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## Title III of the *Libertad* Act: Proceeding in the Absence of True Liberty

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TITLE III OF THE *LIBERTAD* ACT; PROCEEDING IN  
THE ABSENCE OF TRUE LIBERTY

By Luis D. Gutierrez\*

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INTRODUCTION

On April 17, 2019, United States Secretary of State Mike Pompeo announced that the U.S. Government would allow a private right of action to proceed against companies doing business in Cuba on

confiscated property.<sup>1</sup> Title III<sup>2</sup> of the Cuban Liberty and Solidarity Act of 1996<sup>3</sup> – better known as the “*Libertad*”<sup>4</sup> Act” or “Helms-Burton<sup>5</sup>,” permits U.S. nationals whose property was confiscated by the Cuban Government on or after January 1, 1959 to sue in the Federal Courts anyone-regardless of nationality-who knowingly and intentionally “traffics” in that property.<sup>6</sup> Preceding presidential administrations had suspended enforcement of Title III, citing the U.S. national interest in averting extraterritoriality and like violations of International Law.<sup>7</sup> However, with Title III in effect as of May 2, 2019<sup>8</sup> foreign and domestic defendants, now face litigation from Cuban Americans who seek compensation of their expropriated property.<sup>9</sup>

This comment examines the procedural contours of the private right of action afforded to Title III litigants. From this perspective, it argues that the federal courts will not be able to comport with the Constitution in entertaining a Title III action. For one, the harms that the statute seeks redress are not concrete injuries that are fairly traceable to the actions of those deemed liable. In other words, those claimants invoking a right of action do not claim injuries that suffice for standing, under Article III.<sup>10</sup> In addition, Title III grants the courts exorbitant jurisdiction over those liable for trafficking in confiscated property, subjecting any and all defendants to unfair and arbitrary litigation that bypasses their liberty interests under the Fifth

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\* Luis D. Gutierrez received his business degree from Florida International University in 2017 and his law degree from Marquette University in 2020. He thanks Professor Elana Olson for her valuable insights and timely recommendations, all of which contributed to this publication. He also thanks his colleagues, Julie Leary and Meaghan McTigue, for their time and efforts in charting this publication along straight paths. Finally, he acknowledges that this publication was inspired by the political exile of his parents from Cuba in the 1960's. He is humbled by their journey and is grateful for his upbringing, teaching him the value of open discourse and the freedom to question precepts.

<sup>1</sup> See U.S. Department of State, *Secretary of State Michael R. Pompeo's Remarks to the Press*, DEPARTMENT OF STATE (Apr. 17, 2019), <https://www.state.gov/remarks-to-the-press-11/>.

<sup>2</sup> 22 U.S.C. § 6081-6085 (2018)

<sup>3</sup> Cuban Liberty and Solidarity Act of 1996, Pub. L. 104-114, 110 Stat. 785, (1996).

<sup>4</sup> *Libertad* in Spanish means liberty.

<sup>5</sup> *Supra*, note 3 (named after bill co-sponsors Jesse Helms (R-North Carolina) and Dan Burton (R-Indiana)).

<sup>6</sup> 22 U.S.C.A. § 6082 (2018).

<sup>7</sup> See *End of Suspension of Title III of the Helms-Burton Act: Authorization of Claims Under U.S. Law for "Trafficking in Certain Cuban Properties"*, CLEARY GOTTlieb, (Apr. 19, 2019) <https://www.clearygottlieb.com/news-and-insights/publication-listing/end-of-suspension-of--title-iii-of-the-helms-burton-act>.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> S. Kern Alexander, *Trafficking in Confiscated Property in Cuban Property: Lender Liability under the Helms-Burton Act*, 16 Dick J. Int'l L. 523, 538-546 (1998).

<sup>10</sup> See U.S. Const. Art. III, §2, Cl. 2.

Amendment Due Process Clause.<sup>11</sup> All in all, this comment recommends that the federal courts sever Title III from the *Libertad* Act.

### PERTINENT FEDERAL LAW AND EXECUTIVE DECISIONS

During the Spanish-American war, the U.S. and Cuba maintained a close diplomatic relationship.<sup>12</sup> By the late 1950's, North Americans owned almost all the mines and cattle ranches in Cuba and half of the nation's sugar production.<sup>13</sup> But, on January 1, 1959, Fidel Castro assumed power in Cuba that deposed President Fulgencio Batista.<sup>14</sup> Soon thereafter, American relations with Cuba began to deteriorate when Castro aligned himself with the former Soviet Union and agreed to sell sugar in exchange for oil and industrial goods.<sup>15</sup> President Dwight Eisenhower responded by barring the sale of Cuban sugar in the U.S. Castro retaliated by nationalizing foreign-owned businesses and confiscating property owned by Americans without providing compensation.<sup>16</sup> Fearing that Castro would spread his communist agenda to Latin America, the U.S. engaged in an attempted invasion of Cuba, which backfired when the 1,400 Cuban exiles organized by the Central Intelligence Agency were intercepted by Castro's forces as they landed.<sup>17</sup> Thus, President John F. Kennedy issued the Cuban Asset Control Regulations (CACR's), imposing a total economic embargo banning all trade with and travel to Cuba, as a way to constrain Castro's power.<sup>18</sup> The CACRs prohibit U.S. businesses and corporations from conducting business with Cuba or Cuban Nationals and extend to transactions involving property in Cuba or belonging to a Cuban national, unless the transaction is licensed under the regulations.<sup>19</sup> They also prohibit travel to Cuba, with the exception of government officials traveling on official business and close relatives of Cuban nationals.<sup>20</sup> The Cuban Democracy Act of 1992 (CDA)<sup>21</sup> added several provisions

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<sup>11</sup> See U.S. Const. Amend. V ("No Person shall be deprived of life, liberty or property without due process of the law.").

<sup>12</sup> See John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 Hastings Int'l & Comp. L. Rev. 747, 749 (Summer, 1997).

<sup>13</sup> *Id.*

<sup>14</sup> See Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba*, 54 Wash. U. J. Urb. & Contemp. L. 213, 214 (1998).

<sup>15</sup> Yoo, *supra*, note 12 at 750.

<sup>16</sup> *Id.*

<sup>17</sup> See Dunning, *supra*, note 14 at 215.

<sup>18</sup> See Lowenfeld, *supra*, note 9 at 420.

<sup>19</sup> Yoo, *supra*, note 12 at 750.

<sup>20</sup> *Id.*

<sup>21</sup> Cuban Democracy Act of 1992, Pub. L. 102-484, 106 Stat. 2575, (1992).

that fortified the embargo, particularly mandating that no licenses are to be issued to foreign subsidiaries of U.S. firms.<sup>22</sup>

### TITLE III OF THE *LIBERTAD* ACT

#### *BACKGROUND AND LEGISLATIVE HISTORY*

Once the Castro regime ceased trading with the U.S., it began looking to the Soviet Union for massive economic subsidies.<sup>23</sup> With the official dissolution of the Soviet Union in September of 1991, Cuba no longer received these subsidies and its economic output dropped by an estimated fifty percent.<sup>24</sup> Castro, responsible for reviving a struggling economy, invited foreign companies to invest in joint ventures with the Cuban government, allowed for private enterprise in the form of self-employment and private farming, and legalized the use of U.S. currency by Cuban citizens.<sup>25</sup> Many foreign firms began to invest in Cuba with Castro's blessing, including those from Canada and the countries of the European Union, significant U.S. trading partners.<sup>26</sup> In addition, the Cuban government amended and added articles to the Cuban Constitution, which permitted transfer of state-owned property to private ownership, limited public ownership of property to "social property," and recognized certain ownership of mixed enterprises, economic societies and like associations.<sup>27</sup> These constitutional changes were meant to assure foreign companies that Cuba was serious about engaging in joint ventures.<sup>28</sup> In response to these reforms, dissident groups within Cuba called for the Castro regime to grant its citizens the rights guaranteed to them by the Universal Declaration of Human Rights and the Cuban Constitution.<sup>29</sup> However, it was clear to U.S. authorities that the majority of citizens supported the Communist government, and that any prospects for an internal rebellion were faint.<sup>30</sup> Nevertheless, former Cuban citizens living in the U.S. continued to vehemently speak out and express their objections to Castro.<sup>31</sup> Some of these Cuban exiles formed a humanitarian organization

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<sup>22</sup> Dunning, *supra*, note 14 at 215

<sup>23</sup> *Id.* at 219.

<sup>24</sup> *Id.* at 220.

<sup>25</sup> *Id.* at 220-21.

<sup>26</sup> *Id.* at 221.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (Dunning notes that this conclusion was reached by "a group of experts commissioned by the Pentagon.")

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

known as Brothers to the Rescue, which devoted itself to helping Cuban refugees.<sup>32</sup>

Representative Dan Burton (R-I.N.) first introduced the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act in the House of Representatives on February 14, 1995, and The House passed the bill on September 21 by a vote of 294-130, garnering predominant support from Republicans and opposition from Democrats.<sup>33</sup> The bill was then introduced in the Senate by Senator Jesse Helms (R-N.C.), who was said to be motivated by the lobbying influence of former Cuban rum giant *Bacardi*, which would stand to become one of the largest beneficiaries of the act.<sup>34</sup> The Senate passed the bill, as amended, on October 19, 1995, and it later agreed to the House's request for a conference committee on the bill<sup>35</sup>, where it received widespread bipartisan support.<sup>36</sup> The Clinton Administration was initially opposed to the bill.<sup>37</sup> In a letter to House Speaker Newt Gingrich, Secretary of State Warren Christopher noted that he was deeply concerned about the act and that he would recommend that the President veto the bill if passed by Congress.<sup>38</sup> But, on February 24, 1996, Cuban fighter planes shot down two private planes chartered by Brothers to the Rescue, claiming that they had violated Cuban airspace, killing all four American citizens aboard the planes.<sup>39</sup> As a consequence, President Clinton bypassed a presidential veto and signed the bill into law on March 12, 1996.<sup>40</sup>

Some members of Congress did not believe that the Act represented the most effective method of subverting the Castro regime.<sup>41</sup> Prior to the final House vote, Congressman Jack Reed stated that, while he supported the promotion of a democratic Cuba, the *Libertad* Act was contrary to American foreign policy.<sup>42</sup> He further noted that it would increase tensions between the U.S. and Cuba, endangering

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<sup>32</sup> *Id.* at 221-22.

<sup>33</sup> Dunning notes that the bill was passed in essentially the same form in which it was signed into law. *Id.* at 222. Initially, support for the Act was split along party lines: Republicans supported the bill by a margin of 227-4, while Democrats voted against the bill by a 125-67 margin. See Bill Tracking Report, H.R. 927, 104th Cong. (1996).

<sup>34</sup> Dunning, *supra* note 14, at 222-23.

<sup>35</sup> As amended, the bill passed by a 74-24 margin. Republican Senators supported the bill by a 51-2 margin, while Democrats supported it by a narrow 23-22 margin. See Bill Tracking Report, H.R. 927, *supra* note 33.

<sup>36</sup> H.R. REP. NO. 468 (1996).

<sup>37</sup> Dunning, *supra*, note 14, at 223.

<sup>38</sup> *Id.* In correspondence to House Speaker Gingrich, Secretary Christopher added that the Act would actually damage prospects for a peaceful transition and would jeopardize a number of key U.S. interests around the globe. Lowenfeld, *supra* note 9, at 419.

<sup>39</sup> See Dunning, *supra* note 14 at 222; Yoo, *supra*, note 12 at 749.

<sup>40</sup> See Dunning, *supra* note 14 at 223.

<sup>41</sup> *Id.*

<sup>42</sup> See 142 CONG. REC. E308-09 (daily ed. Mar. 7, 1996) (statement of Rep. Reed).

a peaceful transition to democracy.<sup>43</sup> He also pointed to a loophole, which would encourage more, not less, foreign investment in Cuba.<sup>44</sup> Nevertheless, the *Libertad* Act was construed with an intent to promote democratic change in Cuba.<sup>45</sup> Ironically, it was introduced in the House alongside the Free Trade with Cuba Act, which included provisions that would remove the embargo, and any prohibitions against travel to Cuba by United States citizens.<sup>46</sup> It would have also instituted negotiations with Cuba for the purpose of settling claims of U.S. citizens, whose property had been expropriated by the Cuban government.<sup>47</sup>

### LEGISLATION

The *Libertad* Act is divided into four Titles, preceded by sections containing Findings, Purposes, and Definitions.<sup>48</sup> Title III allows U.S. nationals whose property was expropriated by the Cuban government, on or after January 1, 1959, to sue in U.S. courts anyone – regardless of nationality – who knowingly and intentionally “traffics” in that property.<sup>49</sup> Hence, the scheme of Title III is to confront those who traffic in confiscated property that once belonged to U.S. nationals with the prospect of litigation in the federal courts by creating a private right of action.<sup>50</sup> Damages for an initial finding of trafficking equal the value of the property in question, whereas ongoing trafficking exposes offenders to treble damages.<sup>51</sup> “Trafficking” here, is not confined to its traditional legislative conception, concerning those transactions dealing in narcotics.<sup>52</sup> Rather, it is defined to include selling, transferring, buying or leasing the expropriated property, in addition to engaging in commercial activity from using or otherwise benefitting from confiscated property.<sup>53</sup> Thus, under Title III *any person who traffics in Cuban property on which a U.S. national bases a claim may be liable*.<sup>54</sup> A person traffics in confiscated property if that person: knowingly and intentionally – (1) 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

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

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

<sup>45</sup> See Dunning *supra*, note 14 at 223.

<sup>46</sup> H.R. 883, 104th Cong. (1995).

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

<sup>48</sup> Pub. L. 104-114, 110 Stat. 785, 22 U.S.C.A. § 6021.

<sup>49</sup> 22 U.S.C.A. § 6081-6085 (Aug. 1, 1996).

<sup>50</sup> See Lowenfeld, *supra* note 9, at 425.

<sup>51</sup> 22 U.S.C.A. § 6082 (3)(C)(ii) (1996).

<sup>52</sup> See Lowenfeld, *supra* note 9, at 425.

<sup>53</sup> *Id.*

<sup>54</sup> 22 U.S.C. § 6082(a)(1)(A) (1996) (emphasis added).

holds an interest in confiscated property, (2) engages in a commercial activity using or otherwise benefiting from confiscated property, or (3) causes, directs, participates in, or profits from, trafficking by another person, or otherwise engages in trafficking through another person, without the authorization of any United States national who holds a claim to the property.<sup>55</sup> The extension of liability to not just persons who directly control or operate expropriated property, but also to persons who benefit profit from, or have an interest in the property would appear to sweep in a variety of tangential players.<sup>56</sup> For instance, banks that lend to businesses operating with expropriated property are most likely covered, at least to the extent that they maintain a security interest in revenue derived from such property.<sup>57</sup> Some companies with no direct connection to Cuba may also benefit or profit from trafficking if they are closely related to a corporate affiliate that uses expropriated property in its business.<sup>58</sup> The parent company of a wholly-owned subsidiary trafficking in expropriated property, for example, may become implicated.<sup>59</sup>

Title III's private right of action is especially powerful in its allocating damages.<sup>60</sup> Once liability is established, defendants must compensate plaintiffs for the full value of the expropriated property, as measured by the greatest of: (1) the value assigned to the property by the Foreign Claims Settlement Commission (FCSC), if the action was based on an FCSC certified claim; (2) the current fair market value of the property; (3) the fair market value of the property at the time of expropriation, with compounding interest; or (4) a value determined by the court.<sup>61</sup> Any such damages can be tripled when the lawsuit is based on a certified FCSC claim or the defendant continues to traffic in confiscated property 30 days after the plaintiff has provided notice of the action.<sup>62</sup> The cause of action is available to persons who filed claims with the FCSC, thus persons who were U.S. nationals at the time of confiscation.<sup>63</sup> It is also available to Cuban exiles who became or had become U.S. nationals by the effective date

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<sup>55</sup> 22 U.S.C. § 6023(13)(A)(i)-(iii) (1996).

<sup>56</sup> See Dunning, *supra* note 14, at 232.

<sup>57</sup> See Alexander, *supra* note 9, at 546.

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

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

<sup>60</sup> 22 U.S.C. § 6082 (1996).

<sup>61</sup> 22 U.S.C. § 6082(a)(1)(A)(i)(I-III) (1996).

<sup>62</sup> 22 U.S.C. § 6082(a)(3) (1996).

<sup>63</sup> See Lowenfeld, *supra* note 9, at 426.



of the Act, March 12, 1996.<sup>64</sup> This provision also enables children born in the U.S. that succeeded to their parents' claims to file suit.<sup>65</sup>

But, as a compromise, Congress delegated authority to the President to suspend Title III in six-month intervals if they determine and report to Congress that suspension (1) is necessary to the national interests of the U.S. and (2) will expedite a transition to democracy in Cuba. The suspension may be extended for additional periods of six months upon further determinations of the same, even as the act remains in effect.<sup>66</sup> This compromise was accepted at the request of the executive branch "in order to afford the president flexibility to respond to unfolding developments in Cuba."<sup>67</sup> However, Conference Committee noted that President Clinton would not have been able to make, in good faith, the two determinations required for suspension, because suspension would remove a significant deterrent to investment in Cuba, "thereby helping prolong Castro's grip on power."<sup>68</sup> Acknowledging the strong opposition from close allies and documenting concerns about violations of international law, President Clinton suspended Title III on July 16, 1996, defusing tensions with trading partners angered by the law.<sup>69</sup> He continued to suspend Title III throughout the tenure of his presidency, in part to prevent the European Union from pursuing its objections to the *Libertad* Act in the World Trade Organization.<sup>70</sup> Presidents Bush, Obama and Trump would also invoke their suspension authority every six months citing the U.S. national interest.<sup>71</sup>

The Trump administration would become the first to contemplate a full suspension of Title III.<sup>72</sup> On January 16, 2019, that State Department announced that it would suspend the right of action for 45 days only, in order to conduct a "careful review."<sup>73</sup> The Department further noted that it would review "the national interests of the United States and efforts to expedite a transition to democracy in Cuba and include factors such as the Cuban regime's brutal oppression of human rights and fundamental freedoms and its indefensible support for increasingly authoritarian and corrupt regimes

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

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

<sup>66</sup> 22 U.S.C. § 6085(c)(1)-(2) (1996).

<sup>67</sup> Lowenfeld, *supra* note 9, at 426.

<sup>68</sup> *Id.*

<sup>69</sup> President William Jefferson Clinton, Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity Act of 1995 (July 16, 1996).

<sup>70</sup> See Cleary Gottlieb, *supra* note 7, at 3.

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

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

<sup>73</sup> *What is the Helms-Burton Act, and Why does Article III Matter?*, TRT World, at 2. (Mar. 14, 2019), <https://www.trtworld.com/americas/what-is-the-helms-burton-act-and-why-does-article-iii-matter-24946..>

in Venezuela and Nicaragua.”<sup>74</sup> The Ministry of Foreign Affairs of Cuba condemned the announcement, noting that if Title III were to be applied, “each and every Cuban and community in the country will bear witness to the way in which the lawsuits are filed before U.S. courts claiming for the ownership of the house they live in, the workplace where they are provided with medical care, and the parcels where their neighborhoods have been built.”<sup>75</sup> Cuba’s Foreign Minister Bruno Rodriguez added that Title III’s flagrant extraterritoriality and harm “would arbitrarily put third country companies under U.S. Courts” and that the *Libertad* Act was “illegal, inapplicable and void of any legal effect.”<sup>76</sup> Still, the Trump administration persisted on its path towards not invoking its suspension authority when Secretary Pompeo chose to only partially suspend Title III in March of 2019, allowing U.S. Nationals to bring action against Cuban entities and sub-entities on the Cuba Restricted list for 30 days.<sup>77</sup> He would extend the suspension, under the same exceptions, for two weeks in early April.<sup>78</sup> Subsequently, Secretary Pompeo would announce, and then-U.S. National Security Adviser John Bolton would outline the full implementation of Title III’s right of action.<sup>79</sup> As of May 2, 2019, Title III would no longer be suspended.<sup>80</sup>

### **TITLE III RECOGNIZES LIABILITY THAT DOES NOT ALLOW PLAINTIFFS TO MAINTAIN STANDING UNDER ARTICLE III.**

The Constitution limits federal courts jurisdiction to actual “cases or controversies.”<sup>81</sup> Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy and it limits the category of litigants who may bring a lawsuit in federal court.<sup>82</sup> To have standing, a plaintiff must have (1) suffered an injury in-fact, (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable judicial decision.<sup>83</sup> Thus, any case where the plaintiff ceases to meet all three

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

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.*

<sup>77</sup> Zachary Cohen and Jennifer Hansler, *Trump Expected to Become first President to Target Cuba with this Controversial Policy*, CNN.com (Apr. 17, 2019), <https://www.cnn.com/2019/04/16/politics/us-cuba-title-iii-venezuela/index.html>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

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

<sup>81</sup> *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

<sup>82</sup> *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016).

<sup>83</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

requirements for constitutional standing no longer presents a live case or controversy and the federal courts should dismiss it for lack of subject matter jurisdiction.<sup>84</sup> Standing is perhaps the most important jurisdictional requirement as without it, the federal courts would have no power to judge the merits.<sup>85</sup> Here, Title III confers its plaintiffs with an inadequate right of action that would yield no legal standing. The harms that Title III seeks to redress are not concrete injuries and even if they were, they are not fairly traceable to any sort of commercial activity by the defendants that may have produced a harm.

### *TITLE III HARMS DO NOT AMOUNT TO LEGAL INJURIES*

The foremost standing requirement is injury in-fact, which consists of an invasion of a legally protected interest that is, amongst other considerations<sup>86</sup>, concrete.<sup>87</sup> A concrete injury must be *de facto*, meaning that it must be real and not abstract.<sup>88</sup> Congress has the power to define injuries that would allow a case or controversy to mature.<sup>89</sup> However, its role in identifying and elevating harms does not mean that a plaintiff would automatically allege an injury-in-fact whenever a statute authorizes that person to sue.<sup>90</sup> Put simply, Congress cannot evade Article III's standing requirements by statutorily granting someone the right to sue when they would not have standing otherwise.<sup>91</sup> In the context of Title III litigation, Congress clearly intended to make those who traffic in expropriated property liable to the U.S. Nationals who once owned the property. It was prompted to enact Title III because the remedies for (1) the wrongful confiscation of property by foreign governments; and (2) the subsequent unjust enrichment and economic exploitation of that property by foreign investors at the expense of the rightful owners were ineffective.<sup>92</sup> In so doing, it afforded plaintiffs a clear property interest.<sup>93</sup> Yet, the commercial activities of any Title III defendant,

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<sup>84</sup> See *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011).

<sup>85</sup> See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420-21 (2013); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982).

<sup>86</sup> An injury in fact consists of "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

<sup>87</sup> *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 103 (1998).

<sup>88</sup> *Spokeo, Inc.*, 136 S. Ct. at 1548.

<sup>89</sup> *Id.* at 1549.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 22 U.C.S.A. § 6081(8) (1996).

<sup>93</sup> See U.S. CONST. amend. V.

specifically those that rise to the level of trafficking in expropriated property, do not infringe on any such interests.

Critical to the pulse of any prospective Title III litigation is that all such injuries originate in the confiscation of the property by the Cuban Government. Hence, those defendants that would fall within the purview of liability established by the statute are not culpable for the most significant harm to a plaintiff's interests, that being the sovereign taking of the property. Therefore, the federal courts would need to hold that there is a concrete harm in conducting business on the property without obtaining consent or paying adequate compensation to its original owner.<sup>94</sup> But articulating as much, here, would not align with federal law. At the outset, any cause of action alleging unjust enrichment and trespass is predicated on the ongoing ownership of property.<sup>95</sup> Title III, meanwhile, merely provides a right of action to those U.S. Nationals who own a claim to confiscated property in Cuba, without explicitly granting nor acknowledging full legal title.<sup>96</sup> Further, the Supreme Court has recognized the power of the Cuban government to expropriate property within its borders and to vest such rights in Cuba, even when the sovereign fails to compensate former owners.<sup>97</sup> Thus, in carrying a claim to confiscated property that does not vest a full legal title, Title III plaintiffs are not injured when they do not receive and are not entitled to receive commissions stemming from business derived on the property.

***EVEN IF THESE HARMS WERE DEEMED INJURIES, THEY ARE NOT FAIRLY TRACEABLE TO THE TRAFFICKING THAT INCURS LIABILITY***

To establish standing, a plaintiff must also demonstrate that the injuries sustained are fairly traceable to the defendant's conduct,

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<sup>94</sup> See *Havana Docks Corp. v. Carnival Corp.*, Slip Copy at 9, (S.D. Fla. 2020) (holding that a Title III injury was concrete, because while the injury may have had its origin in the confiscation, the Defendant did not explain how the continued use of the Subject Property made the Plaintiff's harm any less tangible. Stated otherwise, Plaintiff's injury was real because it was not receiving the benefit of its interest in the Subject Property, and Defendant's subsequent trafficking in the confiscated property has undermined Plaintiff's right to compensation for that expropriation); *Havana Docks Corp. v. MSC Cruises Sa Co.*, Slip Copy at 8, (S.D. Fla. 2020) (holding along same rationale); *Havana Docks Corp. v. Norwegian Cruise Line Holdings Ltd.*, Slip Copy at 8 (S.D. Fla. 2020) (holding along identical rationale).

<sup>95</sup> See *Glen v. Club Mediterranee S.A.*, 365 F.Supp.2d 1263, 1269 (S.D. Fla. 2005).

<sup>96</sup> 22 U.S.C. §§ 6082(a)(1)(A) (1996); *Glen*, 365 F.Supp.2d at 1269.

<sup>97</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414–415 (1964) (implementing the “Act of State” Doctrine and holding that territorial property rights are vested in a respective sovereign.)

meaning that the injuries are connected with the conduct of they complain.<sup>98</sup> Yet, proximate causation is not a requirement of Article III standing as harms that flow indirectly from the action in question can be said to be fairly traceable to that action.<sup>99</sup> Thus, a plaintiff may be able to satisfy Article III standing even if the allegations pertaining to the chain of causation are weak on the merits.<sup>100</sup> Meeting these requirements is especially pertinent when Congress defines the injuries and articulates the chains of causation that give rise to a case or controversy where none existed before.<sup>101</sup>

In Title III, Congress attempted to recognize a causal link between a claimant's injury from the Cuban Government's expropriation of their property and a subsequent trafficker's unjust enrichment from the use of that property.<sup>102</sup> But, in delineating traceability, it does not properly attribute the harm excised upon its plaintiff's legal interests to the conduct that renders a defendant liable. To the contrary, the causal chain of any such liability starts and ends with the Cuban sovereign, as the nation was entirely responsible for both confiscating and expropriating the property. Traceability to the defendant is significantly curbed when the statute allocates money damages in an amount equal to the sum of a claim certified by the FCSC, by a special master determining the amount or ownership of a claim, or by the fair market value of the property.<sup>103</sup> Essentially, Title III makes no connection between the value of the property on which the claim is based and the value of the enrichment on which the assertion of trafficking rests, grounding the legal harm solely in the confiscation and expropriation by the Cuban Government.<sup>104</sup> In determining that Title III does not articulate a coherent chain of causation between the harm to the plaintiff's property interests and the defendant's trafficking, it follows that any like liability is not fairly traceable to a defendant doing business on the contended property.

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<sup>98</sup> *Trump v. Hawai'i*, 138 S.Ct. 2392, 2416 (2018).

<sup>99</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134, n.6 (2014).

<sup>100</sup> *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

<sup>101</sup> *Spokeo, Inc.*, 136 S. Ct. at 1549.

<sup>102</sup> *See* David P. Fidler, *Libertad v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 Ind. J. Global Legal Stud. 297, 322 (Spring, 1997).

<sup>103</sup> 22 U.S.C.A. §§ 6082 (a)(1)(i)(I)-(III) (1996).

<sup>104</sup> *See Lowenfeld*, *supra* note 9, at 426.

### TITLE III FORGOES DUE PROCESS CONSIDERATIONS UNDER THE FIFTH AMENDMENT AND IS THEREFORE UNCONSTITUTIONAL

When Congress creates liability, it must act within its delegated constitutional powers and not infringe on constitutionally protected rights.<sup>105</sup> The Constitution authorizes Congress to regulate U.S. commerce with foreign nations<sup>106</sup>, allowing it to regulate foreign conduct that has substantial or intended effects on commerce.<sup>107</sup> But, any implementation of liability must still answer to the Bill of Rights.<sup>108</sup> This limitation would entitle foreign defendants to receive Fifth Amendment Due Process protection with respect to exercises of personal jurisdiction by the federal courts.<sup>109</sup> Title III disregards any such protection when imposing liability on *any person that traffics*<sup>110</sup> in property confiscated by the Cuban Government when it merges subject matter jurisdiction over the trafficking that arises from expropriated property in Cuba with personal jurisdiction over those deemed liable. As a consequence, the right of action creates personal jurisdiction where the Constitution forbids it, specifically in violation of the Fifth Amendment Due Process Clause.<sup>111</sup>

### THE FIFTH AMENDMENT DUE PROCESS CLAUSE PROTECTS THE SAME LIBERTY INTEREST AS THE FOURTEENTH AMENDMENT

The extraterritorial application of law by U.S. states is subject to Fourteenth Amendment Due Process limits, and that such

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<sup>105</sup> See Bret A. Sumner, *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, 961 (1997).

<sup>106</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>107</sup> See A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation*, 35 COLUM. J. TRANSNAT'L L. 379, 405 (1997).

<sup>108</sup> See Lea Brilmeyer & Charles Nochi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1252-53, n. 204 (April 1992).

<sup>109</sup> *Id.* at 1260.

<sup>110</sup> 22 U.S.C. § 6082 (a)(1) (1996) (emphasis added).

<sup>111</sup> See *Alcide v. Nippon Yusen Kabushiki Kaisha*, 465 F.Supp.3d 588, 596-97 (E.D. La. 2020) (noting that arguments as to the broad nature of admiralty claims under the Fifth Amendment Due Process Clause, relative to the Fourteenth Amendment Due Process, only serve to conflate subject matter jurisdiction with personal jurisdiction in violation of the Fifth Amendment Due Process Clause); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 465 F.Supp.3d 610, 619, 621-23 (E.D. La. 2020) (articulating the same).

application therefore cannot be unreasonable or fundamentally unfair.<sup>112</sup> Thus, a state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if that defendant has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>113</sup> From this conception of fair play and substantial justice, courts may acquire personal jurisdiction in either one of two ways. First, the courts may exercise specific jurisdiction over its defendants when a lawsuit “arises out of or relates to the defendant’s contacts with the forum.”<sup>114</sup> Second, courts may assert general jurisdiction over its defendants when their operations within the forum are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from these activities.<sup>115</sup> In other words, a court may hear any and all claims against these defendants “when their affiliations with the forum are so continuous and systematic as to render them essentially at home in the forum.”<sup>116</sup>

Yet, in *Daimler AG v. Bauman*<sup>117</sup>, the Supreme Court also noted that to approve the exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous, and systematic course of business would be unacceptably grasping.<sup>118</sup> There, twenty-two residents of Argentina filed suit against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company, in the Northern District of California.<sup>119</sup> The complaint alleged that Mercedes-Benz of Argentina (MB Argentina), a subsidiary of Daimler, collaborated with state security forces, during Argentina’s “Dirty War” to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs.<sup>120</sup> In asserting claims under the Alien Tort statute and the Torture Victim Protection Act, the complaint noted that personal jurisdiction was predicated on the California contacts of Mercedes-Benz, LLC. (MBUSA), another Daimler subsidiary that was incorporated in Delaware with its principal place of business in New Jersey.<sup>121</sup> It cited that MBUSA had distributed Daimler-manufactured

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<sup>112</sup> See *infra*, note 117, at 141; *Asahi Metal Indus. v. Superior Ct. of Cal., Solano Cty.*, 480 U.S. 102, 107 (1987).

<sup>113</sup> See *infra*, note 117, at 142; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

<sup>114</sup> *Helicopteros Nacionales de Colom, S.A. v. Hall*, 466 U.S. 408, 414, n. 8 (1984).

<sup>115</sup> *International Shoe Co.*, 326 U.S. at 318.

<sup>116</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011); *Helicopteros*, 466 U.S., at 414, n.9.

<sup>117</sup> *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

<sup>118</sup> *Id.* at 138.

<sup>119</sup> *Id.* at 120-121.

<sup>120</sup> *Id.* at 122.

<sup>121</sup> *Id.* at 123.

vehicles to independent dealerships throughout the U.S., including California.<sup>122</sup> However, the Court held that Daimler was not, in fact, amenable to suit in California for injuries allegedly caused by conduct of MB Argentina that took place entirely outside of the U.S.<sup>123</sup> It reasoned that, even in assuming that MBUSA qualified as at home in California, Daimler's affiliations were not sufficient to subject it to the general jurisdiction of the forum, especially when the claims by the foreign plaintiffs had nothing to do with anything that occurred or had its principal impact in California.<sup>124</sup> Thus, it cautioned that if Daimler's California activities sufficed to allow adjudication of the Argentina-rooted case in California, it would sanction a grasping view of general jurisdiction.<sup>125</sup> It concluded that exercises of personal jurisdiction so exorbitant, would be barred by due process constraints on the assertion of adjudicatory authority.<sup>126</sup>

Critical to any exercise of personal jurisdiction post-*Daimler* is that the federal courts should entertain it when it is reasonable.<sup>127</sup> This principle is exemplified by the fact that personal jurisdiction represents a restriction on judicial power as a matter of individual liberty.<sup>128</sup> Therefore, the Fifth and Fourteenth Amendments place the same limits upon the unreasonable exercise of personal jurisdiction that would violate due process.<sup>129</sup> Both clauses use the same language to preserve the same liberty interest, that is to be free from arbitrary litigation<sup>130</sup>, which would hale individuals and corporations outside of the forum directly into the forum, and the only distinction that exists between both clauses is when the Fifth Amendment is implicated, indicating that the courts would look to

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 139. The Court was also conscious of the extraterritorial context of the dispute, citing recent precedent that had constrained the exercise of jurisdiction over foreign corporate defendants, under the Alien Tort Statute (ATS), *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013), and the Torture Victim Protection Act (TVPA), *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012). Yet, *Daimler's* outgrowth, relative to *Kiobel* and *Mohamad*, is significantly broader since it affords foreign defendants due process protection from unreasonable exercises of general personal jurisdiction. Furthermore, the presumption against extraterritoriality, as invoked in *Kiobel* pertaining to jurisdiction over the ATS, would be unavailing in raising a defense as to the lack of personal jurisdiction in a Title III action, since Congress was explicitly clear in prescribing jurisdiction abroad in Cuba. See also *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1403 (2018) (holding that absent further action from Congress, it would be inappropriate to extend ATS liability to foreign corporations).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 138.

<sup>126</sup> *Id.* at 139.

<sup>127</sup> See *id.* at 141.

<sup>128</sup> See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999)

<sup>129</sup> See *Brilmayer*, *supra* note 108, at 1222.

<sup>130</sup> *Id.* at 1220.



examining a defendant's contacts with the U.S. as a whole, rather than the local forum.<sup>131</sup>

Hence, in protecting personal rights, the Fifth Amendment Due Process clause limits the extraterritorial application of federal law as the Fourteenth Amendment limits like state actions.<sup>132</sup> Essentially, it shields individuals from arbitrary government actions, rather than divesting government of the competence to act.<sup>133</sup> Although the Court has yet to speak definitively on this proposition as the question remains open,<sup>134</sup> it is clear that the Fifth and Fourteenth Amendment standards for jurisdiction are the same.<sup>135</sup> Therefore, the federal courts should enshrine *Daimler* into the Fifth Amendment Due Process clause, where jurisdiction over foreign defendants will only be reasonable when the contacts of the defendant with the U.S. are so continuous and systematic as to render them essentially at home in the forum.<sup>136</sup> Legislation that authorizes the exercise of any such jurisdiction outside of this setting should be ruled unconstitutional.

### ***TITLE III GRANTS THE FEDERAL COURTS UNREASONABLE JURISDICTION OVER ITS DEFENDANTS***

Where personal jurisdiction recognizes and protects the individual liberty interest of defendants, subject matter jurisdiction concerns the character of the controversies over which federal judiciary

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<sup>131</sup> See *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 234 (5th Cir. 2016). Pertaining to Title III litigation, the courts will either aggregate national contacts or assess local contacts based on the Defendant being hailed into court. Specifically, Title III adopts 28 U.S.C. § 1608 from the Foreign Sovereign Immunities Act (FSIA), meaning that an agency or an instrumentality of a foreign state may be served nationwide in the U.S. In such an instance, the national contacts of the defendant will be aggregated in determining whether the exercise of personal jurisdiction comports with 5th Amendment Due Process and Rule 4(K)(2) of the Federal Rules of Civil Procedure. See *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987) (“[W]here service is made under FSIA section 1608, ‘the relevant area in delineating contacts is the entire United States, not merely [the forum state].’”) In all other instances, the contacts of the defendant will be assessed relative to the local forum, adhering to Fourteenth Amendment Due Process and Rule 4(k)(1). See *Del Valle v. Trivago GmbH*, Slip Copy at 3 (S.D. Fla. 2020) (applying Florida’s long-arm statute to hold that a website accessible in the state was not sufficient to confer the Court general personal jurisdiction over the Defendant).

<sup>132</sup> See Brilmayer, *supra* note 108, at 1222.

<sup>133</sup> *Id.*

<sup>134</sup> See *Republic of Arg. V. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (assuming, without deciding, that a foreign state is a “person” for purposes of the Fifth Amendment Due Process Clause); cf. *S.C. v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (holding that States of the Union are not persons for purposes of the Fourteenth Amendment Due Process Clause).

<sup>135</sup> See *Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2<sup>nd</sup> Cir. 2016) (recognizing *Daimler* test into Fifth Amendment Due Process Clause); *Liynat v. Palestinian Auth.*, 82 F.Supp.3d 19, 25 (D.D.C. 2015) (applying the *Daimler/Goodyear* framework from the Fourteenth Amendment Due Process case in favor of Defendant’s personal liberty interest).

<sup>136</sup> See *Daimler*, 571 U.S. at 141.

authority may extend.<sup>137</sup> Thus, any legislation that grants the federal courts broad subject matter jurisdiction does not correlate to a tantamount exercise of personal jurisdiction.<sup>138</sup> Prescribing as much would be contrary to Supreme Court precedent, which has made clear that subject matter jurisdiction and personal jurisdiction are separate legal requirements that serve distinct purposes.<sup>139</sup>

Title III conflates personal jurisdiction and subject matter jurisdiction when imposing liability on any person that traffics in property confiscated by the Cuban government.<sup>140</sup> The right of action swings wide open the courthouse door to claimants without expressing any clear reservations as to the defendants that may be hauled into court. Rather, any and all limitations on the cases or controversies presented to the courts are limited to a \$50,000 amount-in-controversy requirement<sup>141</sup> and a two-year statute of limitations.<sup>142</sup> Other pertinent limitations concern the termination of rights, particularly the President's suspension authority.<sup>143</sup> However, in line with an objective to affect the behavior of persons in third countries who have done or are considering doing business in or with Cuba<sup>144</sup>, Title III does not delineate any exceptions, limitations, or protections that temper an otherwise unreasonable exercise of jurisdiction.

While a defendant here may be at liberty to raise a motion to dismiss for want of personal jurisdiction<sup>145</sup>, Title III should not stand when the deprivation of the defendant's liberty interest is plain on the face of the statute. Its construction of liability mandates the federal courts to hear any and all claims where any person traffics in confiscated property. Assessing such motions on a case-by-case, fact-sensitive basis would run contrary to the letter of the law, which does not allow courts to discriminate as to the class of defendants that may be found liable for trafficking.<sup>146</sup> But, even more problematic to judicial economy is when a court denies a motion to dismiss on the basis that any constitutional arguments as to the lack of

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<sup>137</sup> *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–02 (1982).

<sup>138</sup> See *Ins. Corp. of Ir.* at 701; cf. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017) (holding that the Fourteenth Amendment due process constraint, under *Daimler*, applies to all state-court assertions of general jurisdiction over nonresident defendants and does not vary with the type of claim asserted).

<sup>139</sup> *Ins. Corp. of Ir.*, 456 U.S. at 701.

<sup>140</sup> See *supra*, note 111.

<sup>141</sup> 22 U.S.C. § 6082(b) (1996).

<sup>142</sup> 22 U.S.C. § 6084 (1996).

<sup>143</sup> 22 U.S.C. § 6085(c)(1)–(2) (1996).

<sup>144</sup> One of the bill's proponents from the Cuban-American community, Nicholas J. Gutierrez, Jr. noted: "We're not doing this to win lawsuits. The main objective is to drive foreigners out of Cuba." See *Lowenfeld*, *supra*, note 9 at 427, note 41.

<sup>145</sup> See *Del Valle*, *supra*, note 131 at 1.

<sup>146</sup> 22 U.S.C. § 6082 (a)(1) (1996).

jurisdiction could still be adjudicated on the merits.<sup>147</sup> Title III does not afford its defendants the opportunity, as the defendants that lose on a pretrial motion to dismiss are certain to lose at trial.

Thus, the outcome of any such case is wholly contingent on aggregating the defendant's contacts<sup>148</sup> with the U.S., as opposed to litigating the merits substantiating the right of action. Title III is therefore unconstitutional, since it entangles the federal courts' personal jurisdiction over the defendant with the merits of the controversy.<sup>149</sup> Recognizing that foreign defendants cannot be subjected to an exorbitant exercise of personal jurisdiction that is unreasonable and unfair<sup>150</sup>, the private the right of action is in violation of the Fifth Amendment Due Process Clause.

### THE FEDERAL COURTS SHOULD SEVER TITLE III FROM THE LIBERTAD ACT

When enacting legislation, Congress sometimes expressly addresses severability, as it may include a severability clause in the law making clear that the unconstitutionality of one provision does not affect the rest of the law.<sup>151</sup> When Congress does include an express severability clause, the federal courts should adhere to the text of the clause, because it leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional.<sup>152</sup> A severability clause indicates that Congress "did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."<sup>153</sup> Although a litigant may argue that the text of a severability clause does not reflect Congress's actual intent as to severability, courts today are more likely to acknowledge the text of a severability clause as indicative of

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<sup>147</sup> While all three *Havana Docks* cases sequentially denied defendants' motions to dismiss for lack of standing, they underscore the complications of Title III litigation. Adhering to the right of action, plaintiffs that satisfy their jurisdictional burdens will not have to face any heightened requirements as to the merits of a cause of action. A defendant that does not prevail on jurisdiction, will not prevail at trial. See *Havana Docks Corp.*, *supra* note 94, at 9.

<sup>148</sup> See *Meadows*, *supra*, note 131 at 523.

<sup>149</sup> See *Ins. Corp. of Ir.*, 456 U.S. at 701.

<sup>150</sup> See *Daimler*, 571 U.S. at 141.

<sup>151</sup> *Barr v. Am. Assoc. of Pol. Consultants, Inc.*, 140 S. Ct. 2325, 2349 (2020).

<sup>152</sup> *Id.*

<sup>153</sup> *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

congressional intent.<sup>154</sup> Congress included a severability clause in the *Libertad* Act, which states that if any provision of the act, or the application to any person is held invalid, the remainder of the act or its application to other persons not similarly situated would not be affected by the invalidation.<sup>155</sup>

Thus, the Act expressly permits the federal courts to sever Title III upon holding that the right of action is unconstitutional. Severing would also be aligned with the holistic intent of the passing Congress. The *Libertad* Act was not passed to stimulate complex litigation in the U.S. nor to compensate investors hurt by the Cuban Revolution.<sup>156</sup> Granting the President suspension authority over Title III<sup>157</sup> demonstrates that the right of action is not critical to the act's purported ends. All in all, twenty-three years elapsed from the effective date of Title III, the conclusion of the three-month grace period, and the rescission of a presidential suspension before claimants were able to file suit under Title III.<sup>158</sup> Conversely, the rescission of the suspension and the subsequent availability of the right of action contemplates other due process considerations,<sup>159</sup> especially pertinent if the current administration or any succeeding administration were to once again suspend Title III. For this very reason, it is imperative that the Federal Courts speak affirmatively as to the unconstitutionality of Title III. Deferring to the President's conferred discretion to suspend would do nothing to ease the liability that is currently imposed on those deemed to be trafficking in expropriated property. Further, any such right of action that can yield damages would be subject to the whims of a sitting administration, thereby designating the enactment of the right of action a mere political question.<sup>160</sup> The federal courts should address Title III in a live case or controversy. In so doing, they should strike it down as unconstitutional and sever it from the *Libertad* Act.

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<sup>154</sup> *Barr*, 140 S.Ct. at 2349.

<sup>155</sup> 22 U.S.C. § 6024 (2020).

<sup>156</sup> See *Lowenfeld*, *supra*, note 9 at 427.

<sup>157</sup> 22 U.S.C. § 6082(h)(1)(A) (1996).

<sup>158</sup> See Cleary Gottlieb, *supra* note 7, at 3.

<sup>159</sup> It has been argued that the President's suspension authority under Title III "transposes" the liability from the foreign entities that are trafficking in the expropriated property to the U.S. Government in the form of eminent domain under the Fifth Amendment. Antonio L. Roca, A Critical Inquiry Into a Government Taking, Presidential Suspension of Title III under the Libertad Act, 11 St. Thomas L. Rev. 545, 571 (Spring 1999).

<sup>160</sup> See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (labeling the nonjusticiability of a political question as primarily a function of separation of powers).

## CONCLUSION

As a shining city on a hill, the United States seeks to exemplify the virtues of its democracy at home and instill those principles abroad. Title III charts a noble endeavor towards honoring one's fundamental right to own and property, which is enshrined in the U.S. Constitution. Furthermore, in the interest of the Cuban people, it is invested in the Cuban government respecting the property rights of its nationals. But, when enacting Title III, the U.S. ignored its own constitution of norms, mores, and values in creating and exacerbating exorbitant encroachments into one's personal liberties without regard for due process. Therefore, the federal courts should sever Title III from the *Libertad* Act, in recognition of true liberty for all.