brought before the Supreme Court, but more than half the Justices disqualified themselves. The case was then certified to the Second Circuit. . . . [T]he decision is binding in all circuits."

plication of the Sherman Act to an extraterritorial conspiracy between foreign parties. Judge Learned Hand's opinion stated, "[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so" ⁷⁸ Although the opinion addressed congressional intent, the expected constitutional analysis never appeared. Other cases similarly address only congressional intent,⁷⁹ and the Court has never invalidated the extraterritorial application of federal law on constitutional grounds.⁸⁰ Indeed, "constitutional arguments rarely have been advanced in the briefs of parties resisting the extraterritorial application of federal law."⁸¹

Perhaps constitutional review of such laws has been pretermitted by the common notion that acts which affect international relations are beyond judicial scrutiny. The political question doctrine holds that certain matters are inappropriate for judicial review. In *Baker v. Carr*,⁸² the Court stated the following test:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸³

Matters touching on foreign relations are often deemed political questions because resolution of these issues frequently turns "on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, [or the situation] uniquely demands a single-voiced statement of the government's view."⁸⁴

The Cuban Democracy Act does touch on foreign affairs because the Act regulates transactions between Cuba and firms located in third countries. But, as the Court stated in *Baker v. Carr*, "[I]t is error to

78. *Aluminum Co.*, 148 F.2d at 443.

79. *Brilmayer & Norchi*, *supra* note 76, at 1219 n.12 (citing cases).

80. *Id.*

81. *Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 *Law & Contemp. Probs.* 11, 25 (1987).

82. 369 U.S. 186, 82 S. Ct. 691 (1962).

83. *Id.* at 217, 82 S. Ct. at 710.

84. *Id.* at 211, 82 S. Ct. at 707.

suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."⁸⁵ Many of the factors favoring non-justiciability of matters touching on foreign affairs are not presented by the Cuban Democracy Act. Judicial review of legislation is a recurring, accepted task with well-defined and manageable standards. It is one of the judiciary's characteristic roles under the Constitution, and should not be avoided merely because deciding the legal issue may result in significant political consequences.⁸⁶ The political question doctrine, therefore, should not prevent judicial review of legislation, such as the Cuban Democracy Act, that regulates trade extraterritorially.

C. Congressional Power to Legislate Extraterritorially

Three possible constitutional grounds for the Cuban Democracy Act are: the Commerce Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause coupled with the federal government's foreign relations power.

The Commerce Clause provides Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁸⁷ Under the current standard of review, the power "to regulate Commerce . . . among the several States" is extremely far-reaching. The judiciary will defer to congressional choices in this area and uphold Congress' power if there is a rational basis upon which Congress could find a relation between its regulation and interstate commerce.⁸⁸ In the review of congressional power under the Commerce Clause, Congress' motive in passing the legislation is irrelevant.⁸⁹

There are two principal ways in which an item, person, or activity may come under the commerce power.⁹⁰ First, Congress may control interstate travel or shipments.⁹¹ Second, it may control "any activity, including 'single state' activities, if the activity has a close and substantial relationship to, or effect on, commerce."⁹² This relationship or effect may be based on theoretical economic relations; and an activity may

85. *Id.*, 82 S. Ct. at 707.

86. See *Japan Whaling Assoc. v. American Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866 (1986) ("But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility because our decision may have significant political overtones.").

87. U.S. Const. art I, § 8, cl. 3.

88. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 4.8 at 395 (2d ed. 1992).

89. *Perez v. United States*, 402 U.S. 146, 91 S. Ct. 1357 (1971) (federal crime); *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377 (1964) (civil rights).

90. Rotunda & Nowak, *supra* note 88, § 4.8 at 395-96.

91. *Id.*

92. *Id.*

be subject to regulation if the activity is one of a type of activities having a cumulative effect on interstate commerce.⁹³

Considering the amount of trade by foreign firms owned or controlled by United States residents or nationals, the firms' trade activities could rationally result in economic effects in the several states. Additionally, the failure to regulate this extraterritorial activity, while doing so territorially, could rationally affect interstate commerce by encouraging the extraterritorial flight of United States corporations and capital. Thus, under the current standard of review, the power "to regulate commerce . . . among the several States" provides a constitutional basis of authority for the Cuban Democracy Act.

The power "to regulate Commerce with foreign nations" might also provide a constitutional basis of authority for the Cuban Democracy Act under a standard of review similar to that concerning interstate commerce. The national plan to regulate commerce with Cuba, to deny Cuba the goods, technology, and capital of the United States market could be frustrated and easily avoided if United States resident or national-owned or controlled firms in third countries are not also regulated. Because in 1990 trade by United States subsidiaries with Cuba was \$700 million, Congress could rationally conclude that these extraterritorial activities are rationally related to, or have an effect on, commerce with foreign nations.

Another constitutional ground for the Cuban Democracy Act is the Necessary and Proper Clause. Under that clause, Congress possesses the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁹⁴ In *M'Culloch v. Maryland*,⁹⁵ the Court construed the Necessary and Proper Clause and consequently defined the basic limits of implied congressional power.⁹⁶ The Court stated:

[T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to

93. *Id.*

94. U.S. Const. art. I, § 8, cl. 18.

95. 17 U.S. (4 Wheat.) 316 (1819).

96. Laurence H. Tribe, *American Constitutional Law* 301 (2d ed. 1988).

that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.⁹⁷

Thus, the Necessary and Proper Clause implies congressional power to use all means reasonably calculated to effect not only the ends within the congressional powers enumerated in Article I, § 8, but it also implies the power to use all means reasonably calculated to effect the ends within the cumulative powers vested in the government of the United States.⁹⁸

It is well accepted that the *government of the United States* is vested with plenary power over foreign affairs.⁹⁹ As the Court stated in *Fong Yue Ting v. United States*:¹⁰⁰ "The United States are a sovereign and independent nation and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective."¹⁰¹ And, in *United States v. Curtiss-Wright Export Corp.*,¹⁰² the Court stated:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.¹⁰³

In *Perez v. Brownell*,¹⁰⁴ the Court recognized the constitutionally implied power of *Congress* to regulate foreign affairs.¹⁰⁵ The Court stated:

Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government . . . must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations.¹⁰⁶

97. *M'Culloch*, 17 U.S. (4 Wheat.) at 421.

98. *Id.*; U.S. Const. art. I, § 8, cl. 18; Tribe, *supra* note 96, at 301-03.

99. Louis Henkin, *Foreign Affairs and the Constitution* 15-28 (1972).

100. 149 U.S. 698, 13 S. Ct. 1016 (1893).

101. *Id.* at 711, 13 S. Ct. at 1021.

102. 299 U.S. 304, 57 S. Ct. 216 (1936).

103. *Id.* at 315-18, 57 S. Ct. at 219-20.

104. 356 U.S. 44, 78 S. Ct. 568 (1958).

105. Rotunda & Nowak, *supra* note 88, § 6.2 at 493.

106. *Perez*, 356 U.S. at 57, 78 S. Ct. at 575 (citations omitted).

Congress could have reasonably concluded that the prohibition of trade between Cuba and overseas firms owned or controlled by United States residents or nationals relates to foreign affairs. The economic embargo of Cuba is the United States' means of indicating our national displeasure with the human rights abuses by the Cuban government, in hopes that the economic pressure upon Cuba will curb these activities and hasten democratic change. Allowing or prohibiting trade with Cuba by United States owned or controlled firms in third countries could impact upon the perceptions of Cuba and the international community regarding our national position on Cuba and its activities. Additionally, the allowal or disallowal of trade with Cuba by these firms could impact upon the effectiveness of the national embargo of Cuba. Thus, the Necessary and Proper Clause coupled with the federal government's plenary power to control foreign relations provides a Constitutional basis of power for the Cuban Democracy Act.

Therefore, there are three possible constitutional bases of power for the Cuban Democracy Act's regulation of trade between Cuba and United States resident or national-owned or controlled firms organized and operating in third countries: the Commerce Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause coupled with the federal government's foreign relations power. Nevertheless, the constitutional scrutiny should not end upon a finding that Congress intended extraterritorial application and has the power to create such a law. A court's scrutiny should also determine whether the application of the law violates another provision of the Constitution.

D. Constitutional Limitations on the United States' Extraterritorial Power

Although the powers of the federal government are limited by constitutionally guaranteed individual rights, the Court has recognized that not every constitutional provision applies wherever the United States government exercises its powers.¹⁰⁷ For instance, in *United States v. Verdugo-Urquidez*,¹⁰⁸ the Court held that the Fourth Amendment protections did not apply to a search and seizure by United States agents of property owned by a nonresident alien and located in a foreign nation.¹⁰⁹ The Court reasoned that the term "the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection[s]

107. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69, 110 S. Ct. 1056, 1062 (1990).

108. 494 U.S. 259, 110 S. Ct. 1056 (1990).

109. *Id.* at 259, 110 S. Ct. at 1056.

with this country to be considered part of [the] . . . community.”¹¹⁰ The Court noted that the term “the people” is also used in the First, Second, Ninth, and Tenth Amendments. Apparently, these limitations upon governmental power are not available to those who are not part of the national community or who lack significant connections to the community to be considered part of the community.

In contrast, the Court noted that the Fifth Amendment “speaks in the relatively universal term of ‘person.’”¹¹¹ In *Johnson v. Eisentrager*,¹¹² the Court rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. But, as the *Eisentrager* opinion acknowledged, in some cases constitutional provisions extend to those who are not citizens. The Court stated that “[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.”¹¹³ Indeed, in *Verdugo-Urquidez*, the Court recognized that the alien defendant possessed the Fifth Amendment privilege against self-incrimination because the privilege against self-incrimination is a fundamental trial right of all defendants in the United States legal system.¹¹⁴

Although several lower court cases state there are no constitutional issues raised by the extraterritorial application of United States law,¹¹⁵ several Ninth Circuit cases hold there are due process limitations on the extraterritorial application of United States law.¹¹⁶ The early Ninth Circuit cases equated the constitutionality of Congress’ exercise of jurisdiction with international law jurisdictional principles.¹¹⁷ But, in *United States v. Davis*,¹¹⁸ the Ninth Circuit distinguished the two:

International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the

110. *Id.* at 265, 110 S. Ct. at 1061.

111. *Id.*, 110 S. Ct. at 1061.

112. 339 U.S. 763, 70 S. Ct. 936 (1950).

113. *Id.* at 770, 70 S. Ct. at 940.

114. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 1060 (1990) (citing *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489 (1964)).

115. *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031, 105 S. Ct. 1403 (1985); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *Brilmayer & Norchi*, *supra* note 76, at 1219 n.12.

116. *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990); *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987); *United States v. King*, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966, 97 S. Ct. 1646 (1977).

117. *Brilmayer & Norchi*, *supra* note 76, at 1219 n.12; *Davis*, 905 F.2d at 249 n.2 (citing *United States v. Peterson*, 812 F.2d 486, 494 (extraterritorial application of statute is justified by the protective principle and is constitutional) and *United States v. King*, 552 F.2d 833, 851-52 (extraterritorial application of statute is justified by nationality and objective territorial principles and is constitutional)).

118. 905 F.2d 245 (9th Cir. 1990).

United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?¹¹⁹

The Cuban Democracy Act prohibits trade between Cuba and United States resident or national-owned or controlled firms organized and operating in third countries. These corporations do have a nexus to the United States since some of their owners are United States nationals or residents. But, the Cuban Democracy Act prohibits conduct that is either encouraged or required by law or policy in the third country. In many situations, this presents the foreign corporation with the choice of either violating United States law or violating the law of the third state within which the firm is located. Thus, application of the Cuban Democracy Act to an individual defendant might be held to be fundamentally unfair and violative of the Due Process Clause of the Fifth Amendment.¹²⁰

V. CONCLUSION

In conclusion, the Cuban Democracy Act's prohibition of trade between Cuba and United States owned or controlled firms probably violates international law. Even though international law is part of federal law, as such it is overridden by the Cuban Democracy Act's clearly expressed intent to apply extraterritorially and its inconsistency with international law. Under current standards of review, constitutional bases of power for the act are provided by the Interstate Commerce Clause, the Foreign Commerce Clause, and the Necessary and Proper Clause. The only potential limitation to the application of the Cuban Democracy Act in the United States legal system is the Due Process Clause of the Fifth Amendment. Although there are few restrictions in the United States legal system on the power of the United States to prohibit trade between Cuba and the United States owned or controlled firms in third countries, in the international legal system the United States is liable to

119. *Id.* at 249 n.2 (citations omitted). Results of the *Davis* approach may parallel results of the "reasonableness" test of Restatement § 414. *See supra* text accompanying notes 50-63. But, the Restatement approach, balancing the interests of the states, seems more analogous to a conflict of laws analysis. While the due process analysis may consider the states' contradictory commands in determining whether the extraterritorial application of the statute is arbitrary or fundamentally unfair, the analysis focuses more on the relation between the United States and the regulated individual, not a balancing of interests between the United States and the territorial state. Thus, in certain factual situations the results of the two tests concerning jurisdictional validity may be different.

120. *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087 (1958).

the states within which these firms are located for violating its international legal obligation. Perhaps more important than these possible international legal consequences are the international political consequences resulting from this Act.

Allen DeLoach Stewart

