

## Baseball Diplomacy

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# BASEBALL DIPLOMACY

ANDREA KUPFER SCHNEIDER\*

Cuba is perhaps the country with which the United States has had the longest lasting troubled relationship. Dating back to the Bay of Pigs and the Cuban Missile Crisis, the public's response to Cuba is often visceral and negative. Our response to baseball is similarly visceral and positive.<sup>1</sup> Baseball has inspired songs,<sup>2</sup> jingles,<sup>3</sup> poetry,<sup>4</sup> and some of our most beloved movies.<sup>5</sup> When the relationship with Cuba collides with the sport that is perhaps our nation's most cherished, the result is bound to be explosive.

Consider this: our relationship with Cuba in the last decade has included the shooting down of civilian aircraft by the Cuban Air Force, the Helms-Burton Act which tried to expand the Cuban embargo, and the Elian Gonzales saga. Yet, at the same time, numerous Cuban baseball players have made their way to the United States and to Major League Baseball (MLB).

This article will examine several issues at the intersection of Cuba, the United States, and baseball. Inevitably, and sometimes unfortunately, dealings with Cuba involve politics. The first part of this article will examine the broader politics and laws governing the relationship between the United States and Cuba regarding baseball. This section will examine the experience of the Baltimore Orioles in their travels to Cuba to play baseball and their hosting the Cuban National Team in the United States. This section will also analyze the controversy caused by the Orioles when they announced that they would not hire Cuban defectors.

The second part of the article will focus on the narrower issues raised when Cuban defectors come to the United States and want to play baseball. This section will review the history of Cuban player defections to

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1. See, e.g., Roberto González Echevarría, *The Magic of Baseball*, 8 IND. J. GLOBAL LEGAL STUD. 145 (2000).

2. *Take Me Out To The Ball Game*.

3. "Baseball, hotdogs, apple pie and Chevrolet." Chevrolet commercial (1970s).

4. *Casey At The Bat*.

5. E.g., *FIELD OF DREAMS* (Universal Studios 1989); *BULL DURHAM* (Orion Pictures 1988); *THE NATURAL* (Columbia Pictures 1984); *BAD NEWS BEARS* (Paramount Pictures 1976).

the United States and then focus on the recent court case brought by a Cuban player against Major League Baseball alleging discriminatory rules regarding free agency.

## I. THE BALTIMORE ORIOLES CONTROVERSY

After Cuba's shooting down of two planes carrying United States civilians<sup>6</sup> and the resulting passage of the Helms-Burton law which attempted to restrict trade with Cuba even further,<sup>7</sup> relations between the United States and Cuba were very cold. By 1999, however, relations with Cuba were thawing in a variety of ways. Congress had passed several bills that ostensibly relaxed the embargo with Cuba.<sup>8</sup> The Elian Gonzales controversy may have helped to ease relations in the long run by generating sympathy for Elian's Cuban father who wanted to take him home.<sup>9</sup> And in 1999, the thaw continued as the Clinton administration gave permission to the Baltimore Orioles to play baseball in Cuba.<sup>10</sup>

One of the key problems with United States teams playing in Cuba and vice versa was money.<sup>11</sup> Due to United States law prohibiting trade with Cuba,<sup>12</sup> profits from the game in Baltimore could not go to the Cuban government. Resolving this controversy took flexibility and ingenuity on the part of the State Department; the parties finally agreed that the money would go to a Cuban agency.<sup>13</sup>

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6. Matthew N. Greller, Note and Comment, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14 AM. U. INT'L L. REV. 1647, 1649 n.3 (1999).

7. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act) §§ 102, 201, 301, 22 U.S.C. §§ 6032, 6061, 6081 (Supp. V 1999); Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 423 (1996). Both the Clinton and Bush administrations continue not to enforce the most onerous parts of this law.

8. Tim Weiner, *U.S. Ready to Ease Some Restrictions in Policy on Cuba*, N.Y. TIMES, Jan. 5, 1999, at A4; see also H.R. 5426, 106th Cong. (2001) (allowing certain materials to be traded with Cuba, particularly food and medicine).

9. Christopher Marquis, *Altered States: A Shift in the U.S.-Cuba Time Warp*, N.Y. TIMES, Dec. 3, 2000, § 4, at 4.

10. Murray Chass, *Orioles to Play in Cuba: First Such Trip Since '59*, N.Y. TIMES, Mar. 6, 1999, at D6. The Orioles had requested permission for this exchange for three years before it was granted.

11. Murray Chass, *Deal Is Finally Worked Out for Orioles-Cuba Exhibition*, N.Y. TIMES, Mar. 7, 1999, § 8, at 2.

12. Exec. Order No. 3447, 27 Fed. Reg. 1085 (Feb. 6, 1962) (explaining that President Kennedy's establishment of a comprehensive economic embargo against Cuba sought to promote security throughout the western hemisphere); 22 U.S.C. §§ 6032, 6061, 6081.

13. Chass, *supra* note 11, § 8, at 2.

In March 1999, the Orioles traveled to Cuba for several games against the Cuban National Team. The Cuban National Team played the Orioles in Baltimore that May. The response to this baseball exchange was interesting for a number of reasons. First, the owner of the Orioles, Peter Angelos, was accused by other owners of using the games as a pretext for recruiting Cuban players.<sup>14</sup> Second, some baseball players and politicians criticized the games for giving Castro legitimacy as the leader of Cuba.<sup>15</sup> Finally, others praised the exchange as a continuation of the thawing of United States-Cuban relations.<sup>16</sup> The mixed response to these games reflected the wide variety of viewpoints on dealing with Cuba.

The reaction to these games also demonstrated how special baseball is in the eyes of many Americans. While Cuban-American exchanges in other professions (orchestras, teachers, etc.) had received some notice,<sup>17</sup> the exchange of baseball teams received wide press coverage. The focus of this coverage was both regarding the respective quality of the teams<sup>18</sup> as well as the potential impact that this type of exchange could have on foreign relations in general.<sup>19</sup> When the games were over, many expected that this type of exchange would be repeated.<sup>20</sup>

Undoubtedly with an eye toward continuing these exchanges, the Orioles Vice-President, Syd Thrift, was quoted by the conservative paper *The Washington Times* on May 17, 2000, as stating that the Orioles would not hire any Cuban defectors in order to maintain good relations with Castro.<sup>21</sup> Perhaps recognizing the storm to come, Thrift back-peddled the next day by calling his statement a concept not a policy.<sup>22</sup> Baltimore

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14. Wire Report, *Marlins Owner Rips O's for Playing Cuba*, TAMPA TRIB., Mar. 27, 1999, at 5.

15. Murray Chass, *Cubans in Majors Opposing Orioles' Trip to Homeland*, N.Y. TIMES, Mar. 25, 1999, at D3.

16. George Vecsey, *Sports of the Times; Cuba Game Could Open Some Doors*, N.Y. TIMES, May 4, 1999, at D1.

17. Peter Watous, *Arts Abroad: Swapping Cha-Chas and Rap in Cuba*, N.Y. TIMES, Mar. 31, 1999, at E1.

18. Richard Justice, *Orioles' Extra Effort Pays Off: Baines's Hit in 11th Wins Game in Cuba*, WASH. POST, Mar. 29, 1999, at D1; Richard Justice, *Orioles Get Smoked By Cubans: Visitors Collect 18 Hits, Pickering Makes 3 Errors*, WASH. POST, May 4, 1999, at D1.

19. Thomas W. Lippman, *U.S. Ready to Play Ball With Cuba: Clinton to Ease Trade Embargo, Using Orioles as Unofficial Envoys*, WASH. POST, Jan. 5, 1999, at A1.

20. Christopher Marquis, *Despite U.S. Restrictions Against Cuba, Door Opens Wider for Visits by Americans*, N.Y. TIMES, June 19, 2000, at A10.

21. Brooke Tunstall, *Orioles Won't Make a Pitch for Cuban Defectors; Seek Better U.S. Relations with Havana*, WASH. TIMES, May 17, 2000, at A1.

22. Peter Schmuck, *O's Won't Pursue Cuban Defectors: Thrift Says Stance is 'Concept,' Not Policy*, BALT. SUN, May 18, 2000, at 6D.

Orioles owner Peter Angelos also denied that the comment was Orioles' policy but added that he did not like how Cuban players were signed in a "meat market" fashion<sup>23</sup> and that the Orioles did not want to encourage defections.<sup>24</sup> Neither Thrift's nor Angelos's denials were sufficiently vehement to avert the political fallout of such commentary. Thrift naively lamented to the press that "[T]he trip was supposed to be non-political. It was supposed to be just baseball."<sup>25</sup>

While the Orioles would probably have been subject to the same criticisms by these politicians, the situation was made even more explosive by the fact that Peter Angelos was a significant contributor to the Democratic National Committee.<sup>26</sup> As the controversy escalated, members of both sides began throwing their proverbial brush-back pitches. Republican National Committee chairman Jim Nicholson started the accusations with a press release noting,

The Cubans who flee the brutal regime of Castro's Cuba should be welcomed to the United States with wide-open arms and all the opportunities that freedom and capitalism provide. Instead, Peter Angelos – who sits in the swank owner's box at Camden yards and is the biggest trial lawyer donor in the country – turns a blind eye to the atrocities committed by Castro's totalitarian state.<sup>27</sup>

Within days, Senator Jesse Helms asked the Justice Department to begin an investigation regarding the Orioles' hiring practices.<sup>28</sup> Helms's spokesman Marc Thiessen commented, "Unfortunately, for Orioles owner Peter Angelos, being friends in this country with Fidel Castro doesn't put you above the law."<sup>29</sup> A day after Helms's request, the conservative organization Judicial Watch filed an Equal Employment Opportunity Commission (EEOC) complaint against the Orioles.<sup>30</sup> Judicial

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23. Eric Fisher, *Angelos Denies 'Wild Notion' by Helms on Hiring*, WASH. TIMES, May 27, 2000, at A1.

24. George Solomon, *Angelos: Orioles Would Sign Cuban Defectors for Team*, WASH. POST, May 19, 2000, at D6; Schmuck, *supra* note 22, at 60.

25. Schmuck, *supra* note 22, at 6D.

26. Mark Asher, *O's Defector Comments May be Probed*, WASH. POST, May 27, 2000, at D6.

27. Brooke Tunstall, *GOP Slams Angelos on Cuba*, WASH. TIMES, May 19, 2000, at B5.

28. Eric Fisher and Brooke Tunstall, *Justice Probes Orioles' Hiring*, WASH. TIMES, July 13, 2000, at A1.

29. Fisher, *supra* note 23, at A1.

30. Press Release, Judicial Watch, *Judicial Watch Files EEOC Complaint Against Baltimore Orioles Owner Peter Angelos* (May 26, 2000) (on file with author).

The Elian Gonzalez and Baltimore Orioles' sagas are very instructive to the American people. It is now apparent that there are many people in high places in our govern-

Watch President Tom Fitton stated, "The Orioles have as morally bankrupt a position as any racist statement."<sup>31</sup>

The Orioles, of course, had their own commentary. Orioles owner Peter Angelos struck back by stating that "Sen. Helms's irresponsible statement . . . establishes him as the best argument for term limits."<sup>32</sup> And the Orioles spokesmen asked, "Hello? We're listening to Jesse Helms now on issues of race and ethnicity?"<sup>33</sup>

The controversy, and sniping, continued into June. Republican Congressman Bill Goodling, the chairman of the Education and Workforce Committee in the House of Representatives wrote to MLB Commissioner Bud Selig requesting that MLB take action against the Orioles.<sup>34</sup> Later in June, Senator Helms renewed his request for a review of the Orioles, this time taking his argument to the EEOC.<sup>35</sup> And after a particularly brutal Orioles loss (19-1) to the Yankees in July, Helms spokesman Mark Thiessen remarked that the score was only "further evidence that the O's fans are the ones paying the price for Mr. Angelos' love affair with a Cuban dictator . . ."<sup>36</sup>

The political battle and its accompanying soundbites were far more amusing than the potential legal violations. By the end of June, three different organizations were asked to look further into the Orioles hiring practices: the EEOC, the Senate Committee on Education and the Workforce, and Major League Baseball. However, even if one assumed

ment and elsewhere who still sympathize with Castro's Communist dictatorship. . . . And, given the pathetic state of the Orioles, they certainly need all the help they can get from ex-Cuban baseball players.

*Id.* See also Letter from Larry Klayman, Chairman and General Counsel, Judicial Watch, Inc., to Ida L. Castro, Chairman, United States Equal Employment and Opportunity Commission (May 26, 2000) (on file with author).

31. Michael O'Keefe, *Right-Wingers Say Birds Fly Fidel's Colors*, DAILY NEWS (N.Y.), June 21, 2000, at 71.

32. Asher, *supra* note 26, at D6.

33. Fisher, *supra* note 23, at A1 (over the years, Senator Helms, himself, has often been accused of being racist).

34. Letter from Bill Goodling, Chairman, Committee on Education and the Workforce, to Allan H. (Bud) Selig, Commissioner, Major League Baseball (June 20, 2000) (on file with author).

35. Letter from Jesse Helms, Senator, United States Senate, to Ida L. Castro, Chairman, United States Equal Employment and Opportunity Commission (July 14, 2000) (on file with author); see also Brooke Tunstall and Eric Fisher, *Helms Asks Reno for Orioles Probe*, WASH. TIMES, May 26, 2000, at A1.

36. Press Release, United States Senate Committee on Foreign Relations, Marc Thiessen, Hmm . . . Maybe Mr. Angelos Could Use Some Cuban Defectors? (July 26, 2000) (on file with author).

that the Orioles did have a policy of not hiring Cuban defectors, it is unlikely that the Orioles would even be found guilty in a court of law.

First, the potential legal violations that the Orioles were charged with fell primarily under Title VII, which prohibits discrimination on the basis of national origin.<sup>37</sup> Title VII applies primarily to citizens, but Cuban defectors are not citizens. Instead, when the Cuban players arrive in the United States, they are legal residents who are automatically granted refugee status.<sup>38</sup> Therefore, the rights of Cuban ballplayers would primarily be protected under the Immigration and Reform Control Act (IRCA).<sup>39</sup> As IRCA is silent on a number of crucial elements required to prove discrimination, it is unclear how a court would interpret the Orioles alleged policy. When a defendant can show dual or mixed motives for discrimination, these motives may limit damages under the current Title VII<sup>40</sup> or even defeat liability if previous Title VII cases are used as the standard.<sup>41</sup> In this case, the Orioles explanation of not wanting to encourage defections or even a claim that the Orioles could not afford or utilize certain Cuban ballplayers would serve as a permissible motive. Furthermore, without an individual plaintiff to claim damages against the Orioles, the Justice Department would have at most asked for a declaratory judgment against the team.

Secondly, the current Supreme Court interprets the definition of state actor very narrowly.<sup>42</sup> It is unlikely that even earlier cases finding discrimination against MLB in other areas would be decided in the same way today. For example, *Ludtke v. Kuhn*<sup>43</sup> held that women could not be barred from dressing rooms. This case was based on finding that stadiums were public accommodations.<sup>44</sup> However, under today's narrow interpretation for state actor, this case might be decided differently.

Finally, baseball has always received special treatment in the courts even compared to other sports. This has been demonstrated both by the

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37. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1994).

38. Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERK. J. INT'L L. 234 (1998); Matthew A. Pingeton, *United States Immigration Policy: Detaining Cuban Refugees Taken from the Sea*, 8 J. TRANSNAT'L L. & POL'Y 329 (1999).

39. Immigration and Reform Control Act, 8 U.S.C. § 1324(b)(a)(1) (1994).

40. 42 U.S.C. § 2000e-2(m).

41. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a defendant may avoid a finding of liability by proving through a preponderance of the evidence that they would have made the same decision even if it had not used an impermissible motive).

42. *See, e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n.*, 121 S. Ct. 924 (2001).

43. 461 F. Supp. 86 (S.D.N.Y. 1978).

44. *Id.* at 95.

antitrust exemption<sup>45</sup> and in discrimination cases. Although the National Basketball Association (NBA) was found guilty of discrimination regarding female referees,<sup>46</sup> MLB was able to escape liability in a similar case.<sup>47</sup> Therefore, it is hard to argue any likelihood of success, even if the Orioles did have a clear policy not to hire Cuban defectors. And in fact, none of the investigations into Orioles hiring practices found any violations of the law.<sup>48</sup>

The clearest avenue of recourse against the Orioles would be through Major League Baseball, which has had a good record recently of enforcing behavior codes on its own teams. The Marge Schott and John Rocker incidents are the best example of MLB policing itself to eliminate discrimination. Schott had to give up control of the Cincinnati Reds and Rocker was suspended for racist comments they each had made.<sup>49</sup> MLB's response to Representative Goodling, however, makes it clear that MLB was not going to take any action against the Orioles at that time. While confirming that baseball is indeed an "American institution," Commissioner Selig only promised an investigation,<sup>50</sup> which ultimately found no violation. In this controversy, the symbolism of baseball was used to score political points.

## II. FREE AGENCY VS. AMATEUR DRAFT FOR CUBAN PLAYERS

The second issue raised by the intersection of Cuba, the United States, and baseball is less general in scope and less political in focus, but perhaps far more important to the Cuban baseball community. This issue also deals with the hiring of Cuban defectors and focuses on the MLB rules for hiring individual players from Cuba once they arrive in the United States.

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45. *Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

46. *Ortiz-Del Valle v. National Basketball Ass'n*, 42 F. Supp. 2d 334 (S.D.N.Y. 1999).

47. *Postema v. National League of Prof'l Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

48. O'Keeffe, *supra* note 31, at 71; Eric Fisher, *Probe of Orioles Finds No Violations*, WASH. TIMES, Aug. 17, 2001, at B1.

49. Claire Smith, *Baseball Bans Cincinnati Owner for a Year Over Racial Remarks*, N.Y. TIMES, Feb. 4, 1993, at A1; Murray Chass, *Schott Agrees to Give Up Control of Cincinnati Reds Through '98*, N.Y. TIMES, June 13, 1996, at A1; Murray Chass, *Baseball Suspends Rocker Till May for Comments*, N.Y. TIMES, Feb. 1, 2000, at A1.

50. Letter from Allan H. (Bud) Selig, Commissioner, Major League Baseball, to Bill Goodling, Chairman, Committee on Education and the Workforce (June 23, 2000) (on file with author) ("I can assure you that as an employer and as an American institution, Major League Baseball is committed to the goals of equal employment opportunity and diversity.").



While Cuba has had a long history of baseball excellence,<sup>51</sup> the focus on Cuban players is a relatively recent one. Cuban baseball players, as opposed to other foreign players in the United States, must defect from Cuba in order to play. The politics of defection, let alone the drama that often accompanies the defection,<sup>52</sup> sets these players apart from other players in terms of how MLB treats them and how the United States public views them.

In 1977, MLB Commissioner Bowie Kuhn set forth the Kuhn Directive in which he outlined Major League Baseball's position regarding players from Cuba.<sup>53</sup> The Kuhn Directive provided that United States teams could not recruit from Cuba or negotiate with Cuban players who were in Cuba. The Kuhn Directive was not really implicated until 1991 when a Cuban baseball player defected to the United States for the first time since Fidel Castro took power in Cuba.<sup>54</sup> Over the course of the next decade, player defections would become a regular event. With each defection, MLB's handling of these players has continued to evolve.

MLB policy divides players into two groups for the purposes of recruiting them for teams. Under Major League Rule 3, legal residents of the United States or Canada can only enter into employment contracts with a team after being subject to the amateur draft.<sup>55</sup> In other words, a United States resident can be a free agent only if he has been passed over in the draft. On the other hand, foreign players may sign a contract with a team without ever entering the draft.<sup>56</sup>

Cuban players, however, are not treated the same as other foreign players. If a Cuban player is a resident of the United States, he must proceed through the amateur draft and alert all teams as to his presence in the United States. Only those Cuban players who establish residency elsewhere (as in the cases of the two Hernandez brothers discussed be-

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51. See generally ROBERTO GONZÁLEZ ECHEVARRÍA, *THE PRIDE OF HAVANA: A HISTORY OF CUBAN BASEBALL* (1999); Samuel O. Regalado, "Latin Players on the Cheap:" *Professional Baseball Recruitment in Latin America and the Neocolonialist Tradition*, 8 IND. J. GLOBAL LEGAL STUD. 9 (2000).

52. Ira Berkow, *Fulfilling Dreams of Freedom and Dollars: Joe Cubas Helps Cuban Ballplayers Defect*, N.Y. TIMES, Aug. 15, 1996, at B11; Timothy Smith, *A Risk for Freedom and Baseball*, N.Y. TIMES, Jan. 1, 1998, at C1; James C. McKinley, Jr., *Cuban Players Defect, but Often With a Cost*, N.Y. TIMES, Apr. 25, 1999, § 1, at 1.

53. Greller, *supra* note 6, at 1664 n.69.

54. Jason S. Weiss, *The Changing Face of Baseball: In an Age of Globalization, is Baseball Still as American as Apple Pie and Chevrolet?*, 8 U. MIAMI Y.B. INT'L L., 123, 136-37 (2000).

55. Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit C, *Viera v. Major League Baseball Enter's*, (M.D. Fla. 2001) (No. 8:01-CV-1037-T-27MAP).

56. *Id.*

low) can become free agents. Furthermore, in order to establish this residency according to MLB rules, the players must leave the United States if they have already arrived here.<sup>57</sup>

Renee Arocha, who defected in 1991, started the parade of players to the United States. When Arocha arrived, MLB held a special lottery draft for him. This draft basically gave him free agency status and he was able to negotiate with a variety of teams.<sup>58</sup> In response to Arocha's defection, which apparently was assisted by various sports agents, the Kuhn Directive was strengthened to forbid all major league teams from discussing and negotiating with anyone in Cuba about signing a Cuban baseball player.<sup>59</sup>

The next year, three more Cuban players made their way to the United States. Alexis Cabreja, Osmani Estrada, and Ivan Alvarez all defected to Mexico while the Cuban National Team was playing in Mexico and then crossed the United States border illegally.<sup>60</sup> Due to their illegal entry into the United States, the Office of the Commissioner of Major League Baseball declared that the three players would be treated as immigrants arriving without appropriate documentation.<sup>61</sup> The result was that the players would be forced to enter the amateur draft rather than be granted the effective free agency which had been given to Arocha.<sup>62</sup>

In 1995, Cuban pitching star Livan Hernandez defected when the Cuban National Team was in Mexico. On the advice of his agent, Joe Cubas, Hernandez flew to Venezuela and then to the Dominican Republic where he was granted political asylum.<sup>63</sup> Because of these geographic and legal maneuvers, Hernandez was not considered a legal resident of the United States. He was, therefore, permitted to enter MLB as a free agent since he did not defect from Cuba directly to the United States.<sup>64</sup> The monetary rewards of free agency were quickly apparent as Livan

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57. *Id.* at Exhibit D, *Viera* (No. 8:01-CV-1037-T-27MAP).

58. Greller, *supra* note 6, at 1699-70 (1999). The St. Louis Cardinals won the rights to him in the draft.

59. Weiss, *supra* note 54, at 137 n.62.

60. *Id.* at 138 n.67.

61. *Id.* at 138.

62. *Id.* at 139.

63. *Id.* at 143; Berkow, *supra* note 52, at B11.

64. Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit D, *Viera* (No. 8:01-CV-1037-T-27MAP).

signed with the Florida Marlins for a four-year contract at close to \$4.5 million.<sup>65</sup>

Two years later, Livan's half-brother, Orlando Hernandez, was able to enter MLB as a free agent through similar maneuvering. Although Orlando's boat of Cuban refugees landed in the Bahamas and all on board were interned, Orlando Hernandez was freed from the refugee camp and permitted to establish residency in Costa Rica with the help of sports agent Joe Cubas.<sup>66</sup> Again, because Orlando was in Costa Rica legally, he was able to enter the United States and MLB as a free agent with the ensuing financial rewards. In 1998, he signed for \$6.6 million with the New York Yankees.<sup>67</sup>

Although this pathway to the United States and to free agency clearly benefited Orlando Hernandez, both the governments of the Bahamas and Costa Rica responded negatively to his and his agent's maneuvers. By 1996, the Bahamian government had already enacted a repatriation agreement with Cuba that stated Cuba would be notified about any Cuban refugees within seventy-two hours.<sup>68</sup> While Hernandez was freed from the Bahamian detention center, the rest of the Cuban refugees were not;<sup>69</sup> even baseball players were being sent back to Cuba.<sup>70</sup> After the latter Hernandez defection, both the Bahamas and Costa Rica began denying the majority of visa applications from Cuba on the basis that their countries were being used merely as transit points on the way to the United States.<sup>71</sup>

The primary development over the course of the 1990s was that the best Cuban players and their agents learned how to circumvent MLB rules placing Cuban defectors in the amateur draft so that these stars could sign as free agents with the team of their choice for far more money. At the same time, MLB was narrowing these loopholes, making it more likely that Cuban players, in general, would face the draft.

Early in 2001, sports agent Joe Kehoskie tried to establish Dominican Republic residency for two Cuban players, Mayque Quintero, and Evel

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65. Berkow, *supra* note 52, at B11.

66. Smith, *supra* note 52, at C1; *see also* Claire Smith, *Cuban Pitcher Gambles on a Major League Life*, N.Y. TIMES, Feb. 19, 1996, at C2.

67. Buster Olney, *One Man's Journey to the Center of Baseball*, N.Y. TIMES, June 4, 1998, at A1.

68. Scott M. Cwiertny, Note, *The Need for a Worldwide Draft: Major League Baseball and its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 419 (2000).

69. *Id.* at 421.

70. *Plus: Baseball: 4 Cuban Defectors are Sent Home*, N.Y. TIMES, May 19, 1998, at C5.

71. Cwiertny, *supra* note 68, at 420-21.

Bastida who had also arrived here directly from Cuba. MLB ruled that since the two players lived in Tampa, Florida, they were legal residents subject to the draft. When Kehoskie argued that the players were legally residents of the Dominican Republic, MLB further explained that immigration law and baseball would not necessarily interpret the term "legal resident" in the same way.<sup>72</sup>

With this incident as background, Cuban pitcher Rolando Viera defected directly to the United States at the end of April 2001 and was immediately granted refugee status on his visa. Under MLB rules, Viera was subject to the draft. At the end of May, Viera's attorneys filed a motion for a temporary restraining order (TRO) and emergency injunctive relief, trying to prevent MLB from interfering with Viera's ability to act as a free agent.<sup>73</sup> His attorneys argued that Viera's choice of either entering the draft or leaving the United States in order to establish residency elsewhere (and therefore jeopardizing his United States visa) would cause irreparable harm.

Viera had two primary arguments as to why he would suffer irreparable harm. First, forcing him to enter the draft would likely result in him receiving less money than he could receive through free agency. Furthermore, Viera would be tied to a team for a certain amount of time rather than have the ability to negotiate with a team of his choosing. If, in the alternative, he were to leave the United States in order to avoid the draft, Viera would potentially lose his "parolee" status on his visa and have to jump several immigration hurdles in order to re-enter the United States.<sup>74</sup> The choice presented to Cuban players by MLB, Viera argued, was discrimination on the basis of national origin.<sup>75</sup> No other foreign player faces the choice between directly entering and remaining in the United States, and thus being subjected to the draft, or leaving the

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72. Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit D, *Viera* (No. 8:01-CV-1037-T-27MAP).

73. See generally Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, *Viera* (No. 8:01-CV-1037-T-27MAP).

74. *Id.* (according to his brief, Viera would have to leave the United States, obtain a license for United States employment, sign a contract in the other country, and then apply for a work visa from the Immigration and Naturalization Service (INS)).

75. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, *Viera* (No. 8:01-CV-1037-T-27MAP). Viera based his case on Title VII, Civil Rights Act of 1964, prohibiting discrimination on the basis of national origin. He also argued that MLB's actions violated the Florida Civil Rights Act of 1992.

United States for a third country in order to establish foreign residency, and thus not being subjected to the draft.

Major League Baseball filed an opposition to the temporary restraining order, arguing that the standard for injunctive relief had not been met.<sup>76</sup> The court agreed.<sup>77</sup> Both the MLB brief and the Order focused on the technical aspects of the standard for the TRO rather than the broader question of whether MLB is engaged in discrimination. The order denying the TRO stated that Viera should have filed a complaint with the EEOC as required by Title VII.<sup>78</sup> Furthermore, the order agreed with the MLB argument that entering the draft was not irreparable harm because any damage suffered by Viera would be monetary and, therefore, could be remedied at a later date.<sup>79</sup> The choice that Viera had to make between leaving the country or joining the draft, the court held, was "speculative" rather than "actual and imminent."<sup>80</sup> The TRO was denied on these procedural grounds rather than upholding the legitimacy of MLB rules. Viera has since filed for partial summary judgment against MLB.<sup>81</sup> A ruling from the court is pending.

The issue of the legality and fairness of the MLB rules is really the far more interesting point that will be dealt with as the case progresses through the courts. Viera's arguments are compelling when compared to the situations of other foreign-born players. None of the recently-arrived Japanese stars signed by MLB teams were forced to go through the draft.<sup>82</sup> These players were free to come to the United States, be scouted, negotiate for their contracts in the United States, and then reside here.

If Cuban players were treated like other foreign players, they would have to apply for special work visas after signing with a team. Because, however, Cubans are immediately granted refugee status, MLB argues that at the moment when Cuban players come to the United States, they

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76. Support Memorandum in Opposition to Motion for Temporary Restraining Order at 2, *Viera* (No. 8:01-CV-1037-T-27MAP). The standard for the Eleventh Circuit is set forth in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (citing *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998)).

77. Order of Court, *Viera* (No. 8:01-CV-1037-T-27MAP).

78. *Id.* at 5-6.

79. *Id.* at 10-11.

80. *Id.* at 10.

81. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, *Viera* (No. 8:01-CV-1037-T-27MAP).

82. Mark Bechtel, *Rising Sons, With Timely Hitting and Superb Defense, the Mariners' Ichiro Suzuki and the Mets' Tsuyoshi Shinjo are Boosting the Stock of Asian Players*, SPORTS ILLUSTRATED, Apr. 23, 2001, at 36; Jack Curry, *Mets Importing Charisma and Defense From Japan*, N.Y. TIMES, Dec. 19, 2000, at D3.

establish legal residency.<sup>83</sup> The irony is that the same immigration policy which benefits other Cubans by granting them refugee status, harms the Cuban players.

MLB argues that it is not discriminating on the basis of national origin—the rules are the same for any player that establishes residency here. However, MLB has not been able to point to any other examples of foreign players facing the same choice as Cuban players. MLB also argues that the Hernandez brothers were able to enter into free agency because they established residency elsewhere first, apparently endorsing this method of avoiding the draft. Yet, MLB's argument is specious. To treat players differently because of where their boat landed when they defected is the height of arbitrary and disparate treatment. The goal—to live and play in the United States—is the same for all of these Cuban players.

### III. FUTURE IMPLICATIONS

Both sports enthusiasts and Congress have proposed interesting ideas for dealing with Cuba and baseball. Potential responses to the Cuban dilemma include the proposed Baseball Diplomacy Act (BDA)<sup>84</sup> or other legislation<sup>85</sup> that would allow Cuban players to return home, to send money back to Cuba, and would otherwise lift some of the most onerous restrictions on immigration and trade.<sup>86</sup>

The threatened enforcement actions against the Orioles have gone nowhere. At the same time, there have been no more games or exchanges between the Cuban National Team and the Baltimore Orioles. The most interesting consequence of the entire Orioles controversy is what it highlights about baseball, United States foreign policy, and greed. While the exchange started out as a sports and public relations

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83. Memorandum of Points and Authorities in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction at Exhibit D, *Viera* (No. 8:01-CV-1037-T-27MAP); see also Thom Loverro, *O's Can Avoid Discrimination Charge by Signing Morales*, WASH. TIMES, Aug. 5, 2000, at C1 (describing Cuban pitcher Andy Morales' quest to come to the United States, one writer called United States' policy the "Gilligan policy" because Morales was allowed to stay in the United States on his second try at defection because he made land).

84. Baseball Diplomacy Act, H.R. 262, 106th Cong. § 2 (1999) (calling for modifications to the United States embargo to permit Cuban baseball players to compete in Major League Baseball).

85. H.R. 9, 105th Cong. § 1(a)(1) (1997) (providing the original language of Serrano's legislation); Congressman Jose E. Serrano, *Serrano's Bill Would Open Doors W/ Cuba Through Sports*, NEWS RELEASE, Nov. 5, 1997.

86. Greller, *supra* note 6, at 1669-71.

opportunity, we must recognize that any interaction with Cuba is fraught with potential landmines. At first, Peter Angelos was accused of going to Cuba in order to recruit more Cuban players for his own team. Other owners were worried that the Orioles would have an advantage in recruiting talented Cuban players. After Thrift's alleged statement, the Orioles were then accused of cozying up to dictators. The last remnant of the Cold War was being fought by baseball owners and politicians all located in the United States.

Politicians, however, have not weighed in on the individual rights of Cuban players. Where is the political furor regarding Viera's unfair situation? When the enemy is MLB itself rather than Castro or a DNC activist, these voices fall silent. The Viera controversy questions the heart of MLB by attacking the rules on free agency. Is MLB using the Cuban embargo to its benefit by denying Cuban players the same rights as other foreign players? Are the rules on residency legitimate or an insidious technicality?

Baseball purists might regret the interference of politics and baseball. After all, don't we all just want to watch a good game of baseball played by the most talented players available? A clear awareness of the actors in the political drama and the players in the baseball drama regarding Cuba make it obvious that baseball is not just a game when one of the players is Cuban.