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Libertad for All?

WHY THE HELMS-BURTON ACT IS AN EMPTY PROMISE OF “FREEDOM” FOR THE CUBAN PEOPLE

“Last time I was in Havana, a meal at a paladar would have been rice and beans. Now, sushi. A certain sign of impending apocalypse All Cuba seems waiting for something. For whatever it is that happens next.”¹

INTRODUCTION

On June 3, 1959, in the midst of the Cuban Revolution,² the insurgent Cuban government seized agricultural land belonging to Daniel A. Gonzalez’s grandfather and expelled his family from the property.³ The government’s seizures of agricultural land in Cuba from private owners marked the beginning of Fidel Castro’s revolutionary government, which ultimately overhauled the Cuban property law system.⁴ Many owners of Cuban property, like the Gonzalez family, never received compensation for their seized property. Gonzalez maintains that the Cuban government possesses his property to this day.⁵

¹ *Anthony Bourdain Parts Unknown*, CNN TRANSCRIPTS, <http://transcripts.cnn.com/TRANSCRIPTS/1512/21/abpu.01.html> [<https://perma.cc/P9TZ-MPV3>].

² The Cuban Revolution was led by Fidel Castro against the dictatorial government of Fulgencio Batista in 1959. The revolution is largely viewed as a reaction to the rampant corruption present in Cuba’s politics and government, as well as to the powerful external economic forces, led by the United States, that controlled Cuba’s valuable primary export: sugar. The Cuban Revolution has been described as “the first successful socialist rebellion in the Americas.” GEORGE LAMBIE, *THE CUBAN REVOLUTION IN THE 21ST CENTURY* 120–22 (2010). To this day, the Cuban Constitution retains the socialist structure and values implemented by the revolutionary 1959 Constitution. CONSTITUCIÓN DE LA REPÚBLICA [CONSTITUTION], Apr. 10, 2019, Preámbulo (Cuba).

³ Complaint at 4–5, *Gonzalez v. Amazon.com, Inc.*, No. 1:19–cv–23988 (S.D. Fla. Sept. 26, 2019) [hereinafter *Complaint*]. Since the writing of this note, United States District Judge Robert N. Scola Jr. granted the defendants’ motion to dismiss Gonzalez’s amended complaint for failure to sufficiently allege an ownership interest in the property in question. *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-Civ-Scola, 2020 WL 2323032, at *1–2 (S.D. Fla. May 11, 2020). Gonzalez has accordingly appealed to the Eleventh Circuit, where a decision is pending. *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-Civ-Scola, (S.D. Fla. May 11, 2020), *appeal docketed*, No. 20-12113 (11th Cir. June 9, 2020).

⁴ Daniel A. Espino, Note, *Step-Down Restitution: A Proposal for an Equitable Resolution to Confiscated Cuban Property*, 32 NOVA L. REV. 423, 430 (2008).

⁵ See *Complaint*, *supra* note 3, at 1, 4–5.

Seeking recompense for the theft of his family's property, Gonzalez filed a lawsuit in the fall of 2019 in the U.S. District Court for the Southern District of Florida. The suit was filed pursuant to Title III of the Helms-Burton Act (Title III). Title III creates a private right of action for individuals whose property has been nationalized by the Cuban government to sue any individual or entity who monetarily profits, or "traffics," in connection with any commercial activity that involves use of the nationalized property.⁶ It was enacted as part of the Cuban Liberty and Democratic Solidarity (Libertad) Act (the Act), a sweeping set of statutes that codifies the long-standing Cuban embargo.⁷ The named defendant in Gonzalez's suit, surprisingly, was not the Cuban government, but rather Amazon.com, whose trafficking activity consisted of marketing charcoal that was produced from the Gonzalez family's former property.⁸

Within the last year, dozens of other plaintiffs who share similar revolution-era expropriation experiences have also filed suits against corporations such as American Airlines, Expedia, and Meliá Hotels.⁹ The Act allows the Executive Branch to suspend Title III for six month increments, effectively giving it the status of proposed legislation rather than enacted and operative law.¹⁰ After Bill Clinton signed the Act into law in 1996, he suspended the operation of Title III, citing the detrimental effect it would have on U.S. foreign interests.¹¹ Since that time, every presidential administration has suspended the operation of Title III due to similar concerns.¹² This meant that individuals with potential Title III claims were unable to sue in federal court during the period of Title III's suspension. Breaking with precedent, the Trump administration lifted the twenty-four-year suspension on Title III,

⁶ See *Helms-Burton Title III Comes to Life*, AKERMAN (Apr. 17, 2019), <https://www.akerman.com/en/perspectives/helms-burton-title-iii-comes-to-life.html> [<https://perma.cc/2VM4-5WPP>].

⁷ 22 U.S.C. §§ 6021–91; Antonella Troia, Note, *The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 Violates U.S. Obligations Under NAFTA*, 23 BROOK. J. INT'L L. 603, 603 (1997).

⁸ See Complaint, *supra* note 3, at 6.

⁹ Dylan Jackson, *American and LATAM Airlines Hit with Helms-Burton Lawsuit*, LAW.COM (Sept. 25, 2019, 8:38 AM), <https://www.law.com/dailybusinessreview/2019/09/25/american-and-latam-airlines-hit-with-helms-burton-lawsuit/> [<https://perma.cc/PW9U-86G6>] [hereinafter Jackson, *American and LATAM Airlines*]; Dylan Jackson, *Meliá's Cuban Hotels Hit with Helms-Burton Class Action*, LAW.COM (Sept. 11, 2019, 1:57 PM), <https://www.law.com/dailybusinessreview/2019/09/11/melias-cuban-hotels-hit-with-helms-burton-class-action/> [<https://perma.cc/94GZ-KAHP>].

¹⁰ See 22 U.S.C. § 6085.

¹¹ See Troia, *supra* note 7, at 604.

¹² See *Helms-Burton Title III Comes to Life*, *supra* note 6.

allowing for these lawsuits that name seemingly unexpected and unconnected defendants to proceed in federal court.¹³

Title III aims to deter foreign investment that helps propagate the undemocratic Cuban government.¹⁴ It is also designed to compensate individuals whose property was improperly nationalized by the Cuban government during the Cuban Revolution.¹⁵ International law requires a State¹⁶ actor that nationalizes property owned by a foreign national to compensate that national for their lost property.¹⁷ The Cuban government's nationalization of foreign-owned property violates international law because the Cuban government failed to compensate most, if not all, of the former owners.¹⁸ In contrast, the Cuban government's nationalizations of its own citizens' property—such as the Gonzalez family's property—without providing compensation do not violate international law.¹⁹

Individuals who are trafficking in the nationalized property and are consequently open to liability under Title III do not violate international law when they engage in trafficking behavior. Thus, Title III enables plaintiffs to file frivolous lawsuits against any defendant that is remotely profiting from or is connected to a commercial venture involving property they or their family owned nearly sixty years ago.²⁰ Many scholars have therefore argued that the justification for Title III is not grounded in sound legal doctrine or policy.²¹

Title III of the Helms-Burton Act compromises the separation of powers articulated by the U.S. Constitution, violates international and domestic standards of legislative

¹³ Jennifer Hansler, *First US Lawsuits Filed Over Use of 'Confiscated' Cuban Property*, CNN (May 3, 2019, 3:44 PM), <https://www.cnn.com/2019/05/02/politics/helms-burton-lawsuits/index.html> [<https://perma.cc/E8FQ-QB26>].

¹⁴ See 22 U.S.C. §§ 6081(6)–(7), (11).

¹⁵ See 22 U.S.C. §§ 6081(2)–(3).

¹⁶ The term “State,” as used throughout this discussion, connotes nations, as in Nation-States or Sovereign States. A Sovereign State is defined as “[a] political community whose members are bound together by the tie of common subjection to some central authority, whose commands those members must obey.” *Sovereign States*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁷ Jeannette M.E. Tramhel, *Helms Burton Invites a Closer Look at Counter-Measures*, 30 GEO. WASH. J. INT'L L. & ECON. 317, 340 (1996–1997).

¹⁸ See *id.*

¹⁹ See *id.* at 341. The nationalization of its citizens' property does not violate international law because international law generally does not inquire into the acts of a sovereign state when those actions are contained within the state. *Id.*

²⁰ See 22 U.S.C. § 6081.

²¹ See, e.g., Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 425, 433–34 (1996); Tramhel, *supra* note 17, at 341–42; David O. Irving, Note, *¿Viva Helms-Burton?: An Alternative to Continued U.S. Sanctions of Cuba and Threats to Third-Party Nationals*, 19 CONN. J. INT'L L. 631, 633–34 (2004). But see Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 437 (1996) (“[T]itle III does no injustice to the ‘traffickers.’”).

extraterritoriality, and will violate the due process rights of defendants in these suits.²² It is ineffective in achieving the U.S. policy objectives of returning democracy to Cuba through a general embargo and compensating Americans who lost property to the Cuban government's nationalizations.²³ While federal courts should find Title III unconstitutional or at least construe the statute narrowly to reduce the potential for frivolous lawsuits, the most effective means for settling these outstanding property claims is to negotiate with the Cuban government in an arbitral tribunal modeled after the Iran-U.S. Claims Tribunal (Iran Claims Tribunal).²⁴

Part I of this note will give a brief history of Cuban-American relations and will provide an in-depth examination of the mechanisms of Title III. Part II will examine the policy concerns with Title III which render it ineffective in deterring foreign investment into Cuba and compensating American property owners for their losses stemming from Cuban nationalization of their property. Part III discusses the constitutionality of Title III, and ultimately concludes that it is unconstitutional because it violates both the due process clause of the Constitution and the doctrine of separation of powers. Part IV will consider the international response to Title III, focusing on the response from international legal institutions such as the European Union (EU) and the United Nations (UN), and the various "claw-back" laws that nations with important ties to both the Cuban and American economies have enacted in response. Part V will propose a variety of approaches courts may take to avoid enforcement of Title III, and posits that the most effective manner in which to recompense American property owners is for Cuba and the United States to set up a claims tribunal modelled off of the Iran Claims Tribunal.

²² Helen Kim, *The Errand Boy's Revenge: Helms-Burton and the Supreme Court's Response to Congress's Abrogation of the Act of State Doctrine*, 48 EMORY L.J. 305, 307-08 (1999). The concept of extraterritoriality prohibits nations from legislating within the territories of different states, with some exceptions. Luisette Gierbolini, Comment, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 301-02 (1997).

²³ 22 U.S.C. § 6081.

²⁴ See, e.g., Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J., 165-68 (2007) ("[In 1980, after extended negotiations aimed at ensuring the return of the Americans held hostage in the American Embassy in Tehran and the discharge of frozen Iranian assets in the U.S.] [i]t was agreed that all claims by Americans against Iran, by the Iranian government against the United States, and by the two governments against each other would be submitted to a Tribunal to be established in The Hague.").

I. THE MECHANISMS OF TITLE III AND ITS HISTORICAL UNDERPINNINGS

By creating a private cause of action for plaintiffs to sue individuals that economically benefit from their former property, Title III seeks redress for property taken from American citizens by the Cuban government during the Cuban Revolution.²⁵ Motivated by a tense geopolitical framework, Title III's mechanisms are aimed at addressing the complex legal issue of foreign national property rights in countries that do not share the same concepts or legal definitions of property.²⁶ Ultimately, Title III adds fuel to the Cuban-American property dispute by sweeping additional foreign political actors into this controversy through its private cause of action, the purpose of which is to deter foreign actors from investing in Cuba.²⁷ These investors are regulated by States that permit and derive economic benefits from private investment into Cuba.²⁸ Thus, these States suffer harm when Title III deters their investors from engaging in lawful foreign economic activity,²⁹ further igniting an international controversy that is unlikely to lead to the resolution of legitimate violations of international law stemming from Cuba's nationalizations of American property.

During the Cuban Revolution, the Cuban government undertook sweeping property reforms to bring about a "fundamental change in 'the ownership of [Cuban] land.'"³⁰ The postrevolutionary Cuban government passed land reform statutes in which significant swaths of property owned by foreigners and Cubans alike were nationalized, without providing a means for owners to seek compensation from the

²⁵ *Id.*

²⁶ See Thomas Bauer et al., *Cuba's Legal Composite: A Blend of the Familiar and the Foreign*, 69 BENCH & B. MINN. 24, 28 (2012) (describing the Cuban property regime as implemented by the postrevolutionary Cuban Constitution); Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 227–33 (1995).

²⁷ See 22 U.S.C. § 6081; see also Lowenfeld, *supra* note 21, at 426 ("[T]he principal purpose of the Helms-Burton Act is . . . to deter nationals of third countries from doing business with and investing in Cuba.").

²⁸ See *Cuba Attracts \$1.7 Billion in Foreign Investment Despite U.S. Sanctions*, REUTERS (Nov. 6, 2019, 7:45 PM), <https://www.reuters.com/article/us-cuba-economy/cuba-attracts-1-7-billion-in-foreign-investment-despite-u-s-sanctions-idUSKBN1XH02L> [<https://perma.cc/H4DV-Z5W9>] (remarking that Cuba continues to generate significant levels of foreign investment in spite of stricter American trade sanctions owing to its favorable foreign investment law).

²⁹ See Jorge F. Pérez-López & Matias F. Travieso-Diaz, *The Helms-Burton Law and Its Antidotes: A Classic Standoff?*, 7 SW. J.L. & TRADE AMERICAS 95, 107–10 (2000).

³⁰ Joyce Rodriguez, *Resolving Legal Claims Between the United States and Cuba: Applying International Law Where Diplomacy Alone Falls Short*, 14 S.C. J. INT'L L. & BUS., 143, 161 (2018) (quoting Michael W. Gordon, *THE CUBAN NATIONALIZATION* 75 (1976)).

Cuban government. These reforms had a severe and negative impact on American corporations that owned real property on the island and intangible assets located in Cuba.³¹ At the time, American commercial investment on the island totaled nearly \$1 billion, and Americans owned approximately 40% of Cuba's sugar plantations.³² Unsurprisingly, the nationalizations resulted in a massive outcry from American corporate entities concerned about their investment interests, which compelled the U.S. government to action.³³ In 1962, President Kennedy instituted the Cuban embargo partially in response to this outcry.³⁴ The Act codified into law and further strengthened the executive orders that initially instituted the Cuban embargo.³⁵

According to legislative findings, Title III responds to the Cuban-American property dispute by deterring foreign investment in these properties until Cuba provides compensation to the American former owners,³⁶ thereby allegedly protecting the property interests of U.S. nationals whose property has been nationalized by the Cuban government. Overall, the Act also aims to return the Cuban people to "freedom and prosperity" and to strengthen international sanctions against Cuba.³⁷ After receiving notice from the President that an adequate transition government is in place in Cuba,³⁸ Congress will determine whether the steps Cuba has taken to compensate U.S. citizens for the nationalized property are satisfactory, which is a precondition to lifting the embargo.³⁹ Adequate compensation for nationalized property would fulfill Title III's goal of protecting the property interests of

³¹ Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 109 (2000).

³² Wendy Dickieson, Comment, *Artistic Absolution: Can Cuba and the United States Cooperate in Restituting Castro's Looted Art Collection?*, 40 U. PA. J. INT'L L. 509, 513 (2019).

³³ See PATRICK J. HANEY & WALT VANDERBUSH, *THE CUBAN EMBARGO: THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY* 15 (2005); LARS SCHOULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION* 93–100, 138–39, 200–02 (2009) (describing the various reforms Castro planned, the private sector lobbying efforts that advocated for the Eisenhower Administration to take action against the reforms, and the budding political campaign of John F. Kennedy to adopt a hard-line stance on Cuban expropriations).

³⁴ See SCHOULTZ, *supra* note 33, at 200.

³⁵ See Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L.J. 293, 320 (2017) (describing the Cuban Embargo which terminated all trade and most diplomatic relationships between Cuba and the United States); *see also* 22 U.S.C. §§ 6033, 6040.

³⁶ 22 U.S.C. §§ 6067, 6081.

³⁷ 22 U.S.C. § 6022.

³⁸ See Lowenfeld, *supra* note 21, at 422 ("Section 204 authorizes the President to take steps to suspend the embargo, but only upon submitting a determination to Congress that a transition government, i.e., a government without Fidel Castro or his brother, is in power in Cuba.").

³⁹ 22 U.S.C. §§ 6065(b), 6067(d).

U.S. nationals in Cuba, thereby nullifying the justifications for Title III and, in turn, those that support the embargo.⁴⁰

The introduction to Title III condemns the Castro government's nationalizations of American property because its actions "undermine[d] the comity of nations," and it urges the Cuban government to recognize the property rights of nationals of other countries.⁴¹ Title III, however, moves beyond the traditional bounds of an embargo or economic sanction and brings the Act into the sphere of impermissible extraterritorial legislation.⁴² It does so by discouraging foreign investment in Cuba, although that foreign investment may be perfectly legal according to the foreign nation's commercial and regulatory laws.⁴³

The legislative history and purposes of Title III inform how the private cause of action functions. Title III creates a private right of action for a U.S. national to sue any "person" that is knowingly "traffic[king]" in U.S. nationalized property for either: (i) the value of the claimant's certified Foreign Claims Settlement Commission (FCSC) claim; (ii) the value of the claim as determined by a special master, or; (iii) the fair market value of the property.⁴⁴ The Act defines a "person" as any person or entity, including state entities.⁴⁵ If a plaintiff provides proper notice to a potential defendant that they are trafficking in confiscated American property and that person does not cease all trafficking activity, the plaintiff may collect treble damages,⁴⁶ or a statutory enhancement of a damages award.⁴⁷ Title III thus allows plaintiffs to recover from the defendant three times the amount of the actual damages they suffer.⁴⁸

The FCSC is an independent, quasi-judicial body housed under the Department of Justice.⁴⁹ Prior to the passage of the Act, many U.S. citizens filed claims with the FCSC for the value of their

⁴⁰ See 22 U.S.C. § 6022.

⁴¹ 22 U.S.C. §§ 6081(1)–(4).

⁴² See Gierbolini, *supra* note 22, at 320.

⁴³ *Title III Lawsuits for Cuba Expropriations Could Impact 21 Countries and 6 U.S. States*, U.S.–CUBA TRADE AND ECON. COUNCIL, INC. (Feb. 18, 2019), <https://www.cubatra.de.org/blog/2019/2/18/title-iii-lawsuits-for-cuba-expropriations-could-impact-20-countries-and-6-us-states> [<https://perma.cc/QW7Q-2T5W>].

⁴⁴ 22 U.S.C. § 6082(a)(1).

⁴⁵ 22 U.S.C. § 6023(11).

⁴⁶ 22 U.S.C. § 6082 (a)(3).

⁴⁷ STEPHEN MICHAEL SHEPPARD, *THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, TREBLE DAMAGES (DOUBLE DAMAGES OR DOUBLE OR MULTIPLE DAMAGES OR TREBLES)* (2012), LexisNexis.

⁴⁸ See 22 U.S.C. § 6082(a)(3).

⁴⁹ *About the Commission*, U.S. DEPT. OF JUST., <https://www.justice.gov/fcsc/about-commission> [<https://perma.cc/6TP7-6QDF>].

nationalized Cuban property.⁵⁰ Despite attempts to negotiate, the State Department failed to reach a settlement of these claims with the Cuban government.⁵¹ Thus, regardless of the existence of a potentially well-conceived system for adjudicating these claims through negotiations with the Cuban government, Title III instead imposes liability for the nationalized property for the amounts determined by the FCSC on actors who were not involved in the original property violations by allowing plaintiffs to sue these actors for the value of these claims.

Title III defines a “trafficker” as someone who

knowingly and intentionally (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) *engages in a commercial activity using or otherwise benefiting from confiscated property*, or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.⁵²

Notably, this definition of trafficking omits uses of property that are incidental to and necessary for lawful travel to Cuba.⁵³ This broad definition of trafficking essentially circumscribes all means of profiting from a nationalized property because it encompasses any kind of commercial activity connected to a nationalized property, no matter how remotely connected that activity or the trafficker is to the property.⁵⁴ In contrast, the Fifth Amendment due process clause of the U.S. Constitution prohibits courts from adjudicating disputes, such as Title III property disputes, when they bear an insufficient connection to the United States.⁵⁵

⁵⁰ Matias F. Travieso-Diaz, *Alternative Remedies in a Negotiated Settlement of the U.S. Nationals' Expropriation Claims Against Cuba*, 17 U. PA. J. INT'L L. 659, 662 (1996).

⁵¹ See Nick Miroff, *In Major Breakthrough, Cuba and U.S. Discuss \$1.9 Billion In Property Claims*, WASH. POST (Dec. 8, 2015), https://www.washingtonpost.com/world/the_american_in_major_breakthrough_cuba_and_us_discuss_19_billion_in_property_claims/2015/12/08/9bc2ced0-9d23-11e5-9ad2-568d814bbf3b_story.html [https://perma.cc/3T6T-FYXZ].

⁵² 22 U.S.C. §§ 6023(13)(A)(i–iii) (emphasis added).

⁵³ 22 U.S.C. § 6023(13)(B)(iii). An example of travel that is incident and necessary to lawful travel to Cuba includes travel for family visits, educational trips, professional research or meetings, humanitarian support for the Cuban people, journalistic research and the “transmission of information.” Press Release, The White House Office of the Press Sec’y, FACT SHEET: Charting a New Course on Cuba (Dec. 17, 2014).

⁵⁴ Thomas J. Timmins et al., *Cuba Update: Helms Burton Title III Activated*, MONDAQ (May 27, 2019), <https://www.mondaq.com/International-Law/808600/Cuba-Update-Helms-Burton-Title-III-Activated> [https://perma.cc/ZGH2-8RXT].

⁵⁵ See U.S. CONST. amend. V; *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113–15 (1987).

II. THE POLICY CONCERNS SURROUNDING TITLE III LITIGATION

Due to the institutionalized settlement mechanism of the FCSC Cuba Claims system, experts predicted an onslaught of litigation after the Trump administration's announcement, especially since Title III, in its broad definition of trafficking, permits suits based on almost any type of commercial activity.⁵⁶ Nevertheless, this onslaught has not yet occurred because Title III is cost prohibitive and underinclusive of claims and potential claimants.⁵⁷ If Title III does not generate a critical mass of litigation, it will not serve its dual goals of deterring foreign investment in Cuba and achieving a resolution for Americans whose property was nationalized without compensation by Cuba.

A. *Title III's Cost Prohibitive Nature Undermines Its Purposes*

One theory for the leisurely start to Title III litigation is that the costs and complexities outweigh the potential payout to claimants.⁵⁸ If plaintiffs do not see a path to recovery on their claims, Title III will not carry out its purposes—namely, to compensate and deter. Title III suits are nearly guaranteed to be expensive litigation, as there is a \$6,548 special filing fee, as opposed to the general \$400 filing fee for litigation in federal courts.⁵⁹

The most likely Title III plaintiffs are domestic corporations.⁶⁰ Fifty of the largest certified claims are held by U.S. corporations and account for nearly \$1.5 billion of the total value of the FCSC claims.⁶¹ U.S. corporations were subject to the most sweeping revolutionary-era property confiscations because they owned significant portions of Cuban land.⁶² Yet many corporations

⁵⁶ John B. Bellinger, III et al., *Calm Before the Storm? What We Can Learn from the Slow Start to the Helms-Burton Cases*, ARNOLD & PORTER (July 17, 2019), <https://www.arnoldporter.com/en/perspectives/publications/2019/07/what-we-can-learn-from-helms-burton-cases> [https://perma.cc/39EK-22VV].

⁵⁷ See *infra* Sections II.A–B.

⁵⁸ See Bellinger, III et al., *supra* note 56.

⁵⁹ *District Court Miscellaneous Fee Schedule*, U.S. CTS., <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule> [https://perma.cc/8DE2-FZYZ]; UNITED STATES DIST. COURT W. DIST. WASH., A PRO SE GUIDE TO FILING YOUR LAWSUIT IN FEDERAL COURT 9 (2015). Title III provides no explanation for the increased filing fee, which is set by the Judicial Conference of the United States. 22 U.S.C. § 6082(i).

⁶⁰ See Bellinger, III et al., *supra* note 56.

⁶¹ RICHARD E. FEINBERG, BROOKINGS INST., RECONCILING U.S. PROPERTY CLAIMS IN CUBA: TRANSFORMING TRAUMA INTO OPPORTUNITY 19 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/Reconciling-US-Property-Claims-in-Cuba-Feinberg.pdf> [https://perma.cc/2UFE-9R3X].

⁶² See Bellinger, III et al., *supra* note 56.

with certified claims are reluctant to sue alleged traffickers for fear of discouraging and isolating their prospective or ongoing business partners.⁶³ Corporations are also fearful of sabotaging their efforts to secure Cuban business licenses or harming other Cuban investments by making use of Title III's cause of action and incurring the wrath of the Cuban government.⁶⁴

For example, ExxonMobil, one of the first corporate plaintiffs exercising its right to sue under Title III, filed its lawsuit against only Cuban oil entities.⁶⁵ It is likely that these Cuban oil companies have foreign contacts that would, in turn, sweep further alleged traffickers into ExxonMobil's complaint under the broad definition of trafficking.⁶⁶ However, ExxonMobil chose not to name other defendants.⁶⁷ While it is possible that ExxonMobil may be awaiting further discovery before naming other defendants, sophisticated counsel employed by ExxonMobil is likely to have knowledge of the Cuban entities' main corporate partners and to name them as defendants in the event that the Cuban corporations are judgement proof. It is more likely that ExxonMobil is making the conscious decision not to alienate other foreign corporate defendants. Thus, the most probable corporate plaintiffs are unwilling to sue foreign defendants via Title III, which contravenes Title III's agenda of discouraging foreign investment in Cuba in order to chokehold the island's economy and force its return to democracy, just as the theory behind the Act postulates will naturally occur in the face of economic devastation.⁶⁸

Additionally, Title III excludes those who possess a certified claim assigned to them by value, which further limits the efficacy of Title III since corporate interests and claims frequently change

⁶³ See Dylan Jackson, *Where Are All the Helms-Burton Lawsuits?*, LAW.COM (June 7, 2019, 3:13 PM), <https://www.law.com/dailybusinessreview/2019/06/07/where-are-all-the-helms-burton-lawsuits/> [<https://perma.cc/HKL6-L426>].

⁶⁴ Peter Fox, *Will Putting Title III of Helms-Burton into Effect Open the Litigation Floodgates?*, COLUM. L. SCH. BLUE SKY BLOG (May 14, 2019), <http://clsbluesky.law.columbia.edu/2019/05/14/will-putting-title-iii-of-helms-burton-into-effect-open-the-litigation-floodgates/> [<https://perma.cc/3GX4-K9DA>].

⁶⁵ Complaint at 1, *Exxon Mobil Corp. v. Corporación Cimex S.A.*, No. 19-cv-1277 (D. D.C. May 2, 2019) [hereinafter *Exxon Mobil Complaint*]; Mike LaSusa, *Exxon Sues Cuban Cos. Over \$71.6M In Seized Assets*, LAW 360 (May 2, 2019, 7:09 PM), <https://www.law360.com/articles/1155780/exxon-sues-cuban-cos-over-71-6m-in-seized-assets> [<https://perma.cc/SB5Z-PUVD>].

⁶⁶ See Ernesto Hernandez Catá, *Cuba's Petroleum Trade Statistics and the Impact of Cutbacks in Venezuelan Oil*, ASS'N FOR STUDY CUBAN ECON. (Mar. 15, 2019), <https://www.ascecuba.org/cubas-petroleum-trade-statistics-impact-cutbacks-venezuelan-oil/> [<https://perma.cc/3KV9-77A8>].

⁶⁷ See *Exxon Mobil Complaint*, *supra* note 65.

⁶⁸ See 22 U.S.C. § 6081(6); Fox, *supra* note 64.

hands.⁶⁹ An assignment by value occurs when an assignor transfers a right to which they are entitled to an assignee by contract.⁷⁰ For example, the largest certified claim was filed by the Cuban Electric Company, but is now held by Office Depot. However, these high-value corporate claims are the ones that would have the strongest deterrent influence since the more numerous smaller-value claims are excluded from Title III.⁷¹ Thus, due to its costly nature and the fact that the entities who can sue foreign defendants are wary of doing so, Title III may prove to be largely ineffective in creating a democratic Cuba by way of deterring the foreign investment that promotes the communist regime.⁷²

B. Title III Intentionally and Procedurally Excludes Many Plaintiffs with Property Claims Against the Cuban Government

The Act purports to protect American property interests abroad through Title III, yet its limits on who can sue contradicts this stated purpose, rendering it an “irrational[],” impermissible, and extraterritorial exercise of power.⁷³ Title III imposes a statutory amount in controversy of over \$50,000, exclusive of interest, costs, attorney’s fees, and the punitive treble damages.⁷⁴ This amount may be calculated as either the damages amount as certified by the FCSC, the fair market value of the property, or the amount of the claim as designated by a court-appointed special master.⁷⁵ However, 79% of the FCSC claims are for less than \$10,000.⁷⁶ This clearly indicates that many of the claims may

⁶⁹ 22 U.S.C. § 6082(4)(C); *see also* Chaim J. Fortang & Thomas Moers Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1, 2–3 (1990) (for the proposition that corporate interests and claims often shift ownership).

⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 317 (AM. LAW INST. 1981).

⁷¹ *See* FEINBERG, *supra* note 61, at 18, 20 (tracing the Office Depot corporate claim and noting the exclusion of smaller-value claims from Title III litigation).

⁷² *See* 22 U.S.C. § 6081.

⁷³ 22 U.S.C. § 6022(6); *see* Gierbolini, *supra* note 22, at 289, 301.

⁷⁴ 22 U.S.C. § 6082(b). In order for a federal court to hear a particular case or controversy, the plaintiff must claim damages that meet a certain numerical threshold as determined by federal statute. *See* 28 U.S.C. § 1332. Normally, the amount in controversy is \$75,000 and applies only in suits where the parties are from different states, yet Helms-Burton Title III requires the plaintiff to allege damages of \$50,000 no matter if the defendant is from the same state. *See* 28 U.S.C. § 1332; 22 U.S.C. § 6082(b).

⁷⁵ 22 U.S.C. §§ 6082(a)(1)(A), 6083(a)(2). “[F]air market value” is the greater of the fair market value of the property at the time of confiscation plus interest, or the current fair market value of the property. 22 U.S.C. § 6082(a)(1)(A)(i)(III).

⁷⁶ PATRICK J. BORCHERS ET AL., CREIGHTON UNIV. SCH. OF LAW & DEPT OF POLITICAL SCI., REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 115 (2007) [hereinafter THE REPORT]; FOREIGN CLAIMS SETTLEMENT COMM’N OF THE U.S., SECTION II COMPLETION OF THE CUBAN CLAIMS PROGRAM UNDER TITLE V OF THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949 69, 413 (1979) <https://www.justice.gov/sites/default/files/fcsc/docs/final-report-cuba-1972.pdf> [https://perma.

not reach the statutory amount in controversy, which prohibits these individuals from taking advantage of Title III's cause of action. The claims that do meet the statutory amount in controversy may only just clear it, meaning that the damages that these plaintiffs can receive may not be worth the significant burden and costs of litigation.⁷⁷ Thus, Title III's statutory requirement of \$50,000 in controversy, along with other required fees, prevent a significant portion of those with nationalized property claims from suing under Title III, thereby compromising the statute's goals of deterrence and compensation. Only the small number of claimants with high-value claims will be able to take advantage of the private cause of action.

Title III also excludes residential property from its definition of property unless it is a claim for residential property that has been certified by the FCSC or it is property that is "occupied by an official of the Cuban Government or the ruling political party in Cuba."⁷⁸ However, of the smaller-value certified claims that do not meet the statutory amount in controversy, 92.8% of the claims are individual claims for expropriated property.⁷⁹ Since a considerable majority of the FCSC certified claims are less than \$10,000, individuals likely filed more frequently for less valuable residential and intangible property such as securities, rather than for valuable commercial property.⁸⁰ Consequently, it is clear that Title III's exclusion of residential property claims prevents many potential plaintiffs from suing under Title III, and that it largely fails to protect the property interests of American nationals.

By barring claims for residential property that have not been certified by the FCSC, Title III excludes an important demographic from pursuing traffickers: ex-Cuban refugees who lost their homes and later became naturalized American citizens.⁸¹ One of the FCSC program prerequisites is the requirement of "continuous ownership" of a claim.⁸² "Continuous ownership" requires successive ownership of a confiscated

cc/5DCP-FR86] [hereinafter FCSC PROGRAM]; *see also supra* notes 50–51 and accompanying text (discussing the FCSC claims system).

⁷⁷ *See* Bellinger, III et al., *supra* note 56; *see also* THE REPORT, *supra* note 76, at 112 (showing the average number and amounts of FCSC claims).

⁷⁸ 22 U.S.C. § 6023(12).

⁷⁹ *See* THE REPORT, *supra* note 76, at 127; *see also* FCSC PROGRAM, *supra* note 76, at 412 (providing a helpful chart that breaks down the number of claims by value between individuals and corporations).

⁸⁰ *See* THE REPORT, *supra* note 76, at 121–28; FEINBERG, *supra* note 61.

⁸¹ *See* 22 U.S.C. § 6023(12).

⁸² *See* FEINBERG, *supra* note 61 ("To be eligible for compensation under FCSC rules, a firm must be under continuous ownership by U.S. nationals (the 'continuous nationality principle' of public international law)."); *see also* FCSC PROGRAM, *supra* note 76, at 72.

property claim by a U.S. national from the time the property was confiscated until the time the claim was filed.⁸³ Admittedly, many of the refugees' property was nationalized after it was deemed "abandoned" by the Cuban government, which would disqualify the former owner from collecting compensation.⁸⁴

Nevertheless, one legal scholar posits that these "abandoned property" confiscations still qualify as takings, as the law was "inconsistent with the constitutional norms in place at the time of the takings and therefore invalid."⁸⁵ This is because the properties were not taken for a legitimate public purpose pursuant to the then-governing Cuban Constitution, and because the theories of socialism espoused by the Cuban Revolution only gave the government limited power to nationalize property of personal consumption, such as residences.⁸⁶ As a result, nationalized Cuban refugees, who are allegedly permitted to recover under Title III, are in reality excluded from Title III's statutory right of action based on the property right that was taken from them by the Cuban government.⁸⁷ Title III's limitations on the types of plaintiffs that can sue in turn weaken the Act and render it ineffective.

For these reasons, Title III will not meaningfully end foreign investment into Cuba. It imposes strict limitations on the types of claims and claimants that may utilize the private cause of action to recover damages, which serves to undermine the stated purposes of the Act: to bring democracy to the island through a general economic embargo and to protect American property interests.⁸⁸

III. THE CONSTITUTIONAL ISSUES RAISED BY TITLE III

In many circumstances, courts should not enforce Title III of the Act because it will violate the due process rights of defendants.⁸⁹ The due process clause mandates courts to assess

⁸³ See FEINBERG, *supra* note 61.

⁸⁴ See Travieso-Diaz, *supra* note 26, at 235.

⁸⁵ *Id.* at 235, 239–40.

⁸⁶ *Id.* at 240.

⁸⁷ See 22 U.S.C. §§ 6023(15), 6082. Note that this argument depends on the validity of including Cuban nationals as claimants because international law does not prohibit a nation from expropriating the property of its own citizens. See Gierbolini, *supra* note 22, at 311.

⁸⁸ 22 U.S.C. § 6081(6).

⁸⁹ This argument depends on the applicability of the jurisdictional analysis that the Supreme Court has developed with respect to the Fifth Amendment of the Constitution. This is because the Fifth Amendment constrains the powers of the federal government, including Acts of Congress, such as the Helms-Burton Act. While the Supreme Court has not ruled on this, courts and scholars have posited that the same jurisdictional analysis applies to both Amendments. See *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017) (collecting cases); *Republic of Pan. v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942

whether a defendant is subject to the court's jurisdiction, i.e., whether a court may assert its power over the defendant; if not, the court must dismiss the action.⁹⁰ Because Title III defendants and the allegations against them will often have only remote connections to the United States, an exercise of jurisdiction over many Title III defendants will not comport with the demands of the due process clause. Even if a defendant is subject to the jurisdiction of a U.S. court, Title III is unconstitutional because it violates the separation of powers doctrine.⁹¹

A. *Title III Violates the Due Process Rights of Defendants*

As a general matter, Congress is permitted to enact extraterritorial legislation in violation of international legal principles as long as legislators explicitly articulate their intent when doing so.⁹² The Act clearly expresses such an intent, as it abrogates the act of state doctrine, which is a “judge-made rule that prevents [the U.S.] courts from sitting in judgement on official acts of foreign sovereigns.”⁹³ When enacting extraterritorial legislation, Congress must adhere to the same constitutional limitations that it is sworn to uphold when enacting domestic legislation,⁹⁴ yet the legislature violates this principle when it mandates unreasonable assertions of jurisdiction over many foreign Title III defendants by allowing plaintiffs to sue them for conduct that occurs abroad.⁹⁵

While there is no Supreme Court precedent directly on point, past decisions make clear that Title III violates the due process clause of the Fifth Amendment in two respects. First, an assertion of jurisdiction over many Title III defendants will be unreasonable under the due process clause. Second, many Title III defendants will

(11th Cir. 1997); see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992).

⁹⁰ See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945).

⁹¹ See Kim, *supra* note 22, at 307–08.

⁹² Extraterritorial is defined as “[o]ccurring outside a particular state or country; beyond the geographic limits of a particular jurisdiction.” *Extraterritorial*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“[W]e look to see whether ‘language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.’” (alteration in original) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))).

⁹³ Kenneth B. Sills, *Act of State Doctrine*, in 47 TEX. JURISPRUDENCE § 6 (3d ed. 2020), Westlaw; 22 U.S.C. § 6082(6).

⁹⁴ See Brilmayer & Norchi, *supra* note 89, at 1239.

⁹⁵ This due process argument is limited to foreign defendants because a finding that a Title III defendant is a U.S. citizen may allow a federal court to retain general jurisdiction over them, which in turn opens up the defendant to suit in U.S. courts for any conduct. Since many U.S. persons, as defined by the Act, are prohibited from conducting business in Cuba, it is more likely that defendants under Title III will be foreign defendants.

lack sufficient contact with the United States, which is necessary to subject them to the jurisdiction of U.S. courts.⁹⁶

The test for whether it is reasonable for a court to assert its power over a defendant derives from *Asahi Metal Indus. Co. v. Superior Court of Cal.*⁹⁷ and *World-Wide Volkswagen v. Woodson*.⁹⁸ According to this precedent, courts consider four factors to determine whether a plaintiff's Title III lawsuit against a foreign defendant complies with the due process requirements of "fair play and substantial justice."⁹⁹ These are: (1) the burden on the foreign defendant to litigate; (2) the forum state's interest in litigating the dispute; (3) the shared interest of the several states in furthering fundamental social policies; and (4) the plaintiff's interest in obtaining relief.¹⁰⁰ The sufficiency of contacts test mentioned earlier is implicated in the first factor of this analysis.¹⁰¹

In respect to the first factor, the burden on a foreign defendant in Title III litigation is substantial because they are forced to litigate in a U.S. court over activity that occurs in Cuba with little connection to the United States.¹⁰² These defendants may or may not have direct control over the commercial activity involving the property since Title III's definition of trafficking is broad enough to apply to downstream traffickers (i.e., an entity such as Amazon.com whose limited connection with the property

⁹⁶ See *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1243 (9th Cir. 1984) ("It would not comport with fair play and substantial justice to assert jurisdiction over a West German corporation in the distant forum of California on a claim that arises out of activities in Europe, where the corporation had no contact with California other than a developing sales market."); Bret A. Sumner, Comment, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 947–55 (1997) (proposing that it is unreasonable to assert jurisdiction over foreign defendants under Title III and doing so will likely fail the minimum contacts test); Fox, *supra* note 64.

⁹⁷ *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 113–15 (1987).

⁹⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); see also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.").

⁹⁹ *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

¹⁰⁰ *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

¹⁰¹ See Sumner, *supra* note 96, at 947–49 (standing for the proposition that only three reasonableness factors are relevant in a Title III due process analysis and that the reasonableness prong of due process does not weigh in favor of the defendant).

¹⁰² See *Asahi Metal Indus. Co.*, 480 U.S. at 109–14 (failing a finding of minimum contacts with the forum that justifies an exercise of jurisdiction under the due process clause, the burden on the defendant to litigate has significant weight in a reasonableness analysis); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242–43 (9th Cir. 1984) (despite the presence of a large sales and marketing force in the forum state, the lack of a connection between activity in the forum state and the harm suffered abroad is insufficient as a contact for jurisdiction over a foreign defendant to be reasonable).

at issue is marketing charcoal produced from that property).¹⁰³ In *Asahi*, the Supreme Court rejected such an attenuated link between upstream product suppliers and the downstream tortfeasor.¹⁰⁴ The Court held that a Taiwanese manufacturer of tire valves could not be liable for a defect in those valves that caused an injury in California.¹⁰⁵ The Court reasoned that the manufacturer did not purposefully target California to sell its product, and there was no “substantial connection” between the forum state and defendant’s conduct.¹⁰⁶ A substantial connection, the Supreme Court held, consists of sufficient contacts with the forum that demonstrate the defendant’s intention to “purposefully avail[] itself” of the forum’s laws.¹⁰⁷ The Court also stressed that, under the circumstances, the burden placed on the defendant to travel to a foreign state and defend itself in a foreign judicial system was unreasonable and violated the due process clause.¹⁰⁸

Similarly, a foreign defendant akin to Amazon.com, whose trafficking activity consists of marketing or a similar activity, does not have a substantial connection to the United States, the proverbial forum state, because their commercial activity is not purposefully directed at the former property owners.¹⁰⁹ Consequently, in accordance with the due process clause, they cannot be subjected to the jurisdiction of U.S. courts. Title III plaintiffs will argue that the connection to the United States is the existence of their nationalized property claim in the United States.¹¹⁰ This argument fails, because although the defendant’s commercial trafficking activity does involve the use of former American-owned property, that activity is not the cause of their nationalized property claims and is not purposefully directed or related in any meaningful way towards those claims.¹¹¹ In other words, there is no substantial connection between the plaintiff’s claim and the defendant’s activities.

¹⁰³ See Sumner, *supra* note 96, at 947, 952–53 (“A defendant that does not have any contact with the United States cannot be sued under Title III for merely being involved in, or tangentially related to, transactions in Cuba that are related to trafficking of expropriated American property because contacts with former American property in another country cannot be construed as voluntary contacts with the United States.”); see also Complaint, *supra* note 3, at 4–6.

¹⁰⁴ See *Asahi Metal Indus. Co.*, 480 U.S. at 111–14.

¹⁰⁵ *Id.* at 106–07, 114.

¹⁰⁶ *Id.* at 112 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

¹⁰⁷ *Id.* at 108–09 (citing *Burger King Corp.*, 471 U.S. at 475).

¹⁰⁸ *Id.* at 113–14.

¹⁰⁹ See Complaint, *supra* note 3, at 6.

¹¹⁰ See Sumner, *supra* note 96, at 949.

¹¹¹ See *Asahi Metal Indus. Co.*, 480 U.S. at 112–13; *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017) (for the proposition that when there is no affiliation or occurrence that takes place between the forum state and the underlying controversy, jurisdiction is lacking).

Plaintiffs will also posit that their interest and the American interest in obtaining relief for these claims, the respective fourth and second factors of the due process reasonableness test, outweighs the burden on foreign defendants.¹¹² It is important to remember, though, that the plaintiffs' harm arose from actions taken by Cuba when it nationalized their property without compensation. It is the State of Cuba that is likely profiting from this nationalization since most land in Cuba is state-owned.¹¹³ Thus, the foreign Title III defendants are comparable to the attenuated upstream and downstream suppliers in *Asahi*, and they should raise this argument against jurisdiction at the outset of Title III litigation against them.¹¹⁴

Not only did the *Asahi* Court find the burdens to the litigant to weigh heavily against an exercise of jurisdiction, but the Court cautioned that a jurisdictional analysis involving a foreign defendant must take into account the interests of the international community and their judicial systems.¹¹⁵ The various countermeasures enacted by States in order to prevent the application of Title III to their nationals, discussed in Part IV, will almost certainly be taken into account as an interest of the international community weighing against the exercise of jurisdiction.¹¹⁶ This is a legislative manifestation of the will of foreign States that demonstrates antagonism towards Title III.

Plaintiffs will likely counter that the United States has a strong interest in protecting its citizens' property rights abroad, and that this outweighs the interests of the international community. However, as noted above, the U.S. interest in the protection of these property rights is against Cuba, which perpetuated the violation of property rights, and not actors such as Amazon.com who were not involved in nationalizing the property and likely had no knowledge that their commercial activity involved a claim to nationalized property when they began marketing charcoal.¹¹⁷ Thus, a jurisdictional exercise of Title III

¹¹² See Sumner, *supra* note 96, at 949.

¹¹³ See Dickieson, *supra* note 32, at 512.

¹¹⁴ See Sumner, *supra* note 96, at 954–55; see also *Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985) (“When a federal district court is sitting in diversity . . . due process requires that the defendant have some ‘contacts, ties or relations’ with the forum state Where a federal statute . . . confers nationwide service of process, ‘the question becomes whether the party has sufficient contacts with the United States’”); *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

¹¹⁵ *Asahi Metal Indus. Co.*, 480 U.S. at 115.

¹¹⁶ See Sumner, *supra* note 96, at 948–49.

¹¹⁷ See Defendant Amazon.com, Inc.'s Motion to Dismiss Plaintiff's Complaint and Memorandum of Law at 10–15, *Gonzalez v. Amazon.com, Inc.*, No. 1:19-cv-23988-RNS (S.D. Fla. Nov. 19, 2019).

will violate “traditional conception[s] of fair play and substantial justice” for many foreign defendants.¹¹⁸

B. Title III Violates Constitutionally Mandated Separation of Powers

When a defendant is headquartered or conducts a significant amount of business in the United States—such as Amazon.com or American Airlines—the jurisdictional arguments discussed above may not be applicable, as the defendant would have a substantial connection to the United States.¹¹⁹ In such a situation, courts should nevertheless find Title III unconstitutional and unenforceable because it impermissibly restrains the judiciary’s role in the federal government as envisioned in Article III of the Constitution, thereby violating the constitutional separation of powers.¹²⁰

Helen Kim argues that Title III’s abrogation of the act of state doctrine restricts the judiciary’s ability to analyze the legal merits of the dispute brought before it, thus violating the constitutional separation of powers.¹²¹ The act of state doctrine is a choice of law doctrine that prevents U.S. courts from inquiring into the validity of a foreign sovereign’s acts when those acts take place entirely within the foreign sovereign’s territory.¹²²

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court invoked and applied the act of state doctrine to situations where a sovereign nationalizes property within its boundaries, even if the nationalization is a violation of international law. In so doing, the Court articulated that the act of state doctrine rests on “constitutional’ underpinnings.”¹²³ Thus, the Supreme Court declined to decide upon the validity of Cuba’s nationalization of property.¹²⁴

¹¹⁸ *Int’l Shoe Co.*, 326 U.S. at 320.

¹¹⁹ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); Complaint, *supra* note 3, at 2–3; Jackson, *supra* note 63. While neither Amazon.com nor American Airlines are being sued in the forum in which they are incorporated, the Southern District of Florida, where both corporations are being sued, may find jurisdiction over the defendants pursuant to statutory authority or through a connection “between the forum and the underlying controversy.” See *Bristol-Meyers Squibb Co. v. Super. Ct. of California*, 137 S. Ct. 1773, 1780 (2017) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); see also *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-Civ-Scola, 2020 WL 2323032, at *1–2 (S.D. Fla. May 11, 2020); Jackson, *American and LATAM Airlines*, *supra* note 9.

¹²⁰ See Christopher M. Pisano, *Unrealized Goals and Unintended Consequences: Why the Helms-Burton and Iran–Libya Sanctions Laws are Counterproductive to the Interests of the United States*, 6 TUL. J. INT’L & COMP. L. 235, 252–55 (1998).

¹²¹ See Kim, *supra* note 22, at 308.

¹²² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415–37 (1964).

¹²³ See, e.g., *Sabbatino*, 376 U.S. at 423–24.

¹²⁴ See *id.* at 400–03, 439.

In response to *Sabbatino*, Congress passed the Second Hickenlooper Amendment (the Amendment), which prohibits U.S. courts from invoking the act of state doctrine when the foreign sovereign's nationalization of property violates international law.¹²⁵ Notably, the Amendment neither overrules the *Sabbatino* court's ruling that the act of state doctrine has a constitutional basis, nor has the Supreme Court passed judgment on its constitutionality.¹²⁶ Since the passing of the Amendment, the Supreme Court has narrowed the application of the act of state doctrine by creating several exceptions to it, seemingly in accordance with Congress' wishes.¹²⁷ None of these exceptions have explicitly detracted from the fundamental notion that the doctrine is based on the constitutional theory of separate but equal branches of government.¹²⁸

In contrast, pursuant to section 6 of Title III, courts are prohibited from invoking the act of state doctrine to these disputes; if courts find Cuba's nationalizations to be valid under the modern iteration of the act of state doctrine, former property owners have no claim to the subject property and the private cause of action fails.¹²⁹ Yet, Title III's complete abrogation of the doctrine renders it unconstitutional because it removes the ability of the judicial branch to evaluate the merits of cases and controversies brought before it, as prescribed by the Constitution. Put differently, because the act of state doctrine is based on the constitutional mandate of the separation of powers, Congress does not have the power to completely dispense with it. Congress may only limit its application.¹³⁰

The act of state doctrine is a result of the Court's self-evaluation of its own foreign policy powers enumerated in Article III of the Constitution. Article III defines the judiciary's role in the federal government and lists the requirements the federal courts must follow when performing their role.¹³¹ By completely

¹²⁵ 22 U.S.C. § 2370(e)(2); *Agudas Chasidei Chabad of U.S. v. Russ. Fed'n*, 528 F.3d 934, 953 (D.C. Cir. 2008).

¹²⁶ 22 U.S.C. § 2370(e)(2); *see Kim, supra* note 22, at 308.

¹²⁷ *See Kim, supra* note 22, at 324–31, 336.

¹²⁸ *See Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375 (2d Cir. 1954) (establishing the Bernstein exception); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 690 (1976) (establishing an exception for when a state acts as a commercial actor); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 619–21 (1983) (establishing an exception for foreign sovereign immunity); *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) (establishing an exception when a foreign sovereign's motivation is not grounded in an official state act).

¹²⁹ *See* 22 U.S.C. § 6082(6).

¹³⁰ *See Kim, supra* note 22, at 332–36.

¹³¹ U.S. CONST. art. III; *see also* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) ("Article III, § 1, serves both to protect the 'role of the independent judiciary within the constitutional scheme of tripartite government,' and to

abrogating the act of state doctrine's applicability to Title III lawsuits, rather than merely limiting its application, Congress impermissibly alters the judiciary's constitutional functions,¹³² and accordingly, Title III violates the separation of powers mandate of the U.S. Constitution.¹³³

IV. INTERNATIONAL RECEPTION AND FOREIGN POLICY RAMIFICATIONS OF TITLE III

Along with Title III's arguable constitutionality and the faulty legislative drafting that renders it unable to achieve its underlying policy goals, the international controversy it provokes further renders it ineffective.¹³⁴ The swift international response to the lifted suspension of Title III includes prominent EU officials who have vowed to challenge Title III and have decried its illegality under international law.¹³⁵ For twenty-eight consecutive years, The UN General Assembly (UNGA) has passed a nearly unanimous resolution calling for an end to the Cuban embargo.¹³⁶ The resolution condemns the Act for not conforming to international law and the prevailing international principles of "non-intervention and non-interference in [the] internal affairs [of

safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" (internal citations omitted).

¹³² See Pisano, *supra* note 120, at 252–55 (noting also that the Act limits the constitutionally-granted foreign policy discretion of the Executive branch).

¹³³ Compare Kim, *supra* note 22, at 307–08 (“[W]hile Congress would be able to limit or modify the non-constitutional, prudential aspects of the doctrine, it would be constitutionally prohibited when that limitation infringed on the Court’s Article III powers.”), with Lowenfeld, *supra* note 21, at 427–28 (“The authors of the Helms-Burton Act . . . provided (in section 302 (a)(6)) that the act of state doctrine shall not be applicable to actions brought under the Act . . . is section 302 (a)(6) constitutional? I think so.”).

¹³⁴ John E. Smith et al., *Back to the Future: Helms-Burton Versus the Blocking Statutes. Who Will Prevail?*, MORRISON FOERSTER, <https://www.mofo.com/resources/insights/190820-helms-burton-blocking-statutes.html> [<https://perma.cc/D2KK-ZHB6>].

¹³⁵ See Joint Statement from Federica Mogherini, High Representative of the Eur. Union for Foreign Affairs and Sec. Policy and Vice President of the Eur. Comm’n. & Cecilia Malmström, Eur. Comm’r. for Trade, On the Decision of the United States to Further Activate Title III of the Helms-Burton (Libertad) Act (Apr. 17, 2019).

¹³⁶ The only two countries apart from the United States that voted against the resolution are Israel—who consistently stands with the United States in opposing or abstaining from the resolution—and, for the first time voting against the resolution, Brazil. Associated Press, *Israel Joins U.S., Brazil as Lone Backers of Cuban Embargo at UN*, TIMES OF ISR. (Nov. 8, 2019, 1:03 AM), <https://www.timesofisrael.com/israel-joins-us-brazil-as-lone-backers-of-cuba-embargo-at-un/#gs.fz670n> [<https://perma.cc/HDC4-CURB>]; see Guest Blogger for Latin America’s Moment, *Brazil’s Vote on Cuban Embargo at the UN: An Unrequited Gamble for U.S. Goodwill?*, COUNCIL ON FOREIGN RELATIONS (May 20, 2019), <https://www.cfr.org/blog/brazils-vote-cuban-embargo-un-unrequited-gamble-us-goodwill> [<https://perma.cc/VS7B-RS6A>]. The two abstainers were Colombia and Ukraine. *Cuba: UN Members Overwhelmingly Support End of U.S. Embargo, as Brazil Backs Washington*, UN NEWS (Nov. 7, 2019), <https://news.un.org/en/story/2019/11/1050891> [<https://perma.cc/GZ24-EBQA>].

States].”¹³⁷ The most pervasive criticism of the Act from the international community is Title III’s extraterritorial nature.¹³⁸ These critiques weaken Title III’s proclaimed goal of promoting democracy by deterring investment in Cuba.

Title III violates international law because it is an extraterritorial piece of legislation.¹³⁹ If a nation does implement extraterritorial legislation, it must be reasonably justified in an effort to regulate conduct that has a substantial, direct effect in the forum nation.¹⁴⁰ By permitting plaintiffs to sue defendants in U.S. domestic courts for conduct that takes place entirely outside of the nation, Title III violates this principle. It also cannot be said that its extraterritorial nature is reasonably justified because the alleged trafficking behavior does not have a substantial effect in the United States and occurred approximately six decades ago.¹⁴¹

In response to what they view as impermissible extraterritoriality, many nations, including important American trade partners such as Canada and countries in the EU, have implemented “claw-back,” or blocking statutes.¹⁴² In effect, these statutes nullify the application of Title III to their respective citizens through various legal mechanisms.¹⁴³ Canada’s claw-back statute, entitled the Canadian Foreign Extraterritorial Measures Act, (FEMA), allows the Canadian Attorney General to order Canadian nationals to ignore lawsuits filed against them pursuant to Title III. The punishment for violating FEMA is severe, giving Canadian nationals a strong incentive to avoid complying and cooperating with attempts to collect on American-rendered Title III judgments in Canada. The Act is also included in the EU Blocking Statute, which compensates individuals for all costs and legal fees related to a Title III lawsuit filed against them.¹⁴⁴ FEMA and the EU Blocking Statute further reduce Title III’s efficacy and thus ensure that it will not achieve its purposes of deterrence and compensation.

As a result of Title III’s extraterritoriality, U.S. federal courts are left with the responsibility of carrying out

¹³⁷ G.A. Res. 74/7, Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba (Nov. 12, 2019).

¹³⁸ See Pérez-López & Travieso-Díaz, *supra* note 29, at 114–27, 142–50.

¹³⁹ Kathleen S. Adams, Casenote & Comment, *Subchapter III of the Helms Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?*, 21 *HAMLIN L. REV.* 147, 159–60 (1997).

¹⁴⁰ *Id.* at 165–66.

¹⁴¹ See Gierbolini, *supra* note 22, at 301–02.

¹⁴² See Pérez-López & Travieso-Díaz, *supra* note 29, at 95–96, 114–27.

¹⁴³ See Muriel van den Berg, Comment, *The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners*, 21 *MD. J. INT’L L. & TRADE* 279, 300–07 (1997).

¹⁴⁴ See Smith et al., *supra* note 134.

controversial foreign policy that violates international law by reason of its extraterritoriality.¹⁴⁵ This undermines the integrity of the federal courts by compelling judges to make decisions regarding foreign policy, for which they are generally ill-equipped.¹⁴⁶ Further, extraterritorial measures such as Title III are ineffective because they are in conflict with the international community's notions of jurisdiction. Nations that perceive Title III as an invasion of their sovereignty will not respect its rule of law and have taken steps to derogate its efficacy.¹⁴⁷ This shifts important foreign policy decisions from the legislative chamber to the judicial chamber, where litigants will encounter judicial reluctance to make foreign policy.¹⁴⁸

V. PROPOSED ALTERNATIVES

In order to truly realize the legitimate purpose of Title III, namely to make reparations to Americans whose property in Cuba was nationalized, the U.S. government must negotiate a settlement of FCSC claims with Cuba in the form of a Claims Tribunal.¹⁴⁹ By allowing plaintiffs to recover punitive damages in the form of treble damages from non-state corporate actors that are unconnected to the initial nationalization by the Cuban government, Title III lawsuits are not actually compensating former American property owners, but rather endowing them with a windfall.¹⁵⁰ Instead, the Cuban government is the deserving defendant that should compensate plaintiffs as a result of its failure to compensate American nationals for the property it took from them.¹⁵¹

While a Claims Tribunal would be the most effective method to compensating American nationals, this does not immediately address the issues faced by defendants subject to Title III lawsuits. In the meantime, courts should eschew enforcement of Title III due to its unconstitutionality. Some courts may be reluctant to do so due to the doctrine of

¹⁴⁵ John Yoo, *Federal Courts As Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 762-63 (1997).

¹⁴⁶ *Id.* at 764-75; *see also* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (stating that the Constitution endows the Executive and Legislative branches the authority to make decisions on foreign policy, and that the judicial branch "has neither the aptitude, facilities nor responsibility" to review those decisions).

¹⁴⁷ *See* William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INT'L & COMP. L. REV. 713, 725-26 (1997); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1316 (1983).

¹⁴⁸ *See* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 321-30 (1994); Yoo, *supra* note 145, at 769.

¹⁴⁹ *See, e.g.*, Rodriguez, *supra* note 30, at 157-58.

¹⁵⁰ *See* 22 U.S.C. § 6082(a)(3) (permitting plaintiff to sue for treble damages).

¹⁵¹ *See* Tramhel, *supra* note 17, at 341-43.

constitutional avoidance, which compels courts to interpret a statute consistently with the Constitution if the statute at issue is “susceptible of more than one construction.”¹⁵² These courts should instead narrowly interpret the definitions of “property” and “claim” in Title III in order to dismiss lawsuits that fail to meet the requirements of Rule 8 of the Federal Rules of Civil Procedure (FRCP).¹⁵³ Rule 8 mandates that a plaintiff’s complaint must show that the plaintiff is legally entitled to relief.¹⁵⁴ In this way, courts may narrow the application of Title III to reasonable cases, such as when a plaintiff shows a corporation actively played a role in Cuba’s nationalization of a foreign-owned property.

A. *A Negotiated Settlement Will Satisfy Former Property Owners for the Loss of Their Property Rights*

As a way for these two nations to resolve this property dispute, which is a precondition for ending the Cuban Embargo, Congress ought to create a system for restitution of American property claims based on existing international instrumentalities.¹⁵⁵ The FCSC claims should be instructive in the amount of restitution Cuba owes to the United States, but should not be strictly adhered to as such a large payment has the potential to ruin Cuba’s underdeveloped economy.¹⁵⁶ Strict adherence to the FCSC claims

¹⁵² *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)).

¹⁵³ *See* FED. R. CIV. P. 8(a); *see also* *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 431 F. Supp. 3d 1375, 1378 (S.D. Fla. 2020) (dismissing a Title III lawsuit for failure to state a claim when the plaintiff’s claim was not a property right within the meaning of Title III). In April, 2020, Judge Beth Bloom of the Southern District of Florida granted the plaintiff’s motion to reconsider after dismissing their complaint. The court reasoned that it incorrectly dismissed the case because the plaintiff, rather than owning an interest in property in Cuba, owns a *claim* to property for which the defendant may be liable, the difference being that an ownership interest in property is unavailable to the plaintiff given that their leasehold expired in 2004 and because Cuba’s nationalizations extinguished such ownership interests. *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 454 F. Supp. 3d 1259, 1272–80 (S.D. Fla. 2020). However, the court’s decision is not supported by the Act, which mandates that damages be determined as the greater of three different calculations, one of which includes the current fair market value of the property. 22 U.S.C. § 6082(a)(1). Moreover, the court in *Gonzalez* took a narrow view of the meaning of “interest in [] property,” indicating that reasonable minds may differ on the proper interpretation of Title III. *See* *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-Civ-Scola, 2020 WL 2323032, at *1–2 (S.D. Fla. May 11, 2020). The court in *Havana Docks* again denied the defendant’s motion to dismiss the plaintiff’s amended complaint on September 1, 2020, for reasons that are not relevant to this argument. *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 19-cv-23591-BLOOM/Louis, 2020 WL 5217218, at *5–9 (S.D. Fla. Sept. 1, 2020).

¹⁵⁴ *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 676–78 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 554–56 (2007).

¹⁵⁵ *See* 22 U.S.C. § 6022; *Rodriguez*, *supra* note 30, at 183–86; THE REPORT, *supra* note 76, at 2.

¹⁵⁶ *See* FEINBERG, *supra* note 61, at 28–29.

would also unfairly preclude claims from formerly Cuban American citizens, who were excluded from filing FCSC claims.¹⁵⁷

This proposed tribunal should be modeled after of the Iran Claims Tribunal.¹⁵⁸ The Iran Claims Tribunal was formed by agreement between Iran and the United States during the Iran Hostage Crisis when the ensuing hostilities between the two nations led to severe economic harm to the private interests of nationals of both countries.¹⁵⁹ It is largely lauded as a successful dispute resolution mechanism.¹⁶⁰ Relations between the United States and Cuba are arguably not as fraught and do not necessitate an immediate agreement such as the Iranian Hostage Crisis required. Nevertheless, a Cuban-U.S. tribunal would serve dual purposes. By negotiating the nature of the tribunal, the two governments would be able to engage in peripheral discussions surrounding the property dispute without having to engage in direct talks on the dispute, which would likely be fruitless due to the deep-seated disagreements between the two countries.¹⁶¹ Second, an independent tribunal will be less influenced by the tense history of Cuban-American relations which will lead to fairer outcomes for both countries.

For example, The Iran Claims Tribunal's method for selecting tribunal members to adjudicate claims will satisfy American and Cuban concerns surrounding the neutrality and capability of the tribunal to fairly adjudicate their dispute.¹⁶² When establishing the Iran Claims Tribunal, each state agreed to choose three arbitrators from their own state to serve on the tribunal, and these members in turn selected three neutral arbitrators from

¹⁵⁷ See 22 U.S.C. § 1621. The "General Provisions" section of the subchapter of the United States Code which creates the FCSC defines "person[s]" and "nationals of the United States" as individuals, among other entities, who are U.S. citizens, meaning only U.S. citizens could have filed under the Cuban Claims Program. *Id.*; see also *Completed Programs—Cuba*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/fcsc/claims-against-cuba> [<https://perma.cc/Z548-82US>].

¹⁵⁸ See THE REPORT, *supra* note 76, at 38–40 (recommending the partial use of a tribunal to adjudicate the Cuban property dispute, but noting that a tribunal modeled after the Iran Claims Tribunal would have shortcomings). The two-track solution proposed by these scholars, however, is too complicated to implement given the current state of diplomatic relations between the United States and Cuba. *But see id.* at 141–260 (describing the various items that the two nations need to negotiate in order for the proposed solution to function properly, while noting that initial negotiations are likely to break down due to a lack of trust between the U.S. and Cuba).

¹⁵⁹ See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 33–34 (2005).

¹⁶⁰ *Id.*

¹⁶¹ See William M. Leogrande, Opinion, *What Trump Misses About Cuba*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/opinion/what-trump-misses-about-cuba.html?searchResultPosition=3> [<https://perma.cc/6VNB-3VWD>].

¹⁶² David D. Caron, *The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 129 (1990).

other states. By selecting members of the arbitral tribunal in this way, both Cuba and the United States can ensure that their interests will be represented and that the neutral arbitrators will serve as tiebreakers in the event of an impasse.¹⁶³

The Iran Claims Tribunal's system for satisfying awards also serves as a precedent for the Cuban Tribunal's framework. The United States placed frozen Iranian assets in a secured account in order to ensure the availability of funds to satisfy the Iran Claims Tribunal's awards.¹⁶⁴ The United States can similarly ensure that restitution will be made to its nationals by compelling Cuba to place a specified amount of money in a secure bank account. The value of the money to be placed in the bank account should be ascertained by referring to the FCSC total value of claims. This value can then be adjusted downwards based on Cuban counterclaims against America and Cuba's ability to pay.¹⁶⁵ Cuba can partially raise the money by either instituting a small fee on alleged Title III traffickers for using the disputed property, or on all foreign investors. Doing so will have the effect of deterring foreign investment as Title III seeks to do, yet the incentive for Cuba to impose such a fee is strong since it is connected to their ability to escape from the devastating embargo.¹⁶⁶ And, in order to fund the Tribunal, a small administrative fee may be taken out of each award the Tribunal renders, as the Iran Claims Tribunal did.¹⁶⁷

Using a tribunal to achieve the purposes of Title III is a superior alternative to Title III's private cause of action.¹⁶⁸ First, a tribunal will hold Cuba accountable to American claimants instead of punishing innocent third parties as Title III does.¹⁶⁹ Second, Cuba's imposition of a fee on the commercial activity of alleged Title III traffickers for the purpose of raising money for the tribunal's distribution fund will deter foreign investment as Title III seeks to do.¹⁷⁰ Third, an arbitral tribunal can vindicate American property rights more efficiently and comprehensively than traditional private

¹⁶³ See Posner & Yoo, *supra* note 159, at 34.

¹⁶⁴ See Caron, *supra* note 162.

¹⁶⁵ See FEINBERG, *supra* note 61, at 19; Rodriguez, *supra* note 30, at 196–97.

¹⁶⁶ See 22 U.S.C. § 6067(d) (“It is the sense of the Congress that the satisfactory resolution of property claims by a Cuban Government recognized by the United States remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba.”); see also Reuters Staff, *U.S. Trade Embargo Has Cost Cuba \$130 Billion*, *U.N. Says*, REUTERS (May 8, 2019, 8:10 PM), <https://www.reuters.com/article/us-cuba-economy-un/us-trade-embargo-has-cost-cuba-130-billion-un-says-idUSKBN1IA00T> [<https://perma.cc/84MA-YR83>].

¹⁶⁷ *U.S. v. Sperry Corp.*, 493 U.S. 52, 62–64 (1989).

¹⁶⁸ 22 U.S.C. § 6082.

¹⁶⁹ See Tramhel, *supra* note 17, at 341–43.

¹⁷⁰ 22 U.S.C. § 6081.

litigation can.¹⁷¹ By using pre-existing FCSC claims data as a framework for rendering awards, the tribunal will spend less time calculating damages than a court would.¹⁷² Title III plaintiffs will receive damages in an amount they deserve for the loss of their property rights in Cuba, rather than receiving a windfall through Title III's treble damages allowance. Thus, Title III's objectives will be met by a tribunal in a way that does not violate the Constitution or international law in the way Title III does.¹⁷³

B. Short Term Solutions to Limit the Application of Title III

Although the establishment of a Claims Tribunal is the most effective and fair means of achieving the purposes of Title III, it is necessarily a long-term solution. Cuba and the United States must first work on a detailed agreement to instate a claims tribunal. If past experience is an indicator, this would likely take many months, just as it took America and Iran nearly two years to agree on the Iran Claims Tribunal in the midst of a hostage crisis.¹⁷⁴ The short-term solutions to Title III that U.S. courts should implement include: (1) dismissing lawsuits for failure to comport with the due process requirement of personal jurisdiction; (2) declaring the law unconstitutional; and (3) interpreting Title III's statutory language narrowly in order to avoid the potential for unlimited liability under Title III's private cause of action.¹⁷⁵

As discussed in Section III.A, Title III will violate the due process rights of many defendants.¹⁷⁶ When a defendant is not subject to the jurisdiction of the court they are being sued in, a court must dismiss the action.¹⁷⁷ If a defendant fails to raise this defense, a court cannot dismiss an action for lack of jurisdiction on its own because the defendant impliedly consents to that court's jurisdiction by arguing on the merits of the case.¹⁷⁸ Because this solution is case-specific, it is only effective when

¹⁷¹ See Thomas H. Oehmke, *Arbitrating International Claims—At Home and Abroad*, 81 AM. JURIS. § 10 (2020), Westlaw.

¹⁷² See *Completed Programs—Cuba*, *supra* note 157.

¹⁷³ See *supra* Parts III and IV.

¹⁷⁴ See Oehmke, *supra* note 171, §§ 123–24; see also Ron Soodalter, *444 Days in Hell*, HISTORYNET, <https://www.historynet.com/444-days-hell.htm> [<https://perma.cc/4U75-EXRC>].

¹⁷⁵ *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 431 F. Supp. 3d 1375, 1377 (S.D. Fla. 2020) (*reconsideration granted, order vacated by Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 454 F. Supp. 3d 1259, 1268–80 (S.D. Fla. 2020); see also *supra* Parts II and III (respectively discussing the policy concerns Title III raises and its unconstitutionality).

¹⁷⁶ See *supra* Section III.A.

¹⁷⁷ *Walden v. Fiore*, 571 U.S. 277, 283–85 (2014).

¹⁷⁸ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982).

there are legitimate issues of jurisdiction over the defendant and will not always function to avoid enforcement of Title III's private cause of action. When this solution does apply though, it will almost certainly lead to the non-enforcement of Title III.

A more encompassing approach that courts should take when faced with adjudicating Title III lawsuits is to analyze the constitutionality of the statute itself. Since Title III violates the constitutional separation of powers, courts that are confronted with examining the issue should declare the law unconstitutional and strike it down.¹⁷⁹ This solution is applicable to every Title III lawsuit, as opposed to a limited number as in the jurisdictional solution, because every Act of Congress must comply with the Constitution.¹⁸⁰ Because Title III does not comply with the Constitution, its private cause of action should be struck down.

A court may instead uphold Title III by interpreting it within the bounds of the Constitution, pursuant to the doctrine of constitutional avoidance.¹⁸¹ Since it is the abrogation of the judicially-created act of state doctrine that makes Title III unconstitutional, courts would simply employ the act of state doctrine when adjudicating Title III lawsuits in order to interpret Title III consistently with the Constitution.

This alone does not resolve the fact that Title III is an international legal quagmire.¹⁸² The Second Hickenlooper Amendment abrogates the act of state doctrine when there is a clear violation of international law.¹⁸³ Cuba has violated international law by failing to compensate foreign property owners for the nationalizations of their property.¹⁸⁴ Thus, some courts will undoubtedly conclude that the act of state doctrine is inapplicable to Title III litigation and will continue to hold foreign third parties liable for conduct that does not occur in the United States and is not illegal in their own countries.

Since the constitutional solution is riddled with open-ended possibilities, an effective secondary solution to the application of Title III is for courts to narrowly construe the statutory language, which would in turn limit the opportunity for

¹⁷⁹ See *supra* Section III.B.

¹⁸⁰ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533–38 (2012) (“The Federal Government ‘is acknowledged by all to be one of enumerated powers’ . . . Congress may, for example, ‘coin Money,’ ‘establish Post Offices,’ and ‘raise and support Armies.’ The enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’ The Constitution’s express conferral of some powers makes clear that it does not grant others.” (internal citations omitted)).

¹⁸¹ See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

¹⁸² See *supra* Part IV.

¹⁸³ 22 U.S.C. § 2370(e)(2).

¹⁸⁴ See *Tramhel*, *supra* note 17.

plaintiffs to receive an award of damages from an undeserving defendant. This solution is analogous to a federal judge's reasoning in the recent dismissal of one of the first Title III cases.¹⁸⁵ For example, nowhere in the Act or its legislative history is the term "claim" defined.¹⁸⁶ A court can construe the term narrowly so that it conforms with basic and fundamental concepts of property law, where a property owner is only entitled to damages stemming from nationalizations that equate to the value of their property interest.¹⁸⁷ To illustrate, a court can define claim to mean any claim to property that was not expropriated by the Cuban government pursuant to any postrevolutionary legislation, as detailed in Part I.¹⁸⁸ By doing so, courts can avoid enforcing Title III by dismissing suits for failure to state a claim pursuant to Rule 8 of the FRCP.¹⁸⁹ This will also serve as a prompt to the legislative and executive branches that the judicial branch should not be used to manage disputes involving foreign policy. Thus, by reading Title III narrowly and consistently with preexisting property law, courts can limit the application of Title III and avoid an unreasonable extraterritorial exercise of the law.

CONCLUSION

Title III does not address the injustices that stemmed from Cuba's nationalization of private property and those aggrieved are in need of recourse. Cuba nationalized significantly valuable American assets without providing any semblance of recompense, in violation of international law.¹⁹⁰ A punitive measure such as Title III is not the way to address this international dispute. Title III is unconstitutional, extraterritorial, and has caused international controversy.¹⁹¹ It will not achieve its main purpose of

¹⁸⁵ See *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 431 F. Supp. 3d 1375, 1378–79 (S.D. Fla. 2020). A federal judge recently dismissed a Title III lawsuit filed against Norwegian Cruise Lines based on a narrow reading of Title III's definition of "a claim to property." As noted earlier, this opinion has been vacated by the same district court. See *supra* note 153 and accompanying text. The opinion cited here notes that the plaintiff owns a claim to property through the FCSC, which Title III presumes to be a valid claim to property. Regardless, the opinion reasons, the nature of the plaintiff's property rights to the disputed property expired in 2004. Consequently, although the plaintiff owns a claim to nationalized property that is currently being "trafficked" within the definition of Title III, the plaintiff is precluded from seeking damages for trafficking activity that occurs after their property rights to the nationalized property expired. *Havana Docks Corp.*, 431 F. Supp. 3d at 1378–80.

¹⁸⁶ See 22 U.S.C. § 6023.

¹⁸⁷ See *Havana Docks Corp.*, 431 F. Supp. 3d at 1380.

¹⁸⁸ See *supra* notes 30–32 and accompanying text.

¹⁸⁹ See *Havana Docks Corp.*, 431 F. Supp. 3d at 1381.

¹⁹⁰ See *supra* notes 17–18 and accompanying text.

¹⁹¹ See *supra* Parts III and IV.

recompensating former property owners.¹⁹² An effective solution is for courts to declare the law unconstitutional, but given the nuances of constitutional interpretation, this may not end enforcement of Title III.¹⁹³ It also does not resolve the outstanding issue of compensating former property owners. The same holds true for an approach whereby defendants challenge Title III based on violations of their due process rights.¹⁹⁴ A narrow interpretation of the statute may work to limit the application of Title III, yet it would not resolve the issues Title III raises in the international legal context.¹⁹⁵ The superior, and arguably only, way to end this dispute is to hold Cuba accountable for its actions through an arbitration process. This would have the effect of thawing Cuban-American relations and would lead to a final resolution of this property dispute. Only then will Congress consider lifting the oppressive Cuban Embargo, which has soured Cuban-American relations for the better part of the last century.¹⁹⁶ Perhaps when the embargo is lifted, lawmakers in the proverbial “smoke-filled room” can finally enjoy that room with a Cuban cigar.

Cristina L. Lang[†]

¹⁹² See *supra* Part II.

¹⁹³ See *Jennings v. Rodriguez*, 138 U.S. 830, 842 (2018).

¹⁹⁴ See *supra* Section III.A.

¹⁹⁵ See *supra* Part IV.

¹⁹⁶ 22 U.S.C. § 6065.

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