Relaxing Restrictions on Cuba: More Air Travel Now than Before

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RELAXING RESTRICTIONS ON CUBA: MORE AIR TRAVEL NOW THAN BEFORE

JENNIFER SMILEY*

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IN 2013, Jay-Z and Beyoncé traveled to the island of Cuba.\(^1\) The celebrity couple’s trip captured the news cycle and sparked debate over the trip’s legality and whether Americans should be allowed to travel to the controversial Caribbean nation without restriction.\(^2\) Although the Cuban embargo and related regulatory policy prevents most Americans from traveling to Cuba as tourists, stories like theirs and even the regulations themselves seem to make Americans want to go more than ever.\(^3\)

This comment will explore the changing atmosphere regarding travel to Cuba because of the Obama administration’s loosening of restrictions.\(^4\) While the current policy toward Cuba is a step in the right direction, the embargo’s travel restrictions should be loosened even further. Eventually, the embargo should be eliminated either because (1) the political atmosphere of Cuba has shifted or (2) the administration rightfully decides that the travel restrictions in their current state are not reaching its goals. Also, several constitutional arguments support the end of the travel ban.

To manage a reduction or an end to the travel ban, this comment proposes how aviation and airport regulations must change to promote safe air travel to Cuba. Part II provides a historical overview of the travel and aviation regulations gov-

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\(^3\) 31 C.F.R. § 515.560 (2014); Ignacio M. Sarmiento, Traveling to Cuba? Sorry, It’s Closed, 29 NOVA L. REV. 287, 290 (2005) (“For more than 150 years, Cuba has been a particularly favorite vacation spot for many Americans. Even today, Cuba’s charm and picturesque scenery continues to be a beloved location for United States travelers.”).

erning U.S. travel to Cuba, including the constitutionality of the regulations. Part III examines the current rules and regulations surrounding the loosened travel restrictions with an in-depth review of travel licenses, airports, and aviation safety. Part IV highlights arguments for and against the travel ban and suggests the Federal Aviation Administration's (FAA) probable responses when the ban is reduced or lifted entirely. Finally, Part V concludes that the current U.S policy on travel to and from Cuba is unsustainable and unfair to both Cubans and Americans. To implement the suggested changes, aviation law surrounding air travel to Cuba must adapt to ensure success.

II. HISTORICAL BACKGROUND OF AVIATION REGULATIONS TO CUBA

Any discussion of the United States' relationship with Cuba—even the flights between the two countries—must start with the restrictions established by the Cuban embargo, which is now over fifty years old. For this comment, the relevant portions of the embargo are those that restrict air travel to Cuba. This section gives a brief explanation of the embargo on trade with Cuba, a description of the previous restrictions, including what the Obama administration changes have done, and information about current air travel conditions.

A. AN OVERVIEW OF THE CUBAN EMBARGO

The U.S. trade embargo on Cuba is comprised of statutes and regulations designed to affect every level of the Cuban economy, including travel and tourism. First, the Foreign Assistance Act of 1961 authorizes the President to prohibit all trade between the United States and Cuba. The statute distinguishes between the prohibitions on providing assistance "to the present government of Cuba" and "to any government of Cuba." This distinction leaves open the possibility that these policies could change when the Castro government is gone. Second, President Kennedy's Proclamation Number 3447 prohibits the importation of

7 Pagan, supra note 5, at 485.
9 Id. § 2370(a)(1)–(2) (emphasis added); Pagan, supra note 5, at 487.
10 22 U.S.C. § 2370(a)(1)–(2); Pagan, supra note 5, at 487.
Cuban goods and the exportation of goods to Cuba. The Proclamation does not have an expiration date and lacks direction on when or how to terminate the embargo.

Third, the Trading with the Enemy Act (TWEA) restricts trade “using President Truman’s 1950 declaration of an emergency with respect to the threat of world communism, in relation to the Korean conflict” instead of an emergency directly related to Cuba. Applying to people and property subject to U.S. jurisdiction, the TWEA prohibits various activities, such as transactions involving Cuban-made goods, transactions with vessels that have recently had business in Cuba or have Cuban passengers, and unlicensed exports to Cuba.

The fourth statute comprising the trade embargo with Cuba is the Cuban Democracy Act of 1992. The Act “purports to encourage a ‘peaceful transition to democracy and [the] resumption of economic growth in Cuba,’ through the dual strategy of tightening sanctions against the Cuban government while increasing support for the Cuban people.” While this aspect of the embargo does not contain explicit travel restrictions, it looks to the United States’ future interactions with the Cuban government when Cuba is no longer communist by “proposing the gradual reduction of sanctions by the President in response to positive developments towards democracy.”

The Bureau of Export Administration under the Department of Commerce executes the embargo on U.S. exports to Cuba, and its authority is based on the Export Administration Act of 1979, the fifth source of authority for the embargo. This Act permits the President to continue the embargo on Cuban exports because the embargo furthers the President’s U.S. foreign policy goals.

Lastly, the Cuban Assets Control Regulations are contained in the Code of Federal Regulations and enforced by the Office of Foreign Assets Control (OFAC) of the Department of Treasury.

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11 Pagan, supra note 5, at 488.
12 Id.
13 Id. at 489.
15 Pagan, supra note 5, at 499.
16 Id.
17 Id. at 501.
18 Id. at 504.
19 Id.
in the executive branch.\textsuperscript{20} The OFAC is in charge of “enforcing embargoes and economic sanctions against foreign countries,” such as the travel restrictions on Cuba.\textsuperscript{21}

One of the main goals of the travel restrictions is to stop U.S. currency from benefitting the Cuban government.\textsuperscript{22} Even though it was imposed during peacetime, another goal of the embargo was to address problems “created by Cuban attempts to destabilize governments throughout Latin America.”\textsuperscript{23} Knowing the legal basis for the embargo helps to understand its development and to evaluate whether its existence is still furthering the stated goals. Since these regulations concern air travel to Cuba and are the focus of this comment, the specific regulations and changes over time are explored in the next two sections: Part II.B and Part II.C discuss the historical regulations, and Part III reviews the current state of these aviation regulations.

\section*{B. Air Travel Regulations from President Kennedy to President Bush}

Authorized by the foreign policy powers in the TWEA, President Kennedy imposed economic sanctions and the travel ban on Cuba, which prevented most Americans from traveling to Cuba.\textsuperscript{24} In turn, the OFAC extended the restrictions on trade with Cuba to “travel-related expenditures that effectively made illegal all but fully-hosted travel to Cuba.”\textsuperscript{25}

In 1977, President Carter altered policy toward Cuba by introducing a limited travel license.\textsuperscript{26} The embargo continued but travel-related expense transactions were excluded from it, so U.S. travelers to Cuba were allowed to pay for living and transportation expenses and were required to keep records of the transactions.\textsuperscript{27} A general license to travel to Cuba was allowed, but the license could be revoked or modified “at any time.”\textsuperscript{28} Later, Congress altered and increased the President’s “emergency economic powers in response to peacetime crises” in the

\begin{footnotesize}
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\item[20] Id. at 485.
\item[21] Sarmiento, \textit{supra} note 3, at 293–94.
\item[22] See Pagan, \textit{supra} note 5, at 493.
\item[25] Id. at 13.
\item[26] Id. at 15.
\item[27] Regan, 468 U.S. at 227.
\item[28] Id. at 234.
\end{footnotes}
\end{footnotesize}
International Emergency Economic Powers Act (IEEPA). President Carter and then President Reagan both extended the embargo each year.

The 1982 change under President Reagan was the beginning of new restrictions on travel to Cuba. The amended regulations reduced licenses to cover only fully hosted travel, “official visits, news gathering, professional research, and visits to close relatives,” thereby eliminating the general license, which previously permitted U.S. travelers to spend money in Cuba. Since general business and tourist travel were prohibited because of this amendment, American plaintiffs brought a constitutional challenge to the President’s authority to limit travel to Cuba under existing law.

Under President Clinton, the new travel restrictions “severely limit[ed]” travel of tourists, business people, and relatives of Cuban residents. By revising federal regulations, the Clinton Administration aimed to “limit the categories of travelers to Cuba who are generally authorized to engage in travel-related transactions to [U.S.] journalists and officials or foreign governments or international organizations traveling on official business.” Because of the creation of new categories of people who could travel to Cuba, the Cuban-American lobby opposed this relaxing of the travel restrictions.

During the Clinton Administration, air carriers seeking a license to Cuba had to prove to the OFAC that they did not have policies that “charg[ed] discriminatory rates for air travel.” Generally, the government sought to discourage any behavior it considered as participating in the Cuban government’s discrimination against U.S. travelers. Another air travel restriction ex-

29 Id. at 227–28.
30 Id. at 229.
31 Id.; see also 31 C.F.R. § 515.420 (2003); Sarmiento, supra note 3, at 294 (stating that the provision on fully hosted travel allowed “an American [to] legally travel to Cuba if the trip, and all associated costs, were paid by a person outside of the United States, and United States’ jurisdiction.”).
32 Barrios, supra note 24, at 15.
34 Pagan, supra note 5, at 494.
36 Barrios, supra note 24, at 16.
37 Pagan, supra note 5, at 496.
38 See id.
isted for fully sponsored travel: persons in U.S. jurisdictions were not allowed to charter flights to Cuba.\textsuperscript{39} Also, during this time, U.S. flights to and from Cuba were limited to Miami International Airport as the point of arrival or departure.\textsuperscript{40}

President Bush’s policy on the embargo was split into before and after June 30, 2004.\textsuperscript{41} Before the 2004 changes, many Americans (an estimated 200,000 in 2003) visited Cuba using the fully hosted provisions, the educational travel provisions, or the family visitation provisions.\textsuperscript{42} Fully hosted travel was authorized when a person outside of the United States paid the expenses of the U.S. traveler.\textsuperscript{43} As for the educational travel allowed before the 2004 shift, the OFAC gave renewable permits to five categories of academics: (1) students earning a professional degree doing research; (2) foreign students enrolled at a Cuban institution; (3) teachers at Cuban schools; (4) participants of a “structured educational program” to earn class credit; and (5) employees of the above organizations that coordinated the trips.\textsuperscript{44} And if a person had a family member or relative in Cuba, the traveler could visit once a year (or more) with a license and without restriction on the length of stay.\textsuperscript{45}

Airports and airlines were affected by this change: “When President Clinton relaxed travel rules to Cuba in the 1990s, a charter company called Cuba Travel Services began offering flights from Los Angeles (LAX) to Havana. After President George W. Bush restricted such visits in 2003, CTS ended its flights.”\textsuperscript{46}

However, the Bush Administration’s new policies based on the 2004 report by the Commission for Assistance to a Free Cuba altered these somewhat “lenient” restrictions.\textsuperscript{47} The changes aimed to make a “statement” about the United States’ views on the Castro government and to “oppose any attempt to weaken sanctions against the Castro regime until it respects the basic human rights of its citizens, frees political prisoners, holds

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 519; 19 C.F.R. § 122.153 (1994).
\textsuperscript{41} See Sarmiento, supra note 3, at 294, 300.
\textsuperscript{42} Id. at 288, 294–97.
\textsuperscript{43} Id. at 294.
\textsuperscript{44} Id. at 295–96.
\textsuperscript{45} Id. at 295.
\textsuperscript{46} Ana Radlet, 9 Airports Win Blessing for Cuba Flights, but Most Won’t Offer Service—For Now, CUBA NEWS, Apr. 1, 2011, available at 2011 WLNR 8225371.
\textsuperscript{47} See Sarmiento, supra note 3, at 295, 300.
democratic free elections, and allows free speech." Under the amended regulations, to "ensur[e] that Americans are not dealing in property in which Cubans or Cuban nationals might have an interest," the fully hosted travel provision was removed. The changes to the educational travel provisions consisted of stricter regulations, such as licensing for one year (instead of two), some activities requiring a ten-week minimum length, and a mandate that students be enrolled and teachers be employed full-time at their institutions to qualify for permission to travel to Cuba. The new regulations narrowed the definition of "family" for visitation to "member[s] of the person's immediate family," and all U.S. travelers had to be related to the Cuban family member to qualify. In addition, the length of stay was limited to two weeks once every three years. "In order to visit a non-Cuban national in Cuba, 'exigent circumstances' [had to] exist," and the American traveler in Cuba was only permitted to spend fifty dollars a day.

As for air travel, the 2004 changes specified that "[p]ayment for air travel to Cuba via a carrier from a third country involving property in which Cuba has an interest" was prohibited because the carrier would pass some payment to Cuba. The airports then authorized to host air traffic between Cuba and the United States increased to include Miami International Airport, John F. Kennedy Airport, and Los Angeles International Airport. The inclusion of the new airports demanded stronger enforcement efforts from the Department of Homeland Security.

President Bush "vigorously upheld restrictions on Cuba, while preserving the rights of Cuban citizens." According to one author, because the Cuban government owed money to other nations, the travel regulations became tighter to prevent U.S. dollars from entering the Cuban economy. This seems to be

48 Id. at 300–01.
49 Id. at 301; Cuban Assets Control Regulations, 69 Fed. Reg. 33,768-01 (June 16, 2004); 31 C.F.R. § 515.420 (2014).
50 Sarmiento, supra note 3, at 303–04.
51 Id. at 302.
52 Id.
53 Id. at 303.
54 Id. at 301.
55 Id. at 304.
56 Id.
57 Id. at 300.
58 Id. at 307.
substantiated because tourism is a large part of the Cuban economy, contributing more than $1.6 billion in 2002.\textsuperscript{59}

1.\textsuperscript{ }Constitutionality of the Cuban Travel Restrictions: Regan v. Wald

In response to one of the challenges to the embargo, the U.S. Supreme Court decided in \textit{Regan v. Wald} that the President had the authority to limit travel restrictions in this way.\textsuperscript{60} After evaluating the legislative purposes of the statutes and addressing the constitutional argument, the Court held that the 1982 amendment, which restricted general and other kinds of legal travel to Cuba, had a statutory source.\textsuperscript{61} The Court further held that the right to travel was not violated because of precedent and was "justified by weighty concerns of foreign policy."\textsuperscript{62} This case is crucial to understanding the travel restrictions and to arguing for the end of the ban.

In reaching its decision, the Court addressed the issues of (1) whether there was "an adequate statutory basis" for the 1982 change and (2) whether the limitations on travel to Cuba violated the freedom to travel protected by the Due Process Clause of the Fifth Amendment.\textsuperscript{63} The plaintiffs' main argument for the first issue was that the amendment, which prohibited general tourist travel, "is invalid because it was not promulgated in accordance with the procedures mandated by IEEPA [International Emergency Economic Powers Act]."\textsuperscript{64} The plaintiffs argued that because the President used foreign affairs powers, which had been grandfathered in from 1977, instead of declaring a new national emergency in 1982, he and Congress were not in accordance with the statute.\textsuperscript{65} The government argued that the "'authority'" to regulate travel was being exercised in 1977, even though the restrictions on travel transactions did not exist until 1982.\textsuperscript{66}

Reversing the court of appeals that held for the plaintiffs, the Supreme Court found that the grandfather clause and the TWEA "preserved" the power of the President to restrict travel

\textsuperscript{59} Id. at 290.
\textsuperscript{60} Pagan, \textit{supra} note 5, at 493.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} See \textit{id.} at 244.
\textsuperscript{64} \textit{Id.} at 290.
\textsuperscript{65} \textit{Id.} at 228–30.
\textsuperscript{66} \textit{Id.} at 230.
to Cuba because it was being exercised prior to the amendment. After an extensive look at the legislative history of the grandfather clause and relevant legislation, the Court decided that it did not agree with "the view that only those restrictions actually in place on July 1, 1977, were to be grandfathered." Bolstering this argument, the Court rejected another of the plaintiffs' arguments: "that the purpose of the grandfather clause was merely to preserve existing bargaining chips in negotiations with affected countries." While Congress did discuss this reasoning, the main rationale for having the grandfather clause was to prevent the bill from being "too controversial."

Turning to the constitutional right to travel issue, the plaintiffs argued that enforcement of the President's restriction of travel to Cuba violated the Due Process Clause of the Fifth Amendment by infringing the right to travel. Basing its decision on precedent and its understanding of the President's broad foreign policy powers, the Court "sustain[ed] the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel." The Court compared these travel restrictions to the travel ban previously addressed in Zemel v. Rusk (1965) and made no distinction—the national security concerns involving Cuba then and now outweighed the right to travel to Cuba. The national security concerns with Cuba in the 1960s existed because of the Cuban Missile Crisis, and, in the 1980s, because "Cuba, with the political, economic, and military backing of the Soviet Union, ha[d] provided widespread support for armed violence and terrorism in the Western Hemi-

67 Id. at 232.
68 Id. at 238.
69 Id. at 239.
70 Id.
71 Id. at 240; see also Zemel v. Rusk, 381 U.S. 1, 15 (1965); Edwards v. California, 314 U.S. 160, 178 (1941) ("The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.") (Douglas, J., concurring).
72 Regan, 468 U.S. at 240–43.
73 Id. at 242; Zemel, 381 U.S. at 3, 13 (After breaking "diplomatic and consular relations with Cuba," the Court held that the Secretary of State is constitutionally authorized to "to refuse to validate passports of United States citizens for travel to Cuba." In addition, this action was deemed proper "not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.").
The Supreme Court’s decision may have been appropriate in the past, but current conditions demand that the executive branch change its stance on limiting travel to Cuba.

C. Air Travel to Cuba Under President Obama

The travel restrictions to Cuba underwent another change during President Obama’s presidency. Currently, almost 500,000 people travel from the United States to Cuba each year. In 2012, three million people visited Cuba, which included 476,000 Cuban-Americans and about 98,000 other U.S. residents on “people-to-people” trips. President Obama’s first foray into altering Cuban foreign policy was in April 2009 when he took “actions to help reunite divided Cuban families; to facilitate greater telecommunications with the Cuban people; and to increase humanitarian flows to Cuba.”

In January 2011, U.S. policy toward Cuba shifted again, and this time, air travel was expressly affected. To achieve its goals of “increas[ing] people-to-people contact; support[ing] civil society in Cuba; enhanc[ing] the free flow of information to, from, and among the Cuban people; and help[ing] promote their independence from Cuban authorities,” President Obama instructed the administration to change the rules governing “purposeful travel,” “non-family remittances,” and U.S. airports that license outbound and incoming charter flights with Cuba. Unfortunately, these changes came with the President’s affirmation of the continued embargo with hope that the Cuban government will recognize and honor its citizens’ rights. The 2011 changes affecting the state of the law surrounding travel to Cuba and their various impacts on air travel are discussed in the next section.

74 Regan, 468 U.S. at 242-43.
75 See Press Release, Reaching Out to Cuban People, supra note 4.
77 Cuban Officials Visit Miami to Talk Travel, CUBA NEWS, Dec. 1, 2013, available at 2013 WLNR 32608280; see infra Part III.A.1 (discussing people-to-people trips).
78 Press Release, Reaching Out to Cuban People, supra note 4.
79 Id.
80 Id.
81 See id.
III. THE CURRENT STATE OF AVIATION REGULATIONS TO CUBA

While it is true that the travel restrictions are lighter now than in the past, air travel to Cuba remains heavily regulated by many agencies. The Departments of Transportation, State, Homeland Security, and Treasury are all involved in the creation and implementation of the 2011 changes. The regulations of the Federal Aviation Agency (FAA), which is part of the Department of Transportation, are contained in the Code of Federal Regulations (C.F.R.). This section will describe the current state of the law governing air travel to Cuba as laid out in federal regulations, statutes, and policies put forth by the FAA, Department of State, Department of Homeland Security, and Department of Treasury. The first subsection describes air traffic regulations and the licenses needed for individual travelers and pilots of charter planes. The next subsection details the process for how airports can host Cuban air traffic. The last subsection explores the aviation safety issues that air travelers and the United States must face for current and future air travel to Cuba.

A. FLIGHT AND TRAVEL LICENSE REGULATIONS ESTABLISHED AND ENFORCED BY THE EXECUTIVE BRANCH

Part of the FAA regulations that govern air traffic and flight operation state that "[n]o person may operate a civil aircraft from the United States to Cuba unless" the departure point comes from an approved airport, and the pilot has filed a defense visual flight rules (DVFR) or instrument flight rules (IFR) flight plan and a written statement that consists of "(i) All information in the flight plan; (ii) The name of each occupant of the aircraft; (iii) The number of occupants of the aircraft; and (iv) A description of the cargo, if any." Designated airports are listed in a separate section of the C.F.R.s and explained in more detail in the next section. The pilot must file the "written statement" at that airport's Office of Immigration and Naturalization Service within one hour before departure. These regulations do not apply "to the operation of aircraft by a scheduled air car-

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82 Id.
84 14 C.F.R. § 91.709 (2014).
86 14 C.F.R. § 91.709(b)(2).
rrier over routes authorized in operations specifications issued by
the Administrator.  

The DVFR and IFR flight plans are similar and consist of the
information required in a visual flight rules (VFR) flight plan
and a listing of an alternate airport with some exceptions. The
VFR flight plan requirements include:

1. The aircraft identification number and, if necessary, its
radio call sign.
2. The type of aircraft or, in the case of a formation flight,
the type of each aircraft and the number of aircraft in the
formation.
3. The full name and address of the pilot in command or, in
the case of a formation flight, the formation commander.
4. The point and proposed time of departure.
5. The proposed route, cruising altitude (or flight level),
and true airspeed at that altitude.
6. The point of first intended landing and the estimated
elapsed time until over that point.
7. The amount of fuel on board (in hours).
8. The number of persons in the aircraft, except where that
information is otherwise readily available to the FAA.
9. Any other information the pilot in command or ATC be-
lieves is necessary for ATC purposes.

In addition, “[n]o person may operate a civil aircraft of Cu-
ban registry except in controlled airspace and in accordance
with air traffic clearance or air traffic control instructions that
may require use of specific airways or routes and landings at spe-
cific airports.”

Turning to the Department of Treasury’s regulations, these
rules deal with the exchange of money between the United
States and Cuba, such as “prohibition on the receipt of goods or
services in Cuba.” For example, the Department now prohibits
fully hosted travel (where a person outside of U.S. jurisdiction
pays for the travel of a person subject to U.S. jurisdiction).

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87 Id. § 91.709(b); see also 31 C.F.R. § 515.560 (2014) (“Administrator means
the Federal Aviation Administrator or any person to whom he has delegated his
88 14 C.F.R. § 91.169(a)(1)–(2).
89 Id. § 91.153(a).
90 Id. § 91.713.
91 31 C.F.R. § 515.420.
92 Id. (stating that “dealing in property in which Cuba or a Cuban national has
an interest” is prohibited “even if provided free-of-charge by the Government of
This rule restricts air travel because it "also prohibits payment for air travel to Cuba on a third-country carrier unless the travel is pursuant to an OFAC general or specific license."993

The most important regulations for an individual air traveler are the general and specific license provisions, which legalize travel to Cuba. Regulations on the OFAC licenses are found in 31 C.F.R. § 501.801 and are also outlined in the OFAC's Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba (Licensing Guidelines).94 The Licensing Guidelines state that although an individual might meet the licensing requirement of a general or specific license, "foreign policy considerations" or other factors may prevent a person from being licensed.95 This suggests that travel to Cuba remains subject to the status of the relationship between the United States and Cuba and that there is no guarantee that a person can travel to Cuba at any time. Although the regulations are later split up into the guidelines on general and specific transactions, an overview of the authorized transactions and types of licensable trips is given in 31 C.F.R. § 515.560.96

There are eight kinds of general licenses for travel-related transactions to or in Cuba97: (1) visiting "'close relatives'"98 who are Cuban nationals or U.S. government employees;99 (2) "official business travel" by U.S. or other government officials;100 (3) Cuba or a national of Cuba or paid for by a third-country national who is not subject to U.S. jurisdiction." (emphasis added)); see id. § 515.329 (stating the definition for a person subject to U.S. jurisdiction).

93 Id. § 515.420.
94 Id. § 501.801; Comprehensive Guidelines for License Applications to Engage in Travel-Related Transactions Involving Cuba, U.S. DEPARTMENT TREASURY 4 (May 10, 2012), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tr_app.pdf [hereinafter Licensing Guidelines]; see also 31 C.F.R. §§ 515.501 (outlining license procedures), 515.502(a)–(b) (stating when transactions are authorized by license).
95 Licensing Guidelines, supra note 94, at 4; see also 31 C.F.R. § 515.503 (stating that the "Secretary of the Treasury reserves the right to exclude from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof").
96 31 C.F.R. § 515.560.
97 Licensing Guidelines, supra note 94, at 5.
98 31 C.F.R. § 515.339(a) (defining "close relative" 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 with that person.").
99 Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.561(a)(1)–(2).
100 Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.562.
"journalistic activities;"\textsuperscript{101} (4) "professional research;"\textsuperscript{102} (5) "educational activities" of accredited U.S. graduate and undergraduate students and faculty;\textsuperscript{103} (6) "religious activities" of a U.S.-based religious organization;\textsuperscript{104} (7) "the commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of [authorized] telecommunications-related items;"\textsuperscript{105} and (8) "the commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of agricultural commodities, medicine, or medical devices by employees of a producer or distributor or an entity duly appointed to represent a producer or distributor."\textsuperscript{106}

These travelers, who maintain that their transactions are licensed by a general license, must keep records of the transactions for at least five years after the travel and be able to supply them to government officials.\textsuperscript{107} A general license authorizes the above categories of transactions and "[n]o further permission from OFAC is required to engage in transactions covered by a general license."\textsuperscript{108}

On the other hand, specific licenses for travel transactions are issued to include what is not covered under a general license.\textsuperscript{109} Issued on a case-by-case basis, specific licenses cover a broader range of travel, including (1) visiting a relative who is not a Cuban national or a U.S. employee;\textsuperscript{110} (2) freelance journalism;\textsuperscript{111} (3) professional or academic activities, including research, exchanges, and conferences that are not approved by a general license;\textsuperscript{112} (4) religious activities not allowed under a general license;\textsuperscript{113} (5) athletic and other competitions;\textsuperscript{114} (6) "activities

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\item Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.563(a).
\item Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.564(a)(1)-(3), (c)-(e).
\item Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.565(a)(1)-(6), (c), (d).
\item Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.566(a), (c).
\item Licensing Guidelines, supra note 94, at 5; 31 C.F.R. § 515.566(f).
\item Licensing Guidelines, supra note 94, at 5-6; 31 C.F.R. § 515.563(e).
\item Licensing Guidelines, supra note 94, at 6.
\item Id. at 5.
\item Id. at 6.
\item Id. at 6-7; 31 C.F.R. § 515.561(b).
\item Licensing Guidelines, supra note 94, at 6-7; 31 C.F.R. § 515.563(b)(1)-(3).
\item Licensing Guidelines, supra note 94, at 6-7; 31 C.F.R. §§ 515.564(b), (e), 515.565(b)-(d).
\item Licensing Guidelines, supra note 94, at 6-7; 31 C.F.R. § 515.566(b), (c).
\item Licensing Guidelines, supra note 94, at 6-7; 31 C.F.R. § 515.567(a)-(c).
\end{enumerate}
\end{footnotesize}
intended to provide support for the Cuban people;"¹¹⁵ (7) humanitarian projects for Cubans;¹¹⁶ (8) "[e]xportation, importation, or transmission of information or informational materials;"¹¹⁷ and (9) "[c]ertain export transactions."¹¹⁸

After obtaining a general or specific license for transactions involving travel to Cuba, the OFAC permits a traveler to obtain air transportation through an OFAC-authorized Travel Service Provider (TSP) or a travel provider that is located outside of U.S. jurisdiction.¹¹⁹ After finding a travel provider, the licensed traveler is allowed to book a direct charter flight from an approved international U.S. airport.¹²⁰ The carrier or travel service provider must keep records of passengers and passenger information to submit to U.S. Customs Service or the OFAC and must make reports to the OFAC about the travel.¹²¹

Persons not complying with the license requirements and restrictions on transactions in Cuba may face criminal prosecution or civil penalties upon return to the United States.¹²² The fine may be up to one million dollars and punishable by up to ten years in prison.¹²³ The general and specific licenses make Cuba more accessible to travelers with a specific purpose who are will-

¹¹⁵ Licensing Guidelines, supra note 94, at 6–7; 31 C.F.R. § 515.574(a)–(b) (listing examples that fall into this license category, including "(1) Activities of recognized human rights organizations; (2) Activities of independent organizations designed to promote a rapid, peaceful transition to democracy; and (3) Activities of individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba").


¹¹⁷ 31 C.F.R. §§ 515.560(a)(11), 515.545(b).

¹¹⁸ Id. §§ 515.560(a)(12), 515.533(g).

¹¹⁹ Licensing Guidelines, supra note 94, at 8; List of Authorized Providers of Air, Travel and Remittance Forwarding Services to Cuba, U.S. DEPARTMENT TREASURY (June 28, 2013), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_tsp.pdf. The list contains the contact information of currently authorized TSPs, a list of TSPs that are no longer authorized, and a list of TSPs that are newly authorized.

¹²⁰ Licensing Guidelines, supra note 94, at 8; 31 C.F.R. § 515.572(a)(1)–(2). The approved airports are discussed in Part III.B.

¹²¹ 31 C.F.R. § 515.572(d)(1)–(3).


ing to comply with the burdensome regulations, but such licenses do not allow for general tourist travel.

Although it is not a purposeful kind of air travel to Cuba, emergency expenses involved with air travel to Cuba are authorized: "[p]ayment to Cuba of charges for services rendered by Cuba in connection with overflights of Cuba or emergency landings in Cuba by aircraft registered in the United States or owned or controlled by, or chartered to, persons subject to U.S. jurisdiction is authorized."124 As this section and others illustrate, many federal agencies jointly regulate air travel to Cuba, and "it is the responsibility of the owner or person in command of the aircraft to ensure that the aircraft has the necessary authorization to travel."125

1. A Closer Look at Specific Travel Licenses to Cuba: People-to-People Licenses

The current law, authorized by the 2011 changes, once again allows "people-to-people" licensed trips, which were previously authorized under President Clinton and stopped by President Bush.126 Because of excitement surrounding these changes, the OFAC corrected the media’s portrayal of the loosened travel restrictions and explained that the rebirth of people-to-people licenses means an expansion in licensing and not "virtually unrestricted group travel to Cuba."127

The people-to-people group travel restrictions are found in the section for special licenses for educational travel:

Specific licenses may be issued on a case-by-case basis authorizing the travel-related transactions set forth in § 515.560(c) and other transactions directly incident to . . . [e]ducational exchanges not involving academic study pursuant to a degree program when those exchanges take place under the auspices of an organization that sponsors and organizes such programs to promote people-to-people contact.128

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124 31 C.F.R. § 515.548.
128 31 C.F.R. § 515.565(b)(2).
Because the OFAC cannot authorize “tourist activities” in Cuba, people-to-people groups traveling under this provision must “have a full-time schedule of educational exchange activities that will result in meaningful interaction between the travelers and individuals in Cuba.”\textsuperscript{129} For example, tour companies are increasingly offering group travel under the people-to-people license that includes activities like “personal encounters with Cuban artists, farmers, fishermen, doctors, mechanics or other locals” to ensure that the requirements of the license are met.\textsuperscript{130} Other companies offer insight into the Cuban people through exposure to Cuban music, salsa dancing, cigar factories, tobacco and coffee farms, and several cities in Cuba.\textsuperscript{131} One company estimated that it would take over 2,200 Americans to Cuba on these people-to-people trips in 2013.\textsuperscript{132}

B. APPROVED AIRPORTS FOR FLIGHTS TO AND FROM CUBA

Another hassle of the current regulations on air travel to Cuba is that only a small percentage of airports can host flights to and from Cuba. As a part of the Department of Homeland Security, U.S. Customs and Border Protection (CBP) determines whether U.S. airports are “suitable to accommodate flights traveling between the U.S. and Cuba.”\textsuperscript{133} The list of airports has grown over time and now includes nineteen U.S. airports.\textsuperscript{134} The states with approved airports are California (two airports); Florida (seven); Georgia (one); Illinois (one); Louisiana (one); Maryland (one); New York (one); Pennsylvania (one); Puerto Rico (one); and Texas (three).\textsuperscript{135} Currently, there are additional U.S. airports pending approval, but the ability to

\textsuperscript{129} OFAC, Cuba Travel Advisory, Travel to Cuba and People-to-People Groups, U.S. DEPARTMENT TREASURY (July 25, 2011), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_trav_adv.pdf.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{134} See 19 C.F.R. § 122.153(a), (c) (2014); U.S. Customs & Border Protection, DHS, CBP Approve Additional U.S. Ports of Entry for Flights to and from Cuba, CBP.gov (June 13, 2011), http://www.cbp.gov/xp/cgov/newsroom/highlights/2011/us_ports.xml (recognizing the addition of ten new airports to the list of approved airports as part of Obama’s 2011 changes).
\textsuperscript{135} 19 C.F.R. § 122.153(c).
see these new airports will not become public information until after the approval has been finalized.\textsuperscript{136}

Other U.S. airports can seek approval from CBP to handle international flights to and from Cuba.\textsuperscript{137} The eligibility of airports depends on whether the airport (1) is an "international airport, landing rights airport, or user fee airport"; (2) has passport and baggage screening capabilities; and (3) has flight service from OFAC-approved carriers.\textsuperscript{138} If an airport has all of those qualities, the director of the airport may file a written request with CBP.\textsuperscript{139} Then, CBP determines if the airport is "suitable to provide such services," notifies the airport, and lists the new airport on its website.\textsuperscript{140} The regulations do not state CBP's process beyond what is mentioned here for evaluating the applicant-airports, but if an airport meets these requirements, CBP will investigate the airport further by working with other agencies and departments "in a continuing review and evaluation process to determine suitability."\textsuperscript{141} Some airports have been denied because they do not meet the criteria of the rule as stated above.\textsuperscript{142} The increasing number of airports that serve as departure and arrival points with Cuba do not change the CBP requirements of seeking "clearance and permission from CBP to depart from or enter at the airport and to provide advance notice of arrival" either to CBP or the FAA.\textsuperscript{143}

Cuba has ten airports.\textsuperscript{144} Havana's airport is Jose Marti (MUHA) and its "main international terminal [Terminal 3] is getting a $10.2 million overhaul to improve operations at the


\textsuperscript{138} 19 C.F.R. § 122.153(b)(1).

\textsuperscript{139} Id. § 122.153(b)(2).

\textsuperscript{140} Id.

\textsuperscript{141} See id. § 122.153(b)(2); E-mail from Arthur A. Pitts to Jennifer Smiley, supra note 136.

\textsuperscript{142} E-mail from Arthur A. Pitts to Jennifer Smiley, supra note 136.


\textsuperscript{144} Cuba, FAA 5–6 (May 6, 2014), http://www.faa.gov/air_traffic/publications/ifim/country_info/PDF/CU.pdf [hereinafter Cuba, FAA].
overcrowded facility." The upgrades are needed because 2.5 million people go through Terminal 3 each year. Aside from an emergency, Guantanamo Bay does not permit civilian airplanes. Accordingly, the increasing amount of airports for travel between the United States and Cuba is a step in the right direction for ultimately allowing unrestricted travel to Cuba.

C. AIRPORT AND AIR TRAVEL SAFETY ISSUES TO CUBA

Since current airport and air travel safety is a concern for licensed American travelers and because unrestricted travel is inevitable, this section will explore Cuba's readiness for air travel with the United States and the FAA's involvement in this area. Established in 1992, the FAA's International Aviation Safety Assessments (IASA) Program assesses a country's ability "to adhere to international standards and recommended practices for aircraft operations and maintenance established by the United Nation's technical agency for aviation, the International Civil Aviation Organization (ICAO)."

Unfortunately, the FAA has not assessed Cuba under these safety standards, likely because there is no direct commercial carrier service to the United States. Therefore, it is unclear whether Cuba's infrastructure meets the IASA Program's goal of "ensur[ing] that all foreign air carriers that operate to or from the United States are properly licensed and with safety oversight provided by a competent Civil Aviation Authority (CAA) in accordance with ICAO standards." Another safety standard analyzed by the IASA Program is whether a country complies with the Chicago Convention; since Cuba has not been assessed, it is unclear whether Cuba complies with these safety obligations as well.

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145 Havana's Terminal 3 to Get $10.2m Upgrade, CUBA NEWS, Aug. 8, 2013, available at 2013 WLNR 23009357.
146 Id.
148 Bureau of Consular Affairs, Cuba, supra note 122; see FAA Flight Standards Serv., International Aviation Safety Assessments (IASA) Program, FAA (July 18, 2013, 2:41:32 PM EDT), http://www.faa.gov/about/initiatives/iasa/ (the "Results" data does not list Cuba as meeting or not meeting the safety standards).
150 See id.
The FAA provides detailed flight information by country, such as the contact information for the aviation authority, a list of airports within the destination, and tips for air travel to the country.\textsuperscript{152} The FAA’s guide to Cuba is severely lacking (solutions for this problem will be assessed in the Analysis section). While it is true that the pamphlet acknowledges its limitations because of “the difficulty in obtaining the information and the rapidly changing environment,” a pilot missing this crucial information is dangerous.\textsuperscript{153} Also, the FAA reinforces that it is the pilot’s responsibility to ensure that the airplane and passengers comply with U.S. and Cuban rules.\textsuperscript{154} The FAA does give recommendations for overflights of and technical stops in Cuba: a “planned technical stop is not advised” and overflying Cuba requires “a lengthy and involved process” to get approval that many pilots avoid.\textsuperscript{155}

The U.S. Interest Section of Havana, Cuba, which is part of the Department of State, does not give much information about the safety of air travel to Cuba, but the Interest Section warns against flying on Cubana de Aviacion, a Cuban airline.\textsuperscript{156} This airline presents a safety hazard to passengers because of “its safety and security standards, maintenance regime and history of fatal accidents.”\textsuperscript{157} In addition, the agency questions the safety of small Cuban airports based on several flight hijackings in 2003.\textsuperscript{158} However, reports suggest that airplane hijackings when departing Cuba are decreasing.\textsuperscript{159} More information about the safety of Cuban airports and air travel to Cuba is needed before a true aviation safety assessment can be made.

IV. ANALYSIS

This section will evaluate the current law and policy affecting air travel to Cuba, suggest changes to the current policy, and make predictions of how the FAA and related agencies will likely respond when the travel restrictions of the embargo are eliminated.

\textsuperscript{152} Cuba, FAA, supra note 144.
\textsuperscript{153} See id. at 4.
\textsuperscript{154} Id. at 5.
\textsuperscript{155} Id. at 8.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Bureau of Consular Affairs, Cuba, supra note 122.
A. CRITICISMS OF THE CUBAN TRAVEL RESTRICTIONS

While it is true a divided Supreme Court (a five-member majority decision) upheld the restrictions on Cuban travel as constitutional,\textsuperscript{160} the travel regulations continue to conflict with the constitutional right to travel and the newly-recognized constitutional right to fly.\textsuperscript{161}

The arguments of the dissenting members of the Court in \textit{Regan v. Wald} are still relevant today. The dissenting opinions interpret the legislative history narrowly to argue that the President did not have power to sustain the Cuban embargo.\textsuperscript{162} The first dissent extensively looks at the same legislative history used by the majority to conclude that Congress intended "a grandfather clause that preserved existing restrictions, but gave the President no authority to impose new restrictions except through the new IEEPA procedures that govern the President's authority to respond to new emergencies."\textsuperscript{163} The dissenters believe that Congress did not want broad presidential power in this area without complying with the statute.\textsuperscript{164} So since the President did not comply with the IEEPA when creating the travel restrictions, the justices dissented because the travel restrictions were not a proper exercise of presidential power.\textsuperscript{165} This argument holds true today because the President's power overreaches and infringes on the established right to travel.

A fresh look at the constitutionality of the restrictions on traveling to Cuba reveals that a recently-recognized right is being violated: the right to fly. A U.S. District Court in Oregon evaluated the constitutionality of the effect of plaintiffs listed on a No Fly List.\textsuperscript{166} The court noted the significance of the fact that the plaintiffs were totally banned from flying, just like all Americans

\textsuperscript{160} Regan v. Wald, 468 U.S. 222, 244 (1984).
\textsuperscript{161} See Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."); DeNieva v. Reyes, 966 F.2d 480, 485 (9th Cir. 1992) ("[T]he Court has consistently treated the right to international travel as a liberty interest that is protected by the Due Process Clause of the Fifth Amendment."); Latif v. Holder, No. 3:10-CV-00750-BR, 2013 WL 4592515, at *9 (D. Or. Aug. 28, 2013) (concluding that the "[p]laintiffs have a constitutionally-protected liberty interest in traveling internationally by air").
\textsuperscript{162} Regan, 468 U.S. at 244 (Blackmun, J., dissenting).
\textsuperscript{163} Id. at 255.
\textsuperscript{164} Id. at 262.
\textsuperscript{165} Id.
\textsuperscript{166} Latif, 2013 WL 4592515, at *9.
are prevented from international tourist travel to Cuba.\textsuperscript{167} The court found that the No Fly List affected their "constitutionally-protected liberty interest in traveling internationally by air."\textsuperscript{168} Although this decision is from a single court, the right to fly should be recognized and taken into consideration by the executive branch and by other courts in the event of another challenge to the travel restrictions.

In addition, even though it seems possible to travel to Cuba by boat or in another fashion, air travel is probably the most convenient and safest way for Americans.\textsuperscript{169} \textit{Regan v. Wald} was decided during a very different political climate, and the Supreme Court should and did defer to the executive to make foreign policy decisions then.\textsuperscript{170} Now, however, the foreign policy argument that the President needs to keep the United States safe from communism is weak.\textsuperscript{171}

Some arguments urge the continuation of the travel ban by focusing on the policy goal of preventing American dollars from entering and supporting the Cuban economy.\textsuperscript{172} The economic sanctions stem from the notion that the communist Cuban government mistreats its people.\textsuperscript{173} Examples of these human rights violations include imprisoning people that speak out against the government, physical abuse of prisoners, forceful prevention of people trying to leave Cuba, and prohibitions on private property and on business in the private sector.\textsuperscript{174} Proponents of the travel restrictions see a direct connection: Americans spending money in Cuba leads to more of Castro "restrict[ing] access to food, education, health care, and work."\textsuperscript{175} However, the concern is more complex than that. The rights and lives of Cuban citizens are an international concern, but travel restrictions are neither the only nor the most efficient way to aid the Cuban people. The U.S. government should no longer support the outdated and unpersuasive arguments that seek to maintain the travel ban.

\textsuperscript{167} See id. at *8.
\textsuperscript{168} Id. at *9.
\textsuperscript{169} See Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012) ("for international travel, air transport in these modern times is practically the only form of transportation").
\textsuperscript{170} Lifting Restrictions, supra note 123, at 4.
\textsuperscript{171} See id.
\textsuperscript{172} Sarmiento, supra note 3, at 307.
\textsuperscript{173} Id. at 308.
\textsuperscript{174} Id. at 308–09.
\textsuperscript{175} Id. at 310.
As the embargo ages, more individuals and organizations speak out against the embargo and the accompanying travel ban. Because the embargo negatively affects international relations and domestic politics and because more people are willing to engage with Cuba, some support drastic changes in Cuban policy, including one editorial author who works for the U.S. government. He argues that the President should remove travel restrictions in order to strengthen trade relations with Cuba, which leads to more "economic inclusion" and "increased political freedom." Another point is that the goal of bringing democracy to Cuba still has not been met fifty years later, so the federal government should lift the embargo to actually help the Cuban people by using different strategies.

Focusing on the travel restrictions and immigration policies for Cubans, the Obama Administration has been criticized for continuing the outdated travel ban. Furthermore, the 2011 changes to the travel restrictions, which came across in the media as legalizing most travel to Cuba, were actually only "modified ever so slightly." The most effective arguments are practical and simple: there must be a better way to accomplish the United States' goals in Cuba beyond the travel ban.

The travel ban is unfair because it "dramatically singles out Cuba as the only nation against which travel is banned in this fashion—and by association, unfairly circumscribes U.S. citizens' right to travel in order to support its failed foreign policy goal."

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178 Id.


180 Barrios, supra note 24, at 2.

181 Id. at 2.

182 Id. at 3.

183 Id.
The President has the power to change the travel ban and to change aviation travel regulations. The OFAC implemented President Obama’s changes and “has the power to narrow or widen the applicable class of activity and, correspondingly, narrow or broaden the numbers of individuals eligible to travel to Cuba.” Therefore, travel may appear banned at the moment because of the codified regulations in place, but the discretion of the President and the OFAC is imbedded in the regulations. Accordingly, the regulations prevent the President from making a full repeal of the ban without Congress’s help, but they should allow the President to make drastic changes to its scope.

Since the executive branch has the authority to alter the ban, the President should direct policy shifts toward opening travel with Cuba or, at the very least, direct agencies to make all necessary evaluations (especially for air travel to and from Cuba) to prepare for the travel restrictions to lift in a few years.

Looking ahead to the future without the travel ban, the FAA has made Cuban air travel regulations a goal and an agenda item in the past. In efforts to assist Civil Aviation Authorities, the FAA has an objective of “[p]reparing a plan of action to address potential significant growth in traffic between the U.S. and Cuba if the political dynamics change.” The other objective is to “[c]ontinue to work with the [Department of State] to facilitate safety-critical operational meetings between the FAA and Cuban air traffic officials on a regular basis.” These objectives suggest that the FAA is aware of the changes it must make in response to relaxed travel restrictions. It is helpful that the FAA is looking ahead because it will need to coordinate with other federal agencies involved in regulating interactions with Cuba. The FAA’s goal could suggest that other agencies are also

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184 See id. at 21 (“Congress intended to incorporate the Presidential discretion already in [Cuban Assets Control Regulations] into its codification of the embargo.”).
185 Id. at 24.
186 Id.
187 Id.
189 Id.
190 Id.
noting the changes in foreign policy and preparing to adapt to a future with reduced or nonexistent travel restrictions to Cuba.

Aviation safety and policy is edging its way into talks between the Department of State and Cuba.\textsuperscript{191} The government is concerned for the safety of travelers if commercial flights are made available and fewer regulations on travel exist. The concern is not unfounded, but it should not be a permanent barrier to opening air travel between the United States and Cuba. Although a history of crashes and anecdotal stories suggest the state-run Cuban airlines are unsafe,\textsuperscript{192} the introduction of regular commercial airlines will bring competition that the Cuban government needs to provide better service and raise safety standards. The introduction of airline competition will not be as easy for Cuba as it would be for a non-communist country, but Cuba has “healthy trade relationship[s]” with other countries, so it can adapt to increased competition.\textsuperscript{193}

\section{C. Future Considerations for the FAA}

The federal government should begin with a new declaration of policy change that allows more travel to Cuba. Then, under the direction of the President, the agencies should be able to alter the general and specific license regulations, with the change trickling down to the FAA regulations.

First, the IASA Program must evaluate Cuba as a country and compare it with International Civil Aviation Organization (ICAO) standards.\textsuperscript{194} This process will involve Cuba filing “a foreign air carrier permit” with the Department of Transportation, and then the FAA can begin to evaluate the safety of the country or carrier.\textsuperscript{195} Next, the IASA Program will determine if the carrier complies with international law, which means that the carrier must meet “the safety standards contained in Part 1 (International Commercial Air Transport) of Annex 6 (Opera-

\begin{footnotes}
\item[193] See \textit{Lifting Restrictions}, \textit{supra} note 123, at 4.
\item[195] \textit{IASA Program Overview}, \textit{supra} note 150.
\end{footnotes}
tions of Aircraft) to the Convention on International Civil Aviation (Chicago Convention)."196 Compliance with the Chicago Convention entails following the list of rules on air navigation, international air transport, airports, and other agreements.197

The IASA Program will then notify the FAA and request its evaluation of the capabilities “for providing safety certification and continuing oversight for its international carriers” for the country’s Civil Aviation Authority.198 The FAA must make an assessment visit to Cuba’s Civil Aviation Authority because it has not previously done so.199 After returning, the team will assemble the information and notify the Cuban and U.S. governments of a positive or negative recommendation.200 If the recommendation is positive, the FAA can then issue the necessary permits to allow the Cuban carrier access to U.S. airports.201 If the recommendation is negative and the carrier does not comply with ICAO safety standards, the FAA will consult with the Civil Aviation Authority with the purpose “to discuss [the FAA’s] findings in some detail and explore means to quickly rectify shortcomings found with regard to ICAO annexes, to enable its air carriers to continue service to the United States.”202 However, if the consultations are not successful in procuring the carrier’s compliance with ICAO standards within a reasonable time, the “FAA will notify the [Department of Transportation (DOT)] that carriers from that country do not have an acceptable level of safety oversight and will recommend that [the] DOT revoke or suspend its carriers’ economic operating authority.”203

Since Cuba does not have existing carrier service to the United States, Cuba must ensure its compliance with ICAO standards because the FAA will not undergo final consultations with Cuba without a history of carrier service.204 Or, in Cuba’s case, since it is unknown whether it can comply with ICAO standards, the FAA should participate in the consultation phase because if policy has shifted toward considering Cuba, the FAA should not

196 14 C.F.R. § 129.5(b) (2014); IASA Program Overview, supra note 150.
198 IASA Program Overview, supra note 150.
199 See id.
200 See id.
201 See id.
203 IASA Program Overview, supra note 150.
204 Id.
stop the process without working with Cuba first. If the FAA does not have a final consultation, the agency will reassess Cuba after receiving notice that Cuba is in compliance with relevant safety standards. The FAA then publishes its assessment results to the public. Fortunately, since Cuba’s aviation history is unpredictable, the FAA already has a mechanism built in if it needs to reassess Cuba’s compliance with ICAO safety standards.

The IASA Program should evaluate Cuba to assess whether Cuba suffers from the problems that other countries face, such as “inadequate and in some cases nonexistent regulatory legislation;” “shortage of experienced airworthiness staff;” “lack of control on important airworthiness related items such as issuance and enforcement of Airworthiness Directives, Minimum Equipment Lists, investigation of Service Difficulty Reports, etc.;” “lack of adequate technical data;” “lack of updated company manuals for the use by airmen;” “inadequate proficiency check procedures;” and “inadequately trained cabin attendants.”

The IASA Program designates each country as either Category 1 (countries that comply with ICAO standards) or Category 2 (countries that do not comply with ICAO standards). The Results list is published on the IASA Program website and reports that Barbados, Curacao, and Nicaragua do not meet ICAO standards and are geographically similar to Cuba. However, Aruba, Costa Rica, Jamaica, and Trinidad and Tobago do meet ICAO standards and are in the same region. Geographic location is not determinative of whether a country is Category 1 or 2 because each country receives an individual assessment, but geography is used here for comparison of Cuba to countries that might have similar circumstances or infrastructures. But since the FAA has not formally assessed Cuba, it is difficult to deter-

205 See id.
206 Id.
207 See id.
208 See id.
211 Id. (July 18, 2013).
mune whether Cuba will pass. Anecdotally, the Cuban airlines seem unlikely to pass the first time, but if the administration directs travel restrictions to be further relaxed, then the FAA should give Cuba a chance and offer consultation even though they have not previously had carrier service with the United States.

After the restrictions are reduced and Cuba is deemed safe, the U.S. Customs and Border Protection should approve more airports or, alternatively, eliminate restrictions on airports that connect with Cuba. The current small number of airports seems unlikely to be able to meet future demand. The United States' close proximity to Cuba should create a demand that will make it worthwhile for airlines to offer more flights to Cuba, thus requiring more airports.

Another concern over the relaxed restrictions is that politics are always at work. President Obama could loosen restrictions further before he leaves office, but just as President Bush reacted and restricted travel from the lighter Clinton restrictions, the next election could determine the next policy. Cuban policy is not a strictly partisan issue and varies between elected officials. Changing air travel to Cuba will require policy shifts and the cooperation of many agencies to implement the changes. Assessing Cuba's safety and implementing these changes will not be a fast process, but the ultimate reward of being allowed to fly to Cuba will be worth the wait.

V. CONCLUSION

Although the process to safe and accessible air travel with Cuba will not be finished overnight, the President should move towards reduction or elimination of the regulations that inhibit most Americans from flying to Cuba. The constitutional arguments upholding the regulations are outdated and must be

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213 Id.

214 See Ed Sanders & Patrick Long, Economic Benefits to the United States from Lifting the Ban on Travel to Cuba, CUBA POL'Y FOUND. (June 2002), http://www.cubafoundation.org/CPF%20Cuba%20Travel%20Study.htm

215 See id.


217 See Castor, supra note 176.
reevaluated. The Court’s deference to foreign policy concerns and the President’s furthering of old policy is no longer justified because the Cuba of fifty years ago is changing.218 While it is true that specific and general licenses allow some travelers to visit the island nation, the categories are not broad enough to allow most American travelers to pursue business or tourist travel to Cuba.

When the administration reduces the travel restrictions, the President will need to direct agencies, such as the FAA and the Department of Homeland Security, to change the regulations that prohibit flying charter and commercial airplanes to Cuba and to approve more airports to meet the increased need. The safety programs in place for approving countries that meet international safety standards should adapt and include Cuba.

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