

In Deepwater: Cuba, Offshore Drilling, and Political Brinkmanship

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I. Introduction

On April 20, 2010, the *Deepwater Horizon*, an oil rig operated by BP, exploded in the Gulf of Mexico, killing eleven crew members and beginning one of the worst economic and environmental disasters ever experienced by the Gulf Coast region.¹ The rig was drilling an exploratory well in Mississippi

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¹ See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* vi-ix (2011) [hereinafter BP COMM'N REP.].

Canyon Block 252,² a deepwater oil prospect BP had been trying to develop for years. Although the well was nearly complete, its progress was significantly behind schedule and over budget.³ Realizing the financial drain the project had become, BP management made several risky judgments affecting the drilling progress in an effort to save time and reduce some of the costs.⁴ These shortcuts created serious pressure regulation problems at the wellhead, the appropriate balance of which is critical to the deepwater drilling method.⁵ At some point, the pressure imbalance overcame the regulation system, and the well blew out.⁶ The blowout sent gas barreling up the riser toward the rig, where it was ignited by sparks from the rig's generators.⁷ For thirty-six hours, the *Deepwater Horizon* burned before sinking below the water's surface on April 22—Earth Day.⁸ It was not readily apparent at the time, but almost one mile below the surface, the Macondo well leaked a steady stream of crude oil into the Gulf

² *Id.* at 47, 89.

³ *Id.* at 2 (noting that BP and its partners in the Macondo venture had budgeted \$96.2 million and 51 working days for the project, but that the project was \$58 million over budget and six weeks behind schedule as of April 20, 2010).

⁴ See WILLIAM R. FREUDENBURG & ROBERT GRAMLING, *BLOWOUT IN THE GULF: THE BP OIL SPILL DISASTER AND THE FUTURE OF ENERGY IN AMERICA* 46-50 (2011) (discussing the evidence of corner-cutting uncovered by congressional investigators). For a thorough explanation of the decisions and oversights that contributed to the blowout, see BP COMM'N REP., *supra* note 1, at 89-127.

⁵ See BP COMM'N REP., *supra* note 1, at 90-91 (“The principal challenge in deepwater drilling is to drill a path to the hydrocarbon-filled pay zone in a manner that simultaneously controls these enormous pressures and avoids fracturing the geologic formation in which the reservoir is found. It is a delicate balance. The drillers must balance the reservoir pressure (pore pressure) pushing hydrocarbons into the well with counter-pressure from inside the wellbore. If too much counter-pressure is used, the formation can be fractured. But if too little counter-pressure is used, the result can be an uncontrolled intrusion of hydrocarbons into the well, and a discharge from the well itself as the oil and gas rush up and out of the well. An uncontrolled discharge is known as a blowout.”).

⁶ See *id.* at 113-14. Because petroleum reservoirs typically contain compressed gas, it is not uncommon for some of the gas to shoot out of the well when the reservoir is breached—this is known as a kick. FREUDENBURG & GRAMLING, *supra* note 4, at 30. If a kick is not controlled, the expanding gas could cause a blowout. *Id.* at 30-31.

⁷ BP COMM'N REP., *supra* note 1, at 114; CARL SAFINA, *A SEA IN FLAMES: THE DEEPWATER HORIZON OIL BLOWOUT* 44 (2011). The riser is the long pipe connecting the rig to the blowout preventer, which is a safety valve installed at the top of the well. FREUDENBURG & GRAMLING, *supra* note 4, at 29.

⁸ FREUDENBURG & GRAMLING, *supra* note 4, at xii.

and would continue to do so for eighty-seven days.⁹

From the time of the blowout until workers capped it on July 15, 2010, the Macondo well released an average of 2.5 million gallons per day into the Gulf of Mexico.¹⁰ For comparison, at this rate, the Macondo blowout leaked more oil than the 1989 *Exxon Valdez* disaster every four and a half days.¹¹ In total, an estimated 206 million gallons of crude oil spilled into the Gulf.¹² At one point, the oil contaminated one-third of the U.S. portion of the Gulf of Mexico.¹³ The spill dealt a major blow to the Gulf Coast economy as well.¹⁴ A substantial portion of the region's economic activity is based on fishing, tourism, and oil, all of which were severely impacted by the Macondo blowout.¹⁵ In June 2010, BP set aside \$20 billion to help compensate Gulf Coast businesses and families for the inevitable economic loss.¹⁶ More than two and a half years later, the region is still struggling to recover.¹⁷

⁹ See BP COMM'N REP., *supra* note 1, at 131-32, 165.

¹⁰ FREUDENBURG & GRAMLING, *supra* note 4, at 13.

¹¹ *Id.*

¹² *BP Feared Spill of 3.4 Million Gallons a Day*, N.Y. TIMES, Jan. 28, 2012, <http://www.nytimes.com/2012/01/29/us/bp-feared-gulf-oil-spill-rate-of-3-4-million-gallons-a-day.html>.

¹³ BP COMM'N REP., *supra* note 1, at 187 (noting that at the most extensive point of contamination, "88,522 square miles of the Gulf of Mexico was closed to fishing").

¹⁴ See *id.* at 185.

¹⁵ See *id.* More than one-third of the United States' domestic food supply is produced by the Gulf Coast region, including most of the crawfish, shrimp, blue crabs, and oysters. *Id.* at 186-87. Tourism in the coastal regions of the five states that border the Gulf generates almost \$20 billion each year. *Id.* at 191. The region also supplies one-third of the nation's domestic oil. *Id.* at 187.

¹⁶ Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion to Help Oil Spill Victims*, N.Y. TIMES, June 17, 2010, at A1. The BP Commission also noted that within just eight weeks, the Gulf Coast Claims Facility had compensated approximately 127,000 claimants for economic losses, totaling more than \$2 billion. BP COMM'N REP., *supra* note 1, at 185. To illustrate the magnitude of the economic damage from the *Deepwater Horizon* blowout, consider that over a two year period, the September 11th Victim Compensation Fund paid out just over \$7 billion to 5,560 individuals. *Id.* at 185-86.

¹⁷ See Susan Cosier, *Feds Leave Door Open to Hit BP with Top Penalties for Gulf Spill*, FORBES (Sept. 6, 2012, 4:02 PM), <http://www.forbes.com/sites/deborahljacobs/2012/09/06/feds-leave-door-open-to-hit-bp-with-top-penalties-for-gulf-spill> (discussing reports of long-term and still uncovered damage to the region); Elizabeth Skree, *Time for BP to Make Things Right in the Gulf*, DELTA DISPATCHES (Sept. 6, 2012), <http://www.mississippiriverdelta.org/blog/2012/09/06/time-for-bp-to-make-things-right-in-the-gulf> ("The gulf environment and the people and businesses that depend on it are

In the wake of the *Deepwater Horizon* disaster, the nation's attention has focused more on the environmental impact of offshore drilling.¹⁸ In recent years, the Cuban government has begun to explore the possibility of tapping into oil reserves in the Straits of Florida, the ninety-mile stretch of water separating Florida from Cuba.¹⁹ The Straits of Florida is significant not only as the thin separation between longtime political foes but also as the major conduit for the beginning of the Gulf Stream.²⁰ Any oil spill picked up by the Gulf Stream could travel through the Straits of Florida and up the Atlantic Coast, contaminating the entire coastline of the Southeast Atlantic.²¹ The gravity of the danger presented by an oil spill in the Straits of Florida combined with the stale relationship between the United States and Cuba has caused several U.S. officials to express concern about the prospect of Cuba engaging in offshore drilling, especially because Cuba lacks the advanced technology necessary to safely explore deepwater oil reserves.²² In February 2012, the *Scarabeo 9*, a semi-submersible oil rig, began drilling the first of several exploratory wells in the Straits of Florida, only sixty miles from the Florida Keys.²³

This situation presents an issue of significant national interest. It also presents an opportunity to change the tone of a foreign policy position that has failed for a half-century.²⁴ In order to

still reeling from the effects of the spill.”).

¹⁸ See JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41684, OIL SPILL LEGISLATION IN THE 112TH CONGRESS 1 (2011).

¹⁹ See NEELESH NERURKAR & MARK P. SULLIVAN, CONG. RESEARCH SERV., R41522, CUBA'S OFFSHORE OIL DEVELOPMENT: BACKGROUND AND U.S. POLICY CONSIDERATIONS 1-4, 13 (2011).

²⁰ *Id.* at 8 n.37.

²¹ See *The U.S., Cuba and Oil Diplomacy*, SOLUTIONS: ENVTL. DEF. FUND, Vol. 43, No. 1, Winter 2012, at 11, available at http://solutions.edf.org/files/2012/01/12SOL_Winter_121211_rev.pdf.

²² See *All Things Considered: Cuban Offshore Drilling Plans Raise U.S. Concerns* (NPR radio broadcast Sept. 12, 2011) [hereinafter *All Things Considered*], available at <http://www.npr.org/2011/09/12/140405282/cuban-offshore-drilling-plans-raise-u-s-concerns>.

²³ William Booth, *Cuban Drilling Causes U.S. to Scramble*, WASH. POST, Mar. 2, 2012, at A12.

²⁴ See VICKI HUDDLESTON & CARLOS PASCUAL, LEARNING TO SALSA: NEW STEPS IN U.S.-CUBA RELATIONS 1 (2010) (“If one compares outcomes to stated objectives, U.S. policy toward Cuba may be the most significant failure in the history of American foreign policy.”).

avoid another environmental and economic disaster like the *Deepwater Horizon* oil spill, the United States should implement policy changes that are designed to build a collaborative relationship with Cuba. This note discusses the current regulatory issues presented by Cuba's efforts to extract oil from reserves in the Straits of Florida and suggests changes to U.S. policy that foster a more cooperative relationship between the United States and Cuba. The following sections discuss the international and domestic regulations that inhibit the ability of the United States to respond to an oil spill in Cuban waters. Next, this note turns to an analysis of the current proposals for responding to a Cuban oil spill and their shortcomings. Finally, this note recommends alternative solutions with an eye toward minimizing the threat of a spill in the Straits of Florida.

II. Historical Context of U.S.-Cuban Relations

A. *Foreign Relations Between the United States and Cuba*

Over the last fifty years, the diplomatic relationship between the United States and Cuba has been tense, if not outright hostile.²⁵ This tension exists because of a fundamental misunderstanding between the two countries over the distribution of hemispheric power.²⁶ Although the current Cuban regime has been in power for just over fifty years, it continues to view the United States as the nineteenth century hegemon that asserted the Monroe Doctrine.²⁷ At the same time, the United States has not done much

²⁵ See generally Carlos Oliva Campos, *The Relations of Cuba with Latin America and the Caribbean: The Long and Winding Road of Reconciliation*, in CUBAN-LATIN AMERICAN RELATIONS IN THE CONTEXT OF A CHANGING HEMISPHERE 17-18 (Gary Prevost & Carlos Oliva Campos eds., 2011) (noting that the U.S. policy toward the Castro revolutionary government created a political climate of hostility against Cuba).

²⁶ See LARS SCHULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC: THE UNITED STATES AND THE CUBAN REVOLUTION 2* (2009) [hereinafter SCHULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC*]. Schultz argues that in some ways, the U.S.-Cuban relationship is a case study in Thucydides' theory of realism—"the strong will do what they want, and the weak will accept what they must." *Id.* at 3-4 (pointing out that the Cuban economy is 1/250th the size of the U.S. economy). But this particular relationship also contains an element that falls beyond the theoretical bounds of realism: when Cubans have refused to bow to the will of the United States, they have generally gotten away with it. *Id.* at 4.

²⁷ See Louis A. Pérez, Jr., *Fear and Loathing of Fidel Castro: Sources of US Policy Toward Cuba*, 34 J. LATIN AM. STUD. 227, 233-34 (2002); see also Rafael Hernández, *Intimate Enemies: Paradoxes in the Conflict Between the United States and*

to alter that perception; in fact, it has done quite the opposite.²⁸ The United States' current policy toward Cuba is largely rooted in this "misunderstanding."²⁹ This section explains the development of this policy in the historical context.

1. Revolution and the Beginning of Hostilities

On January 1, 1959, a group of revolutionaries led by Fidel Castro overthrew the Cuban government led by Fulgencio Batista, a U.S.-friendly dictator who had controlled the island since 1934.³⁰ Although not initially communist, Washington viewed the new government's reform positions with apprehension.³¹ The Revolution was seen as a rebellion against the economic immobilization and social decline that had developed under the corrupt and oppressive Batista regime.³² As part of its reforms, the revolutionary government instituted a land reform law, which sought to create a more equitable apportionment of land among the Cuban people.³³ The law significantly limited the ability of noncitizens to invest in Cuban land and provided for the expropriation of property held by foreign investors.³⁴

Cuba, in DEBATING U.S.-CUBAN RELATIONS 9, 18 (Jorge I. Domínguez et al. eds., 2012) ("Although Cuban anti-imperialism has been reinforced by fifty years of socialism, the attitude has been in existence since the colonial era.").

²⁸ See LARS SCHOULTZ, BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA 368 (1998) [hereinafter SCHOULTZ, BENEATH THE UNITED STATES]. Schoultz explains that "[b]ecause they lack physical power, Latin Americans have never threatened the United States; rather, the fear in Washington has always been that powerful non-hemispheric powers might suddenly use a base in nearby Latin America to attack the United States." *Id.* And so, "[o]nce the United States had asserted its hegemony in Latin America, officials in Washington quickly concluded that it was important to retain control for a symbolic reason: hegemony over the region became an indicator of U.S. credibility in international relations." *Id.* at 368-69.

²⁹ See *id.* at 367.

³⁰ See generally RICHARD GOTT, CUBA: A NEW HISTORY 142-72 (2004) (summarizing the development and ultimate success of the Castro insurrection and the early stages of the revolutionary government).

³¹ See generally Alan Luxenberg, *Did Eisenhower Push Castro into the Arms of the Soviets?*, in NEIGHBORLY ADVERSARIES: READINGS IN U.S.-LATIN AMERICAN RELATIONS 159, 159-73 (Michael LaRosa & Frank O. Mora eds., 2d ed. 2007) (evaluating the various arguments about whether the Eisenhower administration caused the Castro regime to embrace communism).

³² See GOTT, *supra* note 30, at 165-66.

³³ See *id.* at 170-71.

³⁴ SCHOULTZ, THAT INFERNAL LITTLE CUBAN REPUBLIC, *supra* note 26, at 95 ("The

Although the Eisenhower administration was initially unenthusiastic about the Castro government, the land reform law solidified its opposition to the regime.³⁵ Within the first six months of the revolutionary government's existence, Washington determined that the Castro regime must be removed from power.³⁶ During the summer of 1959, the State Department, working with the Central Intelligence Agency, formulated a plan for replacing the Castro government and, in October, recommended that the United States support opposition groups in Cuba "while making Castro's downfall seem to be the result of his own mistakes."³⁷ The plan, which would ultimately result in the Bay of Pigs invasion, was approved by President Eisenhower in March 1960.³⁸

In April 1961, 1500 U.S.-backed Cuban exiles landed at the Bay of Pigs in an attempt to overthrow the Castro government.³⁹

maximum size of a landholding was limited to thirty caballerías (about one thousand acres), with the exception of sugar, rice, and cattle lands, which could be up to one hundred caballerías (about thirty-three hundred acres). Article 6 prohibited tenant farming, and Article 11 prohibited sharecropping. Article 12 permitted landholdings by corporations, the typical form of U.S. ownership, but after a year, all the shareholders of any landowning corporation had to be Cuban citizens. Article 15 stipulated that only Cubans could acquire rural property in the future, and Article 12 also specified that anyone who owned shares in a corporation that grew sugarcane could not at the same time be a shareholder of a corporation that processed the can into raw sugar, a provision that would deprive processors of about two million acres. In short, U.S. investors would lose their land.").

³⁵ See GOTT, *supra* note 30, at 180.

³⁶ See *id.* (noting that the initial decision to overthrow the Castro government was based on the economic concern arising out of the expropriation of land owned by American companies, not because the government posed a communist threat). In fact, Castro did not declare the Revolution to be socialist until the eve of the Bay of Pigs invasion. See JULIA E. SWEIG, *CUBA: WHAT EVERYONE NEEDS TO KNOW* 42 (2010). When the Eisenhower administration decided to oust Castro six months into the Revolution, Cuba had not yet established diplomatic relations with the Soviet Union. See *id.* at 78-79.

³⁷ Piero Gleijeses, *Ships in the Night: The CIA, the White House and the Bay of Pigs*, 24 J. LATIN AM. STUD. 1, 3 (quoting Discussion at the 432nd Meeting of the National Security Council, Thursday, January 14, 1960 (Mar. 31, 1960) (on file with Dwight D. Eisenhower Library)).

³⁸ See *id.* at 4-5 (noting that the plan consisted of four components: (1) organizing a unified opposition group outside Cuba; (2) developing a radio broadcasting facility that would broadcast anti-Castro messages; (3) carrying out intelligence operations and other covert actions and; (4) developing a paramilitary force outside Cuba).

³⁹ See GOTT, *supra* note 30, at 193-95.

The invasion was an immediate failure.⁴⁰ Repelling the exile forces was a major victory for the Castro government.⁴¹ It not only reinforced support for the revolutionary government among Cubans, it stood as a symbol to the greater Latin American community that U.S. imperialism could be defeated, providing legitimacy to the Revolution.⁴² Castro's victory at the Bay of Pigs, however, did not change Washington's belief that the continued existence of the regime was a threat to U.S. interests.⁴³ In fact, from Washington's perspective, the regime became more of a threat in the aftermath of the invasion.⁴⁴

2. *Imposing an Embargo*

The night before the Bay of Pigs invasion, following a preemptive air strike, Fidel Castro declared that the Revolution would be socialist.⁴⁵ Determined not to repeat the Bay of Pigs fiasco, the Kennedy administration instead launched a "multifaceted attack on the Cuban government: diplomatic isolation, sabotage and assassination, and economic pressure."⁴⁶ First, in September 1961, Congress amended the Foreign Assistance Act of 1961 to give the president the power to impose an embargo on commercial transactions with Cuba, which Kennedy exercised to institute a complete embargo on February 7, 1962.⁴⁷ Washington then convinced members of the Organization of American States to expel Cuba from the organization, citing its "incompatibility with the inter-American system."⁴⁸ In addition to the economic and political hostilities against the Castro

⁴⁰ See *id.* at 192-94. Although the operation was supposed to be kept secret, Castro had been expecting it. See *id.* at 191-93. A freshly reinforced local militia prevented the exiles from establishing a position on the island, which was critical to the operation. See *id.* at 190, 192-94. In just two days, more than 1300 exiles had been either captured or killed, thwarting the invasion. See *id.*

⁴¹ See *id.* at 193-95.

⁴² See *id.* at 190-91.

⁴³ See SCHOULTZ, THAT INFERNAL LITTLE CUBAN REPUBLIC, *supra* note 26, at 171-72.

⁴⁴ See *id.* at 171-73.

⁴⁵ See GOTT, *supra* note 30, at 193.

⁴⁶ See SCHOULTZ, THAT INFERNAL LITTLE CUBAN REPUBLIC, *supra* note 26, at 173.

⁴⁷ See ESTEBAN MORALES DOMINGUEZ & GARY PREVOST, UNITED STATES-CUBA RELATIONS: A CRITICAL HISTORY 49 (2008).

⁴⁸ *Id.*

government, the United States also increased its support for counter-revolutionary forces throughout Cuba.⁴⁹ In response to the aggressive measures taken by the U.S. government to undermine the Castro regime, Cuba sought an alliance with the Soviet Union:

Our firm conviction that Yankee imperialism would, under any pretext, launch its military forces directly against our country, and our idea that proposed measures to prevent it would help strengthen the Socialist bloc as a whole, determined our decision to sign the Cuban-Soviet agreement regarding the deployment of nuclear weapons in our territory.⁵⁰

In October 1962, U.S.-Cuban relations reached their height of aggression, bringing the world dangerously close to nuclear war.⁵¹ In an effort to deter another U.S. invasion, Castro allowed the Soviet Union to set up nuclear missile installations in Cuba.⁵² For thirteen days, between October 14 and 26, the world stood on the brink of nuclear war until Soviet Prime Minister Nikita Khrushchev ordered that the missiles be removed from Cuba.⁵³

Following the Cuban missile crisis, the United States continued its economic embargo against the island, implementing new regulations that prohibited all transactions related to Cuba—including those between the United States and third countries involving Cuban goods or U.S. goods being traded by third countries to Cuba.⁵⁴ The United States also amended the Foreign Assistance Act of 1961 to prohibit any assistance to the current or any future government of Cuba until the U.S. owners of property that had been expropriated in 1959 received compensation.⁵⁵ In short, following the failure of its military efforts to overthrow the Castro government, Washington turned to a policy colorfully

⁴⁹ *See id.* at 50.

⁵⁰ *Id.* at 51 (quoting Fidel Castro Ruz, Informe central: Primer Congreso del PCC 40-41).

⁵¹ *See id.* at 53, 64.

⁵² *See id.* at 64.

⁵³ *See* DOMINGUEZ & PREVOST, *supra* note 47, at 53, 64-65. For a different perspective on the Cuban missile crisis, see Michael Dobbs, Op-Ed., *The Price of a 50-Year Myth*, N.Y. TIMES, Oct. 16, 2012, at A31 (arguing that the risk of nuclear war during the crisis was not created by “a clash of wills” between the United States and the Soviet Union, but rather “the fog of war” (internal quotation marks omitted)).

⁵⁴ *See id.* at 73.

⁵⁵ *See id.* at 74.

described as “nut-pinching—an embargo that would make life as miserable as possible for everyday Cubans.”⁵⁶

3. *Strengthening the Embargo*

For the next twenty-five years, as the Cold War continued between the United States and the Soviet Union, Washington generally maintained a strict embargo against Cuba, justifying it on national security grounds.⁵⁷ By 1991, however, the effects of the Soviet Union’s collapse had reached Cuba.⁵⁸ Without the support of its Soviet ally, Cuba entered a period of severe economic deprivation, labeled by Castro as a “Special Period in Times of Peace.”⁵⁹ After the fall of the Soviet Union, the national security interest that had driven U.S. policy toward Cuba vanished.⁶⁰ But rather than move toward reconciliation with its neighbor, the United States maintained its policy toward the island.⁶¹ This decision was due to the influence of the Cuban American community, especially those in South Florida.⁶² In 1984, a group of Cuban exiles formed the Cuban American National Foundation (“CANF”).⁶³ Although their numbers are

⁵⁶ SCHOULTZ, *THAT INFERNAL LITTLE CUBAN REPUBLIC*, *supra* note 26, at 10. Professor Schoultz points to a quote from President Lyndon Johnson as the source of this “nut-pinching” policy toward Cuba: “Inexperienced in foreign affairs, Lyndon Baines Johnson had waited only a few days after inheriting the White House to seek advice from the widely respected chair of the Senate Committee on Foreign Relations, J. William Fullbright, who warned against doing anything dramatic. ‘I’m not getting into any Bay of Pigs deal,’ Johnson interrupted to agree. ‘No, I’m just asking you what we ought to do to pinch their nuts more than we’re doing.’” *Id.* at 5.

⁵⁷ *See generally* DOMINGUEZ & PREVOST, *supra* note 47, at 73-95 (discussing U.S.-Cuban relations during the Johnson, Nixon, Ford, Carter, and Reagan administrations).

⁵⁸ *See* SWEIG, *supra* note 36, at 126-27.

⁵⁹ *Id.* at 127. Following the Soviet Union’s collapse, Cuba’s import capacity fell dramatically—from \$8.1 billion in 1989 to \$2.3 billion in 1992.” GOTT, *supra* note 30, at 288. The loss of its imports shocked other sectors of the economy: “GDP declined by 2.9 per cent in 1990, 10 per cent in 1991, 11.6 per cent in 1992 and 14.9 per cent in 1993.” *Id.*

⁶⁰ *See* Lars Schoultz, *Washington’s Fourth Interest*, *THE LATIN AMERICANIST*, Sept. 2009, at 141-42, 145.

⁶¹ DOMINGUEZ & PREVOST, *supra* note 47, at 100.

⁶² *See* JESSICA F. GIBBS, *US POLICY TOWARDS CUBA: SINCE THE COLD WAR* 27-36 (2009).

⁶³ *See id.* at 21 (“Although there are different versions of the establishment of the Cuban American National Foundation (CANF), Reagan’s first National Security Adviser Richard Allen maintains that he encouraged conservative émigrés to form an

relatively small, the Cuban American lobby holds considerable influence in Washington because of Florida's critical status as a valuable swing state in presidential elections.⁶⁴ It is widely believed that CANF controls the Latino vote in Florida.⁶⁵ Thus, winning the support of the Cuban American community is essential to winning the Electoral College.⁶⁶

The Cuban American lobby, largely controlled by CANF, has taken a hard line on Cuba, supporting pro-embargo policies.⁶⁷ In the 1990s, the lobby used its influence to push two significant pieces of legislation through Congress—the Cuban Democracy Act of 1992⁶⁸ and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996.⁶⁹

The Cuban Democracy Act, also known as the Torricelli Act, was established to broaden “the spectrum of pressures on Cuba with the manifest goal of speeding up the deterioration of the Cuban economy, already depressed by the collapse of the former socialist countries.”⁷⁰ The Act did, however, provide for improvements in telephone communications between the two countries and loosened restrictions on exporting medical supplies to Cuba.⁷¹

In 1996, the Cuban government shot down two airplanes operated by the Cuban American group Brothers to the Rescue, an anti-Castro organization based in Miami.⁷² Although many of the details are unclear,⁷³ the incident resulted in the death of four

organization . . . to lobby Congress.”).

⁶⁴ See ANN LOUISE BARDACH, CUBA CONFIDENTIAL xviii (2002) (“Despite their small numbers (Cuban Americans make up .04% of the U.S. population), the influence and clout of the Cuban exiles in Washington is almost without equal.”).

⁶⁵ See Hernández, *supra* note 27, at 11.

⁶⁶ See SWEIG, *supra* note 36, at 238.

⁶⁷ See generally Hernández, *supra* note 27, at 11-12 (discussing the groups that influence U.S. policy toward Cuba).

⁶⁸ See 22 U.S.C. §§ 6001-6010 (2006).

⁶⁹ See 22 U.S.C. §§ 6021-6091 (2006).

⁷⁰ DOMINGUEZ & PREVOST, *supra* note 47, at 101.

⁷¹ See *id.*

⁷² See *id.* at 110.

⁷³ There is debate about whether the airplanes were in Cuban airspace at the time they were shot down. See *id.* The Cuban government maintains that the airplanes were shot down during their second trip into Cuban airspace, which justified the Cuban government's response. See *id.* As some familiar with the situation have acknowledged,

Cuban Americans.⁷⁴ In response to that incident, President Clinton signed into law the Cuban Liberty and Democratic Solidarity Act, more commonly known as the Helms–Burton Act.⁷⁵ In addition to further strengthening and codifying the embargo, the Helms–Burton Act “specified how the Cuban society must design a ‘transitional government’ without Fidel and Raul Castro and described how to have a ‘democratically elected government,’” which was requisite before the president would be able to lift the embargo.⁷⁶ The most controversial piece of the legislation, however, was Title III, which established procedures for U.S. citizens whose property in Cuba had been nationalized by the Castro regime to file claims in U.S. courts against any person who “traffics” on the confiscated property.⁷⁷

4. *Change*

The twenty-first century has not seen significant change in U.S.-Cuban relations. Shortly before the 2000 presidential election, President Clinton signed into law the Trade Sanctions Reform and Export Enhancement Act (“TSRA”).⁷⁸ The TSRA, which lessened some of the trade restrictions on agricultural products, was the result of a mounting anti-embargo coalition whose constituents were part of the growing pro-engagement community.⁷⁹ There is now much agreement that the current approach of U.S. policy toward Cuba, which remains organized around a Cold War-era isolationist strategy, has failed to bring about the collapse of the Castro regime and foster democracy on the island.⁸⁰ In 2009, President Barack Obama lifted a number of

“it was clear that the exile organization was pushing the limits in challenging the Cuban government and may have been seeking to provoke a confrontation between the two governments.” *Id.*

⁷⁴ *See id.*

⁷⁵ *See id.* at 105, 111.

⁷⁶ DOMINGUEZ & PREVOST, *supra* note 47, at 109.

⁷⁷ *Id.* For further discussion on the controversial nature of Title III, see Brice M. Clagett, *The Controversy over Title III of the Helms–Burton Act: Who Is Breaking International Law—the United States, or the States that Have Made Themselves Co-Conspirators with Cuba in Its Unlawful Confiscations?*, 30 GEO. WASH. J. INT’L L. & ECON. 271 (1996-97).

⁷⁸ 22 U.S.C. §§ 7201-7211 (2006).

⁷⁹ *See* GIBBS, *supra* note 62, at 145-46.

⁸⁰ *See* Jonathan Benjamin-Alvarado, *Evaluating the Prospects for U.S.-Cuban*

restrictions on the ability of Cuban Americans to make family visits to Cuba and send remittances to relatives, a change that the majority of Americans, even those in South Florida, supported.⁸¹ In late 2009, however, Alan Gross, a contractor with the U.S. Agency for International Development working on a democracy-building project in Cuba, was arrested for the unauthorized importation of satellite and other communications equipment to the island, which Cuba considers a crime against the state.⁸² In March 2011, he was sentenced to fifteen years in prison, which brought an abrupt halt to the thawing relations between the United States and Cuba.⁸³

B. International Agreements

Despite their proximity, the United States and Cuba do not have a bilateral agreement regarding oil spills.⁸⁴ Notwithstanding the lack of a formal relationship, the two countries do cooperate on other issues that involve mutual interests, such as drug trafficking.⁸⁵ The United States also made efforts to keep the Cuban government informed about its response efforts to the *Deepwater Horizon* crisis, which presented a threat of oil passing through the Straits of Florida.⁸⁶ Although both parties are signatories to regional multilateral agreements regarding oil

Energy Policy Cooperation, in CUBA'S ENERGY FUTURE: STRATEGIC APPROACHES TO COOPERATION 1, 1 (Jonathan Benjamin-Alvarado ed., 2010) [hereinafter Benjamin-Alvarado, *Evaluating the Prospects for U.S.-Cuban Energy Policy Cooperation*] (noting that the last half-century of U.S. foreign policy toward Cuba "has relied on the application of cold war measures—economic sanctions, technology denial, and political isolation"); see also HUDDLESTON & PASCUAL, *supra* note 24, at 229-37 (discussing the results of a 2008 opinion poll showing increased support in the Cuban American community for improving relations with Cuba).

⁸¹ See Jorge I. Domínguez, *Reshaping the Relations between the United States and Cuba*, in *DEBATING U.S.-CUBA RELATIONS*, *supra* note 27, at 43.

⁸² See Jonathan Weisman, *Senators Urge Castro to Release American*, N.Y. TIMES, Feb. 25, 2012, at A7.

⁸³ See *id.*

⁸⁴ See NERURKAR & SULLIVAN, *supra* note 19, at 11.

⁸⁵ See generally MARK P. SULLIVAN, CONG. RESEARCH SERV., R41617, CUBA: ISSUES FOR THE 112TH CONGRESS 1 (2011) (reporting on the recent developments in Cuba and in U.S.-Cuban relations).

⁸⁶ See Lesley Clark, *U.S. Wary of Cuba's Drilling Plans*, MIAMI HERALD (Oct. 1, 2010), http://iw.newsbank.com/iw-search/we/InfoWeb?p_product=NewsBank&p_theme=aggregated5&p_action=doc&p_docid=132CE34C8C6DAFB8&p_docum=1&p_queryname=1 (subscription required).

pollution,⁸⁷ some analysts advocate for a bilateral agreement between the United States and Cuba that would clearly establish each country's responsibilities in the event of a transnational oil spill.⁸⁸

The International Maritime Organization ("IMO") is a regulatory body within the United Nations specifically concerned with promoting "safe, secure and efficient shipping on clean oceans."⁸⁹ In response to the 1989 *Exxon Valdez* oil spill, the IMO facilitated the adoption of the International Convention on Oil Pollution, Preparedness, Response, and Cooperation ("OPRC").⁹⁰ Both the United States and Cuba are signatories to this agreement, which was designed to "establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries."⁹¹ As part of its efforts under the OPRC, the IMO established a regional training center in Curaçao, which works to facilitate international communication and cooperation for oil spills in the Caribbean region.⁹²

Both countries are also signatories to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, more commonly known as the Cartagena Convention.⁹³ Like the OPRC, the Cartagena Convention establishes protocols for information exchange among the signatory countries regarding the domestic laws and regulations, and institutions and procedures related to preventing oil spills.⁹⁴ In late 2011 and early 2012, the IMO and several other international organizations hosted a series of conferences and workshops in the Caribbean region to help the countries develop policy frameworks to prevent oil pollution from offshore installations and to establish protocols for responding to offshore

⁸⁷ See NERURKAR & SULLIVAN, *supra* note 19, at 13.

⁸⁸ See, e.g., Jorge Piñón, *Why the United States and Cuba Collaborate (and What Could Happen If They Don't)*, HEMISPHERE, Spring 2011, at 25.

⁸⁹ INT'L MAR. ORG., IMO WHAT IT IS 4 (2009), available at <http://www.imo.org/About/Documents/IMO%20What-it-is%20web%202009.pdf>.

⁹⁰ See NERURKAR & SULLIVAN, *supra* note 19, at 14.

⁹¹ *Id.*

⁹² See *id.* at 15.

⁹³ See *id.* at 14.

⁹⁴ See *id.*

drilling incidents.⁹⁵

III. Current Proposals and Why They Will Not Work

The current policies of the United States toward Cuba would significantly hinder any effort to combat a major oil spill in the Straits of Florida.⁹⁶ In an attempt to illustrate some of the “perverse effects” of the current U.S. policy toward Cuba, one observer noted that, in order to comply with the embargo, “Repsol, a Spanish oil company, is paying an Italian firm to build an oil rig in China that will be used next year to explore for oil off the shores of Cuba.”⁹⁷ This global consortium of sorts is the result of Repsol seeking to comply with the provision of the Torricelli Act that prohibits the sale to Cuba of any product of U.S.-origin.⁹⁸ Yet, many familiar with the oil drilling industry have pointed out that U.S. equipment is known for having the “most advanced technolog[y] in [the] field.”⁹⁹ Thus, the sweeping coverage of the embargo, rather than effecting any real change in Cuba, actually increases the risk of an oil spill in the Straits of Florida by depriving the Cuban government of safer, more cost-effective technology.¹⁰⁰ This section will discuss the contingency plans that

⁹⁵ See “Caribe” Newsletter Highlights Workshops on Ballast Water Management, *Oil Spill Preparedness*, INT’L INST. FOR SUSTAINABLE DEV. (Jan. 2012), <http://larc.iisd.org/news/caribe-newsletter-highlights-workshops-on-ballast-water-management-oil-spill-preparedness/115921/>.

⁹⁶ See JORGE R. PIÑÓN & ROBERT L. MUSE, BROOKINGS INST., *COPING WITH THE NEXT OIL SPILL: WHY U.S.-CUBA ENVIRONMENTAL COOPERATION IS CRITICAL I* (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0518_oil_spill_cuba_pinon/0518_oil_spill_cuba_pinon.pdf.

⁹⁷ Marc Frank, *Cuba Plans 7 Gulf of Mexico Oil Test Wells*, REUTERS (Aug. 18, 2010, 2:30 AM), <http://in.mobile.reuters.com/article/idINIndia-50901120100817?ca=rdt>.

⁹⁸ See 22 U.S.C. § 6003(b) (2006); see also 15 C.F.R. § 734.4 (2012) (excluding, *as de minimis*, products containing less than 10% U.S. materials).

⁹⁹ See *U.S. Denies Cuba’s Access to Oil Technologies*, RADIO CADENA AGRAMONTE (Oct. 21, 2010, 7:57 AM), http://www.cadenagramonte.icrt.cu/english/index.php?option=com_content&view=article&id=3065:us-denies-cubas-access-to-oil-technologies&catid=2:cuba&Itemid=14; see also Benjamin-Alvarado, *Evaluating the Prospects for U.S.-Cuban Energy Policy Cooperation*, *supra* note 80, at 28 (discussing the potential benefits of “access [to] advanced technology (primarily U.S.-based technology) and more investment capital”); *infra* note 100.

¹⁰⁰ As Jonathan Benjamin-Alvarado explained at a discussion held by the Brookings Institution:

One of the things that has been apparent over the past 10 years in talking with Cuban officials [in the oil industry] . . . is that their preferred partner is the

the United States has developed to respond unilaterally to an oil spill in the Straits of Florida and why these plans do not provide enough protection. Because the most effective means of combatting a Cuban oil spill involve increased communication and exchange between Cuba and the United States,¹⁰¹ the ultimate issue is one of domestic policy accommodation.¹⁰² The next section will examine the legislative proposals that have been introduced to accommodate the increased risk of an oil spill in the Straits of Florida.

A. Unilateral Response Plans

The U.S. Coast Guard maintains contingency plans for responding to any offshore drilling accidents.¹⁰³ Unlike the *Deepwater Horizon* situation, the Coast Guard has limited

United States. Their preferred access to technology is, you know, is top-shelf U.S., deep water exploration technologies. . . . [I]t's very frustrating for them and it certainly increased the cost of their operations by having . . . to get replacement parts from places like France or Great Britain as opposed to, you know, one phone call away and overnight shipping from Houston for some of the replacement parts for things that are essential to that particular industry.

Jonathan Benjamin-Alvarado, Professor of Political Sci., Univ. of Neb.—Omaha, Panel Discussion at the Brookings Inst.: Cuba's Energy Future: Strategic Approaches to Cooperation (Oct. 22, 2010) (transcript available at http://www.brookings.edu/~media/Files/events/2010/1022_cuba/20101022_cuba_energy.pdf).

¹⁰¹ See, e.g., Piñón, *supra* note 88, at 25 (noting that the high likelihood that an oil spill in the Straits of Florida will become transnational requires a procedural framework that allows for the free movement of equipment and personnel).

¹⁰² But see Richard Sadowski, *Cuban Offshore Drilling: Preparation and Prevention within the Framework of the United States' Embargo*, SUSTAINABLE DEV. L. & POL'Y, Fall 2011, at 37 (arguing that the U.S. embargo against Cuba remains necessary). Sadowski argues that “fears of a Cuban oil spill can be assuaged through less drastic measures such as an oil spill emergency response agreement with Cuba, similar to the one that the United States has enacted with Mexico.” *Id.* Sadowski advocates maintaining restrictions on Cuba's access to U.S. resources and technology—dismissing the environmental concerns as “overblown.” *Id.* at 38. This position, however, ignores the reality of the danger posed by deepwater drilling in the Straits of Florida, the impediments to a U.S.-led spill response created by the embargo, and the actual ineffectiveness of the current U.S. policy toward Cuba. See discussion *infra* Parts III.A-B.

¹⁰³ See *Offshore Drilling in Cuba and the Bahamas: The U.S. Coast Guard's Oil Spill Readiness and Response Planning: Hearing Before the Subcomm. on Coast Guard & Mar. Transp., H. Comm. on Transp. & Infrastructure, 112th Cong.* 39 (2012) [hereinafter *Hearing on Offshore Drilling in Cuba and the Bahamas*] (statements of Rear Admiral William Baumgartner, Commander, Coast Guard Seventh Dist. & Rear Admiral Cari Thomas, Dir. of Response Policy, U.S. Coast Guard).

authority to respond to an oil spill in Cuba's exclusive economic zone ("EEZ").¹⁰⁴ In their testimony before the House Subcommittee on Coast Guard and Maritime Transportation, Rear Admirals William Baumgartner and Cari Thomas explained that if an oil spill occurs in Cuban waters, the oil rig operators and the Cuban government are responsible for launching cleanup operations and other efforts to prevent damage to the United States.¹⁰⁵ If an oil spill threatens U.S. waters or other natural resources, however, the Coast Guard is required to respond.¹⁰⁶ The Coast Guard's Offshore Response Plan for Florida includes ensuring its ability to cooperate with foreign governments and corporations to respond to a spill, increasing communication among state and local governments, and revising local contingency plans.¹⁰⁷ Both the extent and the effectiveness of the response plan, however, suffer from significant limitations.¹⁰⁸

Despite the advanced technologies the Coast Guard has at its disposal, a number of issues remain.¹⁰⁹ As previously mentioned, because there are no bilateral agreements between the United States and Cuba concerning oil spill responses, if an oil spill were to occur, the responsibility of combatting it would initially fall to Cuba and the oil rig operators.¹¹⁰ Some analysts have claimed that Cuba is ill-equipped to respond to a major disaster.¹¹¹ Similarly,

¹⁰⁴ See *id.* (noting that the Coast Guard's efforts to respond to an oil spill offshore are designed to be consistent with domestic and international law).

¹⁰⁵ See *id.* at 41.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* Indeed, as Admiral Baumgartner's written testimony notes, "Such response would focus on combating the spill as far offshore and as close to the source as possible, using all viable response tactics in a manner consistent with domestic and international law." *Id.* In other words, U.S. response efforts could go only as far as the embargo would allow, which poses a number of problems. See *infra* notes 112-114 and accompanying text.

¹⁰⁹ Because of the fast-moving currents in the Straits of Florida, mechanical skimming would be less effective than other methods of oil containment. *Hearing on Offshore Drilling in Cuba and the Bahamas*, *supra* note 103, at 26. The use of aerial dispersants, then, is likely to be the most effective method. See *id.* But this method has its own risks. In a "potential worse case spill of *Deepwater Horizon* proportions," for example, it would take the dispersant manufacturer 24 hours to begin manufacturing more dispersants. *Id.* It is estimated that oil in the Straits of Florida could travel as far as 80 miles in that time frame. See *id.* at 26, 31.

¹¹⁰ *Id.* at 40.

¹¹¹ See, e.g., Booth, *supra* note 23. Former oil executive Jorge Piñón has asserted

because of the embargo, if a blowout like the one in the *Deepwater Horizon* spill occurred, the Cuban government and the oil rig operators would have to wait a week or more for the necessary equipment to arrive before they could even begin repairs.¹¹² As journalist William Booth wrote in a March 2012 article in the *Washington Post*, “[i]f a blowout occurred, Repsol would have to await delivery of a capping stack, which would have to travel from Scotland to Cuba and then out to the rig.”¹¹³ Other estimates are even more startling: “In the event of a spill, were assistance from U.S. firms permitted, relief would take 24–48 hours to arrive on scene. Barring their participation, however, it would take 30–50 days for help to arrive from Brazil, Northern Europe, Africa, or S.E. Asia.”¹¹⁴

In an effort to address these concerns, the Office of Foreign Assets Control (“OFAC”) and the Bureau of Industry and Security (“BIS”) recently issued to the U.S. Coast Guard a general license that, in the event of an oil spill, would permit entrance into the Cuban EEZ “with all necessary equipment that would be required to aggressively respond to a spill in Cuban waters.”¹¹⁵ This license also allows the Coast Guard to call upon and extend the coverage of its license to both public and private sector resources for assistance in combatting a spill.¹¹⁶ While this action gives the Coast Guard and other organizations significantly more freedom to respond to an oil spill off the coast of Florida, it does not go far enough. Because all public and private sector organizations must operate under the command of the Coast Guard’s incident commander to be covered by its license, there remains little flexibility for organizations not directly called upon by the Coast

that because Cuba maintains small naval and coast guard forces, it “has only 5 percent of the resources needed to contain a spill approaching the size of the *Deepwater Horizon* disaster.” *Id.*

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ CTR. FOR DEMOCRACY IN THE AMS., AS CUBA PLANS TO DRILL IN THE GULF OF MEXICO, U.S. POLICY POSES NEEDLESS RISKS TO OUR NATIONAL INTEREST 24-25 (2010), available at http://democracyinamericas.org/pdfs/Cuba_Drilling_and_US_Policy.pdf.

¹¹⁵ *Platts Energy Week: 02.05.12 Cuba Offshore Drilling* (WUSA television broadcast Feb. 5, 2012), available at <http://plattsenergyweektv.com/news/article/189077/293/020512-Cuba-Offshore-Drilling>.

¹¹⁶ *See id.*

Guard to assist with response efforts.¹¹⁷ Thus, the effectiveness of this licensing scheme is predicated on the assumption that the Coast Guard response team will know what caused the spill and what equipment is necessary to combat it.¹¹⁸ The scheme also assumes that the private sector resources called upon by the Coast Guard will be prepared to respond to the situation. But as BP Commission co-chairman William K. Reilly and energy expert Megan Reilly Cayten indicated in a *Washington Post* opinion piece, “[t]he private sector needs considerable time to ready an effective response.”¹¹⁹ Additionally, given the nature of private enterprise, calling upon resources at the last minute may prevent the private sector from providing effective assistance, or any assistance at all.¹²⁰

An even more fundamental problem is that the unilateral response plans are effective only *when* an oil spill occurs. Given the likelihood that the embargo would seriously delay any efforts to repair a blowout or similar subsurface incident, two things are clear. First, the United States should modify its policy toward Cuba to give state and federal organizations and relevant private sector firms more freedom to assist Cuba in the event of an oil spill. Second, the United States should also implement changes to allow more cooperation and coordination between the two

¹¹⁷ *See id.*

¹¹⁸ *See* CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 28. According to the Center’s report, in response to a State Department official’s statement that companies would be granted licenses on a case-by-case basis, an “industry insider” cautioned against the effectiveness of that proposal: “Do not let this statement fool you . . . we need legislation and or an executive order allowing all petroleum services and equipment companies to do business in Cuba. How are we going to know at the time of an accident in Cuban waters what piece of equipment is going to be needed and from what company? In case of an accident, we do not have the luxury to apply for a license for a specific product and or service from a specific company.” *Id.* (internal quotation marks omitted).

¹¹⁹ William K. Reilly & Megan Reilly Cayten, Op-Ed., *Why the U.S. Should Work with Cuba on Oil Drilling*, WASH. POST, Feb. 17, 2012, at A21 (noting that engineers need time to learn about the rig, the characteristics of the particular well, and the marine environment).

¹²⁰ *See id.* (“Certain resources may not be available if summoned at the last minute.”). The danger of the private sector being unable to assist is not insignificant. In his congressional testimony, Admiral Baumgartner explained that “[t]here are Coast Guard resources that can go out and attack the oil . . . [, b]ut the vast bulk of it is going to be private sector.” *Hearing on Offshore Drilling in Cuba and the Bahamas*, *supra* note 103, at 31.

countries in an effort to reduce the risk of a spill.

B. Legislative Proposals

As mentioned above, several members of Congress have introduced legislative proposals in response to Cuba's drilling efforts.¹²¹ The majority of these proposals are designed to prevent Cuba from pursuing any offshore drilling efforts.¹²² As discussed in the previous section, U.S. policy strategies oriented toward isolation and deprivation, with the hope that the Castro regime will give in and embrace democracy, have been ineffective, to say the least.¹²³ Some experts on the subject have also argued that insisting upon only these punitive-type sanctions has caused U.S. policymakers to overlook several significant changes in the Cuban regime and to pass up a number of opportunities to engage Cuba in collaborative efforts.¹²⁴

In both the 111th and 112th Congresses, representatives from South Florida and New Jersey,¹²⁵ whose districts contain the largest populations of Cuban Americans and who typically push for hardline policies against Cuba,¹²⁶ introduced several proposals seeking to impose or increase sanctions against third countries that assist Cuba in developing oil resources.¹²⁷

¹²¹ SULLIVAN, *supra* note 85, at 41-42 (noting that, at the time of publication, legislation focusing on Cuba's offshore drilling and the potential for an oil spill had been proposed in both houses of Congress).

¹²² See *id.*; NERURKAR & SULLIVAN, *supra* note 19, at 15-16 (reviewing the legislative proposals on Cuba's offshore drilling that were introduced during the 111th Congress).

¹²³ See *supra* Part II.A.

¹²⁴ See Benjamin-Alvarado, *Evaluating the Prospects for U.S.-Cuban Energy Policy Cooperation*, *supra* note 80, at 1-2.

¹²⁵ Albio Sires, who represents New Jersey's 13th congressional district, and his predecessor, current New Jersey Senator Robert Menendez, are among the Cuban Americans serving in Congress. Marco Rubio, the junior senator from Florida, along with Ileana Ros-Lehtinen (Fla. 18), Mario Diaz-Balart (Fla. 21), and David Rivera (Fla. 25) compose the remainder of the Cuban Americans currently serving in Congress.

¹²⁶ See David Rieff, *Will Little Havana Go Blue?*, N.Y. TIMES, July 13, 2008, § 6 (Magazine), at 45.

¹²⁷ See Press Release, H. Comm. on Foreign Affairs, Ros-Lehtinen Criticizes Administration Decision to Block Keystone, Allow Cuban Oil Drilling (Jan. 19, 2012), available at http://foreignaffairs.house.gov/press_display.asp?id=2173 ("I have authored the Caribbean Coral Reef Protection Act (H.R. 2047), which sanctions those who assist the Cuban regime in the development of its petroleum sector." (internal quotation marks omitted)).

During the first session of the 112th Congress, Representative Ileana Ros-Lehtinen, in her new post as Chairman of the House Committee on Foreign Affairs, introduced the Caribbean Coral Reef Protection Act of 2011.¹²⁸ This bill seeks to extend the Helms–Burton Act in a number of ways.¹²⁹ First, it would require the Secretary of State to deny a visa to any person who is an “officer or principal of an entity, or a shareholder who owns a controlling interest in an entity” that has invested \$1 million or more in the development of Cuba’s offshore oil resources, and it would also impose a variety of economic sanctions against the entity assisting Cuba.¹³⁰ Second, the Act would categorically prohibit any U.S. citizen from providing “materials, technical equipment, or other assistance that contributes to the enhancement of Cuba’s ability to develop petroleum resources” located offshore.¹³¹ Thus, the Caribbean Coral Reef Protection Act would explicitly prevent the United States from providing *any* materials, including a state-of-the-art blowout preventer, to the Cuban government.¹³²

It also seeks, by threat of sanction, to deter foreign enterprises from assisting Cuba.¹³³ Rather than allowing a company like Repsol, which has a reputation in the offshore drilling community for conducting safe and competent operations, to assist Cuba, this bill would force Cuba to attempt deepwater drilling on its own. The hope is that, without assistance, the cash-strapped Cuban government will simply give up on its efforts to recover an estimated 20 billion barrels of oil. This strategy is akin to a parent taking away a daredevil child’s elbowpads and kneepads, wrist guards, and helmet as a means of discouraging the child from skateboarding down the neighborhood’s steep hills.

During the same legislative session, another South Florida Congressman, Representative David Rivera, introduced the Foreign Oil Spill Liability Act of 2011.¹³⁴ This bill would amend the Oil Pollution Act of 1990 to provide harsher liabilities for any

¹²⁸ H.R. 2047, 112th Cong. (2011).

¹²⁹ *See id.* (noting the context of the resolution).

¹³⁰ *Id.* §§ 4-5(b).

¹³¹ *Id.* § 5(c).

¹³² *See id.*

¹³³ *See id.*

¹³⁴ H.R. 3393, 112th Cong. (2011).

oil spill that occurred in Cuba's territorial waters.¹³⁵ In short, this bill is nothing more than an attempt to deter foreign enterprises from assisting Cuba. The Bahamas is set to begin offshore drilling in 2012 not far from where Cuba is currently exploring and less than 200 miles off the United States coastline.¹³⁶ Yet the raised liability cap provision of this proposed legislation would not apply to any drilling efforts by Bahamian companies or other foreign companies assisting their efforts.¹³⁷

Many experts who have studied this topic agree that the United States should accept that Cuba is going to develop its oil resources no matter how fiercely the Cuban American lobby opposes it.¹³⁸ The history of U.S.-Cuban relations certainly suggests that on matters of interest to Cuba, Washington's opinion carries little weight.¹³⁹ Accepting that Cuba is going to develop its oil resources, rather than trying to prevent it, will allow the United States to search for a more collaborative solution with Cuba. Once a framework of collaboration and cooperation is established, both countries will reap benefits that have long been overshadowed by hostility.¹⁴⁰ On March 5, 2012, Representative Jeff Flake introduced the Western Hemisphere Energy Security Act of 2012,¹⁴¹ which is targeted at fostering a cooperative relationship that would facilitate the prevention of an oil spill in the Straits of Florida and ensure that both countries are better prepared to respond if such an incident does occur.¹⁴² The Act would

¹³⁵ *Id.* § 2 (explaining that the liability limits would triple if the incident causing injury were to occur in the territory of a state sponsor of terrorism, as determined by the Secretary of State).

¹³⁶ David Goodhue, *Bahamas Oil Drilling Could Begin by 2012*, MIAMI HERALD, Oct. 14, 2011, http://www.thebahamasweekly.com/publish/international/Bahamas_oil_drilling_could_begin_by_201218334.shtml.

¹³⁷ See H.R. 3393.

¹³⁸ See, e.g., Council on Foreign Relations Policy Innovation Memorandum No. 15, Melissa Bert & Blake Clayton, *Addressing the Risk of a Cuban Oil Spill* (March 2012) ("Cuba will drill for oil in its territorial waters with or without the blessing of the United States."); CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 31 ("Punitive measures designed to discourage foreign oil companies from doing business with Cuba will only work for so long, if at all. Cuba will eventually drill, if not with Spanish companies with Russians or with Chinese or others." (internal quotation marks omitted)).

¹³⁹ See Bert & Clayton, *supra* note 138, at 1-2.

¹⁴⁰ See *id.* at 2-3.

¹⁴¹ H.R. 4135, 112th Cong. (2012).

¹⁴² See *id.*

categorically “permit United States companies to participate in the exploration for and the extraction of hydrocarbon resources from any portion of a foreign maritime exclusive economic zone that is contiguous to the exclusive economic zone of the United States.”¹⁴³ The Act would also permit U.S. individuals to “engage in *any transaction necessary*” for the exploration and extraction of oil resources in a qualified zone and would allow those resources to be imported to the United States.¹⁴⁴ It would further permit individuals to “export without license authority *all equipment necessary* for the exploration for or extraction of hydrocarbon resources, or oil spill prevention and clean-up activities”¹⁴⁵ The Western Hemisphere Energy Security Act sets the kind of accommodating and supportive tone¹⁴⁶ that has been unnecessarily absent from U.S.-Cuban relations.¹⁴⁷ The following section proposes other recommendations for U.S. policy that seek to further the supportive engagement with Cuba in those areas of mutual interest.

IV. Recommendations

The development of Cuba’s offshore oil resources has sparked the interest of a number of academics, foreign policy think tanks, and environmental activist groups.¹⁴⁸ This section of the note will explore several of the more effective options while keeping an eye toward practicality.¹⁴⁹ Due to the disagreement over the direction

¹⁴³ *Id.* § 2.

¹⁴⁴ *Id.* § 3(a) (emphasis added).

¹⁴⁵ *Id.* § 3(a)(3) (emphasis added).

¹⁴⁶ See generally CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 39 (discussing the Act’s potential to relax the U.S. embargo on Cuba and benefit both the United States and Cuba).

¹⁴⁷ See generally Pérez, *supra* note 27 (describing U.S. interactions with Cuba following the Cuban Revolution as generally punitive).

¹⁴⁸ See, e.g., PIÑÓN & MUSE, *supra* note 96 (Brookings Inst.); Bert & Clayton, *supra* note 138 (Council on Foreign Relations); *The U.S., Cuba and Oil Diplomacy*, *supra* note 21 (Envtl. Def. Fund).

¹⁴⁹ In seeking to provide practical recommendations, this note is mindful of the considerable influence the pro-embargo establishment continues to wield. There are a variety of strong arguments in favor of a more sweeping change, such as repealing the embargo altogether. See generally Archibald R. M. Ritter, *The Potential Economic Implications of Normalization*, in DEBATING U.S.-CUBA RELATIONS, *supra* note 27 (discussing the economic benefits of normalizing relations to both Cuba and the United States). Considering the zeal on both sides of the debate over U.S. policy toward

U.S. policy should take, as evidenced by the various legislative proposals introduced over the past several years, it is unlikely that U.S. policy toward Cuba will change overnight.¹⁵⁰ Nevertheless, making small changes that are in the best interest of both Cuba and the United States, such as loosening restrictions on the ability of private companies to assist Cuba's offshore drilling efforts, can help provide a long-term framework for the normalization of relations on mutually acceptable terms.

A. Domestic Policy Change

1. Immediate Steps the United States Should Take

Cuba is receptive to the idea of U.S. investment, especially when it comes to offshore drilling.¹⁵¹ Because the United States is near the drill site and has significant experience with deepwater drilling, there is a substantial economic interest in allowing private companies to engage in Cuba's drilling efforts.¹⁵² It is also

Cuba—and particularly the embargo—this note intends to suggest cautious reform by pushing only those policy modifications necessary to accommodate the risk created by offshore drilling in the Straits of Florida. That being said, any policy modifications should leave open the possibility for further reforms as they become necessary or desirable.

¹⁵⁰ See generally NERURKAR & SULLIVAN, *supra* note 19, at 14-18 (discussing the various legislative proposals introduced in the 111th Congress and the 112th Congress).

¹⁵¹ See CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 16. In gathering data for this report, the Center sent a delegation of scholars to Cuba to meet with officials of the Cuban government's Ministry of Foreign Investment ("MINCEX"). According to the Center for Democracy in the Americas ("CDA"), the MINCEX officials "repeatedly emphasized that the country is open to any foreign investor and that Havana would welcome U.S. investment . . ." *Id.* In fact, when the Cuban government considered drilling for oil in the 1990s, it initially sought investment only from U.S. energy companies. *Id.* It was not until after U.S. companies declined to participate—citing embargo implications—that the Cuban government looked for non-U.S. investors. See *id.*

¹⁵² See Jonathan Benjamin-Alvarado, *Prospects for U.S.-Cuban Energy Engagement: Findings and Recommendations*, in CUBA'S ENERGY FUTURE: STRATEGIC APPROACHES TO COOPERATION, *supra* note 80, at 111 [hereinafter Benjamin-Alvarado, *Prospects for U.S.-Cuban Energy Engagement*]. There are several incentives for the United States to become involved in the development of Cuba's offshore oil resources. First, the United States needs oil, and that fact is not changing with much haste. Being close to an oil-exporting Cuba could provide another oil source with significantly reduced transaction costs compared to the Middle East. Furthermore, Cuba's investment in the oil production industry would become substantially more valuable to both countries if U.S. companies were not restrained from providing equipment and services to Cuba. See Jorge R. Piñón & Jonathan Benjamin-Alvarado, *Extracting Cuba's Oil and*

important to consider the economic impact of a spill. For example, the Florida Reef Tract—the world’s third-largest barrier reef—generates approximately \$2 billion in revenue each year from tourism.¹⁵³ This makes up only a fraction of the tourism dollars that Florida receives each year, yet it supplies the state with 33,000 jobs.¹⁵⁴ Considering the economic benefits and environmental security that would result from the United States being actively involved in Cuba’s drilling efforts, it makes sense to lift the economic restrictions in a manner provided by the Western Hemisphere Energy Security Act.¹⁵⁵

To take advantage of this engagement with the Cuban government, the United States should develop a framework for information-sharing between the two governments. The Center for Democracy in the Americas suggests that “comprehensive information sharing with the Cuban government [be] standard operating procedure.”¹⁵⁶ This information-sharing could include conducting joint workshops and conferences on issues of mutual interest, such as offshore drilling, drug trafficking, and immigration. It has also been suggested that information-sharing include technology sharing.¹⁵⁷ Technology sharing could include

*Gas: Challenges and Opportunities, in CUBA’S ENERGY FUTURE: STRATEGIC APPROACHES TO COOPERATION, supra note 80, at 34 [hereinafter Piñón & Benjamin-Alvarado, *Extracting Cuba’s Oil and Gas*] (pointing out that Cuba’s natural market, the United States, is also the largest oil-importer in the world). Second, because Cuba has no local suppliers of oil producing equipment and supplies, those oil companies assisting with offshore oil production must make significant plans to bring everything they need. This is not only difficult, it is expensive—increasing the project cost by 30%. See Ronald Soligo & Amy Myers Jaffee, *Energy Balance and the Potential for Biofuels in Cuba, in CUBA’S ENERGY FUTURE: STRATEGIC APPROACHES TO COOPERATION, supra note 80, at 84. Third, Cuba’s refining capabilities are limited due to outdated technology. See Benjamin-Alvarado, *Prospects for U.S.-Cuban Energy Engagement, supra*. Finally, the geographic proximity of the Gulf Coast refineries to the offshore tract would provide a market for the excess crude oil. See *id.* (noting that access to the expertise, technology, and capital of U.S. companies would allow Cuba to increase its refining capacity from about 52,000 barrels per day to more than 75,000 barrels per day).**

¹⁵³ See Tim Padgett, *The Oil Off Cuba: Washington and Havana Dance at Arms Length Over Spill Prevention*, TIME, Jan. 27, 2012, at para. 7, <http://www.time.com/time/world/article/0,8599,2105598,00.html>.

¹⁵⁴ See *id.*

¹⁵⁵ H.R. 4135, 112th Cong. (2012).

¹⁵⁶ CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 37.

¹⁵⁷ See Benjamin-Alvarado, *Prospects for U.S.-Cuban Energy Engagement, supra* note 152, at 127.

sharing oil spill mapping software with Cuba and providing it with subsea oil spill response technology, such as dispersants. Finally, U.S. regulatory agencies should engage their Cuban counterparts on a regular basis rather than attempting to channel all information-sharing through the U.S. Interests Section in Havana.¹⁵⁸

2. Long Term Policy Changes

Aside from the short-term benefits discussed in the previous section, getting the private sector involved with Cuba's energy development could provide several long-term benefits to both the United States and Cuba. This initial engagement should be designed with a long-term view of encouraging U.S. investment in Cuba's energy sector. The U.S. government should use this opportunity as a way to help Cuba diversify its energy resources, which will push Cuba toward obtaining energy independence.¹⁵⁹ In doing so, the United States would help develop a new market in Cuba for U.S. products designed to increase energy efficiency and renewable energy sources.¹⁶⁰

Many commentators have also suggested that one of the best ways to encourage economic reform in Cuba is to engage the country as a new market, which naturally promotes economic development and subsequent reforms.¹⁶¹ By encouraging economic growth and development in Cuba during the current period of economic transformation on the island,¹⁶² the United States will directly benefit the Cuban people by empowering them and allowing them to select their own form of government, rather than imposing American democracy.¹⁶³

Allowing the private sector to engage Cuba will ultimately increase the people-to-people contacts in Cuba,¹⁶⁴ revealing more

¹⁵⁸ See SULLIVAN, *supra* note 85, at 57.

¹⁵⁹ See PIÑÓN & MUSE, *supra* note 96, at 3-4.

¹⁶⁰ See NERURKAR & SULLIVAN, *supra* note 19, at 16.

¹⁶¹ See Benjamin-Alvarado, *Prospects for U.S.-Cuban Energy Engagement*, *supra* note 152, at 127.

¹⁶² See NERURKAR & SULLIVAN, *supra* note 19, at 1.

¹⁶³ See Lars Schoultz, *The Blessings of Liberty: The United States and the Promotion of Democracy in Cuba*, 34 J. LATIN AM. STUD. 397, 425 (2002).

¹⁶⁴ See Schoultz, *supra* note 60, at 153 (describing the general Cuban sentiment favoring the development of economic and diplomatic relations with the United States).

of the interests shared by the two communities. This increased contact should ultimately lead Washington to engage in full diplomatic communication. The United States should begin this process sooner rather than later, so that it can help foster these goals of energy independence, economic development, and reform.

B. Potential International Agreement

It will also be important for the United States to create a bilateral agreement with Cuba regarding oil spills. It has been noted that “[t]he United States has strong spill-response agreements with Canada, Mexico and Russia,” causing some in the field to suggest that the United States “make sure Cuba has the same safeguards and rigorous oversight. We can’t let politics get in the way of common-sense actions.”¹⁶⁵ Several scholars suggest using the MEXUS Treaty¹⁶⁶ as a model for a bilateral agreement between the United States and Cuba.¹⁶⁷ This type of treaty informs both countries of their respective responsibilities in the event of a transnational oil spill.¹⁶⁸ It is critical to have plans already in place to respond to an oil spill in regions like the Straits of Florida, where hours can make a significant difference in the impact a spill will have on the local marine environment.¹⁶⁹

V. Conclusion

At the time this note went to print, the well Repsol had begun drilling in February 2012, turned out to be dry, and the company announced that it would stop drilling in Cuba’s waters.¹⁷⁰ Following Repsol’s exit, the Malaysian oil company Petronas took over drilling efforts in the Straits of Florida.¹⁷¹ In August 2012,

¹⁶⁵ *The U.S., Cuba and Oil Diplomacy*, *supra* note 21, at 11.

¹⁶⁶ Agreement of Cooperation Regarding Pollution of the Marine Environment by Discharges of Hydrocarbons and Other Hazardous Substances, U.S.-Mexico, July 24, 1980, 32 U.S.T. 5899.

¹⁶⁷ *See* NERURKAR & SULLIVAN, *supra* note 19, at 13-14.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 7-13.

¹⁷⁰ EMILY A. PETERSON ET AL., ENVTL. DEF. FUND, BRIDGING THE GULF: FINDING COMMON GROUND ON ENVIRONMENTAL AND SAFETY PREPAREDNESS FOR OFFSHORE OIL AND GAS IN CUBA v (2012), *available at* http://www.edf.org/sites/default/files/EDF-Bridging_the_Gulf-2012.pdf.

¹⁷¹ *Id.*

however, Petronas also announced that its well was not viable.¹⁷² In November 2012, after drilling a third unsuccessful well, the *Scarabeo 9* rig prepared to leave Cuban waters in an effort to explore other, more lucrative prospects, temporarily stalling Cuba's deepwater oil exploration.¹⁷³ Despite the lack of success thus far, the potential of a major oil spill in the Straits of Florida remains a significant threat. The estimated oil reserves off the coast of Cuba will continue to attract foreign oil companies, who had already planned to explore Cuba's reserves for at least another year.¹⁷⁴

A change in the tone of U.S. policy toward Cuba is long overdue.¹⁷⁵ Although there is significant bipartisan support for shifting U.S. policy toward Cuba to a more engaging model,¹⁷⁶ the sharply polarized environment in Washington seems to force legislators to remain at loggerheads.¹⁷⁷ The intransigency of the parties has led to repeated instances of brinkmanship,¹⁷⁸ which is counterproductive to the national interest. Engaging with Cuba in the development of its energy resources is an issue that both parties should be able to agree on, even over the objections of the minority, who continue to take a hardline approach to anything related to Cuba.¹⁷⁹ This issue is simply too important. As Dan

¹⁷² *Id.*

¹⁷³ See Clifford Krauss & Damien Cave, *Cuba's Prospects for an Oil-Fueled Economic Jolt Falter with Departure of Rig*, N.Y. TIMES, Nov. 10, 2012, at A10.

¹⁷⁴ PETERSON ET AL., *supra* note 170.

¹⁷⁵ In a 2002 article, Cuban historian Louis Pérez stated, "US policy stands at once as an anomaly and an anachronism. It has outlived its historical time and outlasted its political purpose." Pérez, *supra* note 27, at 228. That was ten years ago, but the sentiment remains. See, e.g., Free Trade With Cuba Act, H.R. 1887, 112th Cong. § 2 (2011) (finding that Cuba is no longer a threat to the United States, that the embargo is counterproductive and harms the Cuban people, and that the United States can best support democratic change through communication and exchange—an approach it takes with former and other current communist countries).

¹⁷⁶ See CTR. FOR DEMOCRACY IN THE AMS., *supra* note 114, at 39.

¹⁷⁷ See SULLIVAN, *supra* note 85, at 25-29.

¹⁷⁸ For example, repeated instances of gridlock over raising the federal debt ceiling in 2011 led to historically high congressional disapproval ratings. See Jeffrey M. Jones, *Congressional Job Approval Ties Historic Low of 13%*, GALLUP (Aug. 16, 2011), <http://www.gallup.com/poll/149009/Congressional-Job-Approval-Ties-Historic-Low.aspx> (finding a record-setting 84% disapproval rate of Congress's job performance).

¹⁷⁹ See SULLIVAN, *supra* note 85, at 25.

Whittle, director of the Environmental Defense Fund's Cuba Project, put it: "[T]his isn't about politics. It's about protecting our beaches, our shores, our fishermen, our communities."¹⁸⁰

¹⁸⁰ *All Things Considered*, supra note 22.