

Telecommunications in Cuba: Repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act

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I. INTRODUCTION

Cuba should be the latest hot spot for telecommunications providers. In 2015, only 40 percent of Cuba's 11.5 million people had access to the Internet.¹ More than half of Cubans who use Cuba's national telecommunications service, Empresa de Telecomunicaciones de Cuba S.A. (ETECSA), travel up to three miles to get Wi-Fi.² The United States' telecommunications providers should be eager to remedy these problems and set up telecommunications facilities in Cuba, since President Obama announced restored diplomatic relations between the United States and Cuba in December of 2014.³ And while President Trump has since reversed some actions on travel and trade taken by the Obama Administration, he has not announced that he would break diplomatic relations.⁴ In fact, the Trump Administration has stated that it plans to increase telecommunications and Internet access for the Cuban people.⁵ On January 15, 2016, the FCC removed Cuba from its Exclusion List,⁶ allowing companies to provide telecommunications services to Cuba without separate approval from the FCC and making Cuba seem even more appealing for telecommunications providers.⁷ Although Cuba's untapped telecommunications market and recently restored diplomatic relations with the island may make Cuba look

1. See *Freedom on the Net 2017 Cuba Country Profile*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-net/2017/cuba> [<https://perma.cc/NK8G-FJ5V>] (last visited Apr. 6, 2018) [hereinafter *Freedom on the Net*].

2. See Abel Fernandez, *How Do Cubans Use the Internet and Smartphones on the Island?*, MIAMI HERALD, <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article89199142.html> [<https://perma.cc/GEN4-XVUU>] (last updated Oct. 24, 2016).

3. See *Statement by the President on Cuba Policy Changes*, OBAMA WHITE HOUSE ARCHIVES (Dec. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> [<https://perma.cc/DCZ4-FAJL>] [hereinafter *Statement by the President*].

4. See Claire Felter et al., *U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounders/us-cuba-relations> [<https://perma.cc/X58D-V8MG>] (last updated Mar. 7, 2019).

5. See *Look for Tech, Telecom to Survive Trump's Cuba Rollback*, POLITICO (June 16, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-tech/2017/06/16/look-for-tech-telecom-to-survive-trumps-cuba-rollback-220885> [<https://perma.cc/R65S-8MUD>] [hereinafter *Look for Tech*].

6. See *Removing Cuba from the Exclusion List for Int'l Section 214 Authorizations, Order*, 31 FCC Rcd 194(1), para. 1 (2016) [hereinafter *Removing Cuba from the Exclusion List*].

7. See Roger Yu, *FCC to Allow U.S. Telecom Services to Cuba*, USA TODAY (Jan. 15, 2016), <https://www.usatoday.com/story/money/2016/01/15/fcc-allows-us-telecom-companies-provide-services-cuba-without-agency-approval/78866114/> [<https://perma.cc/XS4A-DHZW>].

like the ideal location for telecommunications companies,⁸ these companies risk violating federal laws by getting involved in telecommunications in Cuba.⁹

A. Overview of Thesis

Congress should repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in an effort to restore trade relations with Cuba, allowing telecommunications providers to conduct business with Cuba legally. Most importantly, Congress should repeal or redefine United States Code 22 Section 6004(e)(2) of the Cuban Democracy Act and repeal United States Code 22 Sections 6061(14), 6065, and 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act in an effort to increase telecommunications services in Cuba and the free flow of information between the U.S. and Cuba.

First, this Note will give a brief history of the United States' trade embargo on Cuba. Second, it will explain the implications of the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the FCC's 2016 decision to remove Cuba from its Exclusion List. Then, it will describe recent telecommunications issues in Cuba, the latest changes made under the Obama and Trump administrations, and the current state of telecommunications in Cuba. Next, this Note will analyze the current state of telecommunications between the United States and Cuba and the problems that U.S. telecommunications providers face by setting up facilities in Cuba. This Note will propose legislative action that should be taken to allow telecommunications companies to provide service to Cubans without violating federal law. Lastly, this Note will explain some of the unintended consequences that could occur if the recommended legislative proposals are implemented and why Congress should act despite the potential drawbacks.

II. BACKGROUND

In order to understand the obstacles facing companies wishing to establish telecommunications services in Cuba, it is important to understand the history of U.S.-Cuban relations and the legislation that has kept the trade embargo in place. The circumstances surrounding the United States breaking off ties with Cuba, a country once significantly tied to American business and tourism, is an important aspect of the diplomatic history that has led to the

8. See Mark Walsh, *US Telecom Businesses Struggling to Make Connections as Cuba Opens Up*, GUARDIAN (Mar. 23, 2016, 7:00 AM), <https://www.theguardian.com/world/2016/mar/23/us-telecom-businesses-cuba-relations-etecsa> [https://perma.cc/927B-AJGS].

9. Claire Suddath, *U.S.-Cuba Relations*, TIME (Apr. 15, 2009), <http://content.time.com/time/nation/article/0,8599,1891359,00.html> [https://perma.cc/F83L-WQYQ].

current state of business relations and telecommunications between the United States and Cuba. The history of the United States embargo on Cuba can be understood through the Cuban Democracy Act of 1992¹⁰ and the Cuban Liberty and Democratic Solidarity Act of 1996.¹¹ It is important to understand the recent changes made in United States-Cuban policy and telecommunications by the Obama Administration, the Trump Administration, and the FCC in order to understand the current state of telecommunications in Cuba and the problem with United States telecommunications providers setting up facilities in Cuba for U.S. companies.

A. History of the United States Embargo on Cuba

Fidel Castro came to power in Cuba on January 1, 1959 when he overthrew United States-backed President General Fulgencio Batista.¹² Castro established a socialist state in Cuba, allied and backed by the Soviet Union.¹³ His new government quickly “seized private land [and] nationalized hundreds of private companies, including several local subsidiaries of U.S. corporations,” and imposed heavy taxes on imports from the United States.¹⁴ Over the past 50 years, the United States has implemented policies and legislation intended to isolate Cuba economically and diplomatically until democracy is restored on the island.¹⁵

On October 19, 1960, President Eisenhower’s State Department responded to Castro’s actions by imposing the first trade embargo on Cuba, which “covered all U.S. exports to Cuba except for medicine and some foods.”¹⁶ Then, in 1962, President Kennedy issued Presidential Proclamation No. 3447, which expanded the embargo to U.S. imports from Cuba and cut diplomatic ties with the island.¹⁷ However, it was not until the 1990s that the trade embargo was enacted into law with the passage of the Cuban Democracy Act of 1992¹⁸ and the Helms-Burton Act of 1996.¹⁹ Although relations between the United States and Cuba were reexamined and partially opened under the Obama Administration, the trade embargo is still in place by law and “an act of Congress is required to remove it.”²⁰

The trade embargo that the United States imposed on Cuba forced Cuba’s economy to “rely on the Soviet Union as [the island’s] primary trade

10. 22 U.S.C. §§ 6001 - 6010 (1992).

11. 22 U.S.C. §§ 6021 - 6091 (1996).

12. See Suddath, *supra* note 9.

13. See Felter, *supra* note 4.

14. See Suddath, *supra* note 9.

15. See Felter, *supra* note 4.

16. See Merrill Fabry, *The U.S. Trade Embargo on Cuba Just Hit 55 Years*, TIME (Oct. 19, 2015), <http://time.com/4076438/us-cuba-embargo-1960/> [<https://perma.cc/RD2B-GBK5>].

17. See Embargo on all Trade with Cuba, 27 Fed. Reg. 1085 (Feb. 3, 1962).

18. 22 U.S.C. §§ 6001 - 6010.

19. 22 U.S.C. §§ 6021 - 6091.

20. See Fabry, *supra* note 16.

partner.”²¹ The island nation’s undiversified economy depended on annual subsidies from the Soviet Union.²² However, when the Soviet Union collapsed in the early 1990s, so did Cuba’s economy.²³ The recession that Cuba faced in the early 1990s came to be known in Cuba as the “Special Period in Peacetime.”²⁴ During this time, Cuba lost over 80 percent of its foreign trade.²⁵ A quarter of the country became unemployed, and food, medicine, and transportation became scarce.²⁶ As the Cuban people and Cuban economy suffered, the United States saw this as an opportunity to oust Fidel Castro and bring democracy to Cuba.²⁷ During Cuba’s Special Period in Peacetime, the United States tightened its economic sanctions on Cuba by passing the Cuban Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity Act of 1996.²⁸

1. The Cuban Democracy Act of 1992

The Cuban Democracy Act of 1992,²⁹ also known as the Torricelli Act, was signed into law by President Bush on October 23, 1992.³⁰ The passage of the Cuban Democracy Act was the first step toward making the United States’ embargo on Cuba an official law, rather than an executive policy upheld by successive administrations.³¹ The act sought to transition Cuba to democracy through the use of sanctions that were “directed at the Castro government.”³² The sanctions restricted the issuing of licenses for transactions between U.S.-owned or controlled firms in third countries and Cuba,³³ prohibited certain vessels from entering the United States’ ports,³⁴ and restricted remittances to Cuba.³⁵ The act also directed the President to encourage countries that conduct trade with Cuba to restrict their trade³⁶ and applied sanctions to any

21. See *Helms-Burton Act: Resurrecting the Iron Curtain*, COUNCIL ON HEMISPHERIC AFFAIRS (June 10, 2011), <http://www.coha.org/helms-burton-act-resurrecting-the-iron-curtain/> [<https://perma.cc/D99C-EBKU>] [hereinafter *Helms-Burton Act*].

22. See Brendan Dolan, *Cubanomics: Mixed Economy in Cuba During the Special Period*, <http://history.emory.edu/home/documents/endeavors/volume1/Brendans.pdf> (last visited Apr. 7, 2018).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015).

28. *Id.*

29. 22 U.S.C. §§ 6001-6010.

30. See Jason Bell, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77, 79 (1993).

31. See *Helms-Burton Act*, *supra* note 21.

32. See 22 U.S.C. § 6002(1).

33. See *id.* § 6005(a).

34. See *id.* § 6005(b).

35. See *id.* § 6005(c).

36. See *id.* § 6003(a).

country that provides assistance to Cuba.³⁷ The act states that the sanctions implemented by the Cuban Democracy Act are to continue as long as the Castro regime “refuse[s] to move toward democratization and greater respect for human rights.”³⁸

United States Code 22 Section 6004(e), from the Cuban Democracy Act, specifically addresses telecommunications services and facilities between the United States and Cuba.³⁹ Section 6004(e)(4) explains that nothing in Section 6004(e) supersedes the authority of the FCC.⁴⁰ Section 6004(e)(1) of the act allows telecommunications services between the United States and Cuba,⁴¹ but Section 6004(e)(2) of the act authorizes telecommunications facilities in Cuba only in the “quantity and quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba.”⁴²

Section 6004(e)(5) of the act prohibits any United States person from contributing funds to or for a domestic telecommunications network within Cuba.⁴³ Finally, Section 6004(e)(6) requires the president to submit to Congress a report detailing payments made to Cuba by any United States person as a result of the provisions of telecommunications services that are authorized in Section 6004(e)(1) on a semiannual basis.⁴⁴

2. The Cuban Liberty and Democratic Solidarity Act of 1996

The Cuban Liberty and Democratic Solidarity Act of 1996,⁴⁵ also known as the Helms-Burton Act, was signed into law by President Clinton on March 12, 1996.⁴⁶ The act went even further than the Cuban Democracy Act of 1992 in its efforts to isolate Cuba by putting more restrictions on trade, making it harder to remove the embargo, and applying the embargo to foreign countries that traded with Cuba.⁴⁷ The act also strengthened the Cuban Democracy Act by reaffirming some of its sections; for example, United States Code 22 Section 6032(a) from the Cuban Liberty and Democratic Solidarity Act reaffirmed United States Code 22 Sections 6003(a) and Section 6003(b) from the Cuban Democracy Act, directed the president to encourage countries that conduct trade with Cuba to restrict their trade, and applied sanctions to any country that provides assistance to Cuba.⁴⁸

37. *See id.* § 6003(b).

38. *See id.* § 6002(6).

39. *See id.* § 6004(e).

40. *See id.* § 6004(e)(4).

41. *See id.* § 6004(e)(1).

42. *See id.* § 6004(e)(2).

43. *See id.* § 6004(e)(5).

44. *See id.* § 6004(e)(6).

45. 22 U.S.C. §§ 6021-6091.

46. *See Helms-Burton Act, supra* note 21.

47. *See* 22 U.S.C. § 6032(h).

48. *See id.* § 6032(a).

United States Code 22 Section 6061(14) from the Cuban Liberty and Democratic Solidarity Act allows the United States to eventually take steps toward removing the economic embargo on Cuba, but only when the president “determines that a transition to a democratically elected government in Cuba has begun.”⁴⁹ However, the conditions for establishing a democratically elected government in Cuba are difficult to meet.⁵⁰ Section 6065(a) lists the requirements for determining a transition government in Cuba.⁵¹ Some of the requirements for a transition government in Cuba include a government that: “has legalized all political activity,”⁵² “has ceased any interference with Radio Marti or Television Marti broadcasts,”⁵³ “does not include Fidel Castro or Raul Castro,”⁵⁴ “has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations,”⁵⁵ “has dissolved the Department of State Security in the Cuban Ministry of the Interior,”⁵⁶ and has taken “appropriate steps to return to United States citizens (and entities which are 50 percent or more beneficially owned by United States citizens) property taken by the Cuban Government from such citizens and entities on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property.”⁵⁷

Section 6032(g) explains that Americans are not authorized to invest in the domestic telecommunications network within Cuba and explains that an investment in the domestic telecommunications network within Cuba includes the “contribution (including by donation) of funds or anything of value to or for, and the making of loans to or for, such network.”⁵⁸ The language in this section is vague and leaves many questions unanswered, such as what exactly qualifies as a “domestic telecommunications network” and whether a new wireless network constitutes a “domestic telecommunications network.”⁵⁹

3. U.S.-Cuban Relations Under the Obama Administration

Diplomatic ties between the United States and Cuba had been broken for over 50 years, when on December 17, 2014, President Obama announced

49. *See id.* § 6061(14).

50. *See Helms-Burton Act, supra* note 21.

51. *See* 22 U.S.C. § 6065(a).

52. *Id.* § 6065(a)(1).

53. *Id.* § 6065(a)(5).

54. *Id.* § 6065(a)(7).

55. *Id.* § 6065(a)(2).

56. *Id.* § 6065(a)(3).

57. *Id.* § 6065(b)(2)(d).

58. *Id.* § 6032(g)(5).

59. *See* Eduardo Guzman, *Telecommunications in Cuba and the U.S. Embargo: History, Opportunities, and Challenges*, DRINKERBIDDLE GLOBAL (Feb. 4, 2015), <https://files.drinkerbiddle.com/Templates/media/files/Memos%20And%20Newsletters/International/Telecommunications-in-Cuba.pdf>.

diplomatic changes to U.S.-Cuban relations.⁶⁰ Under the Obama Administration, diplomatic relations with Cuba were restored and embassies were reopened after being closed since 1961.⁶¹ Direct flights and mail service between the United States and Cuba became available again.⁶² Initiatives were implemented between the United States and Cuba to cooperate on health, agriculture, education, and law enforcement.⁶³ The Obama Administration also eliminated limits on remittances to allow Cubans to have more access to resources from family members in the United States.⁶⁴

While President Obama was able to make some policy changes regarding relations between the United States and Cuba and start conversations with the Cuban government, the trade embargo put limits on what the Obama Administration alone could do.⁶⁵ President Obama called on Congress to lift the embargo codified by the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act during his presidency.⁶⁶ While Congress has not lifted the embargo, President Obama's diplomatic changes made it easier for Americans to travel to and do business in Cuba.⁶⁷ Changes in telecommunications also developed during the Obama Administration when the FCC removed Cuba from its Exclusion List.⁶⁸

4. U.S.-Cuban Relations Under the Trump Administration

President Trump and his Administration have rolled back some of the policy changes to United States travel and business with Cuba that were put in place by President Obama.⁶⁹ On November 9, 2016, the U.S. Department of State released a list of entities and sub-entities that Americans are banned from doing business with because they are either controlled by or act on behalf of the Cuban military, intelligence, or security services.⁷⁰ The list includes stores, hotels, holding companies, and travel agencies, among others.⁷¹ Similarly, the Trump Administration believes that blocking Americans from

60. See *Statement by the President*, *supra* note 3.

61. See *id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. See *id.*

66. See *id.*

67. See *id.*

68. See *Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 5.

69. See Alan Gomez, *Trump Cracks down on U.S. Business and Travel to Cuba. Here's What's Changing*, USA TODAY, <https://www.usatoday.com/story/news/world/2017/11/08/trump-cracks-down-u-s-business-and-travel-cuba/843419001/> [https://perma.cc/SK6K-SJ6M] (last updated Nov. 9, 2017).

70. *List of Restricted Entities and Subentities Associated With Cuba as of November 9, 2017*, U.S. DEP'T OF STATE (Nov. 8, 2017), <https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275331.htm> [https://perma.cc/3G5S-VXPM].

71. *Id.*

doing business with Cuban businesses run by the military will move Cuba closer toward democracy and will grow Cuba's private sector.⁷² President Trump's Cuban policy involves strictly enforcing United States law (the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act), and the Trump Administration has promised not to lift sanctions on the Cuban regime until all Cuban political prisoners are freed.⁷³ The Trump Administration is also changing the types of businesses that are defined as part of the Cuban military, and this affects United States companies' abilities to operate in Cuba.⁷⁴

The Obama Administration sought to get Cubans online in the hopes that connectivity would have a momentum of its own.⁷⁵ President Trump has the same goal of getting more Cubans connected to telecommunications and subsequently information not controlled by the Castro government.⁷⁶ Under the Trump Administration, the Department of State has created a Cuba Internet Task Force "composed of U.S. government and non-government representatives to examine technological challenges and opportunities for expanding [I]nternet access in Cuba."⁷⁷ The Cuba Internet Task Force will also consider "expanding federal support to programs and activities that encourage freedom of expression through independent media and [I]nternet freedom so that the Cuban people can enjoy the free and unregulated flow of information."⁷⁸

B. Telecommunications and Cuba

Cuba's communist government makes the island nation one of the world's most repressive countries for information and telecommunications.⁷⁹ In 2016, there were only 4.5 million Internet users in a country of 11.5 million

72. See Gomez, *supra* note 69.

73. *Fact Sheet on Cuba Policy*, THE WHITE HOUSE (June 16, 2017), <https://www.whitehouse.gov/articles/fact-sheet-cuba-policy/> [https://perma.cc/STX7-S597]; Adam Fisher, *Trump 'Canceling' Obama's Cuba Policy but Leaves Much in Place*, ABC NEWS (June 17, 2017, 4:09 AM), <http://abcnews.go.com/Politics/trumps-cuba-policy/story?id=48058622> [https://perma.cc/UNV6-KMNL].

74. See Fisher, *supra* note 73 ("The White House explained in a fact sheet released earlier today that the policy aims to keep the Grupo de Administración Empresarial (GAESA), a conglomerate managed by the Cuban military, from benefiting from the opening in U.S.-Cuba relations. 'The profits from investment and tourism flow directly to the military. The regime takes the money and owns the industry,' Trump said. 'The outcome of last administration's executive action has been only more repression and a move to crush the peaceful democratic movement. Therefore, effective immediately, I am canceling the last administration's completely one-sided deal with Cuba.'").

75. See *id.*

76. See Nora Gamez Torres, *Trump Administration Wants to Expand Internet Access in Cuba*, MIAMI HERALD (Jan. 23, 2018), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article196234369.html> [https://perma.cc/PSN9-WSX5].

77. *Id.*

78. *Id.* (internal quotation marks omitted).

79. See *Freedom on the Net*, *supra* note 1.

people.⁸⁰ That is 40 percent of Cuba's population; however, this number includes users who can only access the government-controlled intranet.⁸¹ Experts believe that a much smaller percentage of Cubans have regular access to the Internet.⁸² Only 4.3 million Cubans own mobile lines.⁸³

Cuba's telecommunications service provider, Empresa de Telecomunicaciones de Cuba S.A. (ETECSA) is owned by the Cuban government.⁸⁴ The repressive telecommunications environment stems from high prices for Internet access, prohibition of home connections, and a national email system.⁸⁵ For Cubans, access to the Internet is not easily accessible due to the high costs and limited availability.⁸⁶ For years, Cubans were either completely denied Internet access or sent to a government-controlled intranet.⁸⁷ The government-controlled intranet consists of "a national email system, a Cuban encyclopedia, a pool of educational materials and open-access journals, Cuban websites, and foreign websites that are supportive of the Cuban government."⁸⁸

1. The FCC's Removal of Cuba from Its Exclusion List

Cuba was the last country remaining on the FCC's Exclusion List, when in January 2016, the FCC's International Bureau removed Cuba from its Exclusion List for International Section 214 Authorizations.⁸⁹ Section 214 of the Communications Act of 1934 requires any person or entity seeking to provide United States-international common carrier service to obtain approval from the FCC by filing an International Section 214 Application.⁹⁰ The FCC's Exclusion List identifies countries and facilities that are not covered by a Section 214 application and requires a separate international Section 214 application filed by those countries and facilities,⁹¹ along with approval from the U.S. Department of State.⁹²

With guidance from the U.S. Department of State, the FCC has licensed and regulated telecommunications services between the United

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 1.

90. *See* 47 U.S.C. § 214(6) (1934).

91. *Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 1, 3.

92. Sean Spivey, *¡Bienvenidos a Cuba! FCC Removes Cuba from its Exclusion List for International Section 214 Authorizations*, HOGAN LOVELLS (Jan. 27, 2016), <https://www.hlregulation.com/2016/01/27/bienvenidos-a-cuba-fcc-removes-cuba-from-its-exclusion-list-for-international-section-214-authorizations/> [https://perma.cc/B48B-7BGD].

States and Cuba since 1993.⁹³ On October 26, 2015, the State Department recommended that the FCC remove Cuba from the FCC's Exclusion List for International Section 214 Authorizations and allow all carriers to provide telecommunications services under a regular Section 214 application.⁹⁴ On January 15, 2016, the FCC removed Cuba from its Exclusion List for International Section 214 Authorizations.⁹⁵ The FCC's position is that the removal of Cuba from its Exclusion List will "make it easier for U.S. facilities-based carriers to initiate service to Cuba, promote open communications, and help foster bilateral communications between the United States and Cuba."⁹⁶ Removing Cuba from the FCC's Exclusion List also streamlines the Section 214 authorization process by eliminating the requirement that carriers have to file a separate application and receive approval from the U.S. Department of State.⁹⁷ Despite the FCC's action,⁹⁸ the legal restrictions on trade and business in Cuba remain federal law under the Cuban Democracy Act⁹⁹ and the Cuban Liberty and Democratic Solidarity Act.¹⁰⁰

2. Telecommunications Between the United States and Cuba

Besides the legal restrictions that U.S.-based telecommunications providers interested in doing business with Cuba face, United States companies also have to deal with ETECSA, the telecommunications service provider owned by the Cuban government.¹⁰¹ Foreign companies have to abide by the communist government's laws and restrictions.¹⁰² The Cuban government is expected to watch the recent changes made by the FCC carefully "in terms of the kind of access to outside information that this allows their population to have access to," as Cuba is still a "controlled economy."¹⁰³ Fifty years of isolation and distrust between the United States and Cuba have also made telecommunications with Cuba problematic.¹⁰⁴

93. *Removing Cuba from the Exclusion List*, 31 FCC Rcd at para. 3.

94. *Id.* at para. 1.

95. *Id.*

96. *Id.* at para. 5.

97. *Id.*

98. See Spivey, *supra* note 93.

99. 22 U.S.C. §§ 6001-6010.

100. 22 U.S.C. §§ 6021-6091.

101. See Lydia Beyoud, *FCC Lifts Cuban Restriction, Opening Door for U.S. Telecoms*, BLOOMBERG (Jan. 19, 2016), <https://www.bna.com/fcc-lifts-cuban-n57982066350/> [<https://perma.cc/H5A3-ESEK>].

102. *Id.*

103. *Id.*

104. See Walsh, *supra* note 8 ("While other deals are in the offing, with Google, AT&T and others all looking keenly at Cuba, the string of agreements masks a lingering distrust between the two countries that has so far made it difficult to close larger-scale agreements to provide telecommunications services and equipment within Cuba.").

III. ANALYSIS

Telecommunications companies risk violating federal laws by setting up telecommunications facilities in Cuba.¹⁰⁵ However, since the announcement of restored diplomatic relations with Cuba, talk about opportunities for telecommunications providers has been abundant.¹⁰⁶ But despite efforts by both the Obama and Trump administrations to increase telecommunications services in Cuba,¹⁰⁷ the United States' embargo on Cuba is still in effect and only an act of Congress can lift it.¹⁰⁸

A. United States Code 22 Section 6004(e)(2) Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

Section 6004(e)(1) of the Cuban Democracy Act allows for telecommunications services between the United States and Cuba,¹⁰⁹ but Section 6004(e)(2) authorizes telecommunications facilities in Cuba only “in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the United States and Cuba.”¹¹⁰ The language of Section 6004(e)(2) is left incredibly vague and does not define what is considered “efficient and adequate telecommunications services.”¹¹¹ The language of Section 6004(e)(2) could mean that only minimal telecommunications facilities are allowed. It could also mean that a relatively large number of telecommunications facilities is necessary to provide efficient and adequate services in today's well-connected and technology-reliant world.

The vague language of Section 6004(e)(2) is problematic for United States telecommunications providers that want to provide telecommunications facilities in Cuba because if they are “in such quantity”¹¹² or “of such quality”¹¹³ that is deemed unnecessary “to provide efficient and

105. See 22 U.S.C. § 6004(e); 22 U.S.C. § 6032(g).

106. See Guzman, *supra* note 59 (“Since President Obama announced the United States’ new policy to normalize relations with Cuba, talk about opportunities for U.S. telecommunications companies has flourished. That reaction only intensified when the Treasury Department and the Commerce Department published amended rules on January 16, 2015, implementing these policy changes, which authorize commercial telecommunications services linking third countries and Cuba (as well as within Cuba), services incidental to Internet-based communications, and the export of communications items.”).

107. See Torres, *supra* note 77.

108. See Jeremy Diamond, *U.S.-Cuban Relations: 10 Questions on the Embargo, Embassies and Cigars*, CNN, <https://www.cnn.com/2014/12/17/politics/cuban-embargo-questions-answers/index.html> [<https://perma.cc/8QN4-MZ32>] (explaining why the President cannot end the embargo altogether) (last updated July 1, 2015).

109. 22 U.S.C. § 6004(e)(1).

110. *Id.* § 6004 (e)(2).

111. *Id.*

112. *Id.*

113. *Id.*

adequate telecommunications services between the United States and Cuba,”¹¹⁴ then they could be in violation of Section 6004(e)(2) of the Cuban Democracy Act.

B. United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act Create Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

United States Code 22 Section 6061(14) of the Cuban Liberty and Democratic Solidarity Act requires the president to determine that a transition to a democratically-elected government has begun before the economic embargo on Cuba can be removed,¹¹⁵ and Section 6065 of the act lists the arbitrary requirements the president must consider in determining a transition government in Cuba.¹¹⁶ Many of the requirements and factors are difficult to meet and vague in their meaning, making it difficult to lift the economic embargo. For example, Section 6065(a)(8) states that a transition government in Cuba is a government that “has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.”¹¹⁷ This language is unclear and also requires that Cuba meet a standard that the United States has not always met itself during natural disasters and other times of crises.¹¹⁸ Another example is Section 6065(a)(5), which requires that Cuba’s government “has ceased any interference with Radio Marti or Television Marti¹¹⁹ broadcasts.”¹²⁰ This section also requires that Cuba meet a standard that the United States itself does not follow by having the FCC monitor United States television and radio and prohibiting obscene, indecent, and profane broadcasts.¹²¹ While many of the requirements and factors in this section are vague and challenging to meet, as long as sections 6061(14) and 6065 remain in effect, American companies—

114. *Id.*

115. 22 U.S.C. § 6061(14).

116. *Id.* § 6065(a).

117. *Id.* § 6065(a)(8).

118. See, e.g., Scott Shane, *After Failures, Government Officials Play Blame Game*, N.Y. TIMES (Sept. 5, 2005), <https://www.nytimes.com/2005/09/05/us/nationalspecial/after-failures-government-officials-play-blame-game.html> [<https://perma.cc/2RWP-JGDQ>] (explaining how the government failed to adequately provide speedy and efficient assistance after Hurricane Katrina).

119. TV/Radio Martí is a U.S. funded, broadcasting network “aimed at Cuba. It is meant to provide information for Cubans on the island, who don’t have much access to the Internet and must rely on state-controlled media.” See *What is TV Marti?*, HISTORYOFCUBA.COM, <http://www.historyofcuba.com/history/funfacts/TVmarti.htm> [<https://perma.cc/ARB9-T8AC>] (last visited Mar. 13, 2019).

120. 22 U.S.C. § 6065(a)(5).

121. See *Obscene, Indecent and Profane Broadcasts*, FCC, <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> [<https://perma.cc/9KAZ-N4HN>] (last updated Sept. 13, 2017).

including telecommunications companies—risk violating federal law if they set up facilities in and do business with Cuba.

C. United States Code 22 Section 6032(g) Also Creates Problems for United States Telecommunications Providers Interested in Setting Up Facilities in Cuba

Section 6032(g) of the Cuban Liberty and Democratic Solidarity Act explains that Americans are not authorized to invest in the domestic telecommunications network within Cuba and explains that an investment in the domestic telecommunications network within Cuba includes the “contribution (including by donation) of funds or anything of value to or for, and the making of loans to or for, such network.”¹²² However, Section 6032(g) of the act does not define or identify what qualifies as the “domestic telecommunications network.”¹²³ It is unclear if this language means Cuban, government-run networks or any telecommunications network that is set up in Cuba. This vague language is particularly problematic for telecommunications providers that want to set up telecommunications services and facilities in Cuba. Because the statute does not make clear what is considered a domestic telecommunications network, United States telecommunications providers risk violating Section 6032(g) of the Cuban Liberty and Democratic Solidarity Act if they start setting up facilities in Cuba.¹²⁴ Telecommunications providers that attempt to set up facilities in Cuba and invest in the telecommunications network could be particularly at risk depending on the political environment and the presidential administration in the United States. For instance, President Trump has stated that his administration will enforce United States laws regarding investments in Cuba.¹²⁵

IV. PROPOSAL

In an effort to increase the flow of information between the United States and Cuba, end a diplomatic policy that has failed for over fifty years, and allow American companies to operate in Cuba legally, Congress should repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in their entirety. These acts have been repressive to the Cuban people, harmful to innovation, and ineffective in achieving the United States’ goals from when these pieces of legislation were passed.¹²⁶ Most importantly, however, Congress should repeal or redefine Section 6004(e)(2) of the Cuban Democracy Act and repeal sections 6061(14), 6065, and 6032(g) of the Cuban

122. 22 U.S.C. § 6032(g)(5).

123. *Id.*

124. *See id.*

125. *See* Fisher, *supra* note 74.

126. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the lack of success of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in achieving democracy in Cuba and ousting the Castro government).

Liberty and Democratic Solidarity Act in an effort to increase telecommunications services and the free flow of information between the United States and Cuba. This proposal will also allow United States telecommunications providers to set up facilities in Cuba without the risk of violating federal laws. While there could be some drawbacks in repealing these sections, the benefits of these proposals outweigh those drawbacks.

A. Repeal or Redefine United States Code 22 Section 6004(e)(2) of the Cuban Democracy Act

If Congress does not repeal the Cuban Democracy Act in its entirety, it should repeal or redefine Section 6004(e)(2) of the act, which only authorizes telecommunications facilities in Cuba that are of “such a quantity and quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba,” without defining or setting the qualifications for efficient and adequate services.¹²⁷ Section 6004(e)(2) should either be repealed altogether so that even the highest quality telecommunications facilities can operate in Cuba, or it should be amended to define what constitutes the “quantity and . . . quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba.”¹²⁸ Repealing this section altogether so that the highest quality telecommunications facilities can operate in Cuba would further both President Obama and President Trump’s goals of increasing Internet and information access for the Cuban people and increasing telecommunications services between the United States and Cuba. Amending Section 6004(e)(2) to redefine what constitutes the “quantity and . . . quality . . . necessary to provide efficient and adequate telecommunications services between the United States and Cuba”¹²⁹ would also give United States telecommunications providers a better idea of whether they can set up facilities in Cuba without violating federal law.

While Congress could redefine Section 6004(e)(2) to allow the highest quality telecommunications facilities to operate in Cuba, the downside of this proposal is that Congress could also choose to tighten the existing embargo and define “efficient and adequate telecommunications services” in a way that only allows minimal telecommunications facilities to exist.¹³⁰ However, if Congress redefines this section, it should keep in mind the goals of President Obama and President Trump, both of whom have shaped modern day United States-Cuban policy. With these goals in mind, Congress should refine Section 6004(e)(2) so that it allows the highest quality telecommunications facilities to operate in Cuba.

127. 22 U.S.C. § 6004(e)(2).

128. *Id.*

129. *Id.*

130. *Id.* § 6004(e)(2).

B. Repeal United States Code 22 Section 6061(14) and Section 6065 of the Cuban Liberty and Democratic Solidarity Act

If Congress does not repeal the Cuban Liberty and Democratic Solidarity Act in its entirety, Congress should at least repeal Section 6061(14), which requires the president to determine that a transition to a democratically-elected government has begun before the economic embargo on Cuba can be removed¹³¹ and Section 6065, which lists the requirements for the president to consider in assessing whether a transition government exists in Cuba.¹³² Some of the requirements and factors of Section 6065 for a transition government in Cuba include a government that: “has legalized all political activity,”¹³³ “has ceased any interference with Radio Marti or Television Marti broadcasts,”¹³⁴ “does not include Fidel Castro or Raul Castro,”¹³⁵ and “has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.”¹³⁶

Sections 6061(14) and 6065 of the Cuban Liberty and Democratic Solidarity Act make conducting business in Cuba particularly problematic, and repealing these sections would allow for the greatest changes in ending the United States’ embargo on Cuba. By repealing these sections, the United States could begin trading with Cuba without having to wait for the president’s determination that Cuba has met the difficult and arbitrary steps of transitioning to a democratically-elected government. For example, Section 6065(a)(7) of this act explains that Cuba will not meet the criteria for having transitioned to a democratically-elected government as long as Fidel or Raul Castro are part of the Cuban government.¹³⁷ Without repealing this section of the act, trade with Cuba cannot yet take effect because Raul Castro is currently part of the Cuban government, controlling the Communist Party and the armed forces.¹³⁸ Therefore, Cuba does not meet the requirements of Section 6065.¹³⁹

By repealing these sections, United States companies such as telecommunications providers could conduct business with Cuba without Cuba having to meet the requirement that it has begun transitioning to a democratically-elected government. While this proposal would seem to negatively impact Cubans, legislators should be reminded that the diplomatic approach of isolation that the United States has taken with Cuba has failed for

131. See 22 U.S.C. § 6061(14).

132. See *id.* § 6065(a).

133. *Id.* § 6065(a)(1).

134. *Id.* § 6065(a)(5).

135. *Id.* § 6065(a)(7).

136. *Id.* § 6065(a)(8).

137. *Id.* § 6065(a)(7).

138. See Ana Quintana, *This Is Not the ‘End of an Era’ in Cuba*, THE ATLANTIC (Apr. 20, 2018), <https://www.theatlantic.com/international/archive/2018/04/cuba-diaz-canel/558566/> [<https://perma.cc/28HA-L3BU>].

139. 22 U.S.C. § 6065(a)(7).

over 50 years.¹⁴⁰ By repealing these sections and allowing trade with Cuba, the United States could achieve its goal of establishing democracy in Cuba through engagement, as opposed to strangling its economy and forbidding trade. The Obama and Trump administrations have both said that increasing access to the Internet and other forms of telecommunications and information for regular Cuban people is one of the best ways to encourage Cubans to demand democracy on their own.¹⁴¹

C. Repeal United States Code 22 Section 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act

If Congress does not repeal the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in their entirety, Congress should at least repeal United States Code Section 6032(g)(5), which forbids United States persons from investing in the domestic telecommunications network within Cuba.¹⁴² By repealing this section, United States persons could invest in telecommunications services and facilities in Cuba and increase the free flow of information between the U.S. and Cuba. Allowing United States persons to invest in this market could improve the telecommunications network in Cuba and increase business and investment opportunities for Americans interested in doing business in the telecommunications sector in Cuba.

While repealing Section 6032(g)(5) of the Cuban Liberty and Democratic Solidarity Act would be beneficial for American investors, information flow between the United States and Cuba, and telecommunications in Cuba, it could also have the unintended consequence of supporting a repressive, government-run telecommunications network in Cuba. However, the Cuban government has shown significant improvements in increasing telecommunications access for the Cuban people by establishing hundreds of cybercafés and public Wi-Fi hotspots in Cuba.¹⁴³ Therefore, the benefits of repealing this section outweigh the possible unintended consequences.

D. The Benefits of Repealing These Sections of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act Outweigh the Possible Drawbacks

Repealing the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act could be difficult to achieve because of the

140. See *Statement by the President*, *supra* note 3.

141. See *Look for Tech*, *supra* note 5.

142. 22 U.S.C. § 6032(g)(5).

143. See *Freedom on the Net*, *supra* note 1.

bipartisan efforts it would require in Congress.¹⁴⁴ Repealing these acts could also have the unintended consequence of pushing Cuba further from transitioning into a democratic state, which is what the acts were intended to achieve from the start. By repealing these acts and lifting the embargo, Cuba could continue down a path of a Communist government and not accept efforts to transition toward free and fair elections along with the other goals outlined in the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act.¹⁴⁵ This could mean that any investment in telecommunications would be less useful to the average Cuban because it would be more susceptible to censorship by an oppressive regime.

However, Cuban President Raul Castro stepped down as President of Cuba in April of 2018 and was replaced by Miguel Diaz-Canel.¹⁴⁶ This means that while Raul Castro still controls Cuba's communist party as its first secretary, for the first time in over 50 years, a member of the Castro family is not serving as the president of Cuba.¹⁴⁷ President Diaz-Canel is open to increased telecommunications in Cuba and has even met with U.S. telecommunications executives.¹⁴⁸ He has stated that the main obstacle in achieving his telecommunications goals for Cuba is the U.S. embargo.¹⁴⁹

Regardless of the potential difficulty in repealing these acts and the possible unintended consequences, all efforts should still be made to repeal these acts. Repealing these acts will improve telecommunications services between the United States and Cuba, allow United States telecommunications companies to operate in Cuba without violating federal laws, and increase Internet access for the Cuban people, which has been a goal of both presidents Obama and Trump.

144. See Carlos Alberto Montaner, *Cuba Doesn't Deserve Normal Diplomatic Relations*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2014/10/12/should-the-us-normalize-relations-with-cuba/cuba-doesnt-deserve-normal-diplomatic-relations> ("There's . . . a bipartisan consensus in Washington against the Castro regime. All three Cuban-American senators and four Cuban-American representatives, Democrats and Republican, agree that sanctions should be maintained. They are the best interpreters of the opinion of the almost three million Cubans and descendants of Cubans living in the United States.") [<https://perma.cc/S7PE-ASEK>] (last updated Oct. 13, 2014).

145. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the uncertainties surrounding repeal of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act as they pertain to business, personal freedoms, and economic opportunities in Cuba).

146. See Quintana, *supra* note 135.

147. *Id.*

148. See Nora Gamez Torres, *Cuba's new leader meets with American business executives and politicians in NYC*, MIAMI HERALD (Sept. 25, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article219003055.html>.

149. *Id.*

V. CONCLUSION

Cuba has great potential in the telecommunications arena. The country has among the lowest access to the Internet in the world, but the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act stand in the way of increased trade and the free flow of information between the United States and Cuba. These acts should be repealed, at least partially, so that United States telecommunications providers who set up facilities in Cuba do not violate federal laws. These acts have been repressive to the Cuban people, harmful to innovation, and ineffective in achieving the goals that the United States had when passing these pieces of legislation.¹⁵⁰ The possibility of increasing Internet access for the Cuban people and increasing business opportunities for United States telecommunications providers greatly outweigh any potential drawbacks. Therefore, these unsuccessful acts should be repealed in an effort to establish democracy in Cuba through engagement and to allow American telecommunications companies to do business with Cuba legally. Eager telecommunications providers should wait for Congress to act before setting up telecommunications facilities in Cuba.

150. Interview with Devyn Benson, Assistant Professor of Africana Studies and Latin American Studies, Davidson University, in Havana, Cuba (June 15, 2015) (explaining the lack of success of the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act in achieving democracy in Cuba and ousting the Castro government).