

**ARTISTIC ABSOLUTION:  
CAN CUBA AND THE UNITED STATES COOPERATE  
IN RESTITUTING CASTRO'S LOOTED ART COLLECTION?**

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ABSTRACT

Following Fidel Castro's rise to power in Cuba in 1959, his socialist government began a program of mass nationalization of the island nation's artistic heritage. The Office for the Recovery of State Assets, together with the National Institute of Agrarian Reform, brought previously private collections of art and patrimony into the state repository, as agents centralized works that had been in the country homes of fleeing families. In the decades since, claims have piled up: nationalized U.S. citizens who had been living in Cuba up to and during the revolution now seek to have their art returned to them. Many of the works have ended up outside of Cuba, raising issues of international law and property rights. But many items are in the Cuban state collections, and the current legal regime in the United States, dominated by the 1964 *Banco Nacional de Cuba v. Sabbatino* decision of the U.S. Supreme Court, does not provide an avenue for return. This article examines the current legal landscape in both Cuba and the U.S. and provides suggestions for how U.S. lawmakers could work out solutions to either compensate or return seized art to rightful owners and their descendants.

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## 1. INTRODUCTION

In 1953, Fidel Castro, a young lawyer from the rural foothills of the *Sierra de Nipe* in Eastern Cuba, led an attack on the Moncada military barracks.<sup>1</sup> Castro and his comrades were rebelling against what they viewed as President Fulgencio Batista's corruption and tyranny. But the Moncada attack ended in a government victory, and Castro was arrested a few days later. While in prison, Castro wrote a speech entitled "History Will Absolve Me," in which he justified his actions and outlined his plans for a renewed, socialist Cuba. After five more years of fighting, Castro emerged victorious, and quickly moved to establish a Marxist-socialist state.

Despite his persistent belief that "history would absolve him," Castro's reign over Cuba never resulted in the Communist utopia he promised.<sup>2</sup> Instead, his reform programs and nationalizations caused large scale emigrations from the island, created a weak economy with high unemployment, and fomented extreme discontent.

Now, upon the second anniversary of Castro's death, is an ideal time to reevaluate his movement. Is it possible that history might absolve Castro of the mass pillaging of his country's cultural patrimony he ordered in the name of socialist nationalizations? To determine whether such artistic absolution is possible, I will begin by looking at the implementation of Castro's Nationalization Laws and their repercussions in the global art world. Second, I will examine the United States' legal responses to the changes in Cuban property laws. Third, I will discuss the various legal avenues claimants have pursued in attempts to regain their once-private art collections. Fourth, I will evaluate ways in which both Castro's brother Raúl, the former president and current First Secretary of the Communist Party of Cuba, and President Miguel Díaz-Canel Bermúdez could effect changes in Cuban law to fully absolve Fidel of the sins he committed against the Cuban people and their cultural heritage.<sup>3</sup> Fifth, I will use the lessons of other former communist

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<sup>1</sup> See Anthony DePalma, *Fidel Castro, Cuban Revolutionary Who Defied U.S., Dies at 90*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/world/americas/fidel-castro-dies.html> [https://perma.cc/PZ77-ND56] (discussing Fidel Castro's rise to power and the mixed legacy he leaves behind).

<sup>2</sup> *Id.*

<sup>3</sup> See Frances Robles, *Fidel Died and Raúl Resigned, but Castros Still Hold Sway in Cuba*, N.Y. TIMES (Apr. 19, 2018),

states that have succeeded in providing reparations to their citizens and expatriates as possible templates for Cuban reform. Finally, I will examine the prospects for claimants now residing in the U.S., focusing on how U.S. lawmakers could work out solutions to either compensate or return seized art to rightful owners and their descendants.

## 2. HISTORY OF CUBAN NATIONALIZATIONS

Following the success of the revolution in early 1959, the socialists that were part of Castro's 26th of July Movement and its allies against Batista's right-wing authoritarian government redefined the nature of property in the island nation.<sup>4</sup> The Castro government began a program of nationalizations, transforming private assets into public assets by bringing them under the ownership of the new government. The sweeping nationalizations took place over a ten-year span, and different industries and constituents were affected at different times, as the new government experimented with change and reacted to the various international sanctions imposed against the regime.<sup>5</sup>

In February 1959, Castro established the Ministry for the Recovery of Misappropriated Assets.<sup>6</sup> A few months later, the government passed the Agrarian Reform Law and began expropriating land and private property.<sup>7</sup> Farms of any size were seized by the government, while land, businesses, and companies owned by upper- and middle-class Cubans were nationalized. The Castro government formally nationalized all foreign-owned property, including American holdings, on August 6, 1960.<sup>8</sup> The

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<https://www.nytimes.com/2018/04/19/world/americas/cuba-castros-communism.html> [<https://perma.cc/75UV-4BQJ>] (examining continuity and change in Cuba's future leadership).

<sup>4</sup> See MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 71 (1976) (leaving the right to expropriation of foreign investors' property unchanged, Castro's government also authorized broad confiscation of goods of Batista and his collaborators).

<sup>5</sup> See generally *id.* at 69–109 (explaining Castro's process of nationalizing both foreign and domestic private property).

<sup>6</sup> *El Decreto-Ley No. 78, GAC. OF.* (Cuba 1959).

<sup>7</sup> *Ley de Reforma Agraria, 7 LEYES DEL GOBIERNO PROVISIONAL DE LA REVOLUCIÓN* 135 (Cuba 1959).

<sup>8</sup> *Resolution No. 1, Aug. 6, 1960, XXIII, LEYES DEL GOBIERNO PROVISIONAL DE LA REVOLUCIÓN* 181 (Cuba 1960).

majority of nationalizations concerning cultural assets were completed by the end of 1960,<sup>9</sup> with the revolutionary government ultimately nationalizing more than \$25 billion worth of private property.<sup>10</sup>

At the time Castro's revolutionary government came to power, U.S. financial interests on the island included 90% of Cuban mines, 80% of public utilities, 50% of railways, 40% of sugar production, and 25% of bank deposits – about \$1 billion in total.<sup>11</sup> This influx of investment had transformed Havana into a haven for wealthy Cuban nationals and international businessmen. This moneyed class lived in urban mansions that ranged in style from neo-classical to art nouveau and art deco, and decorated their homes with art from both native Cuban artists and masterpieces of European art history.

Their wealth made them a target of the revolutionary government's seizures, and many departed the island in the months following Castro's ascension to power. Most traveled to the U.S., believing Castro's new government would not last long, and that their stay in the U.S. was only temporary. These refugees left their homes, cars, and other property with friends and relatives, planning to return when the regime fell.<sup>12</sup> But the regime never faltered. Rather, it grew in strength, continuing its nationalization programs and forming committees tasked with keeping "vigilance against counter-revolutionary activity," keeping a detailed record of spending habits, citizens' level of contact with foreigners, national work and education history, and any "suspicious" behavior.<sup>13</sup>

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<sup>9</sup> *El Decreto-Ley No. 890*, GAC. OF. (ED. EXTRAORDINARIA) (Cuba 1960); *El Decreto-Ley No. 891*, GAC. OF. (ED. EXTRAORDINARIA) (Cuba 1960).

<sup>10</sup> See MARIO LAZO, *DAGGER IN THE HEART: AMERICAN POLICY FAILURES IN CUBA 198–200*, 204 (1970) ("Castro's line [in the early 1950's] was that he and his regime had nothing against the American people, only against the government.").

<sup>11</sup> See Natasha Geiling, *Before the Revolution: Socialites and celebrities flocked to Cuba in the 1950s*, SMITHSONIAN (July 31, 2007), <https://www.smithsonianmag.com/history/before-the-revolution-159682020/> [<https://perma.cc/D8F7-FSMA>] (discussing America's economic and cultural influence in pre-revolution Cuba).

<sup>12</sup> See DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 185 (1994) (examining factors that would impede the success of abandoned personal property claims formerly owned by Cuban expatriates under contemporary Cuban law).

<sup>13</sup> Jonathan Brown, *The Bandido Counterrevolution in Cuba, 1959-1965*, COLLOQUES, (Feb. 10, 2017), <https://journals.openedition.org/nuevomundo/71412#bodyftn66>

The Office for the Recovery of State Assets, together with the National Institute of Agrarian Reform, contributed greatly to the cause of bringing previously private collections of art and cultural patrimony into the state repository, as its agents centralized works that had been at the country homes of families that were leaving Cuba.<sup>14</sup> Many of the works were stockpiled in government warehouses on Avenida del Puerta, or ended up decorating Castro's Palace of the Revolution.<sup>15</sup>

A large number of masterpieces were brought into the collection of the Museo Nacional de Bellas Artes.<sup>16</sup> According to a former registrar, out of the roughly 50,000 items in the museum's collection, approximately 60-70% were confiscated from their owners after the 1959 Castro takeover.<sup>17</sup> Even now, over a half century later, art historians and preservationists in Cuba celebrate these purloined architectural treasures and art collections as part of the country's bountiful national heritage. Sometimes the original owners of the works are mentioned in published materials, but just as often they are not.<sup>18</sup> The most current version of the museum's catalogue still extols the virtues of this period and its positive impact on the museum's collection. The catalogue outlines the history as such:

That same year [1959] sees the beginning of the exodus from Cuba of a large number of persons, mostly members of the bourgeoisie, some of whom possessed a large part of the country's artistic treasures. When these art works are abandoned by their owners, the government moves them

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<sup>14</sup> See LA HABANA: SALAS DEL MUSEO NACIONAL DE CUBA, PALACIO DE BELLAS ARTES 294 (1990) (discussing the nexus between wealthy Cuban families and nineteenth-century Spanish, and European paintings).

<sup>15</sup> See JOSEPH L. SCARPACI & ARMANDO H. PORTELA, CUBAN LANDSCAPES: HERITAGE, MEMORY, AND PLACE 104 (2009) (noting that, since 1959, thousands of artistic artifacts, mostly originating from private residences of families who fled Cuba, were either disposed of by prominent members of the regime or held in large warehouses and sold).

<sup>16</sup> See EL MUSEO Y SU HISTORIA: 1959-1964. UN MUSEO, MUCHOS MUSEOS, <http://www.bellasartes.co.cu/pagina-estatica/1959-1964-un-museo-muchos-museos> [<https://perma.cc/HF2C-ENMQ>] (last visited Oct. 14, 2018) (describing the origins of the museum's art collection).

<sup>17</sup> *Stealing Venice: Apparently another feat of the revolution*, BABALÚ BLOG (April 22, 2015), <http://babalublog.com/2015/04/22/stealing-venice-apparently-another-feat-of-the-revolution/> [<https://perma.cc/ED5X-AA22>] (providing background on the increase in the Museo Nacional de Bellas Artes' holdings starting in 1959).

<sup>18</sup> See, e.g., MUSEO NACIONAL DE BELLAS ARTES, LA HABANA, CUBA: COLECCIÓN DE ARTE CUBANO 15 (2013).

into State-run institutions. For this aim and faced with the necessity of putting on trial those persons who had committed acts of corruption, those who had collaborated with the Fulgencio Batista dictatorship, the Office for the Recovery of State Assets (ORBE, in its Spanish acronym) is created to retrieve for the nation a great part of the aforementioned treasure and to place it at the service of the people and the nation.<sup>19</sup>

In 1963, Cuba's National Council for Culture organized the "Exhibition of Recovered Art Works. Paintings, Drawings and Prints" at the Museo Nacional.<sup>20</sup> Another such exhibition was organized in 1967.<sup>21</sup>

Other times, the Castro regime left art collections in place in the grand mansions that had once been occupied by Cuba's titans of industry. The homes and possessions, such as those belonging to Julio Lobo, were deemed to be "left in the care of the Cuban government."<sup>22</sup> Lobo's collection is by far the most noteworthy that met this fate. At the time of the revolution, Lobo was the wealthiest of the island's sugar barons, with a fortune valued at \$200 million (about \$5 billion in today's dollars).<sup>23</sup> He possessed a large collection of notable paintings, including several El Greco pictures, a Rembrandt landscape, two Renoir nudes, and a Tintoretto, as well as the largest collection of Napoleonic memorabilia outside of France.<sup>24</sup>

Targeted by the new socialist government due to his wealth and large art collection, Lobo fled to New York in October 1960. He was only able to take a small suitcase out of the country, and was forced to leave behind his collections of paintings and rare books, his palaces, and his vast fortune.<sup>25</sup> Castro's organization quickly moved the priceless treasures into "La Dolce Dimora," the 1929-built Florentine Renaissance style mansion of Orestes Ferrara, an Italian-Cuban politician who also fled the island after Castro's rise to

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<sup>19</sup> LA HABANA: SALAS DEL MUSEO NACIONAL, *supra* note 14, at 294.

<sup>20</sup> MUSEO NACIONAL DE BELLAS ARTES, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> *The Napoleon Museum*, HAVANA UNWRAPPED, <http://www.havana-unwrapped.com/napoleon-museum.html> [<https://perma.cc/88X4-N6Z3>].

<sup>23</sup> See JOHN PAUL RATHBONE, THE SUGAR KING OF HAVANA: THE RISE AND FALL OF JULIO LOBO, CUBA'S LAST TYCOON 2 (2010) (noting that Lobo's personal fortune was so vast that he was globally known as the King of Sugar).

<sup>24</sup> See *id.* at 249 (describing Lobo's private art collection).

<sup>25</sup> See *id.* at 228–229 (recounting Lobo's experiences before leaving Cuba).

power.<sup>26</sup> Like Lobo's, upon his self-imposed exile, Ferrara's home and massive art collection became the property of "la Dirección de Patrimonio Cultural de la Oficina del Historiador de la Ciudad."<sup>27</sup>

But most of the art that had been in the homes of Cuba's elite ultimately left the island. Alberto Bustamante, the chairman of the Cuban National Heritage, estimates that more than a million paintings, sculptures, rare books, furniture, architectural details, jewelry, and other objects were sent out of Cuba for sale abroad between the 1960s and the 1990s.<sup>28</sup> The proceeds went directly to the Castro regime. But the victims of these nationalizations did not stay quiet. Once in the safe haven of the U.S., individuals and companies that had had their property confiscated utilized a variety of legal avenues in attempt to regain their property, or at least be compensated for their losses.

### 3. U.S. RESPONSES TO CUBAN CONFISCATIONS

#### 3.1. *Banco Nacional de Cuba v. Sabbatino*

While the basic right to take foreign private property is generally not challenged under international law, that right is conditioned upon a public interest or public purpose motivation.<sup>29</sup> The difficulty is evaluating whether the seizures were lawful without imposing unfair external notions of development on the seizing nation (i.e., Cuba). To experts evaluating the changes in Cuba, the nationalizations were clearly discriminatory and retaliatory, lacking justifiable purpose and prompt, adequate, and effective compensation, and thus were in violation of international law.<sup>30</sup> The

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<sup>26</sup> See *Museo Napoleónico. "La Dolce Dimora" (II)*, ARQUITECTURA CUBA, <http://www.arquitecturacuba.com/2009/08/museo-napoleonico-la-dolce-dimora-ii.html?q=dimora> [<https://perma.cc/7S56-36DL>] (detailing the history of Ferrara's home, La Dolce Dimora).

<sup>27</sup> *Id.* at 2010–11. There are multiple other examples of private homes being turned into museums. Another is the Museum of Decorative Arts in Havana, which was the former residence of José Gómez Mena. See, e.g., *Museo Nacional de Artes Decorativas*, LAHABANA.COM, <http://www.lahabana.com/guide/museo-nacional-de-artes-decorativas/> (illustrating one example of a private-home-turned-museum).

<sup>28</sup> SCARPACI & PORTELA, *supra* note 15, at 103–104.

<sup>29</sup> GORDON, *supra* note 4, at 119–120.

<sup>30</sup> *Id.* at 140–141.



discriminatory nature of the nationalizations is best demonstrated by the fact that the Castro regime nationalized three U.S. banks, while leaving Canadian banks untouched.<sup>31</sup>

The holding in the 1964 case of *Banco Nacional de Cuba v. Sabbatino* supported this view that the Cuban nationalization laws violated international law because they were discriminatory acts<sup>32</sup> directed against property owned by people and corporations that were opposed to the new socialist regime. The *Sabbatino* case arose when Cuba nationalized its sugar industry, taking control of sugar refineries and other companies in the wake of the revolution.<sup>33</sup> Many Americans who had invested in those companies lost their investments without compensation when the new government assumed control.<sup>34</sup>

An American company, Farr, Whitlock & Co., had contracted to buy sugar from a wholly-owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.), a Cuban company whose capital stock was owned principally by U.S. residents<sup>35</sup>. C.A.V. was ready to ship the sugar to the U.S., but President Eisenhower reduced the Cuban sugar quota,<sup>36</sup> and in response Cuba issued a decree<sup>37</sup> taking possession of the sugar. The Cuban government justified the decree by “character[izing] th[e] reduction in the Cuban sugar quota as an act of ‘aggression, for political purposes’ on the part of the [U.S.]”<sup>38</sup>. The decree “gave the Cuban President and Prime Minister discretionary power to nationalize[,] by forced expropriation[,] property or enterprises in which American nationals had an interest.”<sup>39</sup>

Under the new circumstances, the Cuban government would only allow the sugar to leave Cuba if Farr, Whitlock & Co. entered a new contract with Banco Nacional de Cuba, an instrumentality of

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<sup>31</sup> *Id.* at 142.

<sup>32</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 402–03 (1964).

<sup>33</sup> *Id.* at 401.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> This reduction in the sugar quota was one of the many economic sanctions the U.S. took against Cuba during this period. It was in retaliation to Cuba having reestablished relations with the U.S.S.R. and nationalizing American business interests on the island. *See generally* GORDON Chap. 3.

<sup>37</sup> *El Decreto-Ley No. 851*, GAC. OF. (Cuba 1960). *See also* *Sabbatino*, 376 U.S. at 401 (referring to the Cuban Council of Ministers’ adoption of Law No. 851).

<sup>38</sup> *Sabbatino*, 376 U.S. at 401.

<sup>39</sup> *Id.*

the Cuban government.<sup>40</sup> Farr, Whitlock & Co. then entered the contract, and the sugar left Cuba.<sup>41</sup> But upon arriving back in the U.S., Farr, Whitlock & Co. refused to pay Banco Nacional, and instead paid Sabbatino, the legal representative of C.A.V., the company with whom they had originally contracted.<sup>42</sup> Banco Nacional (on behalf of the Cuban government) filed a lawsuit against Sabbatino to recover the money paid for the sugar.<sup>43</sup> The District Court and the Court of Appeals ruled in favor of Sabbatino, and the case was appealed to the Supreme Court.<sup>44</sup> The Supreme Court granted certiorari<sup>45</sup> to answer the question of whether U.S. courts may refuse to give effect to decrees of a foreign sovereign government (i.e., Cuba) where the decree violates common international law.

The Supreme Court reversed the decision of the lower court and ruled that, despite the Cuban nationalizations causing a loss to Farr, Whitlock & Co., the U.S. would not decide the validity of a decree by a foreign government absent a treaty or other agreement.<sup>46</sup> To support this conclusion, Justice Harlan cited the "classic American statement of the act of state doctrine," a concept that originated in England in the seventeenth century,<sup>47</sup> and was first articulated in American courts in 1897: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."<sup>48</sup>

So, while the justices of the Supreme Court held that the takings were retaliatory and discriminatory and violated customary international law, the violation should not be considered in deciding the issue before them.<sup>49</sup> Indeed, Justice Harlan noted that: "For wrongs of that order the remedy to be followed is along the channels

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<sup>40</sup> *Id.* at 403-05.

<sup>41</sup> *Id.* at 404-05.

<sup>42</sup> *Id.* at 405-06.

<sup>43</sup> *Id.* at 406.

<sup>44</sup> *Id.* at 406-07.

<sup>45</sup> *Id.* at 400-01.

<sup>46</sup> *Id.* at 438-439.

<sup>47</sup> *Id.* at 416.

<sup>48</sup> *Id.* (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

<sup>49</sup> Sabbatino, 376 U.S. at 402-03 (referring to State Department's description of the Cuban laws as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory").

of diplomacy.”<sup>50</sup> The eight justice majority<sup>51</sup> noted that a judicial decision on this issue *without* a treaty would “imperil the amicable relations between governments and vex the peace of nations.”<sup>52</sup> Such a treaty or international law *could* provide an exception to the restraints of the act of state doctrine. Justice Harlan wrote:

[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or international justice.<sup>53</sup>

### 3.2. *Second Hickenlooper Amendment*

The *Sabbatino* decision was applauded by the Johnson Administration, but denounced by the Senate Foreign Relations Committee.<sup>54</sup> The Committee’s ranking Republican, Senator Bourke

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<sup>50</sup> *Id.* at 418, (quoting Justice Cardozo in *Shapleigh v. Mier*, 299 U.S. 468, 471 (1937)).

<sup>51</sup> Justice Byron R. White wrote a dissent, stating that he would decide the case on the merits, absent any specific objection to examining Cuba’s law under international law. *See Sabbatino*, 376 U.S. at 472.

<sup>52</sup> *Sabbatino*, 376 U.S. at 417–18 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–304 (1918)). Justice Harlan also wrote that the act of state doctrine has constitutional underpinnings in the concept of separation of powers; because the Executive has exclusive authority to conduct foreign affairs, disputes arising from the official actions of foreign sovereign powers (such as the nationalization of private property by the Castro regime in Cuba), should not be settled by the Judiciary. *Id.* at 423.

<sup>53</sup> *Id.* at 428. Indeed, many scholars believe the *Sabbatino* decision firmly establishes a treaty or international law exception to the act of state doctrine. The rationale for the exception is that treaties provide settled principles of international law that U.S. courts can apply without offending the sovereignty of other nations or interfering with the Executive Branch’s conduct of foreign relations. Unfortunately, as of the writing of this paper, the U.S. has not entered into a treaty with Cuba over the expropriation matters, so the *Sabbatino* ruling still stands in the way for rightful owners of nationalized property. *See* Joshua Gregory Holt, *The International Law Exception to the Act of State Doctrine: Redressing Human Rights Abuses in Papua New Guinea*, 16.2 PACIFIC RIM L. & POL. J. 459 (2007).

<sup>54</sup> *See* Clifford Michael Green, *A New Approach to the Act of State Doctrine*, 8.2 CORNELL INT’L L. J. 272, at 277, (1975). (Congress swiftly passed the Hickenlooper

B. Hickenlooper of Iowa, hastily added a clause to a pending amendment to the Foreign Assistance Act to create a statutory exception to the act of state doctrine and effectively reverse the *Sabbatino* decision.<sup>55</sup> The *N.Y. Times* reported:

[u]nder the amendment, American courts could not enforce their interpretations of international law on foreign governments. But they could order that property they judged to have been illegally seized and that was later brought to the United States by a foreign Government or any other party must be returned to the injured petitioner."<sup>56</sup>

The amendment, referred to as the Second Hickenlooper Amendment, was supported by U.S. businesses with interests abroad. In Senator Hickenlooper's words:

[t]he amendment is designed to discourage uncompensated expropriation of foreign investment by preserving the right of the original owners to attack any taking in violation of international law if the property involved comes before a U.S. court . . . . [T]he knowledge that this market will be denied to stolen property should discourage seizure of that investment.<sup>57</sup>

Thus, the Amendment "[V]itiates the act of state doctrine's bar, allows forum policy to prevail, and states that the forum policy requires compensation for expropriation. Thus, the law of the United States was applied to the acts of the Cuban government within its own territory."<sup>58</sup> This was a reversal of the usual rule that the law of the *place of the wrong* (i.e., Cuba) controls, and stated

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Amendment, expressing therein its intent to reverse the *Sabbatino* result in future *Sabbatino*-like situations). See generally DAWSON, *supra* Note 29.

<sup>55</sup> Foreign Assistance Act of 1965, 22 U.S.C. § 2370(e)(2) (1970), amending 78 Stat. 1013 (1964).

<sup>56</sup> Max Frankel, *U.S. Fights Change on Asset Seizure*, N.Y. TIMES, July 31, 1964, at A1.

<sup>57</sup> 110 CONG. REC. 19557 (1964). Note that the amendment does not invalidate the *Sabbatino* decision: "Rather, the amendment clarifies public policy applicable to such cases pursuant to Congress constitutional powers to legislate concerning the aid program, foreign commerce, and offenses against international law." *Id.*

<sup>58</sup> *International Law - Sovereign Immunity and Act of State - Hickenlooper Amendment Precludes Assertion of Act of State Where Act is Violative of International Law*, 21 VAND. L. REV. 388, 393 (1968) (detailing how the Hickenlooper Amendment affects the choice of law question).

instead that if foreign policy demands otherwise, the forum law (U.S. law) will prevail.

So, while the *Sabbatino* case affirmed that federal courts would not judge the acts of a foreign government, including expropriation, and left American owners of confiscated property virtually without remedy in U.S. courts, the Second Hickenlooper Amendment created exceptions to the general rule to provide private litigants at least a chance for their day in court. But the Amendment itself included two exceptions limiting the ability to file suit: "Its provisions will not be applicable if the President determines that it is in the foreign policy interests of the nation to apply the 'act of state' doctrine, or if the act of the foreign government is not contrary to international law."<sup>59</sup>

The main snag for potential litigants is the ability of the Executive to intervene if he believes a trial on the merits would not be in the national interest. And over the past several decades it has been understood that any President would indeed block a U.S. court from producing a judgment against Cuba, as it might impede a negotiated settlement with the island nation. Indeed, if the President were to allow the suit to continue, the court would then have to consider whether Cuba's probable defense of sovereign immunity requires dismissal of the litigant's claim.

Despite these impediments, the Second Hickenlooper Amendment did prove somewhat effective in the years immediately following its enactment. On rehearing the *Sabbatino* case, now under the name *Banco Nacional de Cuba v. Farr*, the Second Circuit Court of Appeals held the Amendment constitutional under the Commerce Clause and dismissed the Cuban claim for the proceeds of the expropriated sugar.<sup>60</sup> Later cases further clarified that the Amendment's reversal of the presumption of the Act of State Doctrine would only be applied in cases where property had been seized and then later appeared on the American market.<sup>61</sup>

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<sup>59</sup> Frances X. Hogan, *The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company as a Test Case*, 11 B.C. INDUS. & COM. L. REV. 77, 85 (1969) (describing how the Amendment is limited).

<sup>60</sup> 383 F.2d 166, 183–85 (2d Cir. 1967) (reaffirming the Cuban taking as invalid under international law, yet holding there is no basis for appellant's claim).

<sup>61</sup> See *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394 (2d Cir. 1970) (clarifying that the Second Hickenlooper Amendment in no way prohibits trade of expropriated property, but rather threatens only a potential lawsuit if the property is identified); see also *French v. Banco Nacional de Cuba*, 242 N.E.2d 704 (2d Cir. 1968) (holding that the plaintiff is entitled to judgment based on the taking). See generally *International Law: Hickenlooper Amendment Held Applicable to Property*

Thus, Cuba has been forewarned that it need only seek non-American markets for resale. With the imposition of the trade embargo by President Kennedy's proclamation in 1962,<sup>62</sup> it has been virtually impossible for Cuba to bring such nationalized assets to market in the U.S. anyway, so U.S. nationals and Cuban emigres have an extremely limited judicial avenue for their property claims against the Cuban government.

### 3.3. *Helms-Burton Act*

Another major consideration for claimants whose property was confiscated is the ongoing U.S. embargo against Cuba. President Eisenhower first imposed the embargo in 1958,<sup>63</sup> and it was strengthened by President Kennedy after Cuba nationalized American-owned Cuban oil refineries without compensation.<sup>64</sup> The embargo prohibited U.S. museums from exchanging art or even information related to artistic conservation efforts with the Cuban government, effectively sealing the island's museums off from any outside influence or information regarding the collections housed there.

Conditions on the island changed following the dissolution of the Soviet Union in 1989. The country lost approximately 80% of its imports, 80% of its exports, and its Gross Domestic Product declined by one-third.<sup>65</sup> Cuba needed to raise capital from abroad, and it did so by quietly selling the artworks in the government museums. The decline spurred increased trafficking in property formerly owned by U.S. citizens that was confiscated during the revolution, in order for

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*Confiscated by a Foreign Nation Only If Property Marketed in the U.S.*, 19 DUKE L. J. 1248 (1970) (discussing the several Banco Nacional cases).

<sup>62</sup> See Embargo on All Trade with Cuba, Proclamation No. 3447, 3 C.F.R. 26-27 (1963) (announcing the embargo on February 3, 1962, four days before it would begin on February 7, 1962).

<sup>63</sup> See Werner Wiskari, *U.S. Embargo Set on Arms to Cuba; Shipment Halted*, N.Y. TIMES, Apr. 3, 1958, at A1 (describing the embargo on arms shipments to Cuba).

<sup>64</sup> See *Cuban Embargo Statement and Text*, N.Y. TIMES, Feb. 3, 1962, at 22 (describing and containing the President's trade embargo announcement).

<sup>65</sup> See generally THE CUBAN ECONOMY AT THE START OF THE TWENTY-FIRST CENTURY (Jorge I. Domínguez, et al. eds., 2005) (explaining the state of Cuba's economy at the beginning of the twenty-first century).

the Cuban government to regain hard currency. This included artworks that were now housed in government museums.<sup>66</sup>

The 1996 law passed by Congress, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, popularly known as the Helms-Burton Act, was thus designed to implement increased penalties for foreign companies that do business in Cuba by preventing them from also doing business in the U.S.<sup>67</sup> The law states that any non-U.S. company that traffic in property that had previously been owned by U.S. nationals or entities, and which had been confiscated by the Cuban government after the 1959 revolution can be subjected to litigation, and that the company's leadership can be barred from entry into the United States.<sup>68</sup> Sanctions may also be applied to non-U.S. companies trading with Cuba.<sup>69</sup> Since the enactment of Helms-Burton, however, Presidents Clinton, Bush, Obama, and Trump have continually waived the implementation of the right to file Title III actions, citing the need to seek agreement with U.S. trading partners on policy toward Cuba.<sup>70</sup>

### 3.4. Foreign Claims Settlement Commission

Today, the principal means for U.S. nationals to make claims against foreign governments is through the Foreign Claims Settlement Commission ("FCSC" or "the Commission"). Following the major displacement of people and possessions during World War II, President Eisenhower established the Commission by his

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<sup>66</sup> One notable sale was that of Jean-Léon Gérôme's "Entry of the Bull," which was part of the Museo Nacional de Bellas Artes' collection of European paintings. It sold at Christie's London for £330,000 in 1990. See David D'Arcy, *Cuba's Pillaged Patrimony*, ART + AUCTION, Nov. 1995, at 132.

<sup>67</sup> See generally JOAQUÍN ROY, CUBA, THE UNITED STATES, AND THE HELMS-BURTON DOCTRINE: INTERNATIONAL REACTIONS (2000) (documenting responses and results of the Helms-Burton Doctrine).

<sup>68</sup> S. Kern Alexander, *Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law*, 16 DICKINSON J. OF INT'L L. 523, 526 (1998).

<sup>69</sup> *Cuban Liberty and Democratic Solidarity Act of 1996*, Pub. L. No. 104-114, 110 Stat. 785 [hereinafter "Helms-Burton Act"].

<sup>70</sup> See Brian Egan & John London, *Lawsuits for Cuban Confiscated Property Still Suspended, For Now*, STEPTOE INT'L COMPLIANCE BLOG (July 25, 2017), <http://www.steptointernationalcomplianceblog.com/2017/07/lawsuits-for-cuban-confiscated-property-still-suspended-for-now/> [https://perma.cc/U8MA-CUVE] (explaining the effects and limitations of suspending Title III).

power under the presidential reorganization authority.<sup>71</sup> The new group combined the functions of the War Claims Commission, which adjudicated claims and paid compensation to American prisoners of war and civilian internees, and the International Claims Commission.<sup>72</sup> The FCSC is a quasi-judicial, independent agency within the Department of Justice ("DOJ"), and its power to adjudicate claims of U.S. nationals against foreign governments is granted either under specific jurisdiction conferred by Congress or pursuant to international claims settlement agreements.

A decade after the FCSC's establishment, President Johnson tasked the Commission with considering claims of U.S. nationals against the Government of Cuba, based upon: (1) debts for merchandise furnished or services rendered by nationals of the U.S.; (2) losses resulting from special measures directed against, or the nationalization, expropriation, intervention, or other taking of, property by the Cuban government; and (3) the disability or death of U.S. nationals resulting from actions taken by or under the authority of that government.<sup>73</sup> The Commission was permitted to examine any claim for losses which occurred between January 1, 1959, and the filing deadline of January 1, 1967. The Commission certified 5,911 claims to the State Department as valid claims against the Government of Cuba.

Funds for payment of the Commission's awards are usually derived from congressional appropriations, international claims settlements, or liquidation of the foreign country's assets in the United States. In the case of Cuba, however, a government study determined that Cuban Government assets in the U.S. were not of sufficient magnitude to warrant liquidation.<sup>74</sup> The Commission thus provided a certification of the *validity* and *amounts* of claims against Cuba. Armed with this information, the Secretary of State will hopefully be better positioned to negotiate a settlement agreement with a friendly Cuban government when diplomatic relations are resumed.

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<sup>71</sup> See Reorganization Plan No. 1 of 1954, 5 U.S.C. 133z, 63 Stat. 203 (establishing the commission).

<sup>72</sup> See *Id.* at § 1.

<sup>73</sup> See FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE U.S., COMPLETION OF THE CUBAN CLAIMS PROGRAM UNDER TITLE V OF THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949, 69 (1972) (hereinafter "First Cuban Claims Program Report") (explaining the Commission's authority).

<sup>74</sup> *Id.* at 70.



In the First Cuban Claims Program, there were two claims for nationalized artwork. The more substantial of the two was CU-3669, the Claim of Olga Lengyel.<sup>75</sup> The Lengyel case demonstrates the difficulty of having the FCSC validate a claim for missing works' fair market value. Despite the obvious fact that the claims program was meant to help victims of Castro's regime reclaim their rightful property, the Commission made it difficult for claimants to prove the present value of their missing property, and placed estimates at depressingly low amounts.

Lengyel was born in 1908 in a part of Hungary that later became Romania.<sup>76</sup> During World War II, she was deported – along with her husband, parents, and two children – to the Auschwitz Birkenau concentration camp. She was the only member of her family to survive. At the end of the war Lengyel moved to New York, before ultimately settling in Havana.<sup>77</sup> After Castro's Revolution, Lengyel and her husband fled Cuba and resettled in New York City in 1960. Upon learning of the FCSC's Cuban Claims Program, Lengyel submitted a detailed claim for property that she had been forced to leave behind in Cuba.<sup>78</sup>

Under the Commission's regulations, Lengyel was required to meet a strict standard of proof regarding both her rightful ownership of the allegedly seized property and the fair market value of that property.<sup>79</sup> Lengyel met the first burden by providing

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<sup>75</sup> *Id.* at 357.

<sup>76</sup> See *About Olga Lengyel*, THE OLGA LENGYEL INSTITUTE FOR HOLOCAUST STUDIES AND HUMAN RIGHTS (TOLI) (last visited Dec. 4, 2017), <https://www.toli.us/about/olga-lengyel/> [<https://perma.cc/E8XV-P272>] (offering a brief biography of Lengyel).

<sup>77</sup> Lengyel and her husband were part of a large and prosperous community of Jews in Cuba in the mid-20<sup>th</sup> century. Approximately 94% of Cuba's Jewish population fled after the 1959 Revolution. While the Revolution did not target Jews specifically, they did suffer economically along with other members of Cuba's middle class. Ironically, many of the Jews emigrating to the U.S. from Cuba were originally from Europe, and had been denied entry to the U.S. before and during World War II. As political refugees fleeing a Communist Cuba, they have now found the haven in the U.S. that they previously were denied. See Rebecca Weiner, *Cuba Virtual Jewish History Tour*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/cuba-virtual-jewish-history-tour> [<https://perma.cc/PQQ5-8LQS>] (explaining the history and development of the Jewish community in Cuba).

<sup>78</sup> Lengyel was eligible for participation in the Program, as she had become a naturalized U.S. citizen in 1951.

<sup>79</sup> See FCSC Reg., 45 C.F.R. §531.6 (d) (1970) ("The claimant shall be the moving party, and shall have the burden of proof on all issues involved in the determination of his or her claim."); First Cuban Claims Program Report, at 358.

photographs of her penthouse apartment in Havana, copies of the deeds to the apartment, affidavits, and a pre-nuptial agreement. But the Commission was reticent to accept the valuations Lengyel provided, particularly with regards to the works of art that she had been forced to abandon.

Lengyel's collection consisted primarily of landscapes by the likes of Fragonard, Van Ruysdael, Van Goyen, Memling, and Manet. But her appraiser was at a significant disadvantage: he needed to provide values for Lengyel's written list of about 30 pictures without the benefit of full details of the works, and with only a few photographs of the works in situ. The Commission cast doubt on this method of valuation, and concluded "the evidence was insufficient to support claimant's assertions either as to the number and identities of the paintings or as to the values thereof" on the date of loss, October 14, 1960—the day of the passage of the relevant expropriation laws.<sup>80</sup> Rather, the Commission concluded that the valuation most appropriate to the property and equitable to the claimant is a pre-revolution appraisal made by the curator who had helped Lengyel's father assemble the collection (an appraisal given *ante litam motam*). Thus, the Commission certified Lengyel's loss as \$240,000.<sup>81</sup>

However, Lengyel was never able to claim that sum because of the lack of Cuban funds available in the U.S. Despite a thorough investigation, there was no evidence that the Castro regime had attempted to sell Lengyel's belongings in the U.S., so she was not eligible to file suit under one of the Hickenlooper exceptions to the act of state doctrine. Even if her property had ended up on an American auction block later in the 1970s, Lengyel would have faced the hurdle of the Foreign Sovereign Immunities Act ("FSIA"), which limits when a foreign sovereign nation may be sued in U.S. courts.<sup>82</sup>

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<sup>80</sup> First Cuban Claims Program Report, at 363.

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

<sup>82</sup> In August 2006, the Commission completed the administration of a second Cuban claims program by evaluating previously un-adjudicated claims of U.S. citizens or corporations against the Government of Cuba for losses of real and personal property taken after May 1, 1967. These will be added to the claims already certified in the previous program, bringing the totals to:

Number of Claims	8821
Number of Awards	5913
Amount of Awards - Principal	\$1,902,202,284.95

## 4. PRIVATE LAWSUITS AND POLICY DEVELOPMENTS

Given the lack of closure the FCSC's program provides, many Cuban families have looked for other ways to regain ownership of their nationalized art collections. The most notable confiscated art collection in Cuba belongs to the Fanjul family.<sup>83</sup> The Fanjuls were part of a great sugar dynasty in the first half of the 20<sup>th</sup> century and fled the island in 1959, leaving behind great works of art by Spanish painter Joaquín Sorolla, among many others.<sup>84</sup> The Fanjuls' art collection was "recovered" by the Castro government and placed in the Museo de Bellas Artes in Havana.<sup>85</sup> During the 1990s-economic downturn, one Sorolla painting was quietly removed from the museum to be sold on the international art market to raise cash for the struggling regime.

Upon discovering that Sotheby's was considering selling the painting on behalf of a European client, the Fanjuls filed a claim with the U.S. State Department alleging that Sotheby's had a pattern of "trading with the enemy" and trafficking in expropriated Cuban property.<sup>86</sup> Under Title IV of the Helms-Burton Act, such actions could be the basis for a denial of U.S. visas to Sotheby's executives, or up to ten years in jail.<sup>87</sup> Alas, the multiyear family effort has not resulted in the return of the painting. The picture is currently believed to be in the hands of a private collector in Europe, and the

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DEPT. OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMM'N, "Completed Claims - Cuba", <https://www.justice.gov/fcsc/claims-against-cuba> (last visited Dec. 11, 2017) [<https://perma.cc/ELB3-8G3L>].

<sup>83</sup> See Tania C. Mastrapa, *Identifying and Locating Looted Artworks from Cuba*, *Cuba in Transition* 134 (2009) ("Like thousands of families, the revolutionaries forced the Fanjuls to flee the island leaving behind all their belongings. The family's art largely landed in the Museo de Bellas Artes in Havana.").

<sup>84</sup> See generally Timothy L. O'Brien, *The Castro Collection*, *N.Y. TIMES* (Nov. 21, 2004), <http://www.nytimes.com/2004/11/21/business/yourmoney/the-castro-collection.html> [<https://perma.cc/CQ4L-DB7E>] (detailing the Fanjul family's lost art collection).

<sup>85</sup> See Mary Anastasia O'Grady, *Castro's Art Theft Puts Sotheby's on the Spot*, *WALL STREET JOURNAL* (Oct. 29, 2004), <https://www.wsj.com/articles/SB109900567444459216> [<https://perma.cc/KU94-PLH2>] ("According to the trust's lawyers . . . after the Castro regime issued an 'expropriating decree, the [painting] was taken to the National Museum of Fine Arts in Havana.'").

<sup>86</sup> "Fanjul Family Statement on U.S. Department of State Investigation Against Bruno Scaiola," *REUTERS*, Feb. 24, 2009 [hereinafter "Fanjul Family Statement"].

<sup>87</sup> Helms-Burton Act, Pub. L. 104-114, 110 Stat. 785, 22 U.S.C. § 6021-6091 (excluding certain aliens from the United States).

family has added it to the International Art Loss Register. Sotheby's now issues guidelines on steps to take regarding any work that comes into the auction house's possession that are owned by the Gómez-Mena family, to which the Fanjuls are heirs.<sup>88</sup> Family spokesperson, Pepe Fanjul, stated: "We hope that this [ . . . ] will be a lesson for all in the art world that all these paintings in Cuba or with a Cuban source are strictly off limits."<sup>89</sup>

Concurrent with the Fanjul's hunt for their missing Sorolla, Fidel Castro transferred his presidential duties to his brother, Raúl. Many hoped that Raúl would repeal some of his brother's revolutionary-era "reforms."<sup>90</sup> In fact, while still maintaining the Communist Party's influence in the country, Raúl was slightly more pragmatic than his older brother and instituted some market-oriented economic policies.

The largest alteration was a 2011 law that allowed citizens and permanent residents to buy and sell real estate.<sup>91</sup> For the first time since the 1950s, buyers and sellers could set home prices and move when they wanted. Citizens no longer needed state approval for transactions, including sales and trades, and Cubans emigrating from the island were allowed to gift property to relatives staying behind.<sup>92</sup> These Cuban emigrants were also allowed to bring their art and other possessions with them out of the country, instead forfeiting them upon departure.

The amendment to the property law was one of several changes that precipitated a "thaw" in Cuban-U.S. relations. In December 2014, Presidents Obama and Raúl Castro announced the beginning of a process of normalizing relations between the two nations, including the lifting of some travel restrictions, fewer constraints

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<sup>88</sup> Sotheby's Guidelines Relating to the Handling of Art Confiscated from the Gomez-Mena Family (on file with author).

<sup>89</sup> Fanjul Family Statement, *supra* note 82.

<sup>90</sup> Warren Richey, *Cuban exiles eye change in Cuba*, CHRISTIAN SCIENCE MONITOR (Aug. 2, 2006), <https://www.csmonitor.com/2006/0802/p01s02-woam.html>.

<sup>91</sup> See Damien Cave, *Cuba to Allow Buying and Selling of Property, With Few Restrictions*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/04/world/americas/cubans-can-buy-and-sell-property-government-says.html> [<https://perma.cc/LGP6-X8NB>] ("Cuba announced a new property law . . . that promises to allow citizens and permanent citizens and permanent residents to buy and sell real estate—the most significant market-oriented change yet approved by the government of Raúl Castro, and one that will probably reshape Cuba's cities and conceptions of class.")

<sup>92</sup> See *id.* (explaining that Cuba's new law provided freedom of decision-making for those participating in the real estate market that did not exist under the previous housing system).

on the transfer of money by Cubans in the U.S. to relatives still in Cuba, and the re-establishment of a U.S. embassy in Havana.<sup>93</sup> But President Trump has suspended Obama's policies, calling his predecessor's deal "completely one-sided," with the U.S. granting Cuba relief from sanctions while receiving nothing in return.<sup>94</sup> Conservative Republican lawmakers in Congress generally support Trump's hardline stance on Cuba and will not repeal the Helms-Burton Act.<sup>95</sup> The overall result has been a "return to a Cold War mentality and a set of failed policies that [seem to be doing] little to improve human rights in Cuba or to hasten the end of the Castro regime" in Cuba.<sup>96</sup>

For claimants of nationalized art, the hopes of the mid-2010s have been dashed. Representatives of the Cuban diaspora population in the U.S. must return to the drawing board in developing plans for an eventual post-Castro, and likely post-Trump, restitution resolution. Any plan would need to be a mix of two remedies: *in rem* restitution of objects and property seized by the state, and monetary compensation for when the original property is no longer existent or available.<sup>97</sup> In addition to a dedicated property court within Cuba, there will need to be an international arbitration tribunal to address claims from expatriates living all around the world.<sup>98</sup>

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<sup>93</sup> See Felicia Schwartz, *As Embassies Open, a Further Thaw in Cuban-U.S. ties Faces Hurdles in Congress*, WALL STREET JOURNAL (July 20, 2015), <https://www.wsj.com/articles/as-embassies-open-a-further-cuban-thaw-faces-hurdles-in-congress-1437352444> [<https://perma.cc/HZA3-GBKA>] (describing the steps being taken by the United States and Cuba to establish a relationship between the two states).

<sup>94</sup> See *id.* (Outlining former President Obama's plans to promote peaceful relations between the United States and Cuba).

<sup>95</sup> See William M. LeoGrande, *Reversing the Irreversible: President Donald J. Trump's Cuba Policy*, IDEAS IDÉES D'AMÉRIQUES (Dec. 19, 2017), <https://journals.openedition.org/ideas/2258?lang=en> [<https://perma.cc/SH8L-66BL>] (The language in the Republican Party Platform denounced Obama's Cuba policy as "a shameful accommodation to the demands of its tyrants," and offered normal relations only "after [Cuba's] corrupt rulers are forced from power and brought to account for their crimes against humanity.").

<sup>96</sup> See Vicki Huddleston, *Trump Is Returning Cuba Policy to Cold War*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/opinion/trump-cuba.html?rref=collection%2Ftimestopic%2FCuba> [<https://perma.cc/W4RR-UWYU>].

<sup>97</sup> See generally Matias F. Travieso-Diaz, *Resolving U.S. Expropriation Claims against Cuba: A Very Modest Proposal*, 22 L. & BUS. REV. AM. 3, 22 (2016).

<sup>98</sup> Under the Federal Arbitration Act, 9 U.S.C. § 15, "[e]nforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based

## 5. LEGAL FRAMEWORKS AND PROPOSALS FOR THE FUTURE

In their work to provide restitution and compensate families for losses suffered during and after the Cuban Revolution, legal scholars and policymakers are working with precedent. The lessons of the Eastern Bloc are particularly salient for Cuba's claimants, and provide valuable frameworks for lawmakers attempting to implement equitable restitution policies throughout the Cuban diaspora.

With the expansion of the USSR into Eastern Europe during the 1940s, authorities collectivized agriculture, and nationalized and redistributed private property.<sup>99</sup> In a process later emulated in Fidel Castro's Cuba, Moscow-trained cadres were put into power positions throughout the region to carry out this sociopolitical transformation, and specifically to eliminate the bourgeoisie's social and financial power by expropriating their land, industrial property, and personal assets. Following the dissolution of the Soviet Union in 1989-1991, many countries enacted legislation to provide for the restitution of both private and communal property.

The Czech Republic is a particularly useful example when discussing the return of nationalized art in Cuba, as it was one of the few nations that favored restitution over monetary compensation for lost property.<sup>100</sup> The country's first restitution laws dealt with, among other things, art confiscated between 1948 and 1989. Many of the confiscated pieces ended up in the National Gallery, not unlike the situation in Cuba with the Museo de Bellas Artes.<sup>101</sup>

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on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."

<sup>99</sup> See Mari-Claudia Jiménez, *The Future: Restituting Looted Cuban Art*, 109 AM. SOC'Y INT'L L. PROC. 116, 118 (2015) (describing how different countries have acted and reorganized in the aftermath of the Nazi regime).

<sup>100</sup> CREIGHTON UNIV. SCH. OF LAW & DEP'T OF POLITICAL SCI., REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES 75-78 (2007), <https://www.american.edu/clals/upload/Creighton-University-Report-on-Claims.pdf> [hereinafter "Creighton Report"] [<https://perma.cc/DL6M-SD6T>] (noting that the Czech Republic gave restitution to Holocaust victims to deal with confiscated property).

<sup>101</sup> See DEPT. OF STATE, "Property Restitution in Central and Eastern Europe" (Oct. 3, 2007), <https://2001-2009.state.gov/p/eur/rls/or/93062.htm> [hereinafter "Restitution in Central and Eastern Europe"] [<https://perma.cc/PXX2-P9T7>] (70 works of art from the National Gallery in the Czech Republic were restituted to the Jewish community).

The artwork restitution aspect of the Czech settlement agreement did not have a citizenship requirement. Any Cuban restitution plan *must* replicate this feature, as there is a substantial danger that a transitional government may disallow the claims of Cuban-Americans based on citizenship—essentially using their American citizenship and political exile status against them. Cubans still in Cuba view the Cuban-American exile community as a threatening, wealthy class who could come in and claim the best properties.<sup>102</sup> A new government would thus be motivated to first address the claims of Cubans in Cuba to shore up domestic political support to maintain the democratic underpinnings of the new government. In the Czech situation, the government ultimately agreed that, as a matter of fundamental justice, all claimants, regardless of their citizenship status at the time of the settlement, should get equal treatment.<sup>103</sup> In a potential Cuba settlement, a reasonable solution would be to have two separate bodies to resolve claims disputes: one for Cuban residents, and another for expatriates.

To aid in the restitution effort, the Czech government created a website with information and photographs of artworks of questionable ownership,<sup>104</sup> and Parliament removed all filing deadlines for artwork claims, eliminating any discovery timeline disputes.<sup>105</sup> The Czech government also contributed \$11.7 million from its National Property Fund to support compensation claims and provided payments to about 500 claimants residing in 27 countries.

The Czech Republic's policy has provided beneficial results and enhanced the credibility of economic reform by increasing its irreversibility, providing a way to resolve claims without impacting the country's depleted treasury, and lending political legitimacy to

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<sup>102</sup> See Creighton Report, *supra* note 96, at 87 (“the Cuban-American exile community is seen by Cubans still in Cuba as a wealthy class of individuals who will come in and take all the best properties through their property claims.”).

<sup>103</sup> *Id.* at 168 (“as a matter of fundamental justice, all potential claimants should get roughly equal treatment, and Congress seems to have agreed in the Czechoslovakian situation.”).

<sup>104</sup> See CZECH REPUBLIC MINISTRY OF CULTURE, “Restitution-Art,” <http://www.restitution-art.cz/english/main.html> [https://perma.cc/ZS4L-N6SZ] (linking to the website the Czech government created to list artwork of unknown ownership).

<sup>105</sup> See Restitution in Central and Eastern Europe, *supra* note 97 (“in 2002, [the Czech] Parliament extended the deadline for filing artwork claims to the end of 2006 and, subsequently, has removed all filing deadlines.”).

the government and the democratization process.<sup>106</sup> In February, 2018 Raúl Castro prepared to hand power to his chosen successor; today, as Cuba's new generation of leaders adjusts to the changing regime, it would be prudent look to the example of the Czech Republic and further enhance the credibility and irreversibility of Raúl's property reform laws by implementing a full-scale restitution scheme.

But lawmakers in the U.S. are not being supportive in what should be a shared mission of full restitution. Senator Marco Rubio (R-Fla.), the current leading voice on Cuban-American issues, wants to block transactions between U.S. companies and firms that have ties to the Cuban military.<sup>107</sup> This would mean a de facto return to a total embargo, as the military has a hand in virtually every element of the island's economy. Owen Pell, a partner at White & Case, says that with such lessened commercial and trade connections between Cuba and the U.S., it will be even more difficult for art nationalization victims to make legal claims against Cuba as they will have trouble framing claims "to meet the U.S. nexus requirement inherent in the FSIA."<sup>108</sup>

Mari-Claudia Jiménez, an expert on Cuban art law at Sotheby's, agrees, and adds that despite the somewhat positive recent changes in the Cuban political and economic scene, there have not been any corresponding changes in U.S. law or policy toward the restitution of nationalized art, and there is little of hope of the current Supreme Court overturning *Sabbatino*. Jiménez reports that there has been a steady flow of legal complaints in which Cuban exiles and their heirs

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<sup>106</sup> See 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, 217-18 (1995) (outlining the problems that Cuba will have to navigate in creating its own policy).

<sup>107</sup> See Jason Horowitz, *Marco Rubio Is Hardly a Hero in Cuba. He Likes That*, N.Y. TIMES (July 5, 2015), [https://www.nytimes.com/2015/07/06/us/politics/little-affinity-for-marco-rubio-in-cuba-despite-family-roots.html?\\_r=0](https://www.nytimes.com/2015/07/06/us/politics/little-affinity-for-marco-rubio-in-cuba-despite-family-roots.html?_r=0) [<https://perma.cc/U8FK-RSQA>] (Saying that Senator Rubio believes that "normalized relations with the United States would only strengthen an oppressive Cuban government."); see also Matt Flegenheimer, *Ted Cruz Plays Up Cuban Heritage Before Florida Primary*, N.Y. TIMES (Mar. 9, 2016), <https://www.nytimes.com/2016/03/10/us/politics/ted-cruz-cuban-florida-primary.html> [<https://perma.cc/6Z4K-G847>] (comparing Senators Cruz and Rubio's relationship with their Cuban heritage).

<sup>108</sup> The FSIA provides that foreign states are immune from the jurisdiction of state and federal courts. Email from Owen Pell, Partner, White & Case LLP, to Sharon N. Lorenzo, Lecturer in Law, U. Penn. Law (Nov. 27, 2017, 10:46 AM) (on file with author).



are seeing confiscated property on the market, both in South Florida and abroad.<sup>109</sup>

The most notable recent example of this type of case involved a Wifredo Lam painting, “Sin Título (Suenos Arcabes).”<sup>110</sup> The heirs of Rene Diaz de Villegas, who left Cuba after Castro seized power, saw an image of the painting in a full-page ad for a dealer’s booth at Art Basel Miami in 2015. Armed with a photograph of the painting hanging in the family’s dining room in Cuba in October 1959, the Diaz de Villegas family contacted the gallery representing the seller, demanding return. The seller refuted the family’s claim that the Castro government had seized the painting upon Diaz de Villegas’ flight from the island, and said that the emigrant had in fact donated the work to the Franciscan order and the monastery of San Antonio de Padua in Havana, where it remained until 1996 (when it was sold to fund building improvements at the monastery).<sup>111</sup>

Jiménez represented the family as they sought a declaratory judgment that Diaz de Villegas was the bona fide purchaser of the painting and the defendant consigner did not have any ownership interests. But there had never been a decision by a U.S. court regarding Cuban art that favored claimants, and this case did not break that custom. A settlement was reached out of court, with the heirs receiving undisclosed compensation from the current holder of the work.

Despite this continued lack of positive judicial precedent, a 2016 law creates a new channel for potential litigants. The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act,<sup>112</sup> clarifies the FSIA and adds an exception *disallowing* immunity from seizure for works “taken in connection with the acts of a foreign

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<sup>109</sup> Telephone Interview with Mari-Claudia Jiménez, Senior Vice President, Managing Director of Trusts & Estates and Valuations, Sotheby’s (Nov. 1, 2017).

<sup>110</sup> Wifredo Lam (1902-1982) was a Cuban artist who sought to portray and revive the enduring Afro-Cuban spirit and culture. Interestingly, he was a sympathizer with Castro’s revolutionaries, and in 1965, he showed his loyalty to Castro and his goals of social and economic equality by painting “El Tercer Mundo (The Third World)” for display in the presidential palace. Despite his socialist political leanings, Lam had already established himself as the “Cuban Picasso” by the 1950s, and was popular with the bourgeois art collector set on the island.

<sup>111</sup> See David D’Arcy, *Cuban collector’s heirs settle over Wifredo Lam painting that resurfaced in Miami*, ART NEWSPAPER (Jan. 19, 2017), <http://theartnewspaper.com/news/cuban-collectors-heirs-settle-over-wifredo-lam-painting-that-resurfaced-in-miami> [https://perma.cc/2A9G-JN9W].

<sup>112</sup> H.R. 6477, 114th Cong. (2015-2016) (enacted).

government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.”<sup>113</sup> Cuba’s revolutionary confiscations would surely fall under this exception and be eligible for seizure if on American soil.

In discussing a potential loan of art to the U.S. in March 2017, a curator at Havana’s Museo de Bellas Artes said, “Even though supposedly the Obama administration normalized relations with Cuba, there are so many unsolved issues. We are the pioneers in this, but we are having to pay the pioneer’s price—testing the ground to see how far a project like this can go.”<sup>114</sup> These baby steps toward artistic diplomacy indicate the tides may be turning in “that infernal little Cuban republic.”<sup>115</sup> But while recent government moves, such as the July 2018 approval a draft of a new Constitution that recognize the right to own private property, have fostered the emergence of a non-state sector and an opening to foreign investment, the specter of Fidel Castro’s socialist experiment still looms large over the island.

Even if there are no forward movements in official foreign or domestic policy during the remainder of the Trump administration, museum curators in Cuba and around the world should initiate a reevaluation of museum holdings and begin the restitution process through non-governmental channels. Cuba cannot truly begin the process of normalization with these stolen treasures still hanging in state-funded museums as trophies of the Castro regime’s brutality. Auction houses and dealers should also increase their vigilance and fully investigate the provenance of works that potentially originated in the Cuba. A dedicated international registry for Cuba’s expropriated art, like the one that exists for property looted by the

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<sup>113</sup> Mandy Estinville, *Cuba’s in the Air: The Legal Challenges to Loaning Art from Cuba due to Judgments under the State Sponsored Terrorism Exception*, CENTER FOR ART LAW (Mar. 30, 2017), <https://itsartlaw.com/2017/03/30/cubas-in-the-air-the-legal-challenges-to-loaning-art-from-cuba-due-to-judgments-under-the-state-sponsored-terrorism-exception/> [<https://perma.cc/5Q8Y-2JLZ>].

<sup>114</sup> Julia Halperin, *Cuban loans travel to the US via Europe as barriers remain in place*, ART NEWSPAPER (Mar. 15, 2017), <http://theartnewspaper.com/news/cuban-loans-travel-to-the-us-via-europe-as-barriers-remain-in-place> [<https://perma.cc/T4YD-BZ8N>].

<sup>115</sup> LARS SCHULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION*, (2011), (discussing U.S. efforts to end the Cuban revolution, and how their failure impacted U.S. domestic and foreign policy).

Nazis, would be helpful in this effort to return confiscated works to their rightful owners.<sup>116</sup>

Meanwhile, the U.S. must *insist* on restitution of nationalized U.S. property. If that is not possible because artworks have disappeared into the international market, the alternative should be a settlement strategy that includes lump-sum settlements for U.S. claims, like that of Olga Lengyel. While Lengyel's heirs and similarly situated claimants will surely not be able to recoup the full value of their lost property, especially at the values existing in today's art market, the settlement cap paid out by the Cuban government should as high as possible, as these claimants have been waiting over half a century for this compensation. For its part, the U.S. needs to continue Obama's process of normalizing ties with Cuba, and repeal the Helms-Burton Act and other economic sanctions once and for all.

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<sup>116</sup> See "Lootedart.com: The Central Registry of Information on Looted Cultural Property, 1933-1945," <http://www.lootedart.com/> (last visited Dec. 12, 2017) [<https://perma.cc/A5MK-HQME>].