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Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act

By JOHN YOO*

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, which became law on March 12, 1996,\(^1\) represents something of an innovation in international law and American foreign relations law. Known more popularly as the "Helms-Burton Act," the law creates a novel cause of action for United States citizens to sue "traffickers" in property that was confiscated by Cuba in the early 1960s.\(^2\) Codified in Title III of the statute, the cause of action has generated substantial controversy between the United States and its trading partners in Europe and North America. This essay will sketch some of the legal difficulties created by Helms-Burton, and in particular it will discuss several of the issues surrounding Title III's cause of action. Throughout, I will examine Helms-Burton from the perspective of American foreign relations law, rather than from the vantage point of pure international law.

Title III of Helms-Burton raises several interesting international legal problems. First, Helms-Burton exercises extraterritorial jurisdiction in an attempt to impose economic sanctions on trading partners who do business with Cuba. This use of power over non-American companies for conduct outside of the United States may represent a violation of international principles of jurisdiction. Supporters of the law argue that it is necessary to vindicate international human rights norms against confiscation of property. Even if Helms-Burton violates international law, however, this fact cannot bar the application of the law within the United States.

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2. Helms-Burton Act, §§ 301-06.
Second, Title III of Helms-Burton may constitute a violation of the major international trading agreements to which the United States is a party. The General Agreement on Tariffs and Trade (GATT), which is now administered by the World Trade Organization (WTO), and the North American Free Trade Agreement (NAFTA) generally require signatories to extend most favored nation status to each other and to lower tariff and trade barriers. Whether these provisions are violated or not, the United States can argue that Helms-Burton falls within the GATT and NAFTA exception for anti-trade laws that are necessary to protect the national security. American reliance upon the national security exception itself raises interesting questions concerning whether Helms-Burton addresses a true national security threat, and whether the United States is to be the judge of the scope of the exception. While a close question, on balance it appears that the national security exception may prove flexible enough to permit Helms-Burton.

Ultimately, it is difficult to say that Helms-Burton is "illegal" under American law. The Constitution’s allocation of the foreign relations power grants to the two political branches the plenary authority to dictate the nation’s foreign economic policy. Whether Title III is legal, however, does not answer the question of whether it makes for good policy for the federal courts or for American national security. Putting pure foreign policy to one side, Helms-Burton may represent the misuse of the judiciary as a weapon of foreign policy. Impressing federal judges into the cause of pursuing national security may stretch the courts beyond their abilities and may threaten the judicial independence that lies at the heart of Article III of the Constitution.

As this Essay will suggest, federal courts also may be a poor institution for the nation to use to pursue coordinated policies against other nations. Foreign policy is best executed by institutions that are unified, swift, and rational. Federal courts, by contrast, are notable for their decentralization, delay, and focus solely on the facts of a particular case. While sanctioning Cuba and those who do business with her is no doubt a worthy foreign policy, federal courts are not an effective institution for the execution of those goals.

This Essay will survey these issues and will suggest a few answers. Part I will review the background to Helms-Burton and will describe how the provisions of the Act operate. Part II will identify and analyze the legal issues raised by the Helms-Burton Act under international law. Part III will examine the policy impact of the Helms-Burton Act upon the implementation of American foreign policy and upon the institution of the federal judiciary. It bears emphasis, however, that the lines of analysis and tentative answers sketched here are not intended to be conclusive, but instead are suggestions for future work on Helms-Burton and on American foreign relations law.

I. Background of the Helms-Burton Act

This Section will describe briefly the background of the Helms-Burton legislation and its substantive provisions. On February 24, 1996, the Cuban air force shot down two Cessna 337 planes flown by a Cuban-American humanitarian organization known as Hermanos al Rescate. The following week, President Clinton condemned the attack and announced that he would sign the Helms-Burton bill, which had faced the threat of a presidential veto. The bill generally codifies existing economic sanctions, seeks to encourage a transition to democracy in Cuba, and attempts to impose sanctions on those who do business in Cuba or "traffic" in private property expropriated by Cuba. It became law on March 12, 1996.

Helms-Burton is usefully examined in light of the history of American policy toward the Castro regime. In the wake of the Spanish-American War, the United States and Cuba enjoyed a close political and economic relationship for the first half of the twentieth century. By the late 1950s, North Americans owned almost all the mines and cattle ranches in Cuba and half of the nation's sugar production. After Fidel Castro overthrew the regime of General Fulgencio Batista and took control of the island, relations deteriorated rapidly. In 1960, Castro agreed

to sell sugar to the Soviet Union in exchange for oil and industrial goods, to which the United States responded by ordering American companies to refuse to refine the oil. Castro then seized the oil companies, President Eisenhower barred the sale of Cuban sugar in the United States, and Castro decided to confiscate property owned by Americans. By the time President Eisenhower left office, he had placed an embargo on all trade with Cuba except for medicine and certain foods.

The current ban on trade with, and travel to, Cuba had its roots in Eisenhower's actions, and was formalized by President Kennedy. In February 1962, about ten months after the Bay of Pigs disaster, he issued the Cuban Import Regulations, which had the effect of imposing a total embargo upon the island. At first, the President acted pursuant to a special provision of the Foreign Assistance Act, and then he expanded the reach of the embargo under the Trading with the Enemy Act just a few months before the Cuban Missile Crisis. The regulations substantially took the form they maintain today when they were reissued in July 1963. Over the succeeding years, administrations made different adjustments to address the problem of American-owned subsidiaries in foreign countries that continued to do business with Cuba.

Helms-Burton's first purpose is to set this embargo in stone. Section 102(h) of the statute codifies the embargo as it existed as of March 1, 1996, and permits the President to suspend it only if he certifies that Cuba is making a transition to a democratic government. This represents substantial distrust of the President on the part of Congress, for it removes his ability to terminate the embargo at will. As the House Committee on International Relations stated in its committee report,

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6. LAFEBER, supra note 5, at 568.
7. Id.
12. Helms-Burton Act, §102(h); id., § 204.
13. Lowenfeld, supra note 11, at 422.
"Section 102 addresses a profound concern of the committee that executive branch agencies are not vigorous in their enforcement of certain provisions of the U.S. embargo on Cuba or in their advocacy of U.S. policy before foreign governments."\(^{14}\)

Helms-Burton's second purpose is to create incentives to encourage Cuba to make a transition to democratic government. These provisions are not of much concern to this Essay. The third purpose of the Act, however, is the focus of this Essay: to impose penalties upon our allies who conduct business with Cuba. Title III creates a cause of action to be brought in federal court against anyone who is "trafficking" in Cuban property expropriated from U.S. nationals.\(^{15}\) Trafficking is defined broadly to include not just possessing, selling, transferring, buying, leasing, managing or controlling confiscated property, but also "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property" and profiting, causing, or directing the trafficking of a third person.\(^{16}\)

Plaintiffs are defined as current U.S. nationals. This class apparently includes both anyone who had property confiscated under the Castro regime who was and is still a U.S. national, and anyone who was a foreign national at the time of the confiscation who subsequently has become an American citizen (such as a Cuban-American).\(^{17}\) Plaintiffs may sue for money damages, and if a defendant continues to traffic in the property after notice has been given, the plaintiff may seek treble damages.\(^{18}\) There are certain rules that allow property owners who filed claims with the Foreign Claims Settlement Commission under the International Claims Settlement Act\(^{19}\) to sue first, but these are of no consequence for the analysis here.\(^{20}\) Further, the Act overrides the Act of State doctrine, most famously articulated in a previous Cuban expropriation case, Banco Nacional de Cuba v. Sabbatino,\(^{21}\) for cases brought un-

\(^{15}\) Helms-Burton Act, § 302(a).
\(^{16}\) Id., § 4(13).
\(^{17}\) Id., § 4(15).
\(^{18}\) Id., § 302(a)(3).
\(^{19}\) 22 U.S.C. § 1643 \textit{et seq}. 
\(^{20}\) Helms-Burton Act, § 302(a)(5)(C).
\(^{21}\) See 376 U.S. 398 (1964).
The President is given the authority to suspend the implementation of Title III for renewable six-month periods if he finds it “necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.” President Clinton has exercised this power to prevent Title III from taking effect after the Act became law in March, 1996.

It seems clear that the import of Titles III and IV is to discourage trade with Cuba by our allies as much as it is to protect the property rights of American citizens. The House Committee on International Relations declared as much in its committee report: “The purpose of this new civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals.” Thus, Congress anticipates that threatening to impose the American legal system upon foreign nationals that do business with Cuba will convince our trading partners to divest themselves of their Cuban assets. Congress also appears to believe that divestment will strip Cuba of hard currency and will accelerate the economic decline that began after the cutoff of economic support by the Soviet Union. No doubt these are worthy goals, but we must examine whether the tools used to achieve them are consistent with our international obligations and our domestic constitutional structure.

II. Helms-Burton and International Law

This Section will examine whether Title III of Helms-Burton meets the United States’ obligations under international law and under different multilateral trade agreements. Much attention has focused on whether Title III’s cause of action represents a proper exertion of extraterritorial

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23. Id. § 306(b)-(c).
24. In a provision that has caused much disagreement overseas, Title IV of the Act orders the Secretary of State to exclude from the United States any foreign national who has trafficked in confiscated property. Section 401(a)(3) also requires the exclusion of any corporate officers, principals, or shareholders with a controlling interest of an entity that has been involved in trafficking, and Section 401(a)(4) requires similar treatment for their relatives. These provisions are not germane to the issues discussed by this Essay.
jurisdiction over the activities of foreign nationals. While it appears that Helms-Burton may violate certain principles of prescriptive jurisdiction, these rules have no legal force within the United States and cannot prevent implementation of the law. Provisions of GATT and NAFTA may provide tougher standards, but Helms-Burton appears to fall within the general exception for trade actions taken to protect national security. It appears that international law will not prevent the United States from implementing Title III against those who traffic in confiscated property.

A. Helms-Burton and the International Law of Jurisdiction

Critics of Helms-Burton allege that Title III violates international law principles of jurisdiction. Drafters of the Act clearly attempted to justify the exercise of extraterritorial jurisdiction by patterning parts of the law upon Section 402 of the Restatement (Third) of the Foreign Relations Law of the United States. Professor Andreas Lowenfeld of New York University, however, has described this effort as “fundamentally flawed,” and he concludes that Title III is flatly illegal under international law. While Helms-Burton clearly pushes the outer limits of extraterritorial jurisdiction, I do not believe that Title III’s violations of international law are all that easy and clear to see. Furthermore, it is highly doubtful that any conclusion on this score should have any effect upon the legality of the law within the United States.

There can be little doubt that Title III Helms-Burton attempts to regulate conduct that occurs outside the United States. The law targets anyone who “traffics” in property confiscated from American citizens in a foreign land; that trafficking occurs when someone “engag[es] in a commercial activity using or otherwise benefiting from confiscated property.” Because of the total embargo upon American trade with Cuba, American nationals and American corporations cannot themselves have engaged in trafficking; therefore the entities that have been trafficking must be foreign nationals, and the trafficking must be occurring wholly outside the United States. Although some have argued that Helms-Burton may represent the exercise of pure territorial jurisdiction because

26. Lowenfeld, supra note 11, at 431.
a federal court must have a defendant before it to hear a claim, this confuses the concept of personal jurisdiction under the Due Process Clause of the Fifth and Fourteenth Amendment with standards of international law jurisdiction.

International law, as identified by the American Law Institute (which, I might add, is not the Supreme Court), sets out several grounds for the exercise of jurisdiction. In Section 402, the Restatement declares that a nation may prescribe law with respect to:

1. (a) conduct that, wholly or in substantial part, takes place within its territory;
   (b) the status of persons, or interests in things, present within its territory;
   (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
2. the activities, interests, status, or relations of its nationals outside as well as within its territory; and
3. (a) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Helms-Burton does not appear to rest upon ground (2), the nationality principle, or on ground (3), the protective principle, so we must turn to ground (1), the territoriality principle, to find the basis of jurisdiction for Title III.

In terms of territoriality jurisdiction, Title III’s extraterritorial reach must rely upon what is commonly known as the “substantial effects” doctrine, set out in Section 402(1)(c) of the Restatement. American exercise of extraterritorial jurisdiction in the context of economic regulation has raised substantial controversy in the past between the United States and its trading partners. In particular, several disputes have arisen

30. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (1987) [hereinafter "RESTATEMENT (THIRD)"].
31. Id.
when parties have asked American courts to apply the antitrust laws extraterritorially because of the substantial effects that overseas conspiracies have on the United States markets. Further disputes about the extent of extraterritorial regulation have arisen in the context of American export controls, as when the United States attempted to prevent American subsidiaries in Europe from selling goods to China or from participating in the construction of a Soviet pipeline to Western Europe. These latter disputes, however, have involved claims of nationality jurisdiction rather than of substantial effects jurisdiction.

In light of these previous cases, however, it appears that the claims of substantial effects jurisdiction for Title III are weak. It is unclear what conduct abroad is producing what "substantial effects" in the United States. If the defendants in these actions are the foreign owners of expropriated property in Cuba, such as a European company that purchases a hotel that 35 years ago belonged to an American company, the conduct of these defendants does not appear to cause any direct effect in the United States. It is the conduct of the Cuban government, 35 years ago, in expropriating American property that has caused the substantial effect. Once the expropriation has occurred, it is difficult to see how subsequent transactions involving that property cause any impact within the United States. In Laker Airways v. Sabena, by comparison, the D.C. Circuit upheld the extraterritorial application of the American antitrust laws to the cross-Atlantic passenger market, because a high percentage of the passengers who flew across the Atlantic were American citizens.

Consider, for example, whether any effects would occur in the United States if the act achieved its desired effect. According to Helms-Burton’s statutory findings, trafficking in confiscated property provides financial support to the Cuban government, and "thus undermines the foreign policy of the United States to bring democratic institutions to

33. These controversies are described in HENRY J. STEINER, ET AL., TRANSNATIONAL LEGAL PROBLEMS: MATERIALS & TEXT 921-94 (1994).
34. Lowenfeld, supra note 11, at 431.
35. See 731 F.2d 909 (D.C. Cir. 1984).
36. Id. at 924.
Cuba through the pressure of a general economic embargo.\textsuperscript{17} If Title III succeeds in convincing European, Canadian, and Mexican companies from divesting themselves of Cuban assets, Cuba might manage the assets itself or it might sell them to other companies. In either case, little economic effect will be felt within the United States, unless the Castro regime collapses. Even in that case, however, it will have been the actions of the Cuban government, and not the end of the trafficking, that produces the effects needed for prescriptive jurisdiction.

Even if a basis to prescribe is present under Section 402, international law as identified by the American Law Institute requires that the exercise of jurisdiction be reasonable. Section 403 of the Restatement recommends that 8 factors are to be balanced to determine reasonableness:

\begin{itemize}
\item (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
\item (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
\item (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
\item (d) the existence of justified expectations that might be protected or hurt by the regulation;
\item (e) the importance of the regulation to the international political, legal, or economic system;
\item (f) the extent to which the regulation is consistent with the traditions of the international system;
\item (g) the extent to which another state may have an interest in regulating the activity; and
\item (h) the likelihood of conflict with regulation by another state.\textsuperscript{33}
\end{itemize}

I beg the reader's forgiveness for reprinting the numerous factors that are to be considered, but it is worthwhile in order to understand the

\begin{itemize}
\item \textsuperscript{37} Helms-Burton Act, § 301(6).
\item \textsuperscript{38} \textit{Restatement (Third)} § 403.
\end{itemize}
indeterminacy of the analysis called for by the Restatement. To be sure, 
much of Section 403 appears to derive from American circuit court 
cases. Nonetheless, some courts have refused to adopt an interest-
balancing approach to determine reasonableness, for good reason. I 
submit that it is impossible to predict with any certainty what result this 
interest-balancing test will yield in any given case. This type of multi-
factor balancing undermines the rule of law by robbing the law of its 
certainty and clarity. Further, as the D.C. Circuit properly noted in 
Laker Airways, several factors “which do purport to provide a basis for 
distinguishing between competing bases of jurisdiction, and which are 
thus critical to the balancing process, generally incorporate purely politi-
cal factors which the court is neither qualified to evaluate comparatively 
nor capable of properly balancing.” Reasonableness, in other words, 
will be in the eyes of the beholder. Should Helms-Burton rest on suffi-
cient grounds for substantial effects jurisdiction, the reasonableness 
analysis should pose no obstacle to implementation of Title III.

Even if, however, Helms-Burton violated international law, that fact 
is of little significance for American foreign relations law. While the 
United States may have some obligation of undefined force to obey prin-
ciples of international law, within the American legal system the Presi-
dent and the Congress enjoy the full constitutional authority to violate 
international law as they please. The Constitution contains no textual 
 provision that prohibits the federal government from acting contrary to 
the law of nations. Early Supreme Court decisions from the days of 
Chief Justice John Marshall assume that the United States could violate 
international law. The “last-in-time” doctrine, which allows statutes to 
override treaties, further recognizes the power of the federal government

39. See, e.g., Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); 
Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

40. See Laker Airways v. Sabena, 731 F.2d 909 (D.C. Cir. 1984); Westinghouse 
Electric Corp. v. Rio Algom, 617 F. 2d 1248 (7th Cir. 1980). It also should be noted 
that, while the American Law Institute’s RESTATEMENT (THIRD) is the product of the 
work of many thoughtful international scholars and practitioners, the RESTATEMENT 
(THIRD) itself is not international law.

41. See Laker Airways, 731 F.2d at 949.

42. See Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); The Nereide, 
13 U.S. (9 Cranch) 388 (1815).
to supersede the nation’s international obligations.\textsuperscript{43} Even if one believes that customary international law is directly incorporated into the American legal system as federal common law—a position currently under considerable scholarly doubt\textsuperscript{44}—the case that allegedly supports that position, \emph{The Paquete Habana},\textsuperscript{45} admits that a controlling executive, legislative, or judicial act can overrule international law.

Given the superiorit of federal statutes over international law, the question of jurisdiction is an illusory obstacle to enforcement of Helms-Burton. Congress and the President may take note of international law when they set foreign policy, but in the end the government’s decision trumps, within the United States, any contrary international law. Critics of Helms-Burton will have to turn elsewhere to prevent enforcement of Title III.

\section*{B. Helms-Burton and the Regional and World Trading Systems}

Critics of Helms-Burton have also raised NAFTA and GATT as potential constraints on the implementation of Title III. If NAFTA and GATT are in conflict with a more recently passed statute, the last-in-time doctrine will dictate that the statute supersede the international agreement. We need not reach this conclusion, however, because it is possible that NAFTA and GATT’s provisions for a national security exception are broad enough to include Helms-Burton. If this is the case, then the NAFTA and GATT requirements of equal treatment for foreign trade and investment do not apply.

It appears that a better case can be made under NAFTA than under GATT that the United States is violating its international trade agreements. Under Article 1105 of NAFTA, the signatories are obliged to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”\textsuperscript{46} NAFTA defines an investment under Ar-

\begin{itemize}
  \item See, e.g., The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870); Edye v. Robertson, 112 U.S. 580 (1884).
  \item See 175 U.S. 677 (1900).
  \item NAFTA, \textit{supra} note 3, at art. 1105.
\end{itemize}
article 1105 to include all enterprises, equities, debt instruments, loans, interests, real estate or other property, without apparent regard to the location of the investment. Helms-Burton may contravene this section of NAFTA because it may violate international law, as discussed in Part A, and because it may deny Canadian and Mexican investors “fair and equitable treatment” because of their holdings in Cuba.

As the GATT does not yet have an analogue to NAFTA’s provision on investments, the GATT challenges are correspondingly weaker. Another nation could claim, one supposes, that Helms-Burton represents a non-tariff barrier to trade, which is prohibited by Article XI of the GATT. Article XI provides in part that “[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained” on the imports of other GATT members or on exports to other GATT members. While Title III does not address directly imports or exports, it might deter foreign corporations that own expropriated Cuban assets from conducting trading operations in the United States.

A GATT party also might argue that Helms-Burton violates the Most Favorited Nation Treatment obligation established by Article I of the GATT. Article I, in conjunction with Article III, requires that all GATT members be treated equally in regard to customs duties, internal taxes, and regulations that affect imports, exports, or payments. As with Article XI, however, Helms-Burton does not directly tax or regulate the export or import of products. An argument might be constructed, however, that Title III of Helms-Burton might handicap corporations with Cuban assets from competing on an equal playing field with corporations of other GATT parties.

If the WTO or NAFTA dispute resolution mechanisms are triggered to address these and similar arguments, the United States probably can

47. NAFTA, supra note 3, at art. 1139.
48. GATT, supra note 3, at art. XI.
49. GATT, supra note 3, at art. I, III.
50. There are other possible GATT provisions that might be relevant, but which I do not discuss here. For example, Article XXIII of the GATT allows a signatory to seek redress if another party has “nullified or impaired” a “benefit accruing to [the signatory] directly or indirectly” under the GATT, or a GATT objective is not being attained, due to the party’s conduct. GATT, Article XXIII. This does not seem to be a particularly difficult obstacle for Title III, and there may be other, similarly weak claims that might be raised under other GATT provisions.
mount a successful defense based on the national security exceptions present in both agreements. Article XXI of the GATT declares that nothing in the agreement can “prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.” This provision is essentially repeated in GATS Article XIVbis, the TRIPS Article 73, and NAFTA Article 2102. Although the remainder of the provision states that the exception relates only to nuclear materials, to the arms trade and goods used to support a military, or to actions taken in time of war or emergency, the historical use of this provision does not appear to have been limited to the three areas listed, but instead has expanded to include other national security concerns.

Of particular relevance here is the question of whether a nation that invokes Article XXI of GATT or Article 2102 of NAFTA alone has the right to interpret its scope. In other words, can each nation decide for itself what constitutes a national security threat, and take any trade measures it sees fit in response? As Professors John H. Jackson, William J. Davey, and Alan O. Sykes put it: “The problem with a national security exception in international agreements... is that it is virtually impossible to define its limits. Almost every sector of economic endeavor can and does argue that it is necessary for national security, from shoes to watches, radios to beef production.” If the United States, for example, successfully claims that it alone is entitled to determine whether Title III of Helms-Burton is entitled to the national security exception, what is to prevent Japan from closing its rice markets on national security grounds?

Nonetheless, if the United States claims that Helms-Burton is necessary to address a national security threat generated by Cuba, an “invoker-

51. GATT, supra note 3, at art. XXI.
53. GATT, supra note 3, at art. XXI(b)(i)-(iii).
55. Id. at 983.
interprets” rule will exempt the law from GATT and NAFTA requirements. It appears that precedent, such as it exists within the world trading system, and the previous positions of our trading allies would support this approach to the national security exception. When the United States cut Nicaragua’s sugar import quota in 1983, the GATT Council adopted a panel report that the United States had violated certain GATT consultation provisions. The United States essentially ignored the GATT Council. Two years later, President Reagan invoked national security to impose a total embargo upon Nicaragua, which Nicaragua challenged again through the GATT dispute resolution process. The United States took the position that it saw “no basis for GATT Contracting Parties to question, approve, or disapprove the judgment of each Contracting Party as to what is necessary to protect its national security interests.” This time, the GATT panel declared that it could not find whether the United States was in violation of its GATT obligations or not, and recommended that the GATT Council consider in the future whether an invoker-interprets approach to Article XXI was consistent with the “basic aims of the GATT.” If a GATT panel could not find that a complete economic embargo upon Nicaragua was unjustified, then it is hard to see that the WTO—as a legal, not political matter—will find that Helms-Burton lies outside the national security exception. Cuba, after all, over the years has presented a more direct threat to the foreign policy and national security of the United States than Nicaragua ever did.

The United States-Nicaragua dispute also is of significance because of the position that our trading allies took toward Article XXI. Apparently, the American position that each signatory was to decide for itself what was in its national security interests was supported by Canada, most European countries, and the European Union—the same parties that are challenging Helms-Burton today as violations of NAFTA and GATT. The European Union ambassador reportedly stated that “while we do not wish to pass judgment before the Council, it is not the role of GATT to resolve disputes in the field of national security.” While consistency of

56. See id. at 984-87.
57. Id. at 985.
58. Id. at 985.
59. Id.
60. Id.
argument has never been a requirement in international politics, the po-
position of our trading partners during the Nicaragua embargo certainly
lends support to the American position that nations may define for them-
selves what trade measures are permissible in the interests of national
security. While one might argue within the domestic arena over whether
Helms-Burton is a foreign policy rather than a national security measure,
in the international arena, the United States’ decision to claim the GATT
and NAFTA national security exceptions may prove conclusive.

The preceding analysis indicates that international law will not pre-
sent Helms-Burton with serious difficulties. While Title III might not
regulate activity that produces a substantial effect within the United
States, federal courts are duty-bound to enforce a duly-enacted statute
passed by Congress and signed by the President above customary inter-
national law that is not expressed in any treaty or executive agreement.
Even if firmer obligations are imposed by GATT and NAFTA, both
treaties contain national security exceptions that appear to allow the
United States the freedom to define for itself whether Helms-Burton is
necessary to protect the nation’s security. If Helms-Burton is to en-
counter restraints, they must originate from the American domestic legal
system.

III. Helms-Burton and American Foreign Relations Law

As a textual or structural matter, Helms-Burton does not appear to
raise any significant constitutional difficulties. Article I, Section 8 of the
Constitution clearly gives Congress the power to “regulate Commerce
with foreign Nations,“\(^6^1\) and the executive branch has not claimed that
the law in any way infringes upon executive prerogatives in foreign af-
fairs. In fact, Helms-Burton contains a clause that allows the President
to suspend the implementation of Title III for six-month periods should
he find that “the suspension is necessary to the national interests of the
United States and will expedite a transition to democracy in Cuba.”\(^6^2\)
President Clinton has invoked this authority in order to allow time for

\(^6^1\) U.S. CONST. art. I, § 8.
\(^6^2\) Helms-Burton Act, § 306(b)(1)-(2).
negotiations to proceed with our trading partners to avoid a diplomatic crisis.\textsuperscript{63}

While Helms-Burton may not violate any formal constitutional provision, I believe that it threatens the integrity of the institutions created by the Constitution. In particular, Helms-Burton places duties upon the federal judiciary for which it is ill-suited and which may undermine its independence. Helms-Burton calls upon the federal courts to make complicated judgments concerning not just financial transactions, but also political events that occurred more than three decades ago. Title III also forces the federal courts to act as instruments of American foreign policy, rather than neutral arbiters of disputes over legal rights and wrongs.

It was perhaps inevitable that Cuba policy would find its way into the federal courts. This is not the first time that the issue of the Castro regime has come before the federal judiciary,\textsuperscript{64} nor is it likely to be the last. What Alexis de Tocqueville observed in the early nineteenth century is still true today: Americans have a habit of transforming any significant political issue into a legal controversy.\textsuperscript{65} Scholars have remarked on the manner in which the American political system encourages “adversarial legalism,” in my colleague Robert Kagan’s words, as a preferred method for deciding on policy.\textsuperscript{66} While litigation certainly protects certain values, such as openness and government accountability, Kagan, among others, has noted that adversarial legalism can prove an expensive and wasteful way to make policy, to reallocate resources, and to produce information.\textsuperscript{67} Title III of Helms-Burton is one sign that Americans want to judicialize issues not just of individual rights, social programs, the environment, and the economy, but also of foreign policy.


\textsuperscript{65} \textsc{Alexis de Tocqueville}, \textit{1 Democracy in America} 270 (12th ed. 1848) (J.P. Mayer ed., 1965) (“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”).


\textsuperscript{67} \textit{Id.} at 375-79.
It is doubtful whether the federal judiciary is the best institution to handle such a task. First, I will discuss why courts have not been well-suited to carrying out certain types of programs, and the implicit threat to the judicial institution this has produced. Second, I will argue that foreign affairs policy is a particularly poor area for judicial competence and that American foreign policy itself will be ill-served by further judicializing foreign affairs issues.

A. Federal Courts as Weapons of Foreign Policy

Experience concerning the limits of judicial abilities suggests that federal courts may not be well structured for the types of tasks contemplated by Helms-Burton. In this part, I will draw upon studies that have shown that courts are beset by significant structural difficulties in developing solutions to problems involving schools, prisons, hospitals, and other public institutions. Courts are imperfect tools for gathering information, especially when the relevant issues for decision involve broader political, economic, and social events and trends. Courts experience difficulty in weighing policy alternatives and in calculating costs and benefits. Courts have been shown to be unable to gather and to absorb the sort of sufficient, objective data required to make considered decisions when more than just historical fact and causation are involved.

These difficulties are only compounded when courts formulate structural remedies. Courts possess imperfect tools for communicating their decrees, and they often must rely upon other institutions and personnel to disseminate and implement their orders. Courts have few resources to guarantee compliance on the part of defendants or to create positive incentives to encourage adherence to judicial orders. Aside from a contempt order, judges generally rely upon the moral persuasiveness and the institutional legitimacy of their decisions to encourage compliance. These limitations indicate that courts, in the course of adjudication, can achieve only partial success at best in affecting what Lon


69. Yoo, supra note 68, at 1138.
Fuller called "polycentric" problems—cases that involve many different factors and relationships.  

Structural remedies also indicate that certain roles and certain types of cases can place demands on the integrity of the federal courts as well as on their capabilities. My colleague Paul Mishkin has argued that structural injunctions call upon the courts to employ procedures that undermine the impartiality of the federal judiciary. In setting spending priorities for state governments, allocating state resources, and deciding on policies, federal courts can lose their objectivity and become actors in the political process and in the case itself. As cases move into the remedial stage, federal courts may lose their sense of detachment and become more interested in effective management of the defendant's conduct and of the overall remedy. An intrusive judiciary, and the failure or shortcomings of its remedies, may breed a lack of confidence in, or even a lack of respect for, the legitimacy of the federal courts.

To be sure, there are a great many differences between structural injunction and foreign relations cases. Nonetheless, suits under Title III of Helms-Burton could invite similar problems. To adjudicate a Title III suit, a federal court will have to determine facts and causation that occurred more than 30 years ago in another country. Information on the events producing an expropriation may be hard to discover and may be of doubtful reliability, due to the termination of diplomatic and economic relations between the United States and Cuba. Courts may have to reconstruct complex financial transactions and chains of ownership among many different companies from many different nations that stretch back to the early 1960s. Courts may need to make sensitive judgments about the political relationships and decisions not just of the present day, but of the 1960s, 1970s and 1980s.

The Supreme Court long has recognized that adjudicating claims arising from events and policies abroad present unique problems for the


72. Yoo, supra note 68, at 1140.
federal courts. In its political question cases, the Court has described its unwillingness to hear foreign relations cases both because the foreign affairs power is vested in the other branches, and because the judiciary is functionally ill-equipped for the task. As Justice Jackson wrote, “[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large amounts of prophecy... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility...” While the political question doctrine does not apply to Helms-Burton, these concerns about judicial competence ought to be taken into account in evaluating how Title III will operate and whether it will succeed.

Further, as with structural injunctions, Title III remedies may create significant institutional problems for the judiciary. Defendants are likely to have most of their assets abroad, which would leave the court with little property to attach in order to enforce its judgments. Enforcing judgments abroad is not easy; as the Supreme Court recognized long ago in Hilton v. Guyot, “[a]n act of government, [a judgment’s] effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect.” As the United States has not entered into any international agreements on the enforceability of its judgments abroad, no other nations have a binding obligation to enforce a Title III judgment against their own nationals. These difficulties are only compounded when the foreign nations disagree with the policy of the law that gave rise to the liability, to the extent that they even enact “clawback” legislation that allows their corporations to sue in their domestic courts to recover awards rendered under American laws.

74. See 159 U.S. 113, 163 (1895).
75. See GARY S. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 942-43 (3d ed. 1996).
76. See, e.g., STEINER, ET AL., supra note 33, at 977-98 (discussing British clawback law).
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Current disagreement with Helms-Burton abroad may mean that few judgments rendered under Title II will be capable of enforcement. Such ineffectiveness serves to dilute public respect for the federal courts, which, as Alexander Hamilton noted in Federalist No. 78, "have neither Force nor Will, but merely judgment." If Title III leaves the judiciary in the position of issuing judgments that none expect to be enforced, it enhances an image of powerlessness on the part of the courts. It may dilute the institutional capital of the courts in more important areas (such as constitutional rights), in which judges must depend on public respect to enforce counter-majoritarian decrees. Although considerations of political capital should not prevent the courts from exercising jurisdiction when the Constitution or federal law require it, they should inform policy decisions on whether to expand federal jurisdiction in the first place.

Powerlessness is not the only threat to judicial authority. My colleague Martin Shapiro has written that courts in several different cultures possess certain shared characteristics that enhance their social legitimacy, and hence the willingness of parties and the public to accept their judgments. Although courts deviate in different ways from this ideal model, courts essentially find their legitimacy in the "logic of the triad," as Professor Shapiro describes it—the idea that two parties in conflict refer their dispute to a third, neutral party for resolution. As the adjudicators become less neutral and more a part of the machinery of the state and of the political system, they lose their legitimacy. "When we move from courts as conflict resolvers to courts as social controllers, their social logic and their independence is even further undercut. For in this realm, while proceeding in the guise of triadic conflict resolver, courts clearly operate to impose outside interests on the parties." Ironically, granting the courts too much of a certain type of power—that of enforcer of public policy—also has the effect of threatening judicial integrity.

77. The Federalist No. 78, at 394 (Alexander Hamilton) (Garry Wills ed. 1982).
78. On this point, see Jesse Choper, Judicial Review and the National Political Process (1980).
81. Id. at 37.
Title III of Helms-Burton may prove to be a good example of this tension between a court’s duty to resolve conflicts on the one hand, and to pursue public policy on the other. In the foreign relations area, a cause of action is more likely to be seen as a tool for the advancement of a specific public goal, rather than as the correction of an injustice or inequity. In other words, courts will be acting as instruments of the national government, even of the State Department, rather than as neutral decisionmakers engaged in conflict resolution. The U.S. House Committee on International Relations made this clear with regard to Title III when it declared that the “purpose of this new civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals.”

Usually, these international relations goals would be achieved by the imposition of economic sanctions by the executive and legislative branches, rather than through a cause of action in federal court. Enlisting the judiciary to achieve these purposes encourages a perception of the federal courts as interested implementers of American foreign policy, which will undermine the legitimacy of the federal courts and of their judgment in the eyes of the public and of our allies.

Judicialization of Cuba policy raises yet another threat to judicial independence. We have discussed the problems that arise both from the frustration of judicial remedies and from the perception of courts as merely arms of the state. Again as with structural injunctions, a third difficulty may arise when a class of cases calls for a change in the role of the individual judge. In structural injunctions situations, it will be remembered, judges can lose their objectivity and impartiality as they become interested players in the political give-and-take that occurs in remedial proceedings. Helms-Burton might produce a similar problem by placing judges in the difficult position either of executing American foreign policy or of flouting national security concerns. In ruling on the merits of a Title III case, judges may not find it easy either to put aside their patriotism or to ignore popular support for Cuba sanctions. The

price, however, of giving in to these temptations may be the further loss of neutrality and of legitimacy on the part of the courts.

Judicialization of Cuba policy also will transfer the political bargaining and confrontation that occurs over foreign policy from the Congress and the White House to the courtroom. In the structural injunction context, the expansion of the courts' remedial power over some of the basic decisions of state government, such as budget, tax, and educational policy resulted in the transformation of the judicial process into a forum for the allocation of resources and the development of public programs.83 A similar prospect may lie in store for the federal courts if the enforcement of foreign policy—in this case Cuba policy—becomes the goal of litigation. For example, in Barclays Bank PLC v. Franchise Tax Board of California,84 a case which challenged the constitutionality of California’s tax on multinational corporations, amicus briefs were entered by the United Kingdom, the European Community, Banque Nationale de Paris, the Confederation of British Industry, the Council of Netherlands Industrial Federations, the Federal of German Industries, the Japan Federation of Economic Organizations, the Japan Tax Association, Reuters, the U.S. Chamber of Commerce, and dozens of American states.85 Instead of fighting in Congress and the executive branch for a different international economic policy, these parties transferred their disputes to a judicial forum because of the Court’s jurisdiction over dormant commerce clause cases. A similar result may occur when Cuba policy becomes a regular subject for federal lawsuits. Judicialization may breed politicization, which in the long run would do great harm to the institution of the judiciary.

B. Federal Courts and Effective Foreign Policy

While the last section discussed why the legalization of foreign policy might prove harmful to the federal courts, this section asks whether the legalization of foreign policy might prove harmful to the nation. It begins by sketching the ideal institutional characteristics for the successful execution of foreign policy. It then compares these charac-

83. Yoo, supra note 68, at 1173; see also Missouri v. Jenkins, 115 S. Ct. 2038, 2072 n. 6 (Thomas, J., concurring).
84. See 512 U.S. 298 (1994).
85. Id. at 300-01.
tions to those of the federal court system. This analysis suggests that of the different branches of government, the federal judiciary may be the most ill-suited institution for the implementation of foreign policy goals. This conclusion suggests that Helms-Burton, and laws like it, do not serve the national interest effectively, and that the federal courts ought not to be used to pursue foreign policy goals.

Writers on international relations have defined several of the elements necessary for a "rational actor" model of national security decisionmaking. While the model is intended to be positive, it can also be thought of as a normative model to aspire to as well. As Thomas Schelling has written, the primary requirement for the study of national strategy is "the assumption of rational behavior—not just of intelligent behavior, but of behavior motivated by a conscious calculation of advantages, a calculation that in turn is based on an explicit and internally consistent value system." This actor is conceived of as a rational, unitary decisionmaker who can perceive strategic threats and opportunities, develop options, and estimate the consequences that flow from pursuing different alternatives. The actor can translate national security and the national interest into discrete goals and objectives, which it seeks to achieve by selecting value-maximizing policy options.

Theorists have identified several institutional elements that permit the effective development and implementation of policy choices. Rational actors require organizational arrangements that can identify the values and objectives they wish to maximize; they must be able to calculate the costs and benefits of different policies; they must have a system to receive and convey information; they must be able to receive messages and communicate with other actors in the international system; they must have a process for reaching decisions and then transmitting


87. SCHELLING, supra note 86, at 4.

88. ALLISON, supra note 86, at 32-33.

89. Id.
them throughout the nation. Generally, it is to a nation's advantage, therefore, "to have a communications system in good order, to have complete information, or to be in full command of one's own actions or of one's own assets," writes Schelling.

Of course, these elements do not exist in a pure form within the American national security apparatus, nor are they likely to be present in the government of any nation. Graham Allison's work on the Cuban Missile Crisis, for example, demonstrated how what appeared to be a model of rational action—President Kennedy's use of a quarantine and of military and diplomatic moves convinced the Soviets to withdraw missiles from Cuba—also was produced by domestic organizational and governmental politics. The presence of bureaucratic and political imperatives may distort the reception of information concerning international affairs and the effectiveness of implementation of policy. Other areas of foreign policy, such as trade, involve issues of such domestic economic impact that Congress has become heavily involved, which chips away at the concept of a unitary, rational decisionmaker. Some have written that accurately perceiving and evaluating actions, messages, and threats in the international arena is difficult, if not impossible. Aside from special cases of international bargaining, however, it seems that most commentators believe that the unitary, rational decisionmaker is the ideal institution for the conduct of foreign policy. Work such as Graham Allison's, for example, is designed more to show how hard the model is to establish in the real world of international politics, than to question the advantages that the model brings.

The ideal of a unitary, rational decisionmaker has guided the legal community's approach to foreign relations law as well. In United States v. Curtiss-Wright Export Corp., to take the most famous example, the Supreme Court observed that the President ought to receive broad freedom to act in the international sphere. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President

91. Id. at 18.
92. ALLISON, supra note 86, at 101-143; 185-244.
93. ROBERT JERVIS, PERCEPTION AND Misperception in International Politics (1976).
alone has the power to speak or listen as a representative of the nation.\footnote{See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). As is well known, \textit{Curtiss-Wright} did not truly involve an issue of inherent presidential power in foreign affairs, but instead raised a non-delegation question concerning congressional delegation of economic sanctions authority to the President.} Justice Sutherland justified this conclusion because of the structural advantages of the Presidency. Quoting from a Senate report, the Court noted that: "[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch."\footnote{Id.} In so concluding, the Court could have traced this theme back to the founding. In \textit{The Federalist No. 70}, for example, Alexander Hamilton remarked most famously that energy and unity in the executive were essential for good government, and that "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."\footnote{THE FEDERALIST \textit{No. 70}, supra note 77, at 356 (Alexander Hamilton).} Thus, the framers vested in the President the command over the military, the power to wage and initiate war, the power to negotiate treaties, and the power to conduct diplomatic relations.\footnote{See John C. Yoo, \textit{The Continuation of Politics by Other Means: The Original Understanding of War Powers}, 84 CAL. L. REV. 167, 221-69 (1996).} Even modern legal scholars who are critical of executive dominance in foreign affairs, such as Professor Harold Koh, admit that the structural advantages of a unitary presidency allow it to more easily exercise power in foreign relations.\footnote{HAROLD H. KOH, \textit{The National Security Constitution: Sharing Power after the Iran-Contra Affair} 118-23 (1990).}

If one accepts that the unitary, rational decisionmaker model should govern foreign affairs policymaking, then the defects of Helms-Burton should become apparent. Compared to the Presidency, the federal judicial system is decentralized, slow, and at times irrational (from a national security perspective). The decentralization of the judicial system perhaps is the greatest obstacle to the effective implementation of foreign policy. The first line of courts that would hear a Title III claim are the 92 district courts, which are populated by more than 647 judges. Until appellate courts have ruled on a legal issue, the judges in these district

\begin{footnotesize}
94. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). As is well known, \textit{Curtiss-Wright} did not truly involve an issue of inherent presidential power in foreign affairs, but instead raised a non-delegation question concerning congressional delegation of economic sanctions authority to the President.

95. Id.

96. \textit{The Federalist No. 70}, supra note 77, at 356 (Alexander Hamilton).


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Courts can hold 92 different interpretations of the law. There are 13 federal courts of appeals, with 179 judges, who are the effective judges of last resort for 99% of all federal cases. Until the Supreme Court has decided an issue, the courts of appeals can construe Helms-Burton 13 different ways, if they so choose. It is as if Helms-Burton had created 13 different Departments of State with 179 Secretaries of State. And unlike the Secretary of State, federal judges are not responsible to the President or to Congress as to how they interpret or apply Helms-Burton.

Due to the structure of the federal court system, policy may be slow in implementation, and any errors or deviations from the policy may go uncorrected. Stories about the delay between the filing of a suit in federal court and the eventual judgment are well-known. Such slowness impedes the swift and effective execution of foreign policy. Delay also infects the judiciary’s institutional systems for communicating between its different units and for correcting errors. While the federal courts have several mechanisms to correct errors - in other words, an appeals system - it can take months if not years for an appeal to run its course. Even if a district or circuit judge acts in defiance of established circuit or Supreme Court precedent, litigation is needed to correct the error. Standards of review concerning fact-finding may even render some decisions immune from appellate review despite contrary or conflicting results reached by different trial courts in similar cases.

Execution of foreign policy by the federal courts also may undermine one of the significant advantages of the unitary model: rationality.

99. In October Term 1995, for example, the Supreme Court disposed of 90 cases either by full opinion or by per curiam opinion. Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 1996 Report of the Director 82 (1997). In 1995, the United States Courts of Appeal (excluding the Federal Circuit), received 50,072 cases and disposed of 49,805. Id. at 83. For figures on the numbers of authorized judgeships, see id. at 39-40.

100. Congress and the President, of course, can overrule the judiciary by passing an override statute, which itself would take far longer time than removing a recalcitrant executive branch official. Federal judges are guaranteed lifetime tenure and irreducible pay by the Constitution, subject to impeachment. U.S. Const. art. III, § 1 (rendering them immune from the President’s removal power).

101. See, e.g., Martin Shapiro, Toward a Theory of Stare Decisis, 1 J. Leg. Stud. 125, 125-34 (1972) (applying communications theory to judicial system).

102. Appellate courts cannot re-open questions of fact, for example, unless the finding is “clearly erroneous.” Fed. R. Civ. P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564 (1985).
As will be recalled, strategists have argued that foreign policy should be conducted by a decisionmaker who chooses policy based upon cold calculations of costs and benefits, in light of the nation's value system. Thus, the President and Congress should select the best policies to pursue towards Cuba by weighing all of the advantages and disadvantages that accrue to the national interest by following certain courses of action. As these costs and benefits change, the unitary decisionmaker should enjoy the flexibility to correspondingly alter the nation's policies. Rationality in this case requires not just the calculation of national interest at the beginning of a policy, but constant re-calculation during the policy's implementation and adjustment of the policy as circumstances dictate.

Federal courts do not enjoy this flexibility. Once the President and Congress have established national objectives by statute, the judiciary's duty is to execute those goals in the context of Article III cases or controversies, subject to any policymaking discretion that the courts are implicitly given by Congress in areas of statutory ambiguity or of federal common law. Federal judges cannot alter or refuse to execute statutory policies, even if the original circumstances that gave rise to the statute have disappeared. Put in more specific terms, if a federal court hears a Title III claim, it must render judgment for an American plaintiff if it finds that the defendant has engaged in trafficking. It must do so even if the national interest of the United States would not be served by a judgment in that particular situation. For example, at the same time that the judgment is issued, the United States might be conducting diplomatic negotiations to resolve the Cuba sanctions dispute, or the United States might be seeking an international agreement with the defendant's nation, or the United States might even be relying upon the specific defendant for a critical service or product. A unitary, rational decisionmaker can take these other factors into account in deciding whether to impose economic sanctions; a federal court cannot.

103. See generally Richard H. Fallon, et al., Hart and Wechsler's The Federal Courts and The Federal System 752-62, 789-97, 801-10 (1996). For an important article that raises significant doubts about the legitimacy of the incorporation of international law as federal common law, see Bradley, et al., supra note 44.

104. For a contrary view, see Guido Calabresi, A Common Law for the Age of Statutes (1982). This view has not been accepted by the Supreme Court.
These inherent inabilities of the federal judiciary are only compounded by the defects of the litigation process as a means of executing policy. To be sure, there are certain areas in which courts enjoy some superiority in enforcing and establishing standards of conduct. Nonetheless, several studies have indicated that using “adversarial legalism” produces waste and inefficiency. In particular, Robert Kagan has identified several negative characteristics that arise from the use of litigation to execute public policy: irresolution of issues, fragmentation of decisionmaking, legal complexity, uncertainty and inconsistency, instability of compromises, use of procedure to delay, harass and extort, economic inefficiency, demoralization of parties and government agencies, and diversion of attention from the important issues.

Although one cannot predict whether all of these factors will be present in Title II litigation, it would not be surprising to see many of them at work.

Conclusion

Helms-Burton made a strong symbolic statement against the inhumanity of the Castro regime. It usefully codified many of the economic sanctions upon Cuba that until now had been conducted pursuant to executive order. Nevertheless, the most innovative provision, Title III, may represent a misuse of the federal courts and may undermine the effective implementation of American foreign policy. Congress ought to reconsider whether Title III makes sense, and it ought to hesitate before it includes similar provisions in future laws.

That leaves open the question why Congress would undertake such a policy in the first place. Maybe transferring the implementation of economic sanctions to the courts indicates a substantial distrust of the executive branch’s ability or trustworthiness in following Congress’ foreign economic policies. Perhaps this should not be surprising in an era of divided government, although other foreign economic policy statutes continue to vest substantial discretion in the President. Maybe creating a cause of action is in itself a sanction; the United States may be imposing the costs, delays, and inefficiencies of the American legal system upon


our trading allies as an extra punishment in addition to the economic sanctions of Title III. There are more precise ways, however, of communicating messages and of inflicting economic pain upon other actors in the international system.

Title III instead may be a sign of the growing domestication of American foreign policy. In constitutional law, a question that often arises is whether foreign affairs are different from domestic affairs. Although the Supreme Court has said in the context of individual rights that "[t]he prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined," it might be said that the Court has tolerated greater freedom for the government's ability to act in the foreign sphere than the domestic one. Title III, however, suggests that foreign affairs may no longer "be different." In the last three decades, we have witnessed the use of adversarial legalism to set policy in numerous domestic contexts; the environment, welfare programs, and traffic safety are only three well-studied examples. In Title III, the writers of the Helms-Burton legislation sought to address the problem of Cuba policy with the same tools: of creating new legal rights, of locating the decision-making process to the legal process. Title III may be the first step toward the injection of adversarial legalism into the foreign policy decision-making process, as has already occurred in so many areas of domestic policy. Title III's success or failure will be the first sign of whether turning the federal courts into weapons of foreign policy ultimately is in the nation's best interests.

107. See Reid v. Covert, 354 U.S. 1, 16-17 (1957).