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## Cuban Asset Control Regulations: The Transfer of Estate Assets to Cuban Heirs Under the Obama and Trump Administrations

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# Cuban Asset Control Regulations: The Transfer of Estate Assets to Cuban Heirs Under the Obama and Trump Administrations

Madeleine N. Elser\*

I. INTRODUCTION.....	250
II. BACKGROUND.....	254
A. <i>Trading with the Enemy Act of 1917</i> .....	254
B. <i>Cuban Asset Control Regulations (1963-2009)</i> .....	256
C. <i>Caselaw</i> .....	257
1. Administration of Estates with Cuban Interest.....	257
2. Constitutional Arguments.....	259
III. SUMMARY OF CUBAN ASSET CONTROL REGULATIONS (2011-17).....	262
IV. ANALYSIS .....	265
A. <i>Constitutional Arguments: Did the Courts Get it Right?</i> .....	265
B. <i>Effect on Foreign Policy Goals</i> .....	268
1. How Foreign Policy Goals have changed over time ..	268
2. Cuban Asset Control Regulations: An effective means of achieving foreign policy goals? .....	269
a. 1963 Regulations.....	269
b. Reform Under Obama Administration .....	270

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c. Trump Changes .....	271
C. <i>Probate and Estate Planning in American Courts</i> .....	273
a. Regulations' Effect on Estate Planning .....	273
b. Probate Process in Miami Courts .....	274
V. CONCLUSION .....	276

## I. INTRODUCTION

A transfer of money, property, or other belongings is considered by many Americans to be a fundamental right that comes with the possession of property.<sup>1</sup> Many believe that if you own property, such as a house or land, you also possess the right to leave that property to your friends or family through an estate planning document, or to your intestate heirs if you die without a such documents.<sup>2</sup> When you are on the receiving end of such a transfer, it is likely that you will presume ownership rights over the given piece of property with no limitations by the government. However, the government has the power to place limitations on inheritances involving property within the United States' jurisdiction.<sup>3</sup> In most cases, any limitations that the government will place on the distributions of estate assets are minimal. Generally, the government does not restrict a decedent to leaving gifts to heirs and beneficiaries within the United States. A decedent is entitled to leave gifts to persons residing outside of the United States if he wishes to do so, because aliens have the same rights of inheritance as U.S. citizens under Florida law.<sup>4</sup>

There are instances in which the United States government may limit or even prohibit cross-border transfers, meaning the transfer of property within the United States to an individual or entity outside of the United States.<sup>5</sup> Specifically, the United States government has previously prohibited and now limits gifts made to

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<sup>1</sup> 42 FLA. JUR. 2D *Property* § 5 (2019).

<sup>2</sup> *See id.*

<sup>3</sup> *See* U.S. CONST. amend. V.

<sup>4</sup> *See* FLA. STAT. § 732.1101 (2018).

<sup>5</sup> *See, e.g.,* Trading With the Enemy Act of 1917, Pub. L. No. 65-91, 50 U.S.C. § 5.

anyone considered to be a “Cuban national.”<sup>6</sup> The regulations define the term “Cuban national” as “a subject or citizen of that country or any person who has been domiciled in or a permanent resident of that country at any time on or since the ‘effective date’” of the regulations.<sup>7</sup> The American government has limited or prohibited many transactions with Cuban nationals due to Cuba’s status as an enemy of the United States under the Trading With the Enemy Act of 1917 (TWEA).<sup>8</sup> While many changes have been made to TWEA since its enactment, testamentary gifts or intestate succession to Cuban nationals continue to be heavily regulated in an attempt to prevent American money from entering the hands of Cuban leaders.<sup>9</sup> This creates an infringement on a property owner’s freedom of testamentary disposition so long as the property to be distributed is within the United States’ jurisdiction.

TWEA gave the president the authority to “regulate or prohibit any transactions in foreign exchange . . .” through any agency he saw fit, so long as it was during a period of national emergency, which was to be declared by the president.<sup>10</sup> Under TWEA, the president may make a general declaration of a national state of emergency during any war period or other time during which the president deems fit to declare a state of national emergency.<sup>11</sup> Under 50 U.S.C.S. §1701, the president also has the authority to declare such a national emergency “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>12</sup> The Supreme Court of Utah has defined a state of national emergency to mean an “unforeseen combination of circumstances which calls for immediate action by the national leaders and support from the citizens for the safety, peace, health, and general welfare of the nation.”<sup>13</sup> In the federal courts, the United States Fourth Circuit Court of Appeals has de-

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<sup>6</sup> See generally Cuban Asset Control Regulations, 31 C.F.R. § 515.201 (2017).

<sup>7</sup> *Id.* at § 515.302(a)(1).

<sup>8</sup> Trading With the Enemy Act of 1917 at §5.

<sup>9</sup> See generally 31 C.F.R. §515.201.

<sup>10</sup> Trading With the Enemy Act of 1917 at § 5.

<sup>11</sup> *Id.*

<sup>12</sup> 50 U.S.C.S. § 1701(a) (LEXIS through Pub. L. No. 116-47).

<sup>13</sup> *State v. Foukas*, 560 P.2d 312, 314 n.5 (1977).

defined “state of emergency” as “the condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent.”<sup>14</sup> The National Emergencies Act of 1976 requires that the declaration of a state of national emergency be immediately submitted to Congress, as well as published in the Federal Register.<sup>15</sup> Due to the United States trade embargo against Cuba, the United States has been in a state of emergency with regards to Cuban policy since 1963.<sup>16</sup> The United States Treasury Department issued the Cuban Asset Control Regulations (the “Regulations”) in 1963, under TWEA’s authority, and the Regulations are administered by the Office of Foreign Asset Control.<sup>17</sup> With respect to testate or intestate gifts, the Regulations limit one’s ability to devise property to a Cuban National.<sup>18</sup> Caselaw defines the term “national” as including “a subject or citizen of, or any person who has been within, a foreign country, whether domiciled or a resident therein or otherwise at any time on or since the ‘effective date.’”<sup>19</sup>

The Regulations, as issued in 1963, banned all transactions in which a Cuban National was involved as the recipient.<sup>20</sup> The money from such transactions would be placed into a Cuban Blocked Account (CBA), which could only be unblocked through a license from the Office of Foreign Assets Control (OFAC).<sup>21</sup> OFAC could issue licenses to unblock the account if specific criteria for an exception to the Regulations was met.<sup>22</sup> Initially, funds could only be

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<sup>14</sup> *United States v. Chalk*, 441 F.2d 1277, 1280 (1971).

<sup>15</sup> National Emergencies Act, 50 U.S.C. § 1601-1651 (1976).

<sup>16</sup> Cuban Asset Control Regulations, 68 Fed. Reg. 4422, 4423-24 (Jan. 29, 2004) (to be codified at 31 C.F.R. pt. 515); *see also* Enrique Zamora, *Impact of the Cuban Embargo on Inheritances by Cuban Nationals*, 24 ST. THOMAS L. REV. 525, 526 (2012).

<sup>17</sup> 50 U.S.C. app. § 5(b)(1) (2012); *see generally* Cuban Asset Control Regulations, 31 C.F.R. § 515 (1963).

<sup>18</sup> *See generally* Cuban Asset Control Regulations, 31 C.F.R. § 515. 201 (1964).

<sup>19</sup> *United States v. Fernandez-Pertierra*, 523 F. Supp. 1135, 1142 (S.D. Fla. 1981).

<sup>20</sup> 31 C.F.R. § 515.201 (2012); Zamora, *supra* note 16, at 527-29.

<sup>21</sup> *See* 31 C.F.R. § 515.201 (2012).

<sup>22</sup> *Id.*

unblocked if the Cuban National had taken residence and/or obtained citizenship in another nation that was determined not to be an enemy of the United States.<sup>23</sup> If this qualification was not met, the funds would sit in the account untouched until such a time that the account was permitted to be unblocked.<sup>24</sup> Funds could never be unblocked if going to a prohibited official of the Cuban Government or a prohibited member of the Cuban Communist Party, as defined in 31 C.F.R. § 515.337 and 31 C.F.R. § 515.338.<sup>25</sup>

These restrictions remained in place until the Obama Administration made changes, which eased the restrictions against remittances to Cuban Nationals, in 2009 and again in 2011.<sup>26</sup> In 2009, changes to the Regulations allowed for a license to anyone wishing to remit funds to a Cuban national, so long as the national was proven to be a “close relative” of the decedent.<sup>27</sup> Obama made further changes in 2011 by allowing non-family member remittances to occur, so long as a license was obtained from OFAC to unblock the assets and the remittances were not being made in relation to emigration needs.<sup>28</sup> Currently, these changes remain mostly in place.<sup>29</sup> However, President Trump has made some alterations as well as numerous statements regarding his interest in reinstating restrictions that were eased during Barack Obama’s presidency.<sup>30</sup>

This article will address the limitations placed on the property rights of Cuban nationals with an interest in property located in the United States by the Cuban Asset Control Regulations. This issue will be examined through analysis of the most recent changes

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<sup>23</sup> 31 C.F.R. § 515.505(b) (2011); Zamora, *supra* note 16, at 540.

<sup>24</sup> 31 C.F.R. § 515.505(b) (2011); Zamora, *supra* note 16, at 540.

<sup>25</sup> 31 C.F.R. § 515.337-515.338 (2011).

<sup>26</sup> Sheryl Gay Stolberg and Damien Cave, *Obama Opens Door to Cub, but Only a Crack*, THE N.Y. TIMES, April 13, 2009, <https://www.nytimes.com/2009/04/14/world/americas/14cuba.html>; Press Release, White House Press Office, Reaching Out to the Cuban People (Jan. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people>; Zamora, *supra* note 16, at 529-30.

<sup>27</sup> 31 C.F.R. § 515.339 (2011); Zamora, *supra* note 16, at 530.

<sup>28</sup> 31 C.F.R. § 515.570(f) (2011).

<sup>29</sup> 31 C.F.R. § 515.570(f) (2017).

<sup>30</sup> Strengthening the Policy of the United States Toward Cuba, National Security Presidential Memorandum No. 5, 82 Fed. Reg. 48875 (Oct. 20, 2017); Martina Kunovic, *Five Things you need to know about Trump’s Cuba policy – and who it will hurt*, WASH. POST, June 22, 2017.

made to the Regulations by the Obama Administration and contemplating changes that could be made by President Trump. Part II will outline relevant prior law from the time that the Cuban Embargo was first put into place, up until the Obama Administration changes were made. Part III will detail changes made by the Obama administration and what the current law is, including what limitations still exist. Part IV will analyze the effects of the Regulations and determine whether the restrictions effectively work towards the furtherance of American foreign policy goals with regards to Cuba. Part V will address recommendations for improvement of the Regulations so that they will not hinder the property rights of Cuban nationals and American citizens, while achieving foreign policy goals in relation to Cuba.

## II. BACKGROUND

### A. *Trading with the Enemy Act of 1917*

The Trading with the Enemy Act was signed into law by President Woodrow Wilson in 1917.<sup>31</sup> TWEA was originally intended to give the government the power to confiscate property from anyone who might be considered a threat to the war effort during World War I.<sup>32</sup> The effect of TWEA was the seizure of enemy property within the United States.<sup>33</sup> TWEA allows for the president to regulate or prohibit any foreign transactions during a time of war through any agency that he sees fit.<sup>34</sup> TWEA was amended in 1977 to state that the president has this power during any time of war or other “period of national emergency.”<sup>35</sup> Each year, the pres-

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<sup>31</sup> Trading With the Enemy Act, 50 U.S.C. app. § 1 (2012).

<sup>32</sup> *Id.*; see also Daniel A. Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN, July 28, 2014, <https://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/>.

<sup>33</sup> Daniel A. Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN, July 28, 2014, <https://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/>.

<sup>34</sup> 50 U.S.C. app. § 5 (2012).

<sup>35</sup> § 50 U.S.C. § 101(a-b) (1977) (as amended in 1977 by Pub. L. No. 95-223).

ident must assess whether the extension of the act is appropriate due to a time of war or period of national emergency.<sup>36</sup> The International Emergency Economic Powers Act (IEEPA) defines a period of national emergency as a time when any “unusual and extraordinary threat” is present, which has “its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>37</sup> A “period of war” is defined by federal statute as “the period beginning on the date of any future declaration of war by the Congress and ending on the date prescribed by Presidential proclamation or concurrent resolution of the Congress.”<sup>38</sup>

In December 1950, TWEA was extended by President Harry Truman, who declared a national emergency when China entered into the Korean War, thus giving him the power to regulate economic transfers between the United States and China.<sup>39</sup> Through this extension, the Office of Foreign Asset Control was created, and all Chinese and North Korean Assets were blocked.<sup>40</sup> In 1963, President John F. Kennedy extended the Act in response to Cubans in the United States hosting Soviet nuclear weapons and imposed a trade embargo, which blocked the transfer of all Cuban assets within The United States’ jurisdiction.<sup>41</sup> This extension of TWEA remains in place today with respect to the regulation of financial transactions within Cuba and with Cuban nationals, because Cuba continues to exist as an enemy of the United States.<sup>42</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, § 202(a), 91 Stat. 1626, 1626 (1977); *Regan v. Wald*, 104 S. Ct. 3026, 3031 (1984).

<sup>38</sup> 38 U.S.C. § 101(11) (2017).

<sup>39</sup> Proclamation No. 2914, (1950); *Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, (Feb 2, 2018, 4:25 PM), <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx>; Zamora, *supra* note 16 at 526.

<sup>40</sup> Proclamation No. 2914, (1950); *Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, (Feb 2, 2018, 4:25 PM), <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx>; Zamora, *supra* note 16 at 526.

<sup>41</sup> Cuban Asset Control Regulations, 68 Fed. Reg. 4422, 4423-24 (Jan 29, 2003) (to be codified at 31 C.F.R. pt. 515).

<sup>42</sup> *See generally* 50 U.S.C. app. § 5 (2012).



*B. Cuban Asset Control Regulations (1963-2009)*

The Cuban Asset Control Regulations were issued under TWEA on July 8, 1963.<sup>43</sup> The Regulations were used to enforce the United States Embargo against Cuba by regulating financial transactions between the two nations.<sup>44</sup> The intention of the Regulations was to keep United States dollars out of the hands of the Cuban Government.<sup>45</sup>

Under the original regulations, any testamentary gift or intestate succession, which involved a Cuban interest in property under the jurisdiction of the United States, was prohibited and the property was ordered to be placed in a Cuban Blocked Account (CBA).<sup>46</sup> A person is deemed to have a Cuban interest if he was a Cuban decedent or heir; the personal representative of the estate; or is a creditor, heir, legatee, devisee, distributee, or beneficiary.<sup>47</sup> Transactions were not permitted to take place unless authorized by the Treasury Department, and TWEA listed severe penalties, which could result from the violation of the Regulations.<sup>48</sup> Due to the blocked status of an estate, there was no possibility of assigning a Cuban interest to someone in the United States, so the only way to claim the funds in the CBA was to become a permanent resident of the United States or another country not deemed to be an enemy of the United States.<sup>49</sup>

In 2009, the Regulations became less restrictive through revisions under the Obama Administration.<sup>50</sup> Under the revisions, if a Cuban national with an interest in the estate of a decedent could show that he or she was a “close relative” of the decedent, the Cuban national would be eligible to receive an unlimited remittance of the funds in the CBA.<sup>51</sup> A “close relative” was defined in the Regulations as “any individual related to that person by blood,

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<sup>43</sup> Cuban Asset Control Regulations, 31 C.F.R. § 515.201 (1963).

<sup>44</sup> *Id.*

<sup>45</sup> Emergency Coalition to Defend Educ. Travel v. Dep’t of the Treasury, 545 F. 3d 4, 6 (D.C. Cir. 2008); Zamora, *supra* note 16 at 527.

<sup>46</sup> 31 C.F.R. § 515.201 (1963).

<sup>47</sup> 31 C.F.R. § 515.327 (1963); Ferrera v. United States, 424 F. Supp. 888, 889 (S.D. Fla. 1976).

<sup>48</sup> 50 U.S.C. app. § 16 (2012); 31 C.F.R. § 515.201 (1963).

<sup>49</sup> 31 C.F.R. §§ 515.505(b), 515.319 (1963).

<sup>50</sup> Stolberg & Cave, *supra* note 26.

<sup>51</sup> 31 C.F.R. § 515.570 (2009); Zamora, *supra* note 16 at 531.

marriage, or adoption who is no more than three generations removed from that person or from a common ancestor with that person.”<sup>52</sup> To receive this unlimited remittance from the CBA, the Cuban national had to swear to four conditions: (1) Petitioner was aware that there were penalties associated with misrepresentation of facts for the purposes of obtaining funds from a CBA and that any misrepresentation was a violation of U.S. law; (2) Petitioner was a “close relative”; (3) Petitioner was not one of the prohibited members of the Cuban Communist Party as defined by CFR § 515.338; and (4) Petitioner was not one of the prohibited officials of the Government of Cuba as defined by CFR § 515.337.<sup>53</sup> In order to receive the remittance and unblock the account, the Cuban national was required to apply for a specific license under OFAC, showing that he met the criteria for the “close relative” remittance.<sup>54</sup>

### C. *Caselaw*

#### 1. Administration of Estates with Cuban Interest

State courts in both Florida and New York were initially uncertain on how to handle the administration of estates with Cuban national interests—leading to a circuit court judge from the Eleventh Circuit writing to the Attorney General of Florida seeking guidance.<sup>55</sup> Although the Attorney General found that aliens ineligible for citizenship were permitted to inherit through intestacy or receive testamentary gifts under state common law, he found that the Cuban Asset Control Regulations preempted state law and Cuban aliens could not inherit until the Regulations were changed or a court found otherwise.<sup>56</sup>

In *Zschernig v. Miller*, the Supreme Court analyzed Oregon Statute Section 111.070, which prohibited a foreigner from inheriting property unless it was proven that (1) the foreigner’s govern-

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<sup>52</sup> 31 C.F.R. § 515.339 (2009).

<sup>53</sup> 31 C.F.R. § 515.337, 515.338, 515.339, 515.570 (2009); Zamora, *supra* note 16 at 531.

<sup>54</sup> 31 C.F.R. § 515.570 (2009); Zamora, *supra* note 16 at 530-31.

<sup>55</sup> Distribution of resident decedent’s estate to Cuban national prohibited, 84 Op. Att’y Gen. 02 (1984).

<sup>56</sup> *Id.*

ment would grant Americans equal inheritance rights as their citizens; (2) the foreign government gave Americans the right to receive payment from foreign funds; and (3) the foreigner was able to receive the benefit of the Oregon property without confiscation by their foreign government.<sup>57</sup> A resident of the state of Oregon died intestate and his only heirs resided in East Germany.<sup>58</sup> These relatives brought a suit in the Oregon Probate Court seeking the court to make the determination that they were entitled to distributions of the estate assets.<sup>59</sup> The Supreme Court found that the statute was an “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the president and Congress.”<sup>60</sup> Therefore, unless federal law specifically prohibits another country’s nationals from inheriting property subject to United States Jurisdiction, states may not further legislate to create those prohibitions.<sup>61</sup> In this case, no regulations existed specifically prohibiting transfers between the United States and East German nationals.<sup>62</sup>

Following that decision, courts had to decide whether a Cuban national decedent held an interest that extended beyond his or her death, which would result in the blocking of all estate assets under the Regulations. Initially, courts held that the fact that a decedent was a Cuban national would create a Cuban interest that would block the estate assets from being distributed to his heirs even beyond death. In *Ferrera v. United States*, the Southern District of Florida was presented with a case in which OFAC had not issued a license to unblock estate assets in an estate where the decedent was a Cuban national, but his children all held permanent residency or citizenship in the United States.<sup>63</sup> The court held that a Cuban decedent’s interest extended beyond death and blocked the estate from the interests of heirs living in the United States.<sup>64</sup> This decision meant that the funds in the Cuban national decedent’s estate would remain permanently blocked because the decedent held a

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<sup>57</sup> *Zschemig v. Miller*, 389 U.S. 429, 429 (1968).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Ferrera v. United States*, 424 F. Supp. 888, 888 (S.D. Fla. 1976).

<sup>64</sup> *Id.* at 890.

Cuban interest that determined was not eliminated upon the decedent's death.<sup>65</sup> The Second Circuit held similarly in *Richardson v. Simon* when OFAC denied a license to a woman, who was a Cuban national, to unblock her late husband's estate.<sup>66</sup> OFAC denied the license, finding that the deceased husband's interest and status as a Cuban national blocked his estate assets from being distributed to his heirs and must remain in a Cuban Blocked Account.<sup>67</sup>

However, Courts later held that the Cuban national interest of a decedent ceased to exist and would not affect the blockage of estate assets upon the time of the decedent's death.<sup>68</sup> The only interests that could block the estate's distribution would be those of any surviving heirs or beneficiaries of the estate.<sup>69</sup> In *Tagle v. Regan*, a decedent's surviving children sought to have their mother's estate assets unblocked.<sup>70</sup> Two of the children were permanent residents of the United States and one was a permanent resident and citizen of Cuba.<sup>71</sup> The lower courts held that the interest of both the decedent and son, Cuban nationals, blocked all estate assets from being distributed to the two United States residents.<sup>72</sup> The Fifth Circuit held that any heirs of the estate who were living in the United States were entitled to receive their share of the estate despite any Cuban interests, and the decedent did not have an interest that extended past death.<sup>73</sup>

## 2. Constitutional Arguments

Courts have addressed the issue of whether the Cuban Asset Control Regulations were a Constitutional violation of due process rights under the Fifth Amendment. Courts have found that strict scrutiny is not required, because there is no fundamental right or suspect class that was violated by the Regulations.<sup>74</sup> Therefore, an act will be constitutional when the statutory classification is "the

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<sup>65</sup> *Id.*

<sup>66</sup> *Richardson v. Simon*, 560 F.2d 500, 502 (2d Cir. 1977).

<sup>67</sup> *Id.* at 503.

<sup>68</sup> *Tagle v. Regan*, 643 F.2d 1058, 1068 (5th Cir. 1981).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Richardson v. Simon*, 560 F.2d 500, 505 (2d Cir. 1977).

product of a deliberate and rational choice” by Congress.<sup>75</sup> In *Miranda v. Secretary of Treasury*, the First Circuit found that there was no deprivation of property that violated the Fifth Amendment when OFAC refused to unblock a bank account that the petitioner had inherited from his Cuban aunt, because the Cuban Asset Control Regulations were rationally related to the “governmental interest of protecting the United States Embargo against Cuba.”<sup>76</sup> A rational basis was found for preventing the transfer of estate assets with a Cuban interest, because allowing the transfers and unblocking of frozen Cuban assets would provide an incentive to bypass the Regulations and frustrate its purpose.<sup>77</sup>

As issues regarding the Regulations were litigated before the courts, many parties attempted to argue that the Regulations were not permissible under the United States Constitution for a plethora of reasons.<sup>78</sup> One specific argument that was made was that blocking estate assets did not advance any legislative intent, therefore, creating an unconstitutional deprivation of property and violating due process rights under the Fifth Amendment.<sup>79</sup> The Secretary of Treasury’s direct response to this argument was that the Regulations were permitted under TWEA because the United States was in a state of emergency as declared by President Harry Truman in 1950 and extended by President Kennedy to Cuba in 1963.<sup>80</sup> Courts have repeatedly stated that under TWEA, Congress gave the president a broad authority to continue to regulate any existing economic embargoes.<sup>81</sup> This extensive power was justified by the

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<sup>75</sup> *Id.* at 505 (citing *Alexander v. Fioto*, 430 U.S. 634, 640 (1977)).

<sup>76</sup> *Miranda v. Secretary of Treasury*, 766 F.2d 1 (1st Cir. 1985) (holding that the validity of the freezing of assets of foreign countries and their nationals was recognized and approved by courts).

<sup>77</sup> *Id.*

<sup>78</sup> *See generally* *De Cuellar v. Brady*, 881 F.2d 1561 (11th Cir. 1989) (holding that the Secretary of Treasury’s denial of plaintiff refugee’s application was based upon a reasonable interpretation of the regulations and the refusal to grant plaintiff’s license was proper); *Ferrera v. United States*, 424 F. Supp. 888 (S.D. Fla. 1976); *Miranda*, 766 F.2d at 1; *Richardson v. Simon*, 560 F.2d 500 (2d Cir. 1977); *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975) (holding that the Treasury Department’s determination that surviving heirs were blocked from receiving access to decedent’s security account was proper).

<sup>79</sup> *Miranda*, 766 F.2d at 1.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

president's status as the main authority when it came to issues of foreign policy.<sup>82</sup> In *United States v. Curtiss-Wright*, the Supreme Court stated that Congress had the ability to "accord to the [p]resident a degree of discretion and freedom from statutory restriction, which would not be admissible were domestic affairs alone involved."<sup>83</sup> When it comes to the role of American courts in issues of foreign affairs, their powers are quite limited.<sup>84</sup> The Supreme Court has stated that "matters relating to the conduct of foreign relations . . . are . . . largely immune from judicial inquiry or interference."<sup>85</sup>

In *Real v. Simon*, the government at oral argument stated that the intentions for the Regulations were three-fold: (1) to prevent Cuba from obtaining American dollars that may be used to encourage activities which are contrary to United States interests; (2) to maintain funds for use to settle claims against the Cuban government; and (3) to use blocked funds as material for negotiations with the Cuban government.<sup>86</sup> Courts have stated that the regulations may be upheld as constitutional provided they are rationally related to the objective of maintaining an economic embargo.<sup>87</sup> The fact that parties may have been able to use the property had there been no Cuban interest involved does not create a taking without just compensation under the Fifth Amendment.<sup>88</sup> Because the deprivation of property use is only a temporary blocking of funds or title to property, it does not translate to passing the title of the assets to the government.<sup>89</sup> When an embargo is lifted, or certain regulations are changed to allow the unblocking of such assets, the beneficiaries and heirs of the decedent to whom the assets belonged will be able to use the property as they wish.<sup>90</sup>

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<sup>82</sup> *Id.*; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

<sup>83</sup> *Curtiss-Wright Export Corp.*, 299 U.S. at 320.

<sup>84</sup> *Miranda*, 766 F.2d at 3.

<sup>85</sup> *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

<sup>86</sup> *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975).

<sup>87</sup> *Miranda*, 766 F.2d at 5.

<sup>88</sup> *Id.*

<sup>89</sup> *See Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981).

<sup>90</sup> *See Miranda*, 766 F.2d at 6.

### III. SUMMARY OF CUBAN ASSET CONTROL REGULATIONS (2011-17)

Further changes to the Regulations were made by both the Obama and Trump Administrations.<sup>91</sup> In 2011, President Obama allowed for a general license category to be restored for any person to send remittances during their lifetime of up to \$500 per quarter.<sup>92</sup> These remittances could be sent to family members as well as non-family members.<sup>93</sup> Funds from testamentary dispositions and intestate succession were still blocked and were only granted a specific license to be unblocked upon a finding that the beneficiary or heir was closely related to the decedent.<sup>94</sup> A close relative is defined by the Regulations as “any individual related to that person by blood, marriage, or adoption who is no more than three generations removed from that person or from a common ancestor of that person.”<sup>95</sup> As long as a Cuban national could provide sufficient documentation to prove they met this requirement, they were eligible to receive a license to unblock the decedent’s assets.<sup>96</sup> This specific license for testamentary gifts and intestate succession would generally take about six months to one year to be approved by OFAC.<sup>97</sup> The only effect of the Obama Administration’s 2011 change was on those who wished to make lifetime gifts because the same requirements that were instated in 2009 were still required for intestate succession or testamentary gifts where a Cuban national interest was involved.<sup>98</sup> President Obama created these changes to encourage “people to people contact” and to allow the Cuban people to become more independent from the Cuban government.<sup>99</sup>

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<sup>91</sup> See generally Press Release, White House Press Office, *supra* note 26; Strengthening the Policy of the United States Towards Cuba, *supra* note 30.

<sup>92</sup> Cuban Asset Control Regulations, 31 C.F.R. § 515.570 (2011).

<sup>93</sup> *Id.*

<sup>94</sup> See *id.*

<sup>95</sup> 31 C.F.R. § 515.339.

<sup>96</sup> *Id.*

<sup>97</sup> Interview with Enrique Zamora, Partner, Zamora, Hillman, & Villavicencio, Coconut Grove, Florida (Nov. 12, 2018).

<sup>98</sup> See 31 C.F.R. § 515.570.

<sup>99</sup> Press Release, White House Press Office, *supra* note 26; see Zamora, *supra* note 16, at 529.

In 2015, President Obama entirely removed the restriction that the Cuban national beneficiary or heir be “closely related” to the decedent when seeking to remit funds obtained from a decedent’s estate.<sup>100</sup> Therefore, funds could be remitted without limitations, provided they were not for emigration purposes.<sup>101</sup> The effect of this change was tremendous.<sup>102</sup> Cuban interests in an estate would no longer lead to the assets being put into a CBA that could only be accessed by a specific license from OFAC.<sup>103</sup> A general license was allowed for all transfers to Cuban nationals, during the transferor’s lifetime or after death, whether the transferee was closely related to the decedent or not.<sup>104</sup> The general license allowed for unlimited remittances to be made without prior approval from OFAC and would take about two weeks for the Cuban nationals to receive the funds.<sup>105</sup> The 2015 revisions continued to prohibit any remittances to specified members of the Cuban government or Cuban Communist party, which were listed in the codified regulations.<sup>106</sup>

In 2017, President Trump announced new changes that he would be making to the Regulations.<sup>107</sup> Although President Trump announced that he would be “canceling” the Obama Administration’s Cuban policy, the changes that he made to the Regulations were minimal.<sup>108</sup> President Trump continued to allow remittances

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<sup>100</sup> 31 C.F.R. § 515.570 (2015).

<sup>101</sup> *Id.*

<sup>102</sup> *See generally* Karen DeYoung, *U.S. eases Cuban trade and travel rules as it moves toward restoring full ties*, THE WASHINGTON POST, (Jan. 15, 2015), [https://www.washingtonpost.com/world/national-security/us-eases-cuban-trade-and-travel-rules-in-step-toward-restoring-full-ties/2015/01/15/752f10aa-9cc3-11e4-96cc-e858eba91ced\\_story.html](https://www.washingtonpost.com/world/national-security/us-eases-cuban-trade-and-travel-rules-in-step-toward-restoring-full-ties/2015/01/15/752f10aa-9cc3-11e4-96cc-e858eba91ced_story.html).

<sup>103</sup> *See id.*; Cuban Asset Control Regulations, 31 C.F.R. § 515.570 (2015).

<sup>104</sup> *See generally* Karen DeYoung, *U.S. eases Cuban trade and travel rules as it moves toward restoring full ties*, THE WASHINGTON POST, (Jan. 15, 2015), [https://www.washingtonpost.com/world/national-security/us-eases-cuban-trade-and-travel-rules-in-step-toward-restoring-full-ties/2015/01/15/752f10aa-9cc3-11e4-96cc-e858eba91ced\\_story.html](https://www.washingtonpost.com/world/national-security/us-eases-cuban-trade-and-travel-rules-in-step-toward-restoring-full-ties/2015/01/15/752f10aa-9cc3-11e4-96cc-e858eba91ced_story.html); Cuban Asset Control Regulations, 31 C.F.R. § 515.570 (2015).

<sup>105</sup> Interview with Enrique Zamora, *supra* note 97.

<sup>106</sup> Cuban Asset Control Regulations, 31 C.F.R. § 515.570.

<sup>107</sup> Strengthening the Policy of the United States Toward Cuba, *supra* note 30.

<sup>108</sup> *See id.*; Kunovic, *supra* note 30.



to both those Cuban nationals related and not related to a decedent.<sup>109</sup> The most impactful change that President Trump made was an expansion of the list of officials of the Cuban government to whom remittances are prohibited.<sup>110</sup> The list of prohibited officials could now result in being up to twenty-five percent of Cuba's working class.<sup>111</sup> Previously, the list of prohibited officials was restricted to members of the Council Ministers and flag officers of the Revolutionary Armed Forces.<sup>112</sup> Trump's list now includes: hundreds of senior officials in every government agency, thousands of ordinary Cubans who volunteer as leaders of the local Committees for the Defense of the Revolution, and—most importantly—every employee of the Ministry of the Revolutionary Armed Forces (MINFAR) and Ministry of the Interior (MININT).<sup>113</sup>

MINFAR consists of 60,000 active duty troops and MININT has 35,000 police and border guards, as well as civilian employees.<sup>114</sup> Because military service is required by the Cuban government, every Cuban family will be affected at some point in the near future.<sup>115</sup> Because so many Cuban families are underpaid and have come to rely on remittances from their families living in the United States, one observer has stated that the impact of Trump's policy will be catastrophic.<sup>116</sup>

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<sup>109</sup> See generally Strengthening the Policy of the United States Toward Cuba, *supra* note 30.

<sup>110</sup> *Id.*; William LeoGrande, *Trump Policy Could Cut Remittances To A Million Cuban Families*, HUFFINGTON POST, (June 20, 2017), [http://www.huffpost.com/entry/trump-policy-could-cut-remittances-to-a-million-cuban\\_b\\_594946d8e4b028db60c61490](http://www.huffpost.com/entry/trump-policy-could-cut-remittances-to-a-million-cuban_b_594946d8e4b028db60c61490).

<sup>111</sup> See LeoGrande, *supra* note 110.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

## IV. ANALYSIS

A. *Constitutional Arguments: Did the Courts Get it Right?*

Under TWEA, the powers delegated to the president are quite broad, so the Regulations are permissible so long as the country is in a state of emergency.<sup>117</sup> Therefore, the executive branch has a lot of flexibility as to the scope and extent of the Regulations because there has been an ongoing state of emergency since declared by President Truman in 1950.<sup>118</sup> Because the president has long been recognized as the main figure in all foreign policy decisions and regulations, the presidential power to regulate Cuban financial transactions under TWEA is justified.<sup>119</sup> Congress gave the president this power, and even extended it in its 1977 amendments to TWEA, so the ability of the president to regulate financial transactions with Cuba may not be restricted unless and until Congress further amends TWEA, or TWEA is found to be unconstitutional by the Supreme Court.<sup>120</sup> Until that time, courts are correct in continuing to operate under existing law and reasoning that the Regulations are not void and the executive branch has the power to regulate Cuban financial transactions in any way deemed to be in the best interest of the nation.

The judicial branch's stated intentions for the Regulations—which include the prevention of American dollars from reaching Cuban hands, maintaining funds for claims against the Cuban government, and for the use of funds in negotiations with the Cuban government—represent a valid goal that is rationally related to the maintenance of the economic embargo.<sup>121</sup> Although the Regulations have changed over time, they have continuously prevented any financial transactions between members of the Cuban Communist party and specified government officials due to the prohibition of transfers to specified officials, and the focus on only allowing the transfer of assets to the ordinary people of Cuba who depend on such transfers for their daily lives. While some of the regulations may prohibit funds from entering the hands of those who

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<sup>117</sup> Trading With the Enemy Act of 1917, *supra* note 5.

<sup>118</sup> *Miranda*, 766 F.2d at 1.

<sup>119</sup> *See* U.S. CONST. art. II.

<sup>120</sup> Trading With the Enemy Act of 1917, 50 U.S.C. app. § 5 (2012).

<sup>121</sup> *See generally* *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975).

wish to use them for activities not in violation of American interests, this issue is outweighed by the fact that funds remain out of the hands of those who are acting in opposition of American interests. Finally, the fact that the American government has withheld funds from the Cuban government as well as some Cuban civilians, has created a strain on the Cuban economy. Withholding funds has been and will continue to be a major benefit to the United States government in their negotiations with the Cuban government, which may eventually lead to the lift of the embargo in years to come.

The courts were correct in refusing to apply the strict scrutiny standard of review when analyzing any constitutional issues raised with regards to the Regulations.<sup>122</sup> A court may apply the strict scrutiny standard only when there is a violation of a “fundamental right” or a “disadvantage of a suspect class.”<sup>123</sup> Fundamental rights are a group of rights that the Supreme Court recognizes as deserving a higher degree of protection by the courts, such as the right to marriage, privacy, etc. Here, the right to remit funds from a decedent’s estate to a beneficiary or heir where there is a Cuban national involved is not a fundamental right under the United States Constitution. While many people may think of the right to receive an inheritance as a fundamental right, there is no such right. When it comes to an inheritance from a decedent, the government allows such a right, although it is not enumerated in the constitution.<sup>124</sup> The Supreme Court has held that rights of succession and the rights to receive a transfer of estate assets are created by statutes, and “[n]othing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”<sup>125</sup> The Supreme Court has also addressed the issue of a decedent’s right to transfer under the Constitution.<sup>126</sup> In *Hodel v. Irving*, the Court analyzed a statute that ordered the escheat of fractional interests in real property that had been bequeathed to members of the Sioux

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<sup>122</sup> See *Miranda*, 766 F.2d at 6.

<sup>123</sup> *Id.* (quoting *Mass. Bd. of Ret.* 427 U.S. 307, 312 (1976)).

<sup>124</sup> See FLA. STAT. § 732.101 (2019).

<sup>125</sup> *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

<sup>126</sup> See generally *Hodel v. Irving*, 481 U.S. 704, 706 (1987).

tribe by decedent members of the tribe.<sup>127</sup> The Court found that at death, decedents have a right to control disposition of their property and taking that property without compensation violates Article V of the Constitution.<sup>128</sup> While Congress has the right to regulate the right to transfer property at death, the total abrogation “goes too far.”<sup>129</sup>

The Regulations do not create a suspect class because the restrictions apply equally to all estates involving a Cuban interest. Additionally, regulations exist with regards to all countries in which an embargo exists, such as Iraq and North Korea, so the restrictions of financial transactions with a country considered to be an enemy of the United States is not limited to Cuba. For this reason, any arguments that the Regulations must be subject to strict scrutiny due to a suspect class based on national origin would fail before the court. Because neither of the requirements for strict scrutiny are met by the Regulations, the use of equal protection scrutiny is proper for claims of constitutional violation. When analyzing the Regulations under this lessened scrutiny, courts must find that there is a rational basis for the Regulations related to the intent of the Regulations.<sup>130</sup> As mentioned above, many of the stated intentions of the Regulations have been met, so this test of constitutionality has also been met.

Arguments of a governmental taking of property without just compensation have also been made before the courts when contesting the constitutionality of the Regulations.<sup>131</sup> However, the courts have decided that the effects of the Regulations do not constitute a taking without just compensation.<sup>132</sup> While the Regulations create an inability for heirs and beneficiaries’ immediate use of property from a decedent’s estate, this inability is temporary and may be eliminated through changes to the Regulations or lifting of the embargo. Beneficiaries and heirs may also take independent action to access their property rights by obtaining residence or citizenship in another country or otherwise meeting the requirements to obtain a

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 717.

<sup>129</sup> *Id.* at 718.

<sup>130</sup> *See Miranda*, 766 F.2d at 6.

<sup>131</sup> *See generally id.* at 5.

<sup>132</sup> *Id.* at 7.

license to unblock the estate assets as laid out in the Regulations. Many of the restrictions that created Cuban Blocked Accounts that could not be unblocked through an OFAC license were changed during the Obama Administration, creating an end to the temporary inability to use property in many cases.

*B. Effect on Foreign Policy Goals*

1. How Foreign Policy Goals have changed over time

Over time, the Regulations have changed to reflect new and changing foreign policy goals. The United States' relationship with the Cuban government has been strained since 1959 when Fidel Castro overthrew a regime, which the United States had supported, and allied himself with the Soviet Union.<sup>133</sup> The Cuban government's actions led to the creation of the United States' Cuban embargo, which was established to keep American dollars out of Cuba in turn creating a negative impact on the Cuban economy.<sup>134</sup> This would become a major tool in the United States' attempts to negotiate with Cuba. At this time, American foreign policy with regards to Cuba was economic and diplomatic isolation. The Regulations barred any and all financial transactions with Cuba, which included the transfer of estate assets where a Cuban national interest was involved.

While most of the changes to foreign policy goals with Cuba were a result of Barack Obama's presidency, some changes were made to the Regulations prior to the Obama Administration. For example, in 1999, some medical supplies and food products were permitted to be exported to Cuba.<sup>135</sup> When President Obama took office, some of the previous foreign policy goals as to Cuba began to change drastically for the first time since the 1950s. Foreign policy goals that would completely isolate Cuba became less restrictive. President Obama met with Raul Castro, Fidel's successor, in an attempt to normalize diplomatic relations.<sup>136</sup> As a result, the

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<sup>133</sup> Claire Felter, Danielle Renwick, and Rocio Cara Labrador, *Background-er: U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, (Mar. 7, 2019).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Julie Hirschfeld Davis and Damien Cave, *Cuba Meeting Between Obama and Castro Exposes Old Grievances*, N.Y. TIMES, (Mar. 21, 2006),

Obama administration relaxed many restrictions in the Regulations, including travel restrictions and restrictions on financial remittances to the Cuban people.<sup>137</sup> The Regulations continued to exclude Cuban government and Communist party members, creating a shift in foreign policy that would continue to keep American dollars out of the hands of those acting in opposition to American interests and place money in the hands of Cuban civilians who would come to rely on American remittances for providing their daily needs.

Prior to and after President Trump taking office, he expressed intentions of further restricting the Regulations and foreign policy with Cuba. While the Obama Administration hoped to bring funds into the hands of the Cuban people, the Trump Administration announced that restrictions were needed to keep funds out of the hands of the Cuban “military, intelligence, and security services . . . and encourage the government to move toward greater economic freedom.”<sup>138</sup> However, as stated above, these newly stated foreign policy intentions have not been evident through the Regulations, which have not been changed dramatically as promised by President Trump.

## 2. Cuban Asset Control Regulations: An effective means of achieving foreign policy goals?

### a. 1963 Regulations

Initially, the Regulations proved to be a very effective way to achieve foreign policy goals when it came to Cuba and remittances to the Cuban people. The Regulations prohibited any and all remittances where there was a Cuban interest, whether that was a lifetime gift or a transfer from a decedent’s estate. Because the original foreign policy goal with Cuba was to completely isolate its economy, the Regulations were doing exactly what they were designed to do. Many Cubans had come to rely on the support of

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<https://www.nytimes.com/2016/03/22/world/americas/obama-and-raul-castro-to-meet-in-pivotal-moment-for-us-cuba-thaw.html>.

<sup>137</sup> Caitlin Taylor, *President Obama to Lift Restrictions on Cuba*, ABC NEWS BLOG (Apr. 13, 2009).

<sup>138</sup> Strengthening the Policy of the United States Toward Cuba, *supra* note 30.

American dollars to make ends meet in their daily lives. In addition to creating economic isolation, the original foreign policy also included diplomatic isolation by ceasing all communication between the United States and Cuban government officials.<sup>139</sup> This means that there would be no direct negotiations between the United States and Cuba, and that all relations between the two countries would be absolutely frozen for an unspecified if not endless period of time. There continued to be no diplomatic relations between the two countries until Barack Obama entered office in 2008.<sup>140</sup>

However, when evaluating if foreign policy goals were met, it is also important to analyze what the effects of these goals were on the Cuban government as well as the Cuban people. When it comes to estate assets, the Cuban civilians were the people who suffered the most. Many had come to rely on money sent or left to them by family in the United States. Although this was later changed, American citizens also suffered because they were initially not permitted to receive assets from a decedent in Cuba due to the involvement of a Cuban interest. Prior to the ban on Cuban remittances, many lifetime gifts were sent through postal money orders.<sup>141</sup> Once direct mail between the United States and Cuba was suspended in 1962, this was no longer an option. While some people resorted to performing bank transfers through a third country, this was only possible if the funds were a lifetime gift. As soon as a Cuban interest was recognized in an estate being probated, the funds were immediately placed into a blocked account. While the Cuban people were left with no options to receive money from friends or family in the United States, American foreign policy goals continued to be met because they were to isolate the Cuban government despite the many negative effects on Cuban civilians.

#### b. Reform Under Obama Administration

In his campaign for office, Barack Obama promised alterations to the United States foreign policy towards Cuba. He followed

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<sup>139</sup> Felter, Renwick, and Labrador, *supra* note 133.

<sup>140</sup> See Davis & Cave, *supra* note 136.

<sup>141</sup> Lorena Barberia, *Remittances to Cuba: An Evaluation of Cuban and US Government Policy Measures* (Rosemary Rogers Working Paper No. 15, 2002), [http://balseros.miami.edu/pdf/15\\_remittances.pdf](http://balseros.miami.edu/pdf/15_remittances.pdf).

through by making many dramatic changes during his presidency such as, relaxing restrictions on remittances and travel to Cuba.<sup>142</sup> Obama quickly changed the focus of foreign policy from isolating the Cuban government to providing aid to the Cuban people who had suffered as a result of the restrictions.<sup>143</sup> Changes made by the Obama Administration achieved their goal by initially allowing unlimited remittances from decedents' estates with a Cuban interest to any family members in Cuba. They later allowed unlimited remittances to Cuban nationals living in Cuba regardless of their status as a family member. Foreign policy was now focused on helping Cuban civilians and that is exactly the group of people who was able to receive funds from previously blocked accounts in the United States. Because President Obama's changes in 2011 would allow for a general license for these remittances, the financial burden of hiring legal counsel and petitioning OFAC for a special license to remit the funds to Cuban Blocked Accounts was eliminated. The amended regulations would still prohibit remittances going to a member of the Cuban Communist Party or specified Cuban government officials, thus completing the foreign policy goal of keeping American dollars out of the hands of those Cubans who were likely to use the money in a way that conflicted with American interests.<sup>144</sup> The Obama-era changes tackled all foreign policy goals by finally allowing Cuban civilians assistance with cost of living and granting them the right of using the property that had been left to them by decedents, while continuing to leave diplomatic relations in semi-isolation.

### c. Trump Changes

As noted above, the Trump Administration partially reinstated restrictions that had been relaxed during Obama's presidential terms. While the main focus of these changes was on travel restrictions, the minor changes to remittance policy had an impact on the flow of monetary support to Cuban nationals who were recipi-

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<sup>142</sup> Mark P. Sullivan, Cong. Research Serv., RL31139, Cuba: U.S. Restrictions on Travel and Remittances (Nov. 16, 2018)

<sup>143</sup> See Press Release, White House Press Office, Reaching Out to the Cuban People. (Jan. 14, 2011).

<sup>144</sup> See Cuban Asset Control Regulations, 31 C.F.R. § 515.570(a)(3) (2017).



ents of a decedent's estate assets.<sup>145</sup> Similar to the 1963 Regulations, the Cuban people will be the ones most negatively impacted, although American foreign policy claims to be targeting the Cuban government. Fortunately, the impact will not be nearly as widespread as the 1963 restrictions. The new foreign policy lists about 180 specifically restricted groups within Cuba, including "military, intelligence, or security services or personnel with which financial transactions that would disproportionately benefit such services or personnel at the expense of Cuban people or private enterprise in Cuba."<sup>146</sup> The prohibition on remittances to those working within the military will have the largest impact, considering many Cuban civilians work within the military.<sup>147</sup> There are also many hotels and restaurants owned by the Cuban military that employ a large number of Cuban civilians, as evidenced by the United States Department of State's "List of Restricted Entities and Subentities Associated With Cuba as of November 9, 2017."<sup>148</sup> Under the new regulations, it would appear that none of these civilians would be eligible to receive remittances of any kind, once again creating a devastating impact on the Cuban economy and the lives of ordinary Cuban civilians.

President Donald Trump has stated that his policy goals are to "channel funds toward the Cuban people and away from a regime that has failed to meet the most basic requirements of a free and just society."<sup>149</sup> However, his changes to foreign policy have failed to do that. The changes made by President Obama successfully directed funds into the hands of the Cuban people by relaxing remittance restrictions that previously did not allow for private family transfers by lifetime gift or estate assets. Although President Trump has left much of the Obama changes in place and continues to allow these private family transfers to the majority of the Cuban civilian population, his changes to the list of prohibited entities

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<sup>145</sup> See generally LeoGrande, *supra* note 110.

<sup>146</sup> Cuban Asset Control Regulations, 31 C.F.R. § 515.209(a) (2017).

<sup>147</sup> *Id.*

<sup>148</sup> See U.S. Dep't of State, Bureau of Economic and Business Affairs, List of Restricted Entities and Subentities Associated with Cuba as of November 9, 2017, (Nov. 8, 2017).

<sup>149</sup> Strengthening the Policy of the United States Toward Cuba, *supra* note 30.

will not have the impact that his administration had intended. While it has long been understood that specific members of the Cuban government and communist party should not be entitled to receive remittances,<sup>150</sup> Trump's expanded list of prohibited remittances will keep funds out of the hands of Cubans employed by one of the prohibited entities, instead of the stated intention of weakening the Cuban government and other entities that work against American interests of freedom, democracy, and basic human rights.

### C. *Probate and Estate Planning in American Courts*

#### a. Regulations' Effect on Estate Planning

While it is impossible to completely surpass the Regulations' restrictions through estate planning, it is possible to plan an estate's assets in a way that will make the probate process less costly and time consuming for both the attorney and client. One must keep in mind changes that have been made to the current Regulations as well as possible changes that could be made in the future, which would affect the transfer of estate assets to Cuban heirs.

The current Regulations allow for the transfer of estate assets through a general license to any Cuban national—provided that the nationals are not included in the specific list of excluded entities under the 2017 Regulations.<sup>151</sup> If a client wishes to leave a bequest to an individual who is within the list of excluded entities, the attorney may encourage the client to leave the bequest in trust to another individual who is not within the excluded entities or advise the client of the procedure of what would happen if that bequest remained as is.<sup>152</sup> Additionally, an attorney should request that their client keep an accurate record of what heirs exist within Cuba and where they are located, should the attorney have to locate them to make a designation of heirs or obtain their consent to dispose of any real property within an estate.<sup>153</sup> If all beneficiaries in an estate plan are Cuban nationals who do not fall into the list of prohibited

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<sup>150</sup> See generally Cuban Asset Control Regulations, 31 C.F.R. § 515.209(a) (2017).

<sup>151</sup> 31 C.F.R. § 515.570(f)(1) (2017).

<sup>152</sup> Interview with Enrique Zamora, *supra* note 97.

<sup>153</sup> *Id.*

entities, there should be little to no difficulties in distributing the estate assets if the Regulations remain as they are written today.<sup>154</sup>

An attorney should then consider any possible changes that may be likely to result within the near future. While President Trump has left many of the Obama Administrations alterations to the Regulations untouched, he has changed some portions and has expressed his intent to rescind many of the relaxations to the Regulations that were made by President Obama. Therefore, an estate planning attorney should advise clients of the changes that were made by President Obama and what could change if restrictions were to be put back into place before they make decisions in their estate planning documents. It is highly unlikely that the Restrictions will revert back completely, making it so that no transfers with a Cuban national interest are permitted whatsoever, but it can still be smart to advise a client of the historical background of the Regulations. Before President Obama legalized the transfer of estate assets to any Cuban national, apart from those excluded, the restrictions only permitted for transfers to “close relatives” of the decedent. A competent attorney working in this area should inform their client of this change, and of the possibility that it will revert back, even if reversion is unlikely. The client should be advised of these facts to make the best determination of who they would like to bequest their assets to in their estate planning documents.

#### b. Probate Process in Miami Courts

Due to the large number of Cuban-Americans now residing in Miami-Dade County,<sup>155</sup> Miami Probate Courts had to develop a system for the administration of estates with a Cuban national interest. In situations where an estate is blocked due to restrictions under the Regulations, guardian ad litem would be appointed.<sup>156</sup> With the relaxation of many of the restrictions for remittances to Cuba, the responsibilities of the guardians has become more lim-

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<sup>154</sup> *Id.*

<sup>155</sup> Rob Wile, *Miami's biggest new wave of immigrants looks a lot like its previous ones*, MIAMI HERALD, (Aug. 5, 2019), <https://www.miamiherald.com/news/business/article232514327.html>.

<sup>156</sup> See Jose I. Valdes & Enrique Zamora, *Obstacles Encountered Representing the Interests of Cuban Nationals in the American Courts*, 15 FLA. J. INT'L L. 365, 368 (2003).

ited, but they are still needed to perform certain tasks in specific situations like where a specific license under OFAC is required, where there is real property in Cuba that must be sold in order to be distributed to the beneficiaries or heirs of the estate, or performing a determination of heirs in Cuba and locating the heirs. In the Eleventh Judicial Circuit's Probate Division, there is a rotating list of attorneys who are licensed under OFAC to perform this type of work.<sup>157</sup>

The process for probating an estate in which the Cuban heirs involved are not those specified in President Trump's 2017 amendments to the Regulations has become quite simple. When a Cuban interest is involved, those portions of estate assets will be placed in a Cuban Blocked Account. As soon as the transfer has been approved by the Probate Court, the funds may be transmitted through an authorized remitter bank, such as Western Union. Due to changes in the Regulations, the funds may be remitted through a general license under OFAC, meaning that no specific permission is required for the transfer to take place. This process will take less than a week for the Cuban heir or beneficiary to receive the transfer.<sup>158</sup> If the Cuban heirs are within the specifically listed prohibited entities under the Regulations, then the funds will be placed in a Cuban Blocked Account and remain there until and unless the Regulations are further amended to allow for their transfer.<sup>159</sup>

In many cases, the guardian ad litem is responsible for making a determination of heirs and locating the heirs within Cuba.<sup>160</sup> To do this, the guardian ad litem will obtain birth certificates, marriage certificates, death certificates, etc.<sup>161</sup> This is crucial in providing the heirs with knowledge of the Regulations and any other information they should know regarding the transfer of estate assets. When there is real property located in Cuba within the estate, it is recommended by the court and experienced Cuban heirs attorneys that the property be sold, and the proceeds distributed equally among the heirs.<sup>162</sup> When selling real property within Cuba, it is

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<sup>157</sup> *Id.*

<sup>158</sup> Interview with Enrique Zamora, *supra* note 97.

<sup>159</sup> *See generally* 31 C.F.R. § 515.570(f)(1) (2017).

<sup>160</sup> Zamora, *supra* note 16, at 533.

<sup>161</sup> Interview with Enrique Zamora, *supra* note 97.

<sup>162</sup> *Id.*

most often required to have a deed from each heir. To obtain a deed from a Cuban national, the guardian ad litem must have the deed executed before the United States Interest Section in Havana before proceeding with the process of selling the property.<sup>163</sup> Finally, the guardian ad litem must file a report with the probate court specifying that he identified the heirs and advised them regarding the Regulations and how the estate assets will be transferred. The guardian ad litem will then obtain a specific license to withdraw his fees from the amount to be transferred as a remittance. In any event, travel to Cuba is a necessity for the guardian ad litem. Fortunately, the Regulations have relaxed restrictions so that these attorneys may travel to and from Cuba for work-related purposes without obtaining a specific license from OFAC, as was previously required. While the process has become much more expedited than it was under previous regulation restrictions, it is essential that any attorney working on a Cuban heir's case be knowledgeable and experienced on the process of probating the estate.

## V. CONCLUSION

Within the last decade, many changes have been made to the Cuban Asset Control Regulations that make the process of distributing an estate's assets with a Cuban interest involved much less expensive and time-consuming. The Obama Administration relaxed restrictions, allowing Cuban nationals to access money and property left to them by decedents, which the heirs and beneficiaries of such property had not been able to access since the Cuban Embargo was put into place. The Obama Administration first created the possibility of accessing a decedent's assets if they were left to an heir or beneficiary who was considered to be a "close relative" of the decedent. The standards for this requirement were set by the Regulations. This dramatic change allowed for Cuban nationals to access family property that they had previously been completely barred from receiving unless they became a citizen or permanent resident of the United States or other country that was determined not to be an enemy of the United States. However, this change still required a tremendous amount of work for attorneys to

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<sup>163</sup> Zamora, *supra* note 16, at 534.

apply for and receive a license from OFAC, travel to Cuba to determine who met the requirements of being considered a “close relative,” and then proceed with the distribution of assets. Additionally, this did not allow for a decedent to exercise their complete property rights because they were still not permitted to leave any of their assets to a Cuban national who fell outside of the “close relative” requirement.

While the restrictions stated in the Regulations have become much more relaxed than the previous ban on all transfers of estate assets regardless of who was receiving the transfer, individuals working to complete the estate transfers must do so carefully in order to ensure that they comply with federal regulations regarding the transfer of such assets. Cuban heirs and beneficiaries must be aware of what restrictions may affect them. For many transfers, one must be licensed by OFAC, travel to Cuba to determine who all of the heirs to an estate are, and complete the probate process in American courts. While this process must be carefully followed, the relaxation of the Regulations has been a tremendous aid to Cuban families who rely on funds given to them by American family and friends to survive. Ultimately, foreign policy goals are being met by the Regulations. The Regulations’ prohibitions have continued to keep United States dollars out of the hands of the Cuban government. The relaxation of restrictions by Obama has allowed for a large amount of cash to flow to the Cuban people, and the changes that remain in place continue to positively impact the majority of Cuban families who have come to rely on remittances from the United States.