



Options for Engagement

A Resource Guide for Reforming U.S. Policy toward Cuba

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“The United States seeks a new beginning with Cuba. I know there is a long journey that must be traveled to overcome decades of mistrust, but there are critical steps we can take toward a new day.”

President Barack Obama, April 17, 2009

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INTRODUCTION

For nearly fifty years, the United States has been expecting and, in diverse ways, actively planning for the collapse of Fidel Castro's government in Cuba. Numerous efforts – from the botched Bay of Pigs and Operation Mongoose (a covert action program to overthrow or otherwise undermine Fidel Castro) of the 1960's, to the post-Cold War 1992 Cuban Democracy Act, 1996 Helms-Burton Act and the 2004 Commission for Assistance to a Free Cuba – all have failed to bring down communism in Cuba, and most especially, to bring Fidel Castro down with it.

The unanticipated scenario – a stable transition from one Castro government to another – is what President Barack Obama and the 111th Congress face now.

In July 2006, then-President Fidel Castro temporarily relinquished his Presidential powers to his younger brother, First Vice President and Defense Minister Raul Castro, in order to undergo surgery. Since that time, Fidel Castro has apparently been recuperating and has not been seen in public. Cuban state media have occasionally shown photos or video of the former President meeting with visiting foreign dignitaries.

On February 19, 2008, Fidel Castro announced he would not seek or accept another term as President of Cuba. On February 24, 2008, the Cuban National Assembly formally elected Raul Castro as Cuba's new President. The transfer of power was met by the Cuban people with a mixture of curiosity, optimism, skepticism, disappointment and disinterest. It was not met by any popular unrest or other signs of instability. January 1, 2009, the 50th anniversary of the Cuban Revolution, came and went.

In recent months, as the new Administration and Congress arrived in Washington, several important reports and essays called upon a willing Administration and Congress to confront U.S. policy failures in Cuba over the last fifty years and to adjust our approach to better match U.S. and regional interests.

Senator Richard Lugar, the current Ranking Member and former Chairman of the Senate Foreign Relations Committee issued a report on Cuba policy endorsing sequenced engagement and rejecting a conditions-based policy toward the Cuban government. "By directing policy towards an unlikely scenario of a short-term democratic transition on the island and rejecting most tools of diplomatic engagement," the report concludes, "the U.S. is left as a powerless bystander, watching events unfold at a distance."¹

Other valuable recent assessments of Cuba policy include: the National Security Archive's Peter Kornbluh's and American University's William LeoGrande's review of previous administrations' secret attempts to engage Cuba; the Council on Foreign Relations' Julia Sweig's "Memo to the President," which cautions against attaching policy changes to inevitably slow democratic changes in Cuba; the National Foreign Trade Council's Jake Colvin's "The Case for a New Cuba Policy," highlighting the broad control the President still retains over the heavily-legislated U.S. embargo; an examination of shared security interests, "Nine Ways the U.S. can talk to Cuba and Cuba can talk to U.S.," compiled by Sarah Stephens of The Center for Democracy in the Americas'; a report produced by a prominent group of conservative Cuban Americans, the Cuba Study Group, entitled "Lifting Restrictions on Travel and Remittances: the Case for Unilateral Action;" a selection of short, medium and long-term policy recommendations from a former top U.S. diplomat in Havana, Ambassador Vicky Huddleston, and noted advisors in Washington and Miami, "U.S. Policy Toward a Cuba in Transition: Roadmap for Critical and Constructive Engagement;" and, two hemisphere-focused reports issued last year by the Council on Foreign Relations and the Brookings Institution, both of which urge a dramatically different approach to Cuba as part of the larger U.S. policy toward Latin America.

This paper draws on the expertise of these and many other specialists on U.S.–Cuban affairs. It also draws on the author's own experience focusing on U.S. policy toward Cuba, including numerous trips to the island over the last decade. It offers detailed history and discussion on more than a dozen of the most pressing and complex issues in U.S. – Cuban relations. In each section, there are specific options for engagement that could be exercised, individually or in combination, by the Administration or by Congress that go beyond initial policy changes made by each in March and April 2009.

Central to this policy review and the more than 70 options for engagement offered herein is the conclusion that current Cuba policy requires reassessment. Central, too, is an expectation that President Obama and the 111th Congress will favor policy adjustments, however small or large, that serve U.S. interests and engage the people and the government of Cuba.

¹ U.S. Senate Committee on Foreign Relations. (2009, February 23). *Changing Cuba Policy – In The United States National Interest*. (Committee Print, S.Prt.111-5). Washington, DC: U.S. Government Printing Office. Available: <http://www.lugar.senate.gov/sfrc/pdf/Cuba.pdf>

I. AGRICULTURAL EXPORTS

Agricultural import restrictions with respect to Cuba began with the 1961 Foreign Assistance Act, which prohibited sugar imports from Cuba until such time as Cuba returned, or adequately compensated for, expropriated U.S. properties on the island. In 1985, the Food Security Act prohibited sugar imports from any country that imports and then re-exports Cuban sugar to the U.S. market.

The 1961 Foreign Assistance Act also authorized the President to “establish and maintain a total embargo upon all trade between the United States and Cuba.”² In 1962, President Kennedy exercised his total embargo authority with respect to Cuba.

2000 food sales exemption

U.S. food exports to Cuba remained prohibited until 2000 when Congress passed the Trade Sanctions Reform and Export Enhancement Act (TSREEA), which prohibited the President from levying new agricultural export sanctions against any nation, and lifted existing food export bans imposed against Cuba, Iran, Libya, North Korea and Sudan. At the time, all five countries were designated by the United States as “state sponsors of terrorism” and were subject to U.S. agricultural trade sanctions.

TSREEA authorized U.S. agricultural exports to the foregoing countries, but prohibited any form of U.S. government assistance or government financing for commercial exports to any of them. However, the law allowed the President to waive this restriction for humanitarian or national security purposes in the case of Iran, Libya, North Korea and Sudan. No such waiver authority was given with respect to Cuba.³

Further, in the case of agricultural exports to Cuba, the law authorized two means of payment: cash paid in advance, or by third-country letter of credit.⁴ Exports to Cuba, alone among the five countries, may not benefit from any private U.S. financing of the sales. Because U.S. regulations under the embargo prohibit direct payments by Cuban banks to those of U.S. exporters,⁵ the payments must be routed through third country banks.

Fidel Castro initially promised that Cuba would buy “not one grain” of any U.S. agricultural goods under the terms laid out in TSREEA.⁶ But following the loss of food stores after Hurricane Michelle in late 2001, the government of Cuba reversed its position and began approaching U.S. agricultural exporters to quickly replace the lost food stores. From late 2001 through early 2005, Cuban purchases of U.S. agricultural exports grew at a rapid pace, from less than \$1 million annually to nearly \$400 million in 2004.⁷

From 2001 to March 2005, Cuba paid cash for many of the U.S. foodstuffs it purchased. Typically, the U.S. seller would authorize shipment of the goods from a U.S. port, after which the Cuban buyer would initiate a cash transfer routed via a third country bank, as required by U.S. law. On some occasions, the U.S. goods would arrive in the Cuban port before the cash had arrived in the seller’s U.S. bank account. The shipper would then hold the goods (and title to them) until payment arrived in the United States bank. If the payment were delayed in such a manner, the Cuban buyer would pay extra shipping (demurrage) costs, until the goods could be turned over to the buyer. According to the U.S. Treasury Department, there were no instances in which a Cuban buyer took possession of U.S. goods prior to completing payment.⁸

² Rennack, Dianne and Sullivan, Mark P. (2005, March). *U.S.–Cuban Relations: An Analytic Compendium of U.S. Policies, Laws and Regulations*. Occasional Paper. Washington D.C.: The Atlantic Council. Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

³ *Making appropriations for Agriculture, Rural Development, Food and Drug Administration and Related Agencies programs for the fiscal year ending September 30, 2001, and for other purposes*, Appropriations Act, H.R. 4461 Section 908 (a)(3), 106th Congress, 2nd Sess. (2000). Available: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ387.106.pdf

⁴ *Making appropriations for Agriculture, Rural Development, Food and Drug Administration and Related Agencies programs for the fiscal year ending September 30, 2001, and for other purposes*, Appropriations Act, H.R. 4461 Section 908 (b)(1), 106th Congress, 2nd Sess. (2000). Available: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ387.106.pdf

⁵ U.S. Department of the Treasury. (1961). *Title 31: Money and Finance: Treasury, Chapter 5, Part 515: Cuban Assets Control Regulations*. (Code of Federal Regulations, CFR 515.201). Washington, D.C. Available: http://www.access.gpo.gov/nara/cfr/waisidx_08/31cfr515_08.html

⁶ Magnusson, Paul. (2002, September 23). Can U.S. Farmers Break Open Trade with Cuba? *BusinessWeek*. Available at: http://www.businessweek.com/magazine/content/02_38/c3800078.htm

⁷ U.S. International Trade Commission. (2007, July). *U.S. Agricultural Sales to Cuba: Certain Economic Effects of U.S. Restrictions*. (Investigation No. 332-489, USITC Publication 3932). Available: <http://hotdocs.usitc.gov/docs/Pubs/332/Pub3932.pdf>

⁸ S.Hrg. 109-219: *Hearing before the Committee on Finance, U.S. Senate, on the Nominations of Robert M. Kimmitt, to be Deputy Secretary of the Treasury; Randall Quarles, to be Under Secretary of the Treasury, Domestic Finance; Sandra L. Pack, to be Assistant Secretary of the Treasury, Management; and Kevin I. Fromer, to be Deputy Under Secretary of the Treasury, for Legislative Affairs*, 109th Congress, 1st Sess. (2005, July 20) (Responses from Robert Kimmitt to Questions for the Record, p.35). Available: <http://finance.senate.gov/hearings/25654.pdf>

Financing restrictions

Cash in advance. In February 2005, the Treasury Department issued a rule that defined “cash-in-advance” payment terms, as required by TSREEA, to mean cash payment had to be received in the seller’s account before the goods *departed* a U.S. port.⁹ (TSREEA did not explicitly define term “cash-in-advance.”) Lawmakers and agricultural groups opposed to the rule reasoned that such an interpretation would tie up the buyer’s funds for longer and increase banking transactions, making U.S. products less competitive. Moreover, they argued, if Cuba paid for the goods while still in a U.S. port, the goods could be considered Cuban assets in U.S. jurisdiction subject to possible seizure against unrelated claims against the Cuban government. For this reason, Cuban buyers have refused to buy U.S. goods on those terms.¹⁰

The American Law Division of the Congressional Research Service (CRS) studied the cash payment issue and concluded, “[I]t would appear difficult to find legal support for OFAC’s [Office of Foreign Assets Control] interpretation that ‘payment of cash in advance’ requires payment be received prior to shipment. CRS reasoned that, “it appears customary within the international trade and finance community to place the emphasis on the legal transfer of control, rather than on the date of shipment...OFAC’s interpretation appears to limit the available payment options to those that are considered risky, undesirable, and underutilized...”¹¹

Since that time, no more cash-basis sales have been transacted and overall agricultural exports to the island decreased by nearly 15% over the next two years. According to an investigation by the U.S. International Trade Commission (USITC), “There is a consensus among exporters and industry officials that eliminating cash-against-documents transactions as an eligible method of payment has had a substantial negative effect on the sale of agricultural products to Cuba.”¹²

Direct payment. The USITC also found that the regulatory requirement to route payment to U.S. sellers through third-country banks puts smaller and medium-sized exporters at further disadvantage. These exporters lack established relationships with these foreign banks, and any delay in departure from the U.S. port can greatly increase the cost of their smaller shipments. “Because each discrete shipment on a vessel is required to have a confirmed letter of credit in place before the vessel leaves port, the delay of any single letter of credit delays all shipments on the same vessel,” the report concluded. “Delays can range from one to ten days, in some cases increasing total shipping costs by \$20,000 to \$40,000.

Agricultural sales-related visits to and from Cuba. The USITC also found that “OFAC appears to have restricted business travel to and from Cuba that is necessary for U.S. exporters to effectuate sales.”¹³ TSREEA authorized agricultural-export related travel to Cuba by Americans, but such travel has been subject to case-by-case prior approvals by the Treasury Department. Legislation passed in March 2009 authorized a general license for such trips, so that they would no longer require prior approval. In a letter to legislators dated March 9, Treasury Secretary Timothy Geithner indicated that general license travelers would have to notify the government prior their trip, and, upon their return, would have to submit, “a report outlining the activities conducted, including the persons with whom they

AGRICULTURAL EXPORTS

Policy options:

1) **Under existing executive authority, amend the 2005 Treasury Department regulation on cash-basis agricultural sales to Cuba,** to reflect that cash-in-advance, for the purpose of implementing the 2000 Trade Sanction Reform and Export Enhancement Act (TSREEA), means cash received prior to transfer of title or control of goods. This change can also be effectuated by a **legislative amendment to TSREEA** that defines cash-in-advance as cash received prior to transfer of title or control of goods.

2) **Extend unlimited general travel license authority** to groups and individuals engaging in marketing, sales, delivery or other **activities directly related to U.S. agricultural sales to Cuba** authorized by TSREEA. Such a license **should not include excessive reporting requirements** (such as disclosure of private business meetings in Cuba) that would discourage its use. Alternatively, Congress could pass legislation to prohibit any regulation of travel to Cuba for such purposes.

3) **Authorize U.S. sellers to collect payment directly** from Cuba for the purpose of transacting U.S. cash-basis sales authorized by TSREEA. This would remove third-country banking institutions from the transaction, so that cash payment could be sent by direct wire transfer from a Cuban bank to the U.S. seller’s account in the United States. No extension of credit would be involved in the transactions. The President can use existing authority to license these transactions, or Congress could pass legislation to explicitly authorize them.

⁹ U.S. Department of the Treasury. (2005, February 22). *OFAC Issues Clarification on Payments for Agricultural and Medical Shipments to Cuba*. (Press Release js2268). Available: <http://www.treas.gov/press/releases/js2268.htm>

¹⁰ U.S. International Trade Commission. (2007, July).

¹¹ Grimmet, Jeanne J., and Tatelman, Todd. (2005, March 4). *Statutory Requirements Regarding Payment Terms for Exports of Agricultural Products to Cuba*. (Congressional Research Service Memorandum). Washington, D.C.; Quoted text found also in S.Hrg. 109-265: *Hearing before the Committee on Finance, U.S. Senate*. (2005, May 24) 109th Congress, 1st Sess. (Prepared Statement of Senator Max Baucus). Available: <http://finance.senate.gov/hearings/25654.pdf>

¹² U.S. International Trade Commission. (2007, July).

¹³ *Ibid.*

met, expenses incurred, and business conducted in Cuba.”¹⁴ Such documentation is not required for specific licenses, and may discourage travelers concerned with protecting proprietary information from using the new general license.

Of additional interest are visits by Cuban officials seeking to negotiate contracts, inspect production, processing or port facilities, including live animals. These visits by Cuban officials to the United States are regulated by the U.S. State Department through its case-by-case decisions on visa applications.

Credits. The USITC also found that the U.S. share of Cuban food imports would increase from one-third now, to between one-half and two-thirds if all remaining restrictions – including the ban on Export-Import Bank credits and other export promotion mechanisms – were lifted.¹⁵ Cuban importing officials routinely point out to visiting American delegations that other countries provide them more favorable terms of sale, not only because of U.S. transactional complications already described here, but because those other exporters offer credit to the Cuban buyers. Some in the U.S. agricultural export sector would like to offer at least private credits to Cuba, in hopes that doing so would net a greater share of Cuba’s market. Others prefer the ban on private and government financing because it ensures that the seller always gets paid.

Licensable goods. After three hurricanes wiped out nearly a third of Cuba’s unharvested crops and food stores, and destroyed or damaged half a million homes on the island in September 2008,¹⁶ the Bush Administration offered \$100,000 in aid, and an assessment team, followed by a \$5 million offer without the team. Cuba declined the offers on the grounds that it could not accept aid from a country that “blockades” it. The Cuban government instead requested that the United States temporarily allow Cuba to buy U.S. foodstuffs on credit, and to license sales of rebuilding supplies not already specifically approved by the U.S. Commerce Department.¹⁷

Although the Bush Administration declined Cuba’s request, Senators Christopher Dodd (D-CT) and Richard Lugar (R-IN) proposed legislation last September to ease financing restrictions on cash-basis food sales and to allow the sale of materials for rebuilding domiciles on the island.¹⁸ The measure did not become law.

Despite statutory and regulatory restrictions, the government of Cuba continues to purchase U.S. foodstuffs. In the last two years, the value of Cuban purchases has increased substantially. Cuban officials estimate total expenditures on U.S. agricultural goods (including shipping charges) grew from \$650,000,000 in 2007 to over \$900,000,000. Cuban import authorities maintain, however, that the increase is largely due to rising freight costs and commodity prices, and most recently, due to the 2008 hurricane season. Officials also note the U.S. market share has dropped from 40% in 2006 to 35% in 2007 and 2008.¹⁹

4) Amend TSREEA, Section 908(b)(1) to **allow private U.S. financing of agricultural sales to Cuba**. Such an amendment would subject such exports to Cuba to the same legal authority as such sales to Iran, Libya, North Korea and Sudan. It would not authorize U.S. government credits for the sales.

5) License, using existing executive authority, the **sale of farm equipment and machinery** to Cuba. Alternatively, Congress could pass legislation mandating licensing for such sales.

6) Pass statutory authority for **agricultural export promotion activities** within the Department of Commerce, to offer assistance to U.S. agricultural producers, cooperative organizations, or state agencies that promote or transact sales of commodities to Cuba as authorized by TSREEA.

7) Direct the State Department to broadly **facilitate temporary entry for high, mid and low-ranking Cuban representatives involved in technical and commercial consultations with U.S. agricultural marketing organizations and exporters**.

¹⁴ Letter From Secretary Timothy Geithner to Senator Robert Menendez. (2009, March 9). Available: http://media.miamiherald.com/smedia/2009/03/10/13/Scan0011.source.prod_affiliate.56.pdf

¹⁵ Ibid.

¹⁶ For background on damages sustained by Cuba in the 2008 hurricane see: Messina, William A, Royce, Frederick S. and Spreen, Thomas H. (2008). *Cuban Agriculture and the Impacts of Tropical Storm Fay and Hurricanes Gustav and Ike*. (University of Florida, IFAS Extension, FE755). Available: <http://edis.ifas.ufl.edu/pdffiles/FE/FE75500.pdf>

¹⁷ Nota Verbal de la Sección de Intereses de Cuba en Washington. (2008, September 15). *Digital Gramma Internacional*. Available: <http://www.granma.cu/espanol/2008/septiembre/lun15/nota.html>

¹⁸ Dodd, Senator Chris. (2008, September 15). Dodd Offers Amendment to Provide Much Needed Relief to the People of Cuba. (Statement to the U.S. Senate). Available: <http://www.dodd.senate.gov/?q=node/4553>

¹⁹ Alimport data provided to the author. (January 2009). Havana, Cuba.

II. BILATERAL DIPLOMACY

The United States and Cuba maintained diplomatic ties even after the Cuba Revolution succeeded in driving out the Batista government in late 1958. But a series of events, including Cuban expropriation of U.S. assets on the island, led President Kennedy to break all official diplomatic ties in January 1961. Nonetheless, as Peter Kornbluh and William LeoGrande documented in their recent article, “Talking with Fidel,” several U.S. Administrations, beginning with the Kennedy Administration, have engaged with Cuba both through diplomatic back channels and official negotiations.²⁰

The Kennedy Administration followed up successful negotiations for the return of Bay of Pigs prisoners of war with a series of back channel talks with Cuban officials, including with Fidel Castro himself. President Kennedy was personally interested in exploring talks, and rejected setting conditions, such as cutting Cuban-Chinese ties, that he felt that Castro couldn’t meet. The talks were cut short by Kennedy’s assassination.

In 1973, after several years of quiet negotiations aided by Swiss and Czech intermediaries, the Nixon Administration signed a bilateral anti-hijacking agreement with the Cuban government.²¹ As Secretary of State in the Nixon and Ford Administrations, Henry Kissinger explored the possibilities of détente with Cuba. Kissinger expressed interest in a process of “synchronized”, “unilateral” and “reciprocal” steps with the Cuban government, and he dispatched top State Department officials to meet secretly with Cuban emissaries several times.²² In 1975, Assistant Secretary of State Bill Rodgers met with Cuban representatives at New York’s LaGuardia Airport, offering an unsigned U.S. proposal approved by Kissinger. “The ideological differences between us are wide,” read the note. “But the fact that such talks will not bridge the ideological differences does not mean that they cannot be useful in addressing concrete issues which it is in the interests of both countries to resolve.”²³ Events, including Cuban military involvement in Africa, overtook the effort, and it never advanced.

In 1977, shortly after taking office, President Carter issued a directive to move toward normalized relations with Cuba. Diplomats from both countries quickly negotiated agreements on maritime borders, fishing rights, and Coast Guard cooperation. In 1977 they opened Interests Sections under the auspices of the Swiss Embassies in Havana and Washington to carry out diplomatic and consular functions.²⁴ In 1978, the two sides agreed on the release and relocation to the United States of several thousand political prisoners in Cuba and their families. Former Principal Officer of the U.S. Interest Section Wayne Smith recounts in his memoir *The Closest of Enemies* that the Cuban government had suggested the release as a means of restarting stalled talks.²⁵ Normalization talks never advanced much further, as the United States objected to Cuban troops in the Horn of Africa, and time simply ran out for the Administration.

U.S.–Cuban relations during the Reagan Administration were fraught with tension over conflicts in Central America and Africa. Nonetheless, beginning in 1982, the Reagan Administration held secret talks with the Cuban government, which in 1984 concluded in an agreement on migration-related issues. After that agreement was reached, U.S. and Cuban officials continued to meet periodically on migration-related issues.

The Clinton Administration considered rapprochement with Cuba, but the effort never got very far. The Administration did open a back channel through Colombian author Gabriel Garcia Marquez when tens of thousands of Cubans took to rafts headed for Miami at the height of Cuba’s post-Soviet economic crisis. This led to talks and a migration accord with the government of Cuba in 1994, and a follow-on agreement in 1995. Though the Clinton Administration did not pursue direct diplomacy to the extent some predecessors had, it encouraged “people-to-people” and “baseball” diplomacy, reminiscent of the U.S.–Soviet Bloc cultural exchanges of the 1970’s and 1980’s. The Administration also engaged Cuba to allow U.S. news bureaus in the country, and to facilitate direct telecommunications with the island.

In 2001, President Bush signaled his position on diplomatic engagement with Cuba: “We welcome the opportunity to build diplomatic relations with Cuba when the Cuban government is a democracy, when the Cuban people can be free from fear to say what they think and chose who shall govern them.”²⁶

²⁰ Kornbluh, Peter and LeoGrande, William M. (2009, January/February) Talking with Castro. *Cigar Aficionado*. Available:

http://www.cigaraficionado.com/Cigar/CA_Archives/CA_Show_Article/0,2322,2195,00.html

²¹ Memorandum from the President’s Assistant For National Security Affairs (Kissinger) to President Nixon. (1969, February 7). Washington, DC.

<http://www.state.gov/r/pa/ho/frus/nixon/e1/c15655.htm>

²² Kornbluh, Peter and LeoGrande, William M. (2009, January/February).

²³ Kissinger Aide-Memoire to Cuba. (1975, January 11). Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/doc06.pdf>

²⁴ Kornbluh, Peter and LeoGrande, William M. (2009, January/February).

²⁵ Smith, Wayne S. (1987). *The Closest of Enemies: A Personal and Diplomatic History of the Castro Years*. W.W. Norton and Company.

²⁶ Remarks by President George W. Bush in recognition of Cuban Independence Day. (2001, May 18). Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

In 2003, President Bush began to roll out what became the focus of his Cuba policy, regime change in Havana: “Clearly, the Castro regime will not change by its own choice. But Cuba must change. So today I’m announcing several new initiatives intended to hasten the arrival of a new, free, democratic Cuba.”²⁷

Over the course of two terms, President Bush tightened the embargo, increased enforcement of it, and increased aid to the Cuban opposition. His Administration also published detailed plans for U.S. assistance to a democratic government in Cuba. However, it showed little interest for diplomatic engagement. In early 2004, the Bush Administration canceled its participation in semi-annual bilateral migration talks, which had been ongoing since before President Bush took office. (Further discussion of the talks’ breakdown follows in the Immigration and Temporary Entry chapter of this report).

After a series of hurricanes battered Cuba in late summer 2008, State Department and Cuban Interests Section officials met in Washington and exchanged a series of diplomatic notes regarding potential U.S. assistance.²⁸ The Cuban government declined the initial U.S. offer of \$100,000 and an assessment team (to determine what kind of aid was necessary), requesting instead the temporary lifting of restrictions on purchases of agricultural goods and rebuilding supplies. The State Department then rejected Cuba’s request, increased its offer to \$5 million, and eventually withdrew its request to send an assessment team to Cuba. The Cuban government issued a statement declaring its unwillingness to accept donations from a country that “blockades” it.

It is impossible to know what might have happened had the United States offered more aid without conditions from the start, or, had the Cuban government accepted the U.S. offer with or without the conditions. But the Obama Administration should be prepared to face a similar dilemma if Cuba is hit hard again next hurricane season.

The bilateral agenda

In a speech at the Cuban American National Foundation in Miami, then-Senator Obama offered his vision for bilateral discussions with Cuba:

It is time to pursue direct diplomacy, with friend and foe alike, without preconditions. There will be careful preparation. We will set a clear agenda. And as President, I would be willing to lead that diplomacy at a time and place of my choosing, but only when we have an opportunity to advance the interests of the United States, and to advance the cause of freedom for the Cuban people.²⁹

Beginning in 2006 Raul Castro has repeatedly expressed willingness to initiate a dialogue with the United States, including meeting with President Obama. (Recently, he suggested Guantanamo Naval Base as an appropriately neutral meeting place.³⁰) In an interview published in *The Nation* last fall, Raul Castro stated his vision of dialogue with the United States: “With the United States, every objective possibility exists. The Chinese say: ‘On the longest path, you start with the

BILATERAL DIPLOMACY

Policy options

8) Seek to improve diplomatic contacts and communication by **increasing contacts between U.S. and Cuban diplomats in Washington and Havana**, and by establishing a high-level diplomatic channel for sensitive issues or crisis talks.

9) Direct the Department of State to **cease use of the electronic message board at the U.S. Interests Section in Havana**. Alternatively, Congress could prohibit the use of any funds appropriated to the State Department for the operation of the billboard.

10) Direct the Department of State to seek to **negotiate the lifting of restrictions that constrain U.S. and Cuban diplomats** to the capital cities in which they are posted.

11) Direct the Department of State to seek to negotiate the posting of **attaches in Havana and Washington**, dedicated to security, law enforcement or agriculture-related activities.

12) Direct the Department of State to seek to negotiate the **establishment of U.S. and Cuban consulates** in, for example, Santiago de Cuba and either Miami or Los Angeles.

²⁷ Remarks by President George W. Bush: Discussion of Cuban Policy in the Rose Garden Speech (2003, October 10). Available:

http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

²⁸ McCormack, Sean, Spokesman. (2008, September 10). Daily Press Briefing. U.S. Department of State, Washington D.C. Available:

<http://www.globalsecurity.org/military/library/news/2008/09/mil-080910-stateb01.htm>

²⁹ Obama, Senator Barack. (2008, May 23). Renewing U.S. Leadership in the Americas.” May 23, 2008. Remarks. Miami, FL: Cuban American National Foundation.

Available: http://blogs.suntimes.com/sweet/2008/05/obama_latin_america_speech_in.html

³⁰ Penn, Sean. (2008, December 15). Conversations With Chávez and Castro. *The Nation*. Available: www.thenation.com/doc/20081215/penn

first step.' The U.S. President should take this step on his own, but with no threat to our sovereignty. That is not negotiable. We can make demands without telling each other what to do within our borders."³¹

Fidel Castro, too, has encouraged a Presidential-level meeting, but wrote in December, "[Obama] should be reminded that the theory of the carrot and the stick will not have any effect in our country. . . . The empire should know that our country may be turned into dust, but the sovereign rights of the Cuban people are not negotiable."³²

Given that both sides say they are willing to talk, there are numerous issues each might propose to discuss.

Human rights, political prisoners and press freedoms are often mentioned as agenda items the United States would likely press in bilateral diplomatic discussions. Raul Castro seemed to acknowledge the human rights issue in an interview he gave to actor/activist Sean Penn last fall. "'No country is 100 percent free of human rights abuses . . . [but] reports in the U.S. media are highly exaggerated and hypocritical.'" While he has rejected broad changes to the Cuban system in a negotiation with the United States, the U.S. side could potentially seek accommodation on specific cases, such as the release of certain political prisoners.

Other issues such as settlement of certified U.S. claims against the Cuban government, U.S. and Cuban immigration policies, security cooperation, and increasing U.S. diplomats' access beyond Havana, are issues that the United States might eventually want to bring to the table.

In an interview given last fall, Raul Castro put "normal trade" at the top of his agenda. On the economic front, the Cuban government would likely want every aspect of the trade embargo on the table (as well as the damage Cuba maintains it has done to the island's economy), including bans on Cuban imports, foreign assistance, financing restrictions on current U.S. exports to Cuban buyers, and intellectual property rights protection.

The Cuban government might also seek to include bilateral issues like curbing illegal migration, increasing Cuban diplomats' access beyond Washington, D.C. and cooperating on shared security threats and interests. In addition, Cuba would probably want to discuss what it views as U.S.-based, supported or tolerated terrorism against Cuba and U.S. material support for activities it views as designed to overthrow the government. The status of the U.S. Naval Base in Guantanamo would likely also be of interest.

Cuban diplomats, and National Assembly President Ricardo Alarcon chief among them, also regularly raise the case of the "Cuban Five," five unregistered agents who infiltrated exile organizations in Florida that Cuba believed to be involved in terrorist activities against Cuba in the 1990's, and who were convicted and sentenced to lengthy U.S. prison terms ten years ago.

The diplomatic mission

During his campaign, President Obama suggested easing family travel and remittance policies would represent a show of "good faith." While Raul Castro has endorsed a "gesture for gesture" approach, his Foreign Ministry does not view easing family restrictions as a gesture toward the Cuban government.³³

Perhaps the most significant good faith gesture would be to treat the U.S. Interests Section in Havana as more of a diplomatic, rather than a political, outpost. This could begin with turning off the infamous billboard flashing messages from the top floor of the U.S. Interests Section, which sits along Havana's seaside boulevard, the Malecon.

The billboard, an electronic screen with five-foot tall letters, began displaying a mixture of politically-oriented quotes and news summaries from the top floor windows of the U.S. mission back in January 2006. The idea was to provide information and commentary to the Cuban people who drive and walk by. The billboard, best visible at night, began by scrolling such messages as, "In a free country you don't need permission to leave the country. Is Cuba a free country?" And from George Orwell's 1984: "All animals are equal, but some animals are more equal than others."³⁴

³¹ Ibid.

³² Castro, Fidel. (2008, December 5). Sailing against the tide. *Granma Internacional* (online). Available: www.granma.cu/ingles/2008/diciembre/vier5/Reflexions-4dic.html

³³ Omestad, Thomas. (2009, March 10). Cuban official rules out any Obama preconditions for improved relations. *U.S. News and World Report*. (online). Available: <http://www.usnews.com/articles/news/obama/2009/03/10/cuban-official-rules-out-any-obama-preconditions-for-improved-relations.html%22>

³⁴ Roig-Franzia, Manuel. (2006, May 13). Havana's 148 Flags Prove Mightier Than the Billboard. *The Washington Post*. Available: <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051201879.html>

The Cuban government responded by hoisting 148 flagpoles flying black flags to obstruct the view of the billboard. The messages are nearly impossible to read with the flags hoisted in front of the building.

In recent months, the billboard messages have carried news rather than polemics. In January 2009, for example, the billboard flashed updates on the fighting in the Gaza Strip. Nonetheless, the billboard remains a symbolic vestige of the 43rd President's more provocative approach to Cuba.

Another significant step toward restoring diplomacy to the U.S. mission in Havana would be to seek the loosening of mutual restrictions that confine U.S. and Cuban diplomats to Washington and Havana and their immediate vicinities. The Bush Administration imposed restrictions on Cuban diplomats' movements beyond Washington, DC in October 2001 after a U.S. Defense Department official was arrested for spying for Cuba.³⁵ Cuba responded with similar restrictions on U.S. diplomats in Havana. Prior to this, both sides had maintained limits on the other country's diplomats' movements, both had generally been able to get permission to travel outside the respective capitals. For example, Cuban diplomats had met with U.S. agricultural interests in Midwestern states, and U.S. diplomats had the right to visit migrants interdicted at sea and returned to their homes outside of Havana.

Another incremental step would be for the United States to seek to exchange attachés with Cuba. The posting of agriculture attachés would be a reasonable first exchange to request. The United States might also propose that the two countries establish consulates outside of Washington, DC and Havana

Finally, the U.S. mission in Havana has also come under criticism for its use of the diplomatic pouch as a means of transferring material support, such as office supplies and equipment, to Cuban dissident activists. The Cuban government believes this to be an abuse of the diplomatic pouch which, under the Vienna Convention on Diplomatic Relations, may not be opened by the receiving country (in this case, Cuba). The Convention provides protection for such packages, so long as they "contain only diplomatic documents or articles intended for official use."³⁶

³⁵ Marquis, Christopher. (2001, October 20). U.S. restricts Cuba diplomats after spy charges. *The New York Times* (online). Available: <http://www.nytimes.com/2001/10/20/world/us-restricts-cuban-diplomats-in-capital-after-spy-charges.html?n=Top/Reference/Times%20Topics/Subjects/E/Espionage>

³⁶ Vienna Convention on Diplomatic Relations (1961, April 18). United Nations, Treaty Series, Vol. 500, pg. 95. Available: http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

III. COOPERATION ON SHARED SECURITY INTERESTS

In a post-Cold War environment, Cuba has represented a security issue for the United States not for its military connection to a foreign empire, but rather because its proximity connects it to security issues in our shared neighborhood, such as drugs, migration, and the environment.

The United States and Cuba cooperate mainly in controlling illegal migration and drug traffic, case-by-case collaboration on law enforcement matters, search and rescue, hurricane data exchange, and matters related to the Guantanamo naval base, but there is no law preventing other contacts from happening. “Outside of a handful of diplomats, military officers, and the five CGLO’s (Coast Guard Liaison Officers) that have been posted in Havana, U.S. government employees have no idea who their Cuban counterparts are, or how to contact them,” notes Randy Beardsworth, a former Assistant Secretary of Homeland Security whose career focus has been on maritime affairs.³⁷

Aside from case-by-case Coast Guard cooperation, the George W. Bush Administration broadly shunned contacts and cooperation with Cuba. One important exception came in the spring of 2003, with bilateral tensions high. Two weeks after six Cuban men hijacked a Cuban plane with more than 20 passengers aboard and diverted it to Key West, another plane was hijacked. This time, Cuban officials reached out to then-chief of the U.S. Interest Section, James Cason, to help them diffuse the crisis. Cason agreed to help, and met various top Cuban officials at the airport.

“It was the first time I had ever met any of these people,” Cason recalled. From the control tower, Cason urged the hijacker to give up his plane, telling him he would face less time in jail in Cuba if he backed down than he would in the United States if he followed through with the hijacking. “You’re not Cason,” the man responded. “The government doesn’t talk to him. I don’t believe you.” Though Cason eventually convinced the man of his identity, he was unsuccessful in dissuading the hijacker. Two U.S. F-16 jets scrambled and accompanied the plane to Key West, where the hijacker was promptly arrested.³⁸

Cooperation in numerous areas would not require legislation – though some lawmakers may be interested in authorizing or appropriating resources to particular efforts.

Coast Guard cooperation. The United States and Cuba have maintained limited Coast Guard contacts for more than two decades. In the 1990’s U.S. Coast Guard cooperation with Cuban counterparts gradually increased. In 1996, at the request of U.S. authorities, Cuban authorities took control of the Limerick, a freighter that had just left Colombia and U.S. authorities believed to be loaded with cocaine. Cuban authorities found more than 6.6 tons of cocaine. Communications were upgraded from Telex and fax to telephone, and the two sides reached agreement on the posting of a U.S. Coast Guard Liaison in Havana.³⁹

Under the Bush Administration, the U.S. Coast Guard Liaison has continued to work with Cuban authorities on a case-by-case basis to deter illegal boat traffic, including human and drug traffickers, transiting Cuban territorial waters and heading for the United States.

Coast Guard contacts have so far been immune to the heightened political tensions between the United States and Cuba in recent years, though the Bush Administration declined repeated requests from Cuba for a bilateral agreement on anti-narcotics cooperation. (Cuba has bilateral agreements with 33 other countries)⁴⁰ Former U.S. Southern Command (SOUTHCOM) Commander General James T. Hill believes that the United States should engage Cuba more on fighting drug-trafficking. “Cuba wants neither drug use nor the lawlessness that comes with the drug trade,” he wrote recently.⁴¹

³⁷ Beardsworth, Randy. (2009). U.S. Cuba Functional Relationships: A Security Imperative. In, *9 Ways for US to Talk to Cuba and for Cuba to Talk to US* (pp. 27-32). The Center for Democracy in the Americas. Available: www.scribd.com/doc/10323598/9-Ways-for-US-to-Talk-to-Cuba-and-for-Cuba-to-Talk-to-US

³⁸ Erikson, Daniel P. (2008). *The Cuba Wars: Fidel Castro, the United States, and the Next Revolution*. Bloomsbury Press.

³⁹ Peters, Philip, (2001, January 1). *U.S./Cuba Bilateral Relations: Cooperation at Arm’s Length*. The Lexington Institute. Available: <http://lexingtoninstitute.org/docs/786.pdf>

⁴⁰ Sullivan, Mark P. (2008, September 24). *Cuba: Issues for the 110th Congress*. (Congressional Research Service Report No. RL33819). Washington, D.C. Available: www.fas.org/sfp/crs/row/RL33819.pdf

⁴¹ Hill, General James T. (2009). A Time to Normalize Relations Between the U.S. and Cuban Militaries. In, *9 Ways for US to Talk to Cuba and for Cuba to Talk to US*. The Center for Democracy in the Americas. Available: www.scribd.com/doc/10323598/9-Ways-for-US-to-Talk-to-Cuba-and-for-Cuba-to-Talk-to-US

Port security cooperation. Seaport security cooperation is another area of potential cooperation, now that U.S. agricultural exports regularly arrive in Cuban ports. In April 2008, the U.S. Coast Guard determined, under the authority provided to it in the 2002 Maritime Transportation Security Act, that Cuban ports lack sufficient security. As a result of its finding, the Coast Guard began to board empty vessels returning from Cuba to the United States.⁴² Closer cooperation on seaport security could help ensure that the empty vessels are safe for U.S. reentry without impeding legal trade or necessitating such an intensive use of Coast Guard resources.

Such exchanges would prosper only in so much as they are designed for mutual benefit, not to identify shortcomings on one side that are subsequently used to block progress on bilateral cooperation. As Beardsworth points out, security cooperation takes and builds trust.

Environmental cooperation. Beardsworth suggests one way to build on the CGLO's ongoing contacts with Cuba would be to seek cooperation in marine environment protection. Through the U.S. CGLO, the Administration could begin apolitical dialogue on issues such as maritime disaster response, fisheries management, water quality and toxic waste disposal. Other agencies, such as the Environmental Protection Agency and Cuban counterparts, could be included.

Agricultural inspection and cooperation. U.S. exports of beef, wheat, seed potatoes, barley and other products are limited by differences in U.S. and Cuban sanitary and phytosanitary standards and requirements, which today require case-by-case visits by Cuban officials to resolve. If the two sides were to negotiate mutually agreed standards, an increase in U.S. agricultural exports might result.

Hurricane data exchange. Cuba's location between the Caribbean Sea and the Gulf of Mexico often places the island right in the path of hurricanes that develop in the Caribbean Sea and move into the Gulf. The U.S. National Hurricane Center and the Cuban Meteorological Institute already share data to help track developing storms. But Ivor van Heerden, Deputy Director of the Louisiana State University Hurricane Center, recommends going further.

The Warm Loop Current entering from the Caribbean Sea is one of the heat engines that makes hurricanes intensify once they enter the Gulf. Were Cuba to maintain oceanographic and weather data buoys in the Yucatan Channel between Mexico and Cuba, their data would prove invaluable. Knowing more about a storm's 3-D structure would aid our understanding of air-sea interactions and benefit hurricane scientists and prediction modelers infinitely.⁴³

Van Heerden points out that Cuba does not have access to American-made weather stations and Doppler radar systems (its weather monitoring equipment is from China and Europe). He argues that if the United States were to share such technologies with Cuba, it would produce "more and better meteorological data to improve U.S. hurricane prediction ability." The Secretary of the Treasury has the authority to license sale of such technology (under Section 515.201 of the Cuban Assets Control Regulations) provided that the Commerce Department also licenses the transfer of any technology – such as radar systems - on its Commerce Control List.

COOPERATION ON SHARED SECURITY INTERESTS

Policy options

13) Direct the Department of State, in consultation with the Department of Homeland Security, to **negotiate a formal bilateral agreement on anti-narcotics cooperation.**

14) **Seek increased bilateral contacts and cooperation on port security,** including regular technical contacts between the Coast Guard, Customs and Border Protection and other agencies and their Cuban counterparts, as appropriate and necessary.

15) Pass legislation to **give statutory authority for the Coast Guard to provide technical security assistance, (i.e. equipment or training)** to Cuban ports, as appropriate, to increase security at Cuban ports that currently have U.S.-bound (returning) vessel traffic.

16) Direct the Environmental Protection Agency, in consultation with other relevant agencies and departments, to **assess how activities in Cuba may affect the environment in the United States,** U.S. coastal waters, and the ocean environment around the United States and Cuba, and to identify possible areas of U.S. – Cuban cooperation to protect these environments.

17) Seek bilateral environmental cooperation between appropriate U.S. and Cuban agencies to **address threats, including those that could develop from deepwater oil exploration** in Cuban waters. Specific cooperation could also be authorized and funded by Congress.

⁴² U.S. Department of Homeland Security: United States Coast Guard. (2008, April 4). Port Security Advisory (4-08). Available:

<http://www.intertanko.com/upload/WeeklyNews/PortSecurityAdvisoryCuba4-08.pdf>

⁴³ van Heerden, Ivor. (2009). Avenues of Potential Cooperation Between the U.S. and Cuba on Hurricane Preparedness and Disaster Management. In, *9 Ways for US to Talk to Cuba and for Cuba to Talk to US*. The Center for Democracy in the Americas. Available: www.scribd.com/doc/10323598/9-Ways-for-US-to-Talk-to-Cuba-and-for-Cuba-to-Talk-to-US

Military to military cooperation. Ret. Gen. Charles Wilhelm, who headed SOUTHCOM from 1997–2000, once called the island of Cuba “a 47,000 square mile blind spot in our security rearview mirror.”⁴⁴ Wilhelm and fellow former SOUTHCOM commanders Ret. Gen. Barry McCaffrey and Ret. Gen. James T. Hill have each called for engagement, including military cooperation, with Cuba.

The United States has had limited but regular contacts with the Cuban military for more than a decade. The meetings, dubbed “fence line” talks because they happen at the U.S. naval base at Guantanamo, occur once a month. Last fall, Raul Castro offered a revealing look at these contacts:

We've had permanent contact with the U.S. military, by secret agreement, since 1994 . . . It is based on the premise that we would discuss issues only related to Guantánamo. On February 17, 1993, following a request by the United States to discuss issues related to buoy locators for ship navigations into the bay, was the first contact in the history of the revolution. Between March 4 and July 1, the Rafters Crisis took place. A military-to-military hot line was established, and on May 9, 1995, we agreed to monthly meetings with primaries from both governments. To this day, there have been 157 meetings, and there is a taped record of every meeting. The meetings are conducted on the third Friday of every month. We alternate locations between the American base at Guantánamo and in Cuban-held territory. We conduct joint emergency-response exercises. For example, we set a fire, and American helicopters bring water from the bay, in concert with Cuban helicopters.⁴⁵

General Hill believes that the United States should increase its cooperation with the Cuban military on security issues. He recommends inviting Cuba to participate in annual exercises that the United States conducts with more than a dozen regional partners, focused on the security of the Panama Canal. Hill also suggests eventually expanding military cooperation to humanitarian and human rights initiatives.⁴⁶

Law enforcement and extraditions. The United States and Cuba signed a bilateral extradition treaty in 1904 on the return of fugitives from justice. The treaty has not been abrogated, although it is considered to have been inoperative since 1959.⁴⁷ Because of the break in U.S.–Cuban relations, a number of U.S. fugitives have fled to Cuba particularly in the 1960s and 1970s, claiming that their cases were political in nature. Most have been allowed to remain on the island.

According to the State Department’s terrorism overview released in April 2007, the Cuban government has given assurances that it would no longer accept any fugitives from U.S. justice. The report cited Cuba’s cooperation in the case of a South Florida man who kidnapped his son in 2006 and flew him to Cuba in a stolen plane. Cuban authorities returned the son to his mother in Mexico and returned the man to South Florida for prosecution.⁴⁸

In June 2008, Cuban authorities cooperated with the U.S. Department of Homeland Security, deporting a “most wanted” fugitive involved in child sex tourism. An official with the State Department’s Bureau of Diplomatic Security (DS) heralded

18) Invigorate and regularize sanitary and phytosanitary cooperation and seek to **negotiate reciprocal standards to facilitate legal trade in agriculture.**

19) Direct the National Hurricane Center to **conduct an assessment of U.S. – Cuban hurricane information exchange**, and to make recommendations for appropriate areas of increased U.S. cooperation, including data and technology exchange.

20) Direct the State Department to initiate talks that explore the possibility of **formal cooperation on law enforcement matters**, including active law enforcement investigations and return of fugitives. Such talks could result in regular contacts through an established channel of communication, or in the posting of law enforcement attaches in Havana and Washington.

⁴⁴ Weinmann, Lissa. (2004, Spring). Washington’s Irrational Cuba Policy. *World Policy Journal*. (online). Available: <http://www.worldpolicy.org/journal/articles/wpj04-1/weinmann.html>

⁴⁵ Penn, Sean. (2008, December 15).

⁴⁶ Hill, General James T. (2009).

⁴⁷ U.S. Department of State. (2007). Bilateral Treaties in Force as of November 1, 2007. Washington, D.C. Available: <http://www.state.gov/documents/organization/83019.pdf>

⁴⁸ State Sponsors of Terrorism Overview. (2007, April 30). In, *Country Reports on Terrorism*. Washington, D.C.: Office of the Coordinator for Counter-Terrorism, U.S. Department of State. Available: http://www.state.gov/sct/rls/crt/2006/82736.htm#_ftn1

the effort: "It's this type of close, worldwide law enforcement liaison capability that gives Diplomatic Security unparalleled ability to return fugitives like Auerbach . . . Auerbach's apprehension was a direct result of law enforcement coordination and field efforts by Diplomatic Security, ICE [Immigration and Customs Enforcement], and Cuban police and immigration officials."⁴⁹

But in September 2008, after three Cuban Americans accused of defrauding the Medicare program of \$119 million fled to Cuba, bilateral cooperation seemed less clear. According to the Miami Herald, Cuban authorities had detained the three men, but "The FBI [Federal Bureau of Investigation] has not formally asked the Cuban government to turn over the Benitezes . . . because the United States does not have formal relations with Cuba."⁵⁰

The Obama Administration could encourage such cooperation by regularizing bilateral law enforcement contacts and cooperation. Given that both the U.S. and Cuban governments want the return of higher value and more controversial fugitives, successfully building trust and coordination on less controversial cases is a necessary first step. Eventually, the Administration may hope to win the return of some of the more notorious U.S. fugitives (such as Joanne Chesimard, wanted for the murder of a New Jersey State Trooper). It is likely that Cuban authorities will want the extradition of Cuban exiles living in Miami wanted on terrorism charges in Cuba and Venezuela. Another option could be for the United States to seek the return of certain U.S. fugitives in exchange for commuting the sentences of the Cuban Five.

⁴⁹ U.S. Immigration and Customs Enforcement. Cuba deports ICE 'Most Wanted' fugitive sought on sex tourism charges in U.S. (2008, June 16). <http://www.ice.gov/pi/news/newsreleases/articles/080616miami.htm>

⁵⁰ Weaver, Jay. (2008, September 30). Brothers wanted in Medicare Fraud detained in Cuba. *The Miami Herald*. Available: <http://www.aegis.com/news/mh/2008/MH080906.html>

IV. DEMOCRACY-BUILDING ACTIVITIES

Section 620 of the Foreign Assistance Act of 1961 prohibits any assistance to the government of Cuba until appropriate compensation for expropriated U.S. properties has been made. Section 620A of the Foreign Assistance Act also prohibits direct government-to-government aid to countries designated by the State Department as “state sponsors of terrorism.”

However, the U.S. government does provide aid to people in Cuba. As authorized by Section 109 of the 1996 Helms-Burton Act, the State Department and U.S. Agency for International Development (USAID) provide assistance through U.S.-based and third country nongovernmental organizations to declared political opposition groups, independent librarians, journalists, economists, and to families of political prisoners, and to fund transition studies and conferences in the United States and Europe.⁵¹ Often, the U.S. Interests Section in Havana has played a role in distributing resources, such as handing out short-wave radios or providing access to the Interests Section for activists in Cuba to organize, study or use the Internet.

During President George W. Bush’s two terms in office, USAID’s Cuba program quadrupled its budget, to include more material assistance to island-based activists and political prisoners, through U.S. and third-country based nonprofit organizations, and funding transition studies and conferences in the United States and Europe.

But the program has its difficulties. A 2006 investigation by the Government Accountability Office found instances in which grantees were sending questionable USAID-financed donations, such as cashmere sweaters, Godiva chocolates and Nintendo Playstations, to dissidents in Cuba. In 2008, two grantees, the Center for a Free Cuba and the Grupo de Apoyo a la Democracia, faced allegations that employees had stolen program funds for personal use.⁵² (Felipe Sixto, who had worked as Chief of Staff at the Center for a Free Cuba was convicted of embezzling USAID funds and sentenced to two and a half years in prison in March 2009.⁵³)

In March 2008, the Cuban American National Foundation study found that less than 17 percent of USAID funding for democracy in Cuba actually reaches the island, and that most funding pays instead for U.S. organizations’ operating costs and off-island transition studies.⁵⁴ (Some grantees responded that their programs are intended to operate in third countries, and their resources help build support networks for the Cuban opposition.)

Cuban charges against dissidents

USAID’s written profile of the Cuba program lays out a key challenge to its success:

[During] the decades of the Cold War, U.S. efforts to promote U.S. foreign policy in the closed societies of the Communist bloc were carried out in substantial part by agencies that operated covertly. In contrast, the USAID Cuba Program, parts of which appear to be modeled on the Eastern European transition experience, operates publicly and openly, subjecting it and its grantees to counter pressures, criticism, policy debates, and occasionally complicating publicity.⁵⁵

From the Cuban government point of view, democracy activists who associate with the U.S. Interests Section in Havana, or who accept support from USAID grantees, are “mercenaries” collaborating with or in the pay of a hostile government. Cuban law prohibits such cooperation.⁵⁶ Cuban government surveillance, infiltration, marginalization and incarceration of dissident actors are common. Such efforts have been arguably very successful in helping to limit the dissidents’ reach among everyday Cubans.

⁵¹ For a recent overview of major USAID Cuba program grant programs, visit:

http://www.usaid.gov/locations/latin_america_caribbean/country/cuba/overviewupdate.html

⁵² Berman, Congressman Howard L. (2008, June 27). Letter to the Honorable Henrietta Fore, Committee on Foreign Affairs. United States Congress. Available: <http://www.lexingtoninstitute.org/docs/814.pdf>

⁵³ Holland, Jesse. (2009, March 18). Former Bush aide gets 30 months for stealing from Cuban democracy advocates. Associated Press. Available: http://seattletimes.nwsourc.com/html/nationworld/2008878870_apcuba.html

⁵⁴ The Cuban American National Foundation. (2008, March). *Findings and Recommendations on the Most Effective Use of USAID-CUBA Funds Authorized by Section 109(a) of the Cuban Liberty and Democratic Solidarity (Helms-Burton) Act of 1996*. Available:

http://www.usaengage.org/storage/usaengage/Publications/2008_03_usaid_funds_canf_report.pdf

⁵⁵ USAID. (2006). Profile of the USAID Cuba Program. USAID (online). Available:

www.usaid.gov/locations/latin_america_caribbean/country/pubs/program_report/profile.html

⁵⁶ Gaceta Oficial de la Republica de Cuba, Ministerio de Justicia. (online). Libro II Especial Delito, Titulo I: Delitos contra la Seguridad del Estado. Available: http://www.gacetaoficial.cu/html/codigo_penal.html#A6

Most opposition groups are relatively small in number, and their vigils, protests and other official acts of civil disobedience generally fail to draw many participants. In 2006, Lexington Institute Vice President Philip Peters analyzed the annual reports of the Cuban Democracy Directorate, a USAID grantee that tracks acts of opposition and civil disobedience in Cuba, and noted:

Its latest report showed a 36 percent increase in the number of opposition actions between 2003 and 2004, from 1,328 to 1,805. However, the report described a decrease in the "intensity" of those actions because most - 1,701, or 94 percent - are vigils in homes on behalf of political prisoners, protests carried out by prisoners themselves, or similar activities. Meanwhile, acts of more direct confrontation with the government declined 74 percent between 2002 and 2004. (The private vigils account for more than 1,300 of the actions. The report documents 26 per week, cutting and pasting verbatim two pages of text that repeat the same details for each vigil every Wednesday throughout the year . . .)⁵⁷

Cuban opposition, and U.S. aid to it, faces other challenges. The dissident community is known to be fractious, competitive, and often unable to agree on basic organizing principles.⁵⁸ There is also a perception in Cuba, fanned by government officials and media, that dissident activists mainly focus their efforts on – and only enjoy support among – foreign governments and media, and not among the Cuban people.

According to the Miami Herald, a 2007 State Department Inspector General assessment of U.S. broadcasting to Cuba revealed that Radio and TV Marti may not always rely on information obtained from dissidents: “The report says information obtained from dissidents or independent journalists in Cuba, while important, is a ‘threat’ to Radio and TV Marti’s credibility because some dissidents may ‘seek to further their own causes’ while others may be Cuban government agents posing as dissidents.”⁵⁹

Aid’s unintended consequences

Cuban opposition groups suffered a major setback in 2003 when the Cuban government arrested 75 nonviolent democracy activists and other independent actors. Cuban counterintelligence agents who had infiltrated dissident groups (including the personal secretary to dissident Martha Beatriz Roque, founder of the Cuban Institute of Independent Economists) revealed themselves and testified against some of the accused. Manuel David Orrio, an independent journalist who had been in frequent contact with the U.S. Interests Section in Havana and benefited from USAID resources, was among the government agents. The dissidents were convicted of colluding with a hostile foreign government against the state and received sentences between 6 and 28 years in jail.⁶⁰

The 2003 crackdown sparked a debate about whether U.S. aid was helping or harming Cuban dissident activists. A former chief of the U.S. Interests Section in Havana and outspoken critic of U.S. Cuba policy, Wayne Smith, argued that U.S. outreach to dissidents in Cuba should not be modeled on U.S. assistance to Polish dissidents before the collapse of the Soviet Union. “It worked in Poland because

DEMOCRACY-BUILDING ACTIVITIES

Policy options:

21) Adopt near-total **competitive solicitation** of grant applications related to Cuba programs.

22) Within USAID, **institute strict reviews of Cuba program grantees prior to grant approvals**, and ensure follow-up on review weaknesses identified.

23) Embrace **monitoring and evaluation methods that assess the relative progress of the program and grant-specific goals**, rather than measuring success by quantities of materials delivered.

24) Insist on close communication between the U.S. Interests Section (USINT) in Havana and the appropriate State Department or USAID grant managers, to **ensure USINT input into grant award and, as appropriate, its implementation**, and full cognizance by USINT of any involvement in grantee activities.

25) **End the use of the diplomatic pouch for the delivery of materials not directly related to diplomatic or consular functions**, unless for strictly humanitarian purposes (e.g. to deliver correspondence to political prisoners and their families). Such deliveries, including any deliveries of USAID grantee material support to the island, should be routed through third countries or legally licensed, non-governmental U.S. travelers to the island.

⁵⁷ Peters, Philip. (2006, June 26). Issue #20 Transition: A Second Crack. Lexington Institute (online). Available: <http://www.lexingtoninstitute.org/903.shtml>

⁵⁸ For a summary of various dissident groups’ reform proposals since 2002, see: Cubasource. (2008, August). Spotlight on Cuba: Planning for the Post Castro Era. The Canadian Foundation for the Americas. Available: www.cubasource.org/publications/spotlight/postcastro/oo_e.asp

⁵⁹ Marti extending its reach, U.S. says. (2007, June 20). *The Miami Herald*. Available: http://www.flacso.org/hemisferio/al-eeuu/boletines/02/74/re1_06.pdf; A redacted version of the referenced Inspector General report is available at: <http://oig.state.gov/documents/organization/89909.pdf>

⁶⁰ Newman, Lucia. (2003, May 8). Cuba’s Climate of Paranoia. CNN (online). Available: <http://www.cnn.com/2003/WORLD/americas/05/08/cuba.dissidents/>

the adversary of Poland nationalism was the Soviet Union," Smith argued. "But in Cuba the adversary of Cuban nationalism is the United States."⁶¹

In 2004 and 2006, the Bush Administration's Commission for Assistance to a Free Cuba called for dramatic funding increases for democracy-building activities. Cuban National Assembly President Ricardo Alarcon reacted, "Imagine that someone in the U.S. were to be supported, trained, equipped and advised by a foreign government, that in itself would be a crime. It would be a serious crime in the U.S., punished with far more years in prison than here in Cuba."⁶²

Reaction among dissidents was mixed. Vladimiro Roca, a former political prisoner and founder of the Social Democrat Party, welcomed increased U.S. aid: "We need materials, equipment, clothes, everything."⁶³

Miriam Leiva, an independent journalist who helped found the Havana-based Ladies in White organization after her husband was among the 75 dissidents jailed in 2003, rejected the increased aid:

Did the Bush Administration ask for the opinion of internal dissidents when the Commission for Assistance to a Free Cuba crafted its report? No. Will the measures hurt the Castro regime? No. Instead, the Cuban people will suffer from the effects of the measures, and more political dissidents could be sent to prison.⁶⁴

What role for USAID?

In addition to considering the USAID program's effectiveness, the Administration will confront the fact that the program itself is an obstacle to engagement because it has been framed as an instrument of regime change, and the Cuban government regards it as a security threat.

As a candidate for President last fall, then-Senator Obama promised that underperforming and nonperforming programs would be cut or decreased. Given the USAID Cuba program's challenges and questionable performance record, the Administration and Congress could consider reducing or eliminating the funding, perhaps maintaining aid to families of political prisoners in Cuba.

Another approach would be to refocus the programming on new objectives, such as broader civil society building efforts, including people-to-people contacts closed off by the Bush Administration, academic exchanges, and private entrepreneurship assistance such as training or and micro-lending.

Using USAID funds to launch university-level and other academic or professional research scholarships could backfire if Cuba views them as just another way of trying to undermine its economic and political system. While academic exchanges might offer a new direction for a faltering USAID program, such efforts may find more success when they are not associated with the U.S. government. In 2004, the Bush Administration announced a community college scholarship program for Cuban students, focused on children of dissidents and political prisoners. Because the Cuban government bureaucracy approves or denies foreign travel for Cuban citizens, only one student came to study in the United States during the program's first two years.⁶⁵

In 2008, the State Department announced it would include Cuban students in an existing Latin America-focused scholarship program. How many Cuban students are able to participate may signal whether Cuba views this approach as a significant enough departure from the previous Administration's regime change-based policies.

Micro-lending and other forms of assistance to entrepreneurs and farmers are natural options for U.S. assistance programs. But in the case of Cuba, there are two obstacles: Cuba's own state-centered economic policies, and Cuban suspicion that such assistance might have at its root a political objective.

⁶¹ Associated Press. (2003, April 13). U.S. aid to Cuba dissidents may do more harm than good. Fox News (online).

<http://www.foxnews.com/story/0,2933,84057,00.html>

⁶² Cuba warns dissidents over US aid. (2006, July 12). BBC (online). Available: <http://news.bbc.co.uk/2/hi/americas/5171836.stm>

⁶³ Ibid.

⁶⁴ Leiva, Miriam. (2004, May 24). Whose country is it, anyway? *Salon.com*. Available:

<http://dir.salon.com/story/opinion/feature/2004/05/24/cuba/index.html>

⁶⁵ Cuba thwarts U.S. efforts to help dissidents. (2006, November 16). *The Miami Herald*. Available: http://www.flacso.org/hemisferio/al-eeuu/boletines/01/50/rel_03.pdf

Given the abundance of U.S.-Cuban people-to-people programs during the 1990's, the Administration could simply encourage broad civil society contacts without dedicating USAID funds to them. And if the Obama Administration continues U.S. aid to dissidents, it could reduce publicity, to avoid making recipients targets of Cuban government opposition and negative publicity.

Direct diplomacy

One approach the United States has not employed on human rights is direct diplomacy. The Cuban government has, in the past, released political prisoners at the request of other parties. The Government of Spain has had some recent success securing release of political prisoners – though only Hector Palacios appears to have been allowed to stay in Cuba (Palacios was released for medical treatment in Spain in 2007, and after traveling in Europe and to the United States, he returned to Cuba). While the two governments have maintained a dialogue on human rights, Spanish Foreign Minister Miguel Angel Moratinos characterized the February 2008 release of seven Cuban prisoners as a “unilateral” decision by the Cuban government.⁶⁶

Raul Castro has indicated his willingness to discuss human rights concerns with the United States. Raul Castro recently commented that Cuba would consider releasing political prisoners in exchange for the release of the Cuban Five.⁶⁷ In February 2008, Cuba signed two United Nations human rights covenants (which Fidel Castro previously opposed) and pledged to allow human rights monitoring by the United Nations Human Rights Council.⁶⁸ In April 2009, Raul Castro struck a conciliatory note: “We have sent word to the U.S. government in private and in public that we are willing to discuss everything - human rights, freedom of the press, political prisoners, everything. We could be talking about many other things,” he added. “We could be wrong, we admit it. We're human beings.”⁶⁹

The independent Cuban Commission for Human Rights and Reconciliation, run by longtime activist Elizardo Sanchez, has reported a decline in political prisoners under Raul Castro: in 2006, there were 316, compared with 205 now. Sanchez believes that the Cuban government has moved away from long-term prison sentences and instead employs “low-intensity political and social repression in the form of hundreds of short-term arbitrary detentions.”⁷⁰

The relative shift in Cuban government tactics may offer an opening for U.S. diplomats to seek a dialogue that includes human rights. But dialogue on human rights will likely only bear fruit against a broader backdrop of constructive engagement between the two countries.

⁶⁶ Valdes, Rosa Tania. (2008, February 15). Cuba to free seven dissidents at Spain's request. Reuters. Available:

http://www.boston.com/news/world/latinamerica/articles/2008/02/15/cuba_to_free_7_dissidents_at_spains_request/

⁶⁷ Cuba seeks deal with U.S. on prisoners. (2008, December 18). BBC News (online). Available: <http://news.bbc.co.uk/2/hi/americas/7790926.stm>

⁶⁸ Cuba signs human rights pledges. (2008, February 28). BBC News (online). Available: <http://news.bbc.co.uk/2/hi/americas/7270179.stm>

⁶⁹ Snow, Anita. (2009, April 16). Relations between U.S., Cuba seem within reach. Associated Press. Available:

http://news.yahoo.com/s/ap/20090417/ap_on_re_la_am_ca/cb_us_cuba

⁷⁰ Snow, Anita. (2009, Feb. 2). Reported number of Cuban political prisoners dips. Associated Press. <http://www.wtop.com/?nid=105&sid=1590781>

V. EXTRATERRITORIAL SANCTIONS AND MULTILATERAL INSTITUTIONS

For three decades, the U.S. embargo on Cuba affected nearly all bilateral trade. But in the 1990's, some in Congress reasoned that it would be possible to collapse the Cuban government by cutting the flow of aid and investments from abroad, so sanctions were applied to third-country actors as a means of squeezing Cuba's economy. Provisions that punished the actions of individuals not subject to U.S. jurisdiction – as contained in the 1992 Cuban Democracy Act and the 1996 Cuban Liberty and Democratic Solidarity (Helms-Burton) Act – have met with indignation from U.S. allies.

Aid, trade and property

Section 1704(b) of the 1992 Cuban Democracy Act authorizes the President to withhold foreign assistance, arms sales or assistance under the Arms Export Control Act, or debt reduction assistance to any country that provides assistance to Cuba. While this provision was designed to influence the actions of other countries towards Cuba, it has actually been put to little use. Repealing it would have more symbolic value to Cuba and its trade partners than any actual effect on any targeted country.

The Cuban Democracy Act (Section 1706 (a)) prohibits subsidiaries of U.S. companies located in third countries from doing business with Cuba, and allows the President to make exceptions only for medicines or telecommunications equipment needed for communication between the United States and Cuba. Foreign subsidiaries had been allowed to trade with Cuba since 1975, when President Ford lifted what had been an executive branch-only ban on such trade.

Title III of the Cuban Liberty and Democratic Solidarity (Helms-Burton) Act allows U.S. nationals to bring suit in U.S. courts against individuals and companies who “traffic” in (which includes benefiting from) property that was confiscated by the Cuban government. Eligibility to file suit is not limited to claimants who were U.S. nationals at the time of the confiscation (international law does not recognize foreign claims brought by a country in which the claimant was not a national at the time of confiscation).⁷¹ The provision may be terminated when the President certifies to Congress that a democratic government exists in Cuba.

Title IV of the Helms-Burton Act also denies entry to the United States for foreign nationals, including “a corporate officer, principal, or shareholder” of an entity that has trafficked in confiscated property, as well as the spouse or minor children of a person so described.

The extra-territorial judicial reach of the Helms-Burton provisions infuriated foreign governments. Two Canadian Members of Parliament introduced a bill mocking the U.S. law, allowing descendants of Canadians who had lost property in the American Revolution to sue in Canadian courts any U.S. entities trafficking in the properties today.⁷² The Canadian Parliament, as well as the European Parliament, eventually passed legislation to block its citizens from complying with the provisions of Helms-Burton.⁷³

President Clinton signed the Helms-Burton bill into law only after the addition of a Presidential waiver for Title III. He and President George W. Bush each waived the provision semiannually throughout their Administrations, and it has never taken effect.

Trademark rights

One of the most controversial extraterritorial provisions of the U.S. embargo is Section 211, a provision dealing with Cuban trademarks. Supporters insist the law is necessary to keep the Cuban government from benefiting from trademarks associated with uncompensated confiscations. Its detractors argue the law violates several U.S. treaty obligations on intellectual property rights, and that it was enacted to settle a court battle over the U.S. rights to a rum label, Havana Club.

⁷¹ For analysis of the Act's provisions on U.S. claims see: Greenburg Traurig LLP. (1996, March 18). Greenburg Traurig Alert: New U.S. Cuba-Related Law Creates Statutory Cause of Cuban-Made Confiscated Property, New Risks for Companies Trading with Cuba or in Cuban-Made Products. (memorandum). Available: http://www2.gtlaw.com/pub/alerts/1996/alert_3_18_96.html

⁷² The Godfrey-Milliken Bill, BILL C-339. House of Commons of Canada. (1996). Available: http://web.textfiles.com/politics/NWO/nwo_0012.txt

⁷³ Canada and Mexico join to oppose U.S. law on Cuba. (1996, June 13). *The New York Times*. Available: <http://www.anthonypalma.com/articles/nyt/cuba/06131996.html>; and, Hillyer, Mike, and Miller, Vaughne. (1998, December 14). *Research Paper 98/114: Cuba and the Helms Burton Act*. House of Commons Library. Available: <http://www.parliament.uk/commons/lib/research/rp98/rp98-114.pdf>

Havana Club rum was first produced by the Arechabala family of Cuba before the Cuban Revolution. After most of the family left Cuba in 1959, the Castro government expropriated the rum factory. While the Cuban government began registering the Havana Club trademark in dozens of other countries during the mid-1960s, the Arechabala family held on to the U.S. trademark rights. But in 1973, the family did not renew its registration. Because the original owner of the mark allowed the U.S. rights to lapse, the Cuban government-owned Cubaexport was able to register the Havana Club name in 1976. Cubaexport entered into a worldwide distribution relationship with Pernod Ricard in 1993, forming the joint venture Havana Club Holdings (HCH). The U.S. Patent and Trademark Office approved the transfer of the trademark to HCH in 1995, though the embargo continued to impede sales in the U.S. market.⁷⁴

In 1995, Bacardi began to bottle rum under the Havana Club name for sale in the United States. HCH filed suit against Bacardi for trademark rights infringement in 1996. In 1997, Bacardi bought what it considers to be the true trademark rights to the Havana Club name from the Arechabala family, now living in Spain.

In 1998 Section 211 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, became law. Section 211 denies protection in the United States to “a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial names, or the bona fide successor-in-interest has expressly consented.” The law prohibits payment for registration of such rights and also prohibits U.S. courts from hearing any trademark claim brought by foreign nationals to defend their U.S. trademarks in the United States, if those marks are “substantially similar” to a mark that was used in connection with confiscated assets – unless the original owner of the mark has expressly consented.

As a result of the law, the judge hearing HCH’s claim against Bacardi was forced to dismiss the case without ruling on who might be the legal owner of the trademark. HCH has attempted to renew its trademark registration with the U.S. Patent and Trademark Office (USPTO) but Section 211 blocks the USPTO from accepting payment for the renewal. In the meantime, Bacardi has sought to acquire the Havana Club trademark.

In January 2002, a World Trade Organization (WTO) dispute panel found that the law violated WTO rules against discriminatory treatment of foreign nationals compared with another country’s nationals, or compared with the country’s own citizens. Disagreements about how to comply with the ruling have stalled legislative action. In 2004, Senator Pete Domenici (R-NM) introduced legislation to amend Section 211 so that it applies to U.S. nationals. Domenici argued that this change would bring the United States back into compliance with WTO rules, without “giving affect to foreign confiscations.”⁷⁵

While the legislation offered by Senator Domenici could bring the United States back into compliance with its WTO commitments, critics argue that it would make bad legislation worse, by putting U.S. trademark holders in a position of demonstrating proof positive that the trademarks they hold today are not connected in any way with confiscated Cuban properties. They also argue that the Castro government cannot confiscate legally registered and continuously maintained U.S. trademark rights.

EXTRATERRITORIAL SANCTIONS

Policy Options:

26) **Repeal Title III of the Cuban Liberty and Democratic Solidarity (Helms-Burton) Act**, which if not waived by the president semiannually, allows Cuban Americans to sue in U.S. courts foreign entities whose businesses in Cuba involve properties expropriated from them by the Cuban government.

27) **Repeal, or amend to provide presidential waiver authority to, Title IV of the Helms-Burton Act**, in particular, Section 401 (a)(2) and (3), which affect officers and shareholders (and their families) of foreign companies which have a controlling interest in an entity that traffics in property that belonged to a U.S. national.

28) **Repeal Section 1704 (b) of the Cuban Democracy Act**, which gives the president the authority to restrict U.S. foreign assistance to other countries that give assistance to Cuba—including concessional sales or loans.

29) Using existing executive authority, **provide a general Treasury Department license for vessels that have entered a port in Cuba within the previous 180 days to enter and load or offload approved freight at a U.S. port**, provided that the U.S. Coast Guard and Customs and Border Protection have appropriate security measures in place to monitor and process such vessels. Alternatively, Congress could repeal Section 1706(b) of the Cuban Democracy Act, which prohibits vessels from entering or offloading in U.S. ports if they have stopped in Cuban ports within 180 days, unless licensed by the Treasury Department.

⁷⁴ Radelat, Ana. (2007, May 1). Long-running rum war between Bacardi, Pernod Ricard shifts to federal courts. *Cuba News*. Available: www.articlearchives.com/government/government-bodies-offices-us/973849-1.html.

⁷⁵ Domenici, Senator Pete V. (2004, April 29). Congressional Record-S4702. Remarks to the United States Senate. Available: http://bulk.resource.org/gpo.gov/record/2004/2004_S04702.pdf

The U.S. Chamber of Commerce and the National Foreign Trade Council (NFTC) have called for the repeal of Section 211. NFTC President Bill Reinsch argues that repealing Section 211 would return the rum label dispute to where he believes it is best settled: in court.

Reinsch argues that Section 211 also violates the Inter-American Convention for Trademarks and Commercial Protection, and that the law “will encourage the Cuban government to discriminate against the thousands of American trademarks registered in Cuba by hundreds of U.S. companies.”⁷⁶ Though the Cuban patent office has continued to recognize and register U.S.-owned trademark rights in Cuba, Fidel Castro once held out the threat of retaliatory action: “I hope no one complains if one day we begin to produce Coca-Cola. We might be able to make it better, and on the can we'll put: Cuban Coca-Cola.”⁷⁷

U.S. opposition to Cuban membership in multilateral institutions

The 1992 Cuban Democracy Act (Section 104) requires the U.S. government to oppose Cuban membership in international financial institutions such as the International Monetary Fund and the World Bank. (Inclusion on the U.S. list of state sponsors of terrorism carries with it the same policy.) The Act further instructs the withholding of payments to such institutions if they provide assistance to a non-democratic government of Cuba.

It is unclear whether the government of Cuba actively wants to join such institutions, having withdrawn from the World Bank and its affiliate institutions in late 1960. Under Fidel Castro, the Cuban government has been highly critical of international financial institutions.

Section 105 of the Cuban Democracy Act also suggests that the United States oppose Cuban re-entry into the Organization of American States (OAS) (Cuba remains a member, but its membership was suspended in 1962), but it does not compel such opposition. However, Raul Castro recently indicated that he does not desire full participation in the OAS.⁷⁸

With its invitation to join the Rio Group (made up of Central and South American countries, and Haiti) in November 2008, Cuba is more integrated in the region than it has been in decades. The Rio Group does not include the United States and Canada, and is often described as an alternative to the OAS. Raul Castro was warmly received at the Rio Group Summit in January 2009, when the group issued a unanimous condemnation of the U.S. embargo on Cuba.⁷⁹

Even if the Cuban government sees no benefit in rejoining the OAS, the United States might garner goodwill across the region for ending its opposition to Cuba's re-entry. Adopted in 1992, the Inter-American Democratic Charter, which calls for all member governments to support and defend the democratic order region-wide, could present an obstacle to restoring Cuba's membership. But with the United States' opposition dropped, the OAS member states would have reason to begin a dialogue with Cuba on democracy and its membership status.

30) Repeal Section 211 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, which denied foreign claimants the right to register or renew trademark rights, and access to U.S. courts to defend trademark rights, if the trademarks in question are associated with property that was confiscated by the Cuban government.

31) End U.S. opposition to Cuba's official re-entry into the Organization of American States.

⁷⁶ Statement by NFTC President Bill Reinsch on the Introduction of S. 1806 to Repeal Section 211. (2007, July 18).

http://www.usaengage.org/index.php?option=com_content&task=view&id=103&Itemid=78

⁷⁷ Radelat, Ana. (1999, June 1). Decision on Trademark Rights for a Rum Spurs a Global Dispute. *The New York Times* (online). Available:

<http://www.nytimes.com/1999/06/01/business/decision-on-trademark-rights-for-a-rum-spurs-a-global-dispute.html>

⁷⁸ Raul Castro: Cuba will not join OAS. (2009, April 16). Escambray Digital. (online). Available: <http://escambray.cu/Eng/news/Craulalba0904161236.htm>

⁷⁹ Latin American Leaders demand U.S. end Cuban embargo. (2008, December 17). AFP. Available:

<http://www.google.com/hostednews/afp/article/ALeqM5hzmHNLJ9NagoxIhCddZeUUWiYVYg>

VI. GUANTANAMO NAVAL BASE

The United States first gained access to the Cuban territory that would become Guantanamo Naval Base when it intervened in the Cuban war for independence from Spain. After the Spanish had been driven out, Cuba's first President, Tomas Estrada Palma (also a U.S. citizen), signed a lease agreement in February 1903 granting the United States a 45 square mile area at the Bay of Guantanamo for its exclusive and perpetual use for naval or coaling stations.⁸⁰ The agreement grew out of a U.S. law, the "Platt amendment," passed in 1902 and also added as an appendix to the Cuban constitution, which gave the United States basing rights in Cuba. An updated version of the lease, signed in October 1903, set the rent for the base at \$2,000 a year.⁸¹

The February 1903 lease agreement stated that while the United States recognized Cuba's "ultimate sovereignty" over the territory, the United States would retain "complete jurisdiction and control" over the land while in use. In 1934, the United States and Cuba signed a friendship treaty which affirmed the continuance of the 1903 lease agreements, adding that:

So long as the United States shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to modifications of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.⁸²

The United States maintains that it has the right to the base under the 1934 friendship treaty. Critics argue that the U.S. government did not obtain open-ended basing rights in Cuba under fair circumstances. The United States only withdrew its troops from Cuba in 1902 after the fledgling Cuban government included in its constitution nearly unlimited U.S. intervention rights along with basing rights at Guantanamo. Critics also point out that it is hypocritical for the United States to maintain a military presence in Cuba on the basis of a "friendship" treaty when the two countries have not been friends for decades. Fidel Castro's government accepted one U.S. lease payment, but thereafter, considered the U.S. presence at Guantanamo to be illegal.

The U.S. naval base at Guantanamo has served a number of purposes over the years. After the end of the Cold War, its geostrategic importance declined. In the 1990's, the base was used to temporarily house Haitian and Cuban refugees. After the September 11, 2001 terrorist attacks on the United States, the Bush Administration began using the naval base at Guantanamo to house suspected terrorists. The Cuban government did not protest the new mission for the base, and then-Defense Minister Raul Castro promised to cooperate with the United States should any of the detainees escape from the base.⁸³

On January 22, 2009, President Obama signed an Executive Order to close the enemy combatant detention facility at Guantanamo. But the Obama Administration has not signaled plans to shut down the base itself or return the territory on which it operates to the government of Cuba.

Even if the United States has no strategic use for the base, maintaining the U.S. presence there could offer leverage in potential negotiations with the Cuban government. Yet, return of the territory occupied by the U.S. base might not be a high priority to the Cuban government. The U.S. base conveniently reinforces Cuban allegations of U.S. imperialist intentions toward Cuba. Raul Castro himself has signaled his ambivalence, "The base is our hostage. As a President, I say the U.S. should go. As a military man, I say let them stay," he said last fall.⁸⁴

⁸⁰ Lease of Coaling or Naval Stations. (1903, February 23). Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

⁸¹ Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda. (1903, October 6). Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

⁸² Treaty between the United States of America and Cuba. (1934, June 9). Washington, D.C. Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

⁸³ Cuba's Raul Castro confident of humane treatment of Taleban at Guantanamo. (2002, January 22). BBC News Online. Available: <http://www.cubanet.org/CNews/y02/jan02/22e7.htm>

⁸⁴ Penn, Sean. (2008, December 15).

One option would be to re-negotiate the lease with an end date ten years from now – when current political players on both sides will likely have rotated out of the picture. Such an offer from the United States would still represent a significant gesture toward Cuba without forcing either side to deal with repercussions of an immediate U.S. abandonment of the base. It would no doubt signal both sides' willingness to redefine the bilateral relationship, without forcing next steps, like lifting economic sanctions.

Guantanamo Naval Base will surely be a topic for negotiation in eventual normalization talks with Cuba. But ahead of full normalization, the naval base presents the U.S. President with an opportunity to unilaterally take a first step in redefining U.S.–Cuban relations. Doing so would not require legislative action by the U.S. Congress or the participation of the Cuban government.

GUANTANAMO NAVAL BASE

Policy options:

32) Announce the **unilateral closure of Guantanamo Naval Base** and withdrawal of American personnel from the base, affirming that the American departure signifies the **abrogation of the 1903 lease**.

33) Offer to **renegotiate the terms of the lease with the Cuban government**, with a lease end date ten years hence.

VII. IMMIGRATION AND TEMPORARY ENTRY

In the first years following the Cuban revolution, thousands of Cubans fled the island to escape persecution by a new government by which they felt threatened, and were granted parole, or admitted to the United States on what was assumed would be a temporary basis.

But after several years went by, it became clear that these first Cuban refugees would not be going home any time soon. In 1966, Congress passed the Cuban Refugee Adjustment Act (commonly referred to as the Cuban Adjustment Act), which allowed that any Cuban who had been paroled into the United States after January 1, 1959 and had been in the United States for one year “may be adjusted by the Attorney General” to permanent residency status (provided they are not otherwise inadmissible).⁸⁵

Under successive Administrations, the U.S. Department of Justice has continued to grant parole to Cuban migrants regardless of their legal status (although, in the 1990’s, the Clinton Administration stopped admitting Cubans found at sea, a practice continued by the Bush Administration). Successive Administrations have also continued to use authority under the Cuban Adjustment Act to give Cuban parolees in the United States permanent residency within one year of their arrival.

As a result, Cuba is the only country in the world from which its nationals can arrive in the United States illegally, be virtually assured of remaining in the country without proving a case of persecution, and after one year, adjust to legal permanent resident status.

Section 606 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 states that the Cuban Adjustment Act may only be repealed upon the President’s determination that a “democratically elected government in Cuba is in power.”⁸⁶ But the law need not be repealed for the attorney general to choose not to use the authority it grants to automatically adjust all admissible Cuban émigrés, and there is no law *requiring* the attorney general to parole in all Cubans who arrive on U.S. soil.

Migration crises and accords

In 1980, a group of Cubans crashed a bus into the Peruvian Embassy in Havana in order to forcibly gain access and asylum. The incident sparked riots, and for a time, Fidel Castro’s government allowed any Cubans who wished to emigrate to do so through the port of Mariel. The government released more than 2,000 criminals and mental institution patients (considered “excludable” by U.S. immigration officials), who boarded overcrowded boats along with thousands of Cubans whose friends and family had sent for them. More than 120,000 Cubans reached the United States before the Cuban government closed the port again. It would take the Reagan Administration nearly two full terms to negotiate and implement an agreement with Cuba for deportation of many of the Mariel excludables and for the resumption of U.S. processing of Cuban immigrant visas (The agreement was originally completed in 1984, but was suspended for several years by the Cuban side in reaction to the initiation of U.S. broadcasting to the island).⁸⁷

After the collapse of the Soviet Union, the Cuban economy, which was highly dependent on preferential trade relationships with the Eastern Bloc, imploded. The ensuing crisis triggered a rafter exodus from Cuba to Florida during the height of summer of 1994. Tens of thousands of Cubans left the island on anything that would float, overwhelming the U.S. Coast Guard, and in turn overwhelming authorities in South Florida and at the Guantanamo Naval Base, where the Coast Guard brought interdicted migrants. In an effort to end the crisis, the Clinton Administration negotiated a migration accord with the government of Cuba in 1994, and a second one in 1995.

⁸⁵ See 8 USC § 1255. Available: http://www4.law.cornell.edu/uscode/html/uscode08/usc_sec_08_00001255---000-.html; see also, Wasem, Ruth Ellen. (2006, January 19). Cuban Migration Policies and Issues. (Congressional Research Service Report No. RS20468). Washington, DC. Available: <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9147:1>

⁸⁶ Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes (1996, September 30). H.R. 3610, Division C, Section 606, 104th Congress, 2nd Sess. Available: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.104.pdf

⁸⁷ Statement by Principal Deputy Press Secretary Speaks on an agreement with Cuba concerning immigration and refugee matters. (1984, December 14). Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=39489>; see also, Skoug, Kenneth. (1996). *The United States and Cuba under Reagan and Schultz*. Greenwood Press; and, de la Cova, Antonio R. (1997). U.S. – Cuban Relations during the Reagan Administration. In, Schmertz, Eric J., Datlof, Natalie and Ugrinsky, Alexej. (Ed.), *President Reagan and the World*. Westport, CT: Greenwood Press.

To encourage legal immigration, the U.S. agreed to facilitate immediate family visas and issue at least 20,000 immigrant visas annually to Cubans. Cuba agreed to “take effective measure in every way it possibly can to prevent unsafe departures using mainly persuasive methods.” Both countries committed to “directing Cuban migration into safe, legal and orderly channels.” The two countries also agreed to “ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally.”⁸⁸

Most significantly, the 1994 Communiqué also stated, “The United States has discontinued its practice of granting parole to all Cuban migrants who reach U.S. territory in irregular ways.”⁸⁹ However, the United States never discontinued its parole policy with respect to Cubans who reach the United States by irregular means; it only began turning back Cubans who were intercepted before they reached U.S. territory. This policy became known as “wet foot, dry foot.”

Maintaining a liberal parole policy for Cubans who manage to make it to dry land has increased the demand for human smugglers piloting over-crowded go-fast boats – known to toss overboard their charges to shake Coast Guard vessels in hot pursuit. In recent years, smugglers have been transporting their human cargo to Mexico’s Yucatan peninsula. Cuban migrants head straight for the U.S. land border, aided by an efficient network of safe house operations. In mid-2008, several Cubans who had been detained by Mexican authorities turned up in Texas one week after the bus transporting them to detention facilities had been hijacked. Because Cubans can walk across the U.S. southern border without fear of being returned (and, the hope of a green card in one year), a cottage industry in fake Cuban documents has sprouted to help other illegal immigrants get into the United States more easily.⁹⁰

After the two migration agreements were made, U.S. and Cuban officials continued to hold twice-yearly talks on migration-related issues. The Bush Administration suspended these talks in 2004. The U.S. grievances centered on five issues: “Cuban delays in issuing exit permits to American-approved migrants; cooperation in staging a new lottery for visa seekers; access to a deeper Cuban port so large Coast Guard cutters can repatriate illegal migrants; obstacles placed in the path of American officials seeking to monitor the fate of returned migrants and others affected by mass arrests of dissidents last spring; and Cuba’s refusal to accept the return of migrants who have committed crimes in this country and are, in immigration parlance, excludable.”⁹¹

Then-Chief of the Cuban Interests Section in Washington, D.C., Dagoberto Rodriguez, dismissed the U.S. grievances as political and manufactured, and offered a longstanding Cuban one in exchange. He argued that the U.S. practice of paroling in Cuban migrants who reach U.S. soil violates the migration accords and fails to encourage only safe and legal immigration.⁹²

Exile and economic emigration

With the liberal parole and adjustment policies toward Cubans remaining in place, Cuban migrants will continue to use all means possible to arrive. Unlike the

IMMIGRATION AND TEMPORARY ENTRY

Policy options:

34) **Restart bilateral immigration talks**, with a special focus on combating human trafficking, and invite Mexican collaboration to confront trafficking activities that use Mexican territory.

35) Using existing Justice Department authority, **discontinue U.S. “dry foot” policy** to parole in Cubans who arrive to the United States by illegal means.

36) In order to discourage arrivals by illegal means, **increase the number of U.S. immigrant visas for Cubans** beyond the current annual target of 20,000.

37) **Discontinue the longstanding Justice Department policy that grants immediate parole and the opportunity to adjust immigration status and seek permanent residency after one year** (as authorized, but not required by, the 1966 Cuban Adjustment Act) to Cubans who arrive by illegal means and without an immigrant visa. Such a move would not affect the U.S. practice of granting asylum or refugee status to Cubans who establish a well-founded fear of persecution if there were to return to Cuba.

38) **Repeal or sunset the Cuban Adjustment Act**, which gives the Attorney General authority to grant Cubans, regardless of their means of arrival, permanent residency status after one year in the United States. Doing so would cause the Administration to discontinue its liberal parole policy for Cubans (because then Cuban parolees would be in the country indefinitely, but with no legal status as an immigrant or resident).

⁸⁸ Joint Statement on U.S. – Cuba Immigration Agreement (1995, May 2). Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

⁸⁹ Joint Communiqué on U.S. – Cuban Immigration Agreement, (1994, September 9). Available: http://www.acus.org/files/publication_pdfs/65/2005-03-U.S.-Cuban_Relations.pdf

⁹⁰ Lacey, Marc (2007, October 16). For Cubans Fleeing to the U.S., the First Stop Is Often Mexico. *The New York Times* (online). Available: <http://query.nytimes.com/gst/fullpage.html?res=9C04E1DF1530F935A25753C1A9619C8B63&fta=y>; and, Stevenson, Mark. Cubans Head for Mexico to Avoid U.S. Sea Patrols. (2008, October 18). Associated Press. Available: http://www.blnz.com/news/2008/10/19/Cubans_head_Mexico_dodge_patrols_3904.html

⁹¹ Marquis, Christopher. (2004, January 8). U.S. Halts Cuban Immigration talks; Worsening of Ties Seen. *The New York Times* (online). Available: <http://www.nytimes.com/2004/01/08/world/us-halts-cuban-immigration-talks-worsening-of-ties-seen.html>

⁹² Ibid.

previous generation who emigrated from Cuba out of imminent fear of persecution and few could or would return, many Cuban emigrants today leave mainly due to a lack of economic opportunity (though there are still those who seek and receive asylum). The new generation of Cubans can and does return to Cuba to visit family, carrying remittances and gifts with them, as soon as their U.S. permanent residency status is assured.

Marco Rubio, speaker of the Florida legislature and a Cuban American, welcomed tough new restrictions in 2004 on Cubans' return trips to visit family.

What you had was a situation where people would come to Miami from Cuba, stay for a year and a day and then go back. And what this was doing was threatening the sustainability of the Cuban Adjustment Act itself, the U.S. law that gives Cubans who come to this country a special status as political exiles rather than immigrants. What makes Cubans different from Haitians who come here or anyone else . . . if they go back and forth, that is to say, if they're not exiles at all? In that case, why should Cubans be any different? The whole structure would have unraveled had something not been done.⁹³

A new Spanish law could add to pressures for the Obama Administration to revise U.S. policy. The Spanish law gives grandchildren of Spanish citizens the right to apply for Spanish citizenship. Spain expects 100,000 requests from Cubans per year, and between 50,000 and 75,000 approved each year.⁹⁴ Cubans who obtain Spanish citizenship and a Spanish passport may then use that passport to visit the United States, and as Spanish citizens they would not need a U.S. visa. Once in the United States, they could go to U.S. Immigration officials with their Cuban passport in hand and declare their intention to remain in the United States.

The Obama Administration could soon face the decision of whether to absorb possibly tens of thousands more Cuban immigrants. The alternative is to clarify that only Cubans who do not hold another passport can apply for U.S. residency and expect it automatically under the Cuban Adjustment Act.

Temporary entry

The President has the authority, as set forth in Section 212 (f) of the Immigration and Naturalization Act, to exclude any foreign national or group of foreign nationals from the United States if he finds that their entry "would be detrimental to the interests of the United States."⁹⁵

In 1985, President Reagan issued Presidential Proclamation 5377, directing the State Department to deny temporary entry to Cuban government employees and Communist Party officials, under Section 212(f) authority. President Reagan's proclamation has never been withdrawn by succeeding Presidents, although they have the discretionary authority to interpret it as they see fit.

Cuba is a one-party state, and the state participates in and controls nearly all activities. Thus, Communist Party membership is a de facto requirement for many Cubans' professional advancement, and the great majority of Cuban professionals could fall under the proclamation.

39) **Withhold application of the Cuban Adjustment Act to Cubans who hold a third country passport.** This would not prevent such Cubans from applying for permanent residency in the same manner as other would-be immigrants to the United States.

40) Issue a presidential proclamation of support, or otherwise direct the State Department to broadly **support temporary entry of Cubans for the purpose of participating in professional exchanges in the United States**, provided that they do not pose a risk to national security.

41) **End the blanket State Department practice of denying temporary entry to all Cuban government employees or members of the Communist Party.** Continue to evaluate temporary entry requests by senior Cuban Communist Party and government officials on case-by-case basis.

42) Pass legislation requiring the President to **report semiannually to Congress on temporary visas denied to Cuban applicants by category and specific reason for exclusion.**

⁹³ Rieff, David. (2008, July 13). Will Little Havana Go Blue? *The New York Times* (online). Available: <http://www.nytimes.com/2008/07/13/magazine/13CUBANS-t.html>

⁹⁴ Ayuso, Silvia. (2009, February 6). Cubans Get Spanish Passports to their Dreams. Deutsche Presse Agentur. Available: http://www.monstersandcritics.com/news/europe/features/article_1458090.php/Cubans_get_Spanish_passports_to_their_dreams_Feature

⁹⁵ See 8 USC § 1182. Available: http://www4.law.cornell.edu/uscode/html/uscode08/usc_sec_08_00001182----000-.html

Seeking to encourage bilateral civil society contacts, President Clinton interpreted the proclamation rather loosely (applying it mainly to senior Cuban government and party officials). But under the George W. Bush Administration, visa requests by lower level members of the Communist Party, or members of organizations associated with the government who were not directly involved in government, were routinely denied or ignored. This has been particularly true in the case of Cuban professors and scholars invited to attend the international meetings of the Latin American Studies Association, held annually, and often in the United States. The Bush Administration also refused to grant entry visas to Cuban Latin Grammy award nominees hoping to attend the ceremony, including the Grammy-winning artist Ibrahim Ferrer (Ferrer became famous at age 70, after being featured in Ry Cooder's 1999 documentary film, *The Buena Vista Social Club*).

The Obama Administration retains broad authority, even without revoking President Reagan's proclamation, to again encourage Cuban professional and cultural exchanges in the United States. Were it to do so, more Cuban visitors, including scientists, academics, students, performers and others (especially Cuban agricultural import negotiators and inspectors) could be admitted for temporary entry without any formal or public change in policy.

VIII. RADIO AND TV MARTI

In 1985, Congress authorized the Office of Cuba Broadcasting (OCB) to initiate Radio Marti broadcasts to Cuba and in 1990 authorized broadcasts of TV Marti. The Broadcasting Board of Governors, the oversight body for OCB, stated Radio and TV Marti's goals as follows in its 2009 budget request:

- “To support the right of the Cuban people to seek, receive and impart information and ideas through any media and regardless of frontiers.
- “To be effective in furthering the open communication of information and ideas through the use of radio and television broadcasting to Cuba;
- “To serve as a consistently reliable and authoritative source of accurate, objective and comprehensive news;
- “To provide news, commentary and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba.”⁹⁶

OCB headquarters, originally in Washington, D.C., was moved to Miami in 1996. Congress mandated the stations' move to Miami so that they could be closer to their target audience in Cuba. (Other government broadcast programs, such as the Voice of America, maintain offices in Washington, D.C.). But some worried that the move would disrupt oversight of OCB: “Moving the facilities to Miami sacrificed its effectiveness, making it simply another Miami radio station,” wrote Dan Fisk, a former aide to Senator Jesse Helms who later worked for President George W. Bush. “Radio Marti should be relocated and every effort should be made to end its image as a mouthpiece of the Miami Cuban-American community.”⁹⁷

Ground-based, satellite and aerial transmissions

Though Radio Marti broadcasts can be heard in Cuba over shortwave radio, the Cuban government has long jammed the TV Marti signal. In an effort to break through Cuban jamming, OCB began transmitting limited TV Marti programming weekly via a C-130 airplane from the U.S. Department of Defense (previously, TV Marti was broadcast to Cuba from a blimp over the Florida Keys). OCB now leases a private aircraft to broadcast live TV Marti programming several hours a day. The aerial transmissions, in part, account for significant increases in funding for OCB, from \$28 million in fiscal year 2005 to \$38 million in FY 2008.⁹⁸

OCB's oversight board considered and rejected aerial transmissions in 1996. According to Christopher Coursen, a former member of the President's Advisory Board for Cuba Broadcasting, “It was something we specifically rejected based on outside engineering and inside engineering. ... The use of an airplane to broadcast TV Marti to Cuba was not cost-effective and would not be functional.”⁹⁹

OCB also pays to broadcast TV and Radio Marti from commercial stations in Miami. Despite various methods of transmission for both stations, few in Cuba tune in. A January 2009 Government Accountability Office (GAO) investigation revealed that less than 2% of OCB's telephone survey respondents since 2003 had listened to or viewed either station in the last week.¹⁰⁰

Low ratings

OCB programming could be partly to blame for its weak performance on the island. A 2006 internal review of OCB programming found a disinclination to air programming “that could be perceived as adverse to the current Presidential Administration, the U.S. government or the exile community.”¹⁰¹

⁹⁶ Fiscal year 2009 Budget Request. (2009). Broadcasting Board of Governors. Available: http://www.bbg.gov/reports/budget/bbg_fy09_budget_request.pdf

⁹⁷ Zajac, Andrew and Marx, Gary. (2006, December 14). U.S. broadcasts in Cuba worth the cost? *The Chicago Tribune*. (online). Available: <http://archives.chicagotribune.com/2006/dec/14/news/chi-0612140145dec14>

⁹⁸ Sullivan, Mark P. (2008, September 24). Cuba: Issues for the 110th Congress. (Congressional Research Service Report No. RL33819). Washington, D.C.

⁹⁹ Zajac, Andrew and Marx, Gary. (2006, December 14).

¹⁰⁰ U.S. Government Accountability Office. (2009, January). Broadcasting to Cuba: Actions Are Needed to Improve Strategy and Operations. (GAO Publication No. GAO-09-127). Washington, D.C.: U.S. Government Accountability Office. Available: <http://www.house.gov/delahunt/cubagao.pdf>

¹⁰¹ While the 2006 report was not publicly available, the quoted text from the referenced report can be found in Appendix C of the following publicly available document: Office of the Inspector General. (2007, June). Report Number ISP-IB-07-35: Office of Cuba Broadcasting. (Report of Inspection). The Department of State and the Broadcasting Board of Governors. Available: <http://oig.state.gov/documents/organization/89909.pdf>

When controversy raged over the banning of the book *Vamos a Cuba* from Miami-Dade county libraries in Florida, a Radio Marti report concluded, “Laden with lies about how Cubans live today, it should be withdrawn from the 33 Miami-Dade libraries that have it . . . this book must be gone.” John Nichols, a Pennsylvania State University professor told *The Chicago Tribune*, “It is astonishingly ironic that a Radio Marti analyst advocated banning ‘Vamos a Cuba’ in broadcasts to Cuba, where books are banned, and used protecting democracy as the justification.”¹⁰²

Critics point to other instances of apparently slanted reporting, such as when OCB waited a full day to broadcast the historic speech by former President Jimmy Carter at the University of Havana in 2002. Carter called for democratic reforms in Cuba in his speech (which he gave in Spanish), and Cuban state television carried the entire speech live. OCB also waited four hours to report in 2000 that U.S. authorities had stormed Elian Gonzalez’ Miami relatives’ home in the middle of the night and taken the boy with them (he was later returned to his father in Cuba). In his testimony before a House panel studying U.S. broadcasting to Cuba in 2002, Lexington Institute Vice President Philip Peters cited these examples and concluded that, “When you blow a major news story, you lose your audience.”¹⁰³

In January 2009, a group of Cuban dissidents announced they would boycott Radio Marti and urged the U.S. government to overhaul it. One activist, Vladimiro Roca, told *El Nuevo Herald* that, “the programming is so bad and so boring that no one listens to it.”¹⁰⁴

According to a recent GAO report, “OCB [Office of Cuba Broadcasting] officials said that the quality of Cuban television programming has recently improved and includes popular U.S. programming (such as *The Sopranos* and *Grey’s Anatomy*).” The GAO also noted that some Cubans have access to satellite television broadcasts (through the use of illegal satellite dishes). “Telephone surveys indicate that TV Martí has a smaller audience than other international television broadcasts. For example, about 30 percent of respondents in 2005 and 2006 said they watched CNN during the past week.”¹⁰⁵

U.S. government-funded Voice of America also has programming targeted to Cuba, including a program called “Window on Cuba.” The Broadcasting Board of Governors reports that other Latin America-oriented programming, such as “Let’s talk with Washington,” has an audience in Cuba. Voice of America radio and television broadcasts produced for Latin American audiences are not jammed by the Cuban government.

The U.S. policy goal of providing news and information for Cuban audiences is likely to be embraced by the Obama Administration. Yet, during his 2008 Presidential campaign, then-Senator Obama promised, “We’ve got to eliminate programs that don’t work, and we’ve got to make sure that the programs that we do have are more efficient and cost less.”¹⁰⁶ An independent review of the two stations, with an eye toward market performance and cost efficiency, could provide the Obama Administration the impetus for overhauling or eliminating them altogether.

RADIO AND TV MARTI

Policy options:

- 43) Cease aerial transmission of TV Marti, and sell or transfer air assets to another government entity.
- 44) Cut back or suspend ground-based satellite transmissions of TV Marti, while expanding Internet TV Marti (‘I-TV Marti’) operations.
- 45) Conduct an independent, non-government review of both TV and Radio Marti programming.
- 46) Conduct third party, non-U.S. government ratings surveys on the island for both TV and Radio Marti.
- 47) Request that the President’s Budget submission to Congress provide budget figures for Radio and TV Marti separately.
- 48) Increase listener-participation and learning programming, such as foreign language programs.
- 49) Pass legislation mandating that Cuba broadcasting headquarters be returned to Washington, DC, while maintaining a bureau in Miami.
- 50) Repeal the mandate for TV Marti and shut down its operations.
- 51) Repeal the mandate for Radio Marti operations, and continue broadcasting Voice of America to Cuba.

¹⁰² Zajac, Andrew and Marx, Gary. (2006, December 14).

¹⁰³ H.Hrg. 107-94: *An Assessment of Cuba Broadcasting: the Voice of Freedom, Hearing before the U.S. House Sub-Committee on International Operations and Human Rights of the Committee on International Relations*, 107th Congress, 2nd Sess. (2002, June 6). (Testimony of Philip Peters). Washington, D.C.: U.S. Government Printing Office. Available: http://commdocs.house.gov/committees/intrel/hfa80062.000/hfa80062_of.htm

¹⁰⁴ Chavez, Juan Carlos. (2009, January 16). Dissidentes Cubanos piden cambios en programacion de Radio Marti. *El Nuevo Herald*. (online). Available: http://www.elnuevoherald.com/noticias/america_latina/cuba/story/359830.html

¹⁰⁵ U.S. Government Accountability Office. (2009, January).

¹⁰⁶ Transcript of First Presidential Debate. (2008, October 14). CNN (online). Available: <http://www.cnn.com/2008/POLITICS/09/26/debate.mississippi.transcript>

IX. REMMITANCES AND GIFT PARCELS

In successive Administrations, U.S. policy regulating remittances and gift parcels sent to Cuba has weighed humanitarian benefits to the Cuban people against the hard currency flows that bring collateral benefits to the government.

Studies have suggested remittance flows to Cuba are as low as \$400 million and as high as \$1 billion annually. Until 2004, individuals subject to U.S. jurisdiction could send \$300 per quarter in remittances to a Cuban household (provided the recipient was not a high-level government or Communist Party official) with no limit on the number of households to which one remitter could send funds.

In 2004, President Bush accepted the recommendations of his Commission for Assistance to a Free Cuba and tightened remittance regulations. Recipients were limited to close family members only (excluding extended family and friends from receiving the financial assistance). He also barred individuals from carrying more than \$300 in remittances to Cuba; the previous limit had been \$3,000, with a requirement that no more than \$300 go to any single household.

Some argue that remittances indirectly enrich the Cuban government. After the 2004 regulations, the Cuban government imposed new fees and exchange rates and monetary policies that together act as a 20 percent tax on those who convert dollars to Cuban currency. Supporters of more relaxed remittance policies argue for the right of people to help their families, regardless of the impact on the Cuban government.

The current policy allowing financial assistance only to a remitter's immediate family inherently discriminates against Cubans who do not have close family members abroad and, due to historic emigration patterns, tend to be Afro-Cuban. The policy, by restricting remittances to immediate family only, also discriminates against the lower economic class and favors those Cuban families that already have some access to hard currency, having paid Cuban government exit fees and consular fees to the United State or other governments.

During the 2008 Presidential campaign, then-Senator Obama promised, "I will immediately allow unlimited family travel and remittances to the island . . . It's time to let Cuban American money make their families less dependent upon the Castro regime."¹⁰⁷ Allowing families to provide for extended family members and friends would likely benefit the most vulnerable of Cubans, the elderly, whose immediate and extended family supports have dwindled due to emigration or death.

Allowing Americans to send remittances to any friend, family member or professional contact on the island, except for designated government and Communist party officials, would broadly promote economic opportunity for Cubans – something the USAID Cuba program does not do. A recent study of Cuban migrants and remittance recipients in Cuba concluded that many Cuban recipients are using the money sent by relatives to start up small businesses, both legal and illegal.¹⁰⁸

U.S. remittance policies could have unintended political ramifications in Cuba. If remittances are described as an instrument of subversion, the Cuban government could react by banning, taxing or otherwise discouraging those remittances. However, given the economic challenges facing Cuba today, the government is not likely to turn away one of the top sources of hard currency flows in the country.

Other policy options concern the remittance transaction itself. Due to the combination of tighter U.S. restrictions on sending remittances, the high cost of transmittal through Western Union, and costly foreign exchange fees, migrants are increasingly using unlicensed couriers to send money to family. The study also noted that many remitters would like the ability to wire money directly to recipients' bank accounts to save some of the cost.

On April 13, 2009, the Obama Administration announced plans to lift nearly all restrictions on family remittances, including to allow Cuban Americans to send unlimited remittances to family members (broadly defined), with the exception of high level Cuban government officials. Families will be allowed to carry up to \$3,000 in remittances when they travel to Cuba. The Administration also indicated it will license remittances from U.S. depository institutions.¹⁰⁹ Currently, families must use a service such as Western Union to remit money to Cuba. The announcement did not change remittance policy for Americans who do not have family living in Cuba.

¹⁰⁷ Obama, Senator Barack. (2008, May 23).

¹⁰⁸ Orozco, Manuel. (2009, March). The Cuban condition: Migration, Remittances and the Diaspora. The Inter-American Dialogue.

¹⁰⁹ The White House: Office of the Press Secretary. (2009, April 13). Fact Sheet: Reaching out to the Cuban people. Available: http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people/

Gift parcels

The U.S. Department of Commerce regulates gift parcels and humanitarian donations to foreign countries. The restrictions currently in place against Cuba are more severe than those for any other country in the world. For gift parcels destined to any country under its sanctions program, the Commerce Department's Export Administration Regulations (EAR) generally approve the inclusion of clothing, personal hygiene items, seeds, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment. The regulations also generally permit "all other items normally sent as gifts."¹¹⁰

The EAR specifically prohibits inclusion in a gift parcel destined to any sanctioned country any item controlled for chemical and biological weapons, missile technology, national security, national security, or nuclear proliferation reasons. Gift items that do not fall into such categories, such as computers, cameras or other controlled electronics are generally allowed.

But in the case of gift parcels to Cuba, the EAR specifically prohibits sending any item on the Commerce Control List (CCL). After the Cuban government announced it would permit Cubans to open cellular telephone accounts in 2008, the Bush Administration amended the EAR to exempt gifts of mobile phones, and various software and accessories necessary to operate the phones, from the blanket CCL prohibition with respect to Cuba.¹¹¹

In 2004, the Bush Administration put new limitations on gift parcels to Cuba, reasoning that "such parcels decrease the burden on the Cuban regime to provide for the basic needs of its people, enabling the regime to dedicate more of its limited resources to strengthening its repressive apparatus."¹¹² The regulations now prohibit sending such things as clothing, personal hygiene items or seeds, and permit only gifts of food (including vitamins), medicines, medical devices, receive-only radio equipment, and cell phones.¹¹³ The 2004 amendment also limits parcels to one per month per household, and that the recipient must be an immediate relation (i.e., sibling, child, parent or grandparent). Previously, the regulations did not restrict parcels to immediate family, and allowed one parcel per month to the same person, rather than to any one household.

Critics of the stricter 2004 gift parcel requirements believe the policy reflects poorly on the United States government. Restricting gifts of soap or clothing does not appear to have significantly reduced the Cuban government's financial resources. There is no evidence that the Cuban government responded to the U.S. policy by distributing more such items to the population.

On April 13, 2009, the Obama Administration announced plans to revise regulations on gift parcels, to again allow gifts of soapmaking materials, fishing equipment, seeds, and clothing, to be sent to from anyone in the United States to anyone in Cuban, regardless of relation (except for already prohibited Cuban government officials). The Administration also announced it will ease restrictions on donations of personal electronics, such as computers or satellite radio equipment.¹¹⁴

REMITTANCES AND GIFT PARCELS

Policy options:

52) Use existing executive authority to provide a general OFAC license to **allow any United States remitter to send unlimited financial assistance to any Cuban household**, provided that no recipients are high-level government or Communist party officials. (In 2004, new regulations prohibited remittances to all but immediate family, and for a maximum of \$300 per quarter.) Congress could also mandate changes to remittance licensing policies.

¹¹⁰ Gift Parcels and Humanitarian Donations. (2008, November 18). Export Administration Regulations, Part 740-12. (U.S. Department of Commerce). Available: http://www.access.gpo.gov/bis/ear/ear_data.html#ccl

¹¹¹ Ibid.

¹¹² Revision of Export and Reexport Restrictions on Cuba. (2004, June 30). Bureau of Industry and Security, Department of Commerce. Docket No. 040610179-4179-01. Available: <https://bxa.ntis.gov/whatsnewcgi.html?filename=exprt古巴.asc>

¹¹³ Part 742: Control Policy – CCL-Based Controls, (2009, January 15). Export Administration Regulations, Department of Commerce. Available: http://www.access.gpo.gov/bis/ear/ear_data.html#ccl

¹¹⁴ The White House: Office of the Press Secretary. (2009, April 13).

X. SETTLEMENT OF U.S. PROPERTY CLAIMS

Between 1959 and 1961, the Cuban government nationalized nearly all U.S.-owned assets on the island. This included the telephone company, most mining operations, nearly the entire electrical grid, as well as ships, hotels, bank accounts, and hundreds of other businesses and residences.

At the time of the nationalization, the United States recognized Cuba's right to expropriate foreign properties as long as prompt compensation was paid. The new Cuban government offered payment in bonds rather than cash.

At the time, Cuban authorities valued expropriated properties based on owners' declared taxable value of each property, rather than on an estimated market value. Basing its claims certifications on declared value instead of market value worked to the Cuban government's favor. This resulted in claims being certified by the new Cuban government at between one-fourth and one-fifth their market value.¹¹⁵

Timothy Ashby, a former official with the Commerce Department (1987-1990),¹¹⁶ writes in a forthcoming legal review of U.S. claims against Cuba that Cuba made several attempts to negotiate compensation for the claims between late 1959 and 1964, and again during his own tenure at the Commerce Department. The U.S. government did not respond in the early instances because it did not expect the Castro government to last.¹¹⁷

The U.S. claimants largely took the same view, and worried that if they accepted compensation, they would give up the possibility to have their assets returned under a new Cuban government. A group of sugar mill owners considered accepting bond payments as security for their claims (not as actual full compensation), but decided against doing so because they could not be sure Cuban law would recognize the payment as such.¹¹⁸

In 1964, the United States Foreign Claims Settlement Commission (FCSC) established a program for certifying claims against Cuba. The Commission certified 5,911 claims worth \$1.84 billion, and suggested a 6% simple interest should be added.

The Cuban government continues to recognize the right of compensation for Americans who lost properties due to Cuba's expropriations, but it has not recognized the amount certified by the FCSC, which only took into account the U.S. claimants' documentation, and is almost twice the original book value (the declared value) at the time of expropriation. Cuba's public position is that it is ready to negotiate a settlement for the claims. But it also wants its estimates of damages it believes the U.S. embargo has inflicted on Cuba, and "all types of aggression by the U.S. government," to be taken into account.

As Henry Kissinger's State Department contemplated normalizing relations with Cuba, then-Deputy Assistant Secretary of State Harry Shlaudeman prepared a secret memo to Kissinger outlining possible steps for rapprochement with Cuba. Shlaudeman anticipated protracted negotiations on the outstanding U.S. claims, which would be further bogged down by Cuban claims against the U.S. for damages due to "the blockade" or "CIA (Central Intelligence Agency) raids." Concerned that détente could get sidetracked, Shlaudeman recommended normalizing relations prior to settlement of U.S. property claims in order to get "the Cuba issue behind us."¹¹⁹

Disposition of U.S. claims

In his legal review, Ashby considers possible scenarios for settlement of the U.S. claims.

While the United States has the authority to negotiate on behalf of certified claim holders, it is under no obligation to do so. In 2007, Assistant Secretary of State for Western Hemisphere Affairs Tom Shannon stated that the United States might not negotiate settlement of the claims even with a new Cuban government:

¹¹⁵ Ashby, Timothy. (2009, forthcoming).

¹¹⁶ According to biographical information available at <http://www.cubatradeexpo.com/CustomContentRetrieve.aspx?ID=584160>, "Dr. Ashby's Cuban-related legal work includes legally compliant trade in the biotechnology, medical products and agricultural sectors, as well as confiscated property claims and aircraft landing licensing."

¹¹⁷ Ashby, Timothy. (2009, forthcoming). *U.S. Certified Claims Against Cuba: Legal Reality and Likely Settlement Mechanisms*, 40 U. MIAMI INTER-AM. L. REV.

¹¹⁸ Ibid.

¹¹⁹ U.S. Department of State. (1975, March 27). Normalizing Relations with Cuba. Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/doc07.pdf>

The United States has always recognized that all property claims issues would have to be resolved by a democratic government of Cuba. In other words, the United States would not have a direct or immediate role in that. What the United States has done is compiled lists of people, U.S. citizens who have property claims that they would like to be able to present once a transition has taken place. But ultimately, those property claims will be determined by a democratic government in Cuba.¹²⁰

The statement might have been intended to de-link claims settlement from a potential normalization of relations.

A U.S. Administration could allow claimants to individually negotiate settlement of claims directly with the Cuban government. The Cuban Assets Control Regulations (CACR) prohibit any claimant from settling a claim with the Cuban government without a license from the Treasury Department. Ashby writes that some claimants began such negotiations in the 1990's but stopped due to U.S. political pressures. It is unclear whether the government of Cuba would prefer to negotiate claims individually with each U.S., claimant, or in one package with the U.S. government, where a settlement would be distributed proportionally among the U.S. claimants.

Further complicating government negotiation of U.S. claims is the Cuban insistence on valuation and inclusion of embargo-related damages to the island in a final settlement of the claims. Allowing claimants to settle their cases without U.S. government representation would avoid a difficult negotiation over Cuba's counter claim of embargo-related damages in this context. For this reason, though, the Cuban government might prefer not to negotiate directly with U.S. claim holders, but to leave the issue on the table for potential government negotiation.

A third option for U.S. claimants would not rely on Cuba's willingness to negotiate the claims: selling their claims to distressed debt investors. Ashby writes that this option might earn claimants more than they would obtain in a bilateral government negotiation. Such investors typically buy distressed debt of a particular country, amassing enough to eventually collect a settlement, possibly including debt for equity swaps, from the subject country.

A number of U.S. claimants have availed themselves of this last option. In July 2008, the Office of Foreign Assets Control issued a notice that prohibits such transfers of claims:

The Cuban Assets Control Regulations, 31 C.F.R. Part 515 (the 'Regulations'), which are administered by OFAC, prohibit all persons subject to U.S. jurisdiction from dealing in property in which Cuba or a Cuban national has or has had an interest, unless authorized pursuant to a general or specific license issued under the Regulations or otherwise exempt.

OFAC regards an FCSC-certified claim against Cuba as property in which Cuba has an interest . . . Accordingly the transfer of a certified Cuban claim is generally prohibited absent authorization by OFAC.¹²¹

SETTLEMENT OF U.S. PROPERTY CLAIMS

Policy options:

53) By Executive Order or by a public announcement of the Treasury Department's Office of Foreign Assets Control (OFAC), **rescind the July 2008 OFAC notice that prohibits owners of U.S. certified claims against Cuba to transfer or sell their claims to heirs or to foreign buyers** without specific authorization by OFAC. Alternatively, Congress could pass legislation clarifying that U.S. claim holders have the right to freely transfer or sell their claims.

54) Adopt a liberal licensing policy to **permit owners of U.S. certified claims against Cuba to negotiate with the Cuban government individually**, and opt out of any future government settlement of their claims, provided that the U.S. government will hold no liability for the satisfaction or performance of such settlement. This would require licensing, under existing Treasury Department authority, for claimants to accept cash payments, or equity in Cuban entities or properties as restitution.

55) Clarify, by issuing formally or informally, a statement of Administration policy, that the **U.S. policy on Cuban claims settlement will be to negotiate on behalf of claimants who were U.S. citizens at the time their properties were nationalized by Cuba.**

56) **Approach the Cuban government to begin a bilateral negotiation** where, under the Foreign Claims Settlement Commission procedures, the U.S. government would negotiate on behalf of all certified claimants and proportionally distribute proceeds.

¹²⁰ On-The-Record Briefing with Secretary of Commerce Carlos M. Gutierrez and Assistant Secretary of State for Western Hemisphere Affairs Thomas A. Shannon On Cuba Policy. (2007, October 24). Washington, DC. Available: <http://merln.ndu.edu/archivepdf/ARA/State/94089.pdf>

¹²¹ Notice regarding the transfer of claims against Cuba certified by the Foreign Claims Commission. (2008, July 29). Department of the Treasury. Available: <http://ustreas.gov/offices/enforcement/ofac/programs/cuba/fcsc.pdf>

The notice – which does not constitute a regulatory action but provides legal advice on OFAC policy – sets up two contradictions. First, Title III of the Helms-Burton Act specifically authorized the transfer of FCSC-certified claims to U.S. nationals without the need for any license from a U.S. regulatory agency. Second, and more fundamentally, the OFAC notice finding that such claims are property in which Cuba holds an interest contradicts the certifications by the FCSC: that the claim holders are the true interest-holders of such properties, until such time as compensation has been made.

Ashby predicts that the OFAC policy would be struck down in court because the policy represents an unconstitutional taking of private property under the Fifth Amendment. He also points to recent comments by the FCSC that “it is not illegal to sell or purchase these claims,” and to the 1981 Supreme Court ruling that American claims against Iran were not considered Iranian property.¹²²

¹²² Ashby, Timothy. (2009, forthcoming).

XI. TERRORISM

On March 1, 1982, the United States government designated Cuba a state sponsor of terrorism, triggering broad economic sanctions (many of which are already in place against Cuba due to the embargo), including limitations on foreign assistance, arms and dual-use technologies exports, and certain financial restrictions.¹²³ No official reason was given at the time, but reports suggested that Cuba's active support for rebel movements in Central America was the reason Cuba was added to the list.¹²⁴

In 1992, Fidel Castro announced that Cuba would no longer support armed rebel movements abroad¹²⁵ (analysts point out that even had Cuba wished to, it no longer had the financial resources to do so). The State Department concluded in each of its annual *Patterns of Global Terrorism* reports between 1993 and 1999, "Cuba no longer actively supports armed struggle in Latin American and other parts of the world."¹²⁶

In an interview given to the New America Foundation in 2008, former Counterterrorism Czar Richard Clarke talked about Cuba's continued presence on the U.S. terrorism list. "The reason in the 1990s, in the late 1990s, why we did not take Cuba off the [state sponsors of terrorism] list, was not because they were sponsoring terrorism. It was because of U.S. domestic political reasons. Factually, objectively, they are no longer sponsoring terrorism."¹²⁷

Core arguments

By the end of the Clinton Administration and beginning of the George W. Bush Administration, the main arguments for keeping Cuba on the U.S. terrorism list included Cuba's contacts with Colombian rebel groups and its harboring of numerous former ETA (a Basque separatist group) terrorists. The Cuban government maintains that its contacts with Colombia rebel groups over the last decade are part of an ongoing effort to help broker peace with the Colombian government (the Administrations of President Alvaro Uribe, and that of Colombia's former President, Andres Pastrana, both have acknowledged Cuba's efforts).¹²⁸ But in 2002, the State Department cited new allegations that a member of the Irish Republican Army (IRA) accused of training members of the Revolutionary Armed Forces of Colombia (FARC) in Colombia had previously lived in Cuba for five years. The Cuban government also maintains that the Basque separatists living in Cuba came to Cuba as a result of a 1984 agreement with the Spanish government, though critics say more have arrived in Cuba since that time.¹²⁹

The government of Cuba maintains that none of these groups or individuals have planned or carried out any terrorist activities from Cuba. In its 2006 report on global terrorism, the State Department noted that, "There is no information concerning terrorist activities of these or other organizations on Cuban territory," and that "The United States is not aware of specific terrorist enclaves in the country."¹³⁰

The State Department terrorism report also regularly refers to as many as 70 fugitives from U.S. justice living in Cuba today (a number of them arrived in the 1960's, 1970's and 1980's). One of the more notorious fugitives is Joanne Chesimard, wanted for the murder of a New Jersey state trooper. In 2005, according to the State Department's annual terrorism report, Cuba signaled it would no longer accept U.S. fugitives, and has since returned several fugitives to U.S. authorities.¹³¹

In 2006, the State Department also cited concern over Cuba's contact with other state sponsors of terrorism, including Iran and North Korea (the Bush Administration removed North Korea from the terrorism list, in 2008). Such contacts were not mentioned in prior reports.¹³²

¹²³ For information on the U.S. list of state sponsors of terrorism, visit <http://www.state.gov/s/ct/c14151.htm>

¹²⁴ Sullivan, Mark. (2005, May 13). *Cuba and the State Sponsors of Terrorism List*. (Congressional Research Service Report No. RL32251). Washington, D.C. Available: <http://www.fas.org/sgp/crs/terror/RL32251.pdf>

¹²⁵ Ibid.

¹²⁶ All State Department terrorism overviews between the years 1989 - 1999 are available online at: <http://www.fas.org/irp/threat/terror.htm>

¹²⁷ Interview by Patrick Doherty with Richard Clarke. (2008, September 17). Available: http://thehavananote.com/2008/09/richard_clarke_cuba_not_a_stat_1.html

¹²⁸ Castro's Comeback (2006, March 20). *Newsweek*. Available: <http://www.newsweek.com/id/47038> and Johnson, Tim. (1999, January 17). Colombian leader takes new stance on Cuba ties. *The Miami Herald*.

¹²⁹ Ministry of Foreign Affairs (2003, May 2). *Declaration by the Cuban Ministry of Foreign Affairs: Cuba has nothing to hide and nothing to be ashamed of*. Available: http://www.iacenter.org/Cuba/cuba_may303.htm; also, Sullivan, Mark. (2005, May 13).

¹³⁰ State Sponsors of Terrorism Overview. (2006, April 28). In U.S. Department of State, *Country Reports on Terrorism*. Washington, D.C.: Office of the Coordinator for Counter-Terrorism, U.S. Department of State. Available: <http://www.state.gov/s/ct/rls/crt/2005/64337.htm>

¹³¹ Ibid.

¹³² Ibid.

Biological weapons allegations

According to the State Department's 2006 global terrorism report, "there is some dispute about the existence and extent of Cuba's offensive biological weapons program," but the report does not provide any further comment or details.¹³³

In 2002, a very public dispute over Cuba and biological weapons erupted days before former President Carter traveled to Cuba in May 2002, when then-Undersecretary of State for Arms Control John Bolton told an audience at the Washington-based Heritage Foundation that, "Cuba has at least a limited offensive biological warfare research and development effort."¹³⁴

Former President Carter disputed the claim noting that he had specifically asked the administration officials who briefed him ahead of his trip about "any possible terrorist activities that were supported by Cuba...I asked them specifically on more than one occasion is there any evidence that Cuba has been involved in sharing any information to any other country on Earth that could be used for terrorist purposes. And the answer from our experts on intelligence was *no*."¹³⁵

Congress called for Mr. Bolton to testify on the claims he had made, but then-Assistant Secretary of State for Intelligence and Research Carl Ford was sent in his place. In his session before the Senate Foreign Relations Committee, Ford reasoned that if Cuba were to develop a biological weapons capability, it would be deterrent in nature. "They are afraid that we are going to use a weapon of mass destruction [against them], biological they've argued, or more likely in their minds probably some sort of nuclear weapons, and that gives them cause – that gives them a reason why they might want to use this capability as a weapon . . . I certainly see no indications that there is a first strike capability or effort to attack the United States."

When asked about Bolton's statement, then-Secretary of State Colin Powell responded, "We didn't say [Cuba] actually had some weapons but it has the capacity and capability to conduct such research."¹³⁶ In mid-2005, a State Department report on global nonproliferation efforts acknowledged a "split view" on Cuba in the Administration. That report noted that "the Intelligence Community unanimously held [in the latest National Intelligence Estimate] that it was unclear whether Cuba has an active biological weapons effort now, or even had one in the past." The State Department report held the 2002 statement to still be "correct".¹³⁷

Anti-terrorism efforts

On September 11, 2001, The Cuban government condemned the terrorist attacks lamenting the "unjustifiable loss of human lives," offering Cuban airspace and airports for returning U.S. aircraft on that day, as well as humanitarian assistance for the victims. The weekend after the attacks, thousands marched in Cuba "in solidarity with the American people during the national tragedy they are living through." And on September 22, Fidel Castro declared terrorism an "ethically indefensible phenomenon which must be eradicated." He went on to pledge, "The territory of Cuba will never be used for terrorist actions against the American

TERRORISM

Policy options:

57) Pass legislation that requires the Department of State to **develop and adhere to a set of published criteria for adding or removing a country from its list of state sponsors of terrorism**. Add additional controls such as Senate Foreign Relations Committee and House Foreign Affairs Committee review of the criteria prior to adoption.

58) **Launch a congressional investigation**, either through closed committee hearings or through the Government Accountability Office, into how antecedent administrations have determined countries to be state sponsors of terrorism and **what criteria have been and should in the future be used to maintain the integrity of the terrorism list**.

59) Direct the Department of State to review Cuba's presence on the terrorism list, and if the review shows there is not sufficient evidence for its presence, **initiate removal of Cuba from the terrorism list**.

60) Direct the Department of State to review Cuba's presence on the terrorism list, and if the review shows evidence for its continued presence, **define in the annual terrorism report which areas the government of Cuba could address to start the process of removal from the list**.

¹³³ S.Hrg. 107-736: *Cuba's Pursuit of Biological Weapons: Fact or Fiction*, a Hearing before the Sub-Committee on Western Hemisphere, Peace Corps and Narcotics Affairs, 109th Congress, 1st Sess. (2002, June 5) Available: <http://www.fas.org/nuke/guide/cuba/sfrc060502.pdf>

¹³⁴ Richter, Paul. (2002, May 7). U.S. cites Cuban bioweapons effort. *The Los Angeles Times*. (online). Available: <http://articles.latimes.com/2002/may/07/world/fg-uscuba7>

¹³⁵ Statement by Carter in Cuba, after his visit to the Center for Genetic Engineering and Biotechnology in Havana. (2002, May 13). The Associated Press. Available: <http://www.ciponline.org/cuba/cubainthenews/newsarticles/ap051302genetic.htm>

¹³⁶ Powell eases off U.S. accusation on Cuba weapons. *Reuters*. May 13, 2002.

¹³⁷ Strobel, Warren. (2005, August 30). U.S. backs away from claims that Cuba has a bioweapons program. Knight Ridder Newspapers. <http://www.cubanet.org/CNews/y05/ago05/31e12.htm>

people, and we will do everything within our power to prevent such actions against that people.”¹³⁸

Fidel Castro opposed the U.S. retaliatory attack on Afghanistan (employing characteristically extreme rhetoric), but his government did not protest the relocation of enemy combatants from that war to the U.S. naval base in Guantanamo, Cuba. Then-Defense Minister Raul Castro promised to return any detainees that might try to escape the base.¹³⁹

In March 2002, Cuba arrested a Colombia drug trafficker wanted in the United States and reiterated its desire to cooperate with the U.S. on migration, drug-interdiction and anti-terrorism efforts.¹⁴⁰

That spring, the State Department’s *Patterns of Global Terrorism* report was, unsurprisingly, colored by the September 11th attacks. The 2001 review noted that Iraq was the only Arab-Muslim country that did not condemn the attacks on the United States. It acknowledged that Libya, Syria and Sudan had each condemned the terrorist attacks.

Libya made a particular effort at sympathy and cooperation with the United States and the *Patterns* report acknowledged the effort. “Following the September 11 terrorist attacks, Libyan leader Muammar Qadhafi issued a statement condemning the attacks as horrific and gruesome and urging Libyans to donate blood for the U.S. victims. On 16 September he declared that the United States had justification to retaliate for the attacks. Since September 11, Qadhafi has repeatedly denounced terrorism.”

The same report characterized Cuba’s response to September 11th in this way:

Since September 11, Fidel Castro has vacillated over the war on terrorism. In October, he labeled the U.S.-led war on terrorism “worse than the original attacks, militaristic, and fascist” . . . When this tactic earned ostracism rather than praise, he undertook an effort to demonstrate Cuban support for the international campaign against terrorism and signed all 12 UN [United Nations] counterterrorism conventions as well as the Ibero-American declaration on terrorism at the 2001 summit . . . Cuba’s signature of UN counterterrorism conventions notwithstanding, Castro continued to view terror as a legitimate revolutionary tactic.¹⁴¹

Some of the recent terrorism reports fault the Cuban government for its failure to participate in the “global war on terrorism.” In its 2005 terrorism review, the State Department concluded that Cuba had “taken no action against against Al Qaida or other terrorist groups.” According to the report released April 30, 2008, “To U.S. knowledge, the Cuban government did not attempt to track, block, or seize terrorist assets, although the authority to do so is contained in Cuba’s Law 93 Against Acts of Terrorism, as well as Instruction 19 of the Superintendent of the Cuban Central Bank.” Also, the report notes that, “The Cuban government did not extradite suspected terrorists during the year.” Neither report indicates whether the U.S. government had evidence that Cuba was in a position to act against Al Qaeda or seize any terrorist assets, or whether any suspected terrorists had arrived on Cuban soil during the year.

Some analysts consider Cuba’s initial gestures following September 11th to have been gratuitous and offset by Fidel Castro’s strident opposition to U.S. foreign policy following September 11th. Others believe that the Cuban government genuinely demonstrated sympathy for the United States and sent actionable signals seeking bilateral cooperation in the aftermath of those attacks.

Cuban exile terrorism

The long history of Cuban exile terrorism plays a sensitive role in U.S.–Cuban relations. Cuban exile terrorist groups emerged from the disbanded CIA training camps of the early 1960s. Once the U.S. government abandoned violent overthrow of Fidel Castro’s government, several exiles emerged as leaders of groups that advocated or used violent means, including against civilians, to try to bring down Cuba’s socialist government.

¹³⁸ Cawthorne, Andrew. (2001, September 11). Cuba’s Castro expresses sympathy. Reuters. Available: <http://www.ibike.org/cuba/911.htm#V>; see also, Speech by Fidel Castro. (2001, September 22). San Antonio de los Banos, Cuba. For coverage of the September 22nd speech, visit: http://www.blythe.org/nytransfer-subs/2001-Caribbean-Vol-3/Mainstream_News_Reports_on_Castro%27s_Speech

¹³⁹ Boadle, Anthony. (2005, December 20). Cuba accepting of U.S. naval base at Guantanamo Bay. Reuters. http://havanajournal.com/politics/entry/cuba_accepting_of_us_naval_base_at_guantanamo_bay/

¹⁴⁰ Batista, Carlos. (2002, March 19). Cuba seeks deals with U.S. on terror, migrant smuggling, drugs. Agence France Presse. Available: <http://www.ciponline.org/cuba/cubainthenews/newsarticles/afp031902batista.htm>

¹⁴¹ State Sponsors of Terrorism Overview. (2002, May 21). In U.S. Department of State, *Patterns of Global Terrorism*. Washington, D.C.: Office of the Coordinator for Counter-Terrorism, U.S. Department of State. Available: <http://www.state.gov/s/ct/rls/crt/2001/html/10249.htm>

According to the U.S. Department of Justice, Orlando Bosch Avila and Luis Posada Carriles masterminded, among many other acts of terrorist violence, the first act of airline terrorism in the Western Hemisphere, the 1976 Cubana airliner bombing which killed all 73 passengers aboard. Bosch bounced around several countries until he returned to the United States and was jailed for a parole violation in 1988. Bosch applied for asylum in the United States, but the Justice Department denied the request, "For thirty years Bosch has been resolute and unwavering in his advocacy of terrorist violence," wrote the Associate Attorney General, Joe Whitely, who ordered Bosch to be deported. "He has repeatedly expressed and demonstrated a willingness to cause indiscriminate injury and death." Despite the deportation order, Bosch received an administrative pardon from the George H.W. Bush Administration in 1989. Bosch lives in Miami.

The case of Luis Posada follows a similar path, except that Posada continued to plan terrorist attacks throughout the 1990's, including a spate of hotel bombings in Havana in 1997, which killed an Italian tourist. "It is sad that someone is dead, but we can't stop. That Italian was sitting in the wrong place at the wrong time." Posada told a reporter for *The New York Times* in 1998. "I sleep like a baby." Posada later turned up in Panama, where he and three other Cuban exiles were arrested for possession of explosives intended for use in assassinating Fidel Castro at the 2000 Ibero-American Summit. Posada served time in Panamanian prison until he was pardoned days before former President Mireya Moscoso left office.

In 2005, Posada entered the United States illegally. He was detained and tried on seven counts of immigration fraud but the charges were dismissed due to what the judge in the proceedings called the government's "fraud, deceit and trickery," during its two-day interview of Posada. The Justice Department filed an appeal to keep Posada – whom it called "an unrepentant criminal and admitted mastermind of terrorist plots and attacks" – in jail, but stopped short of declaring him a terrorist (which would have provided greater authority to detain him).¹⁴² Posada was released in May 2007, and lives in Miami.

In April 2009, a federal grand jury indicted Posada for perjuring himself in immigration court after he first re-entered the United States illegally in 2005, and of obstructing a U.S. investigation into "international terrorism." The grand jury found that Posada lied to an immigration court about his role in planning the 1997 Havana bombings. The Miami Herald reported that the indictment is the first U.S. legal proceeding "linking" the former CIA operative to international terrorism.¹⁴³

The Bosch and Posada cases were never discussed or treated by the Bush Administration in the context of its "global war on terror." If there is no recent evidence that Bosch or Posada or their groups are active, the Obama Administration might well ignore both cases. However, if the Administration seeks the return of fugitives from U.S. justice, it is predictable that Cuba would raise cases such as these.

Removal from the list

Section 6(j)(4) of the Export Administration Act of 1979 sets forth the procedure for removing a country from the State Department's list of "state sponsors of terrorism."

At least 45 days before the President may remove a country from the list, he must report to Congress either:

- that there has been "a change in leadership and policies" in such country, the government is not supporting acts of terrorism, and that such government has provided assurances that it will not do so; or
- that such government has not "provided any support for international terrorism" in the previous six months and that such government has provided assurances that it will not do so in the future.

If the Obama Administration were to conclude that there is no evidence to justify Cuba's continued inclusion on the terrorism list, the Export Administration Act does not provide Congress the authority to block the move; nor does it give Congress authority to compel Cuba's removal from the list. The process of removing Cuba from the terrorism list could hinge on a few key issues, such as asking for a firm Cuban government restatement of its position against terrorism and obtaining a clear commitment concerning anyone living on the island that has ever had ties to terrorist groups.

But there are also dozens of fugitives from U.S. justice cited in the annual terrorism reports. However, the State Department acknowledged in 2006 that the Cuban government would likely not return some of the more notorious U.S. fugitives without

¹⁴² Lazcano, Aracely. (2006, October 15). U.S. cannot find host country for Posada so he stays in jail for now. Reuters. Available: <http://havanajournal.com/politics/entry/us-cannot-find-host-country-for-posada-so-he-stays-in-jail-for-now>

¹⁴³ Chardy, Alfonso. (2009, April 9). U.S. indicts Cuban exile Luis Posada, links him to bombings. *The Miami Herald*. (online). Available: <http://www.miamiherald.com/news/florida/story/991499.html>

reaching agreement on fugitives of interest to Cuba residing in the United States.¹⁴⁴ One option would be for the United States to seek resolution on U.S. fugitives as a bilateral law enforcement issue separate from the U.S. terrorism list.

If the Obama Administration does not immediately initiate Cuba's removal from the terrorism list, the question will remain whether and how to address past criticism that the list lacks a clearly articulated and consistent vision for what constitutes a state sponsor of terrorism – without which there is little incentive for those countries to take action to get off of the list.

In the case of Libya's removal from the list in 2006, that country took responsibility for and made reparations to the victims' families in the Lockerbie bombing, and made public efforts to support the U.S. war on terrorism. North Korea, on the other hand, did little to express support for U.S. policies, and flouted a prior agreement that it would not attempt to develop nuclear weapons capacity. In October 2008, North Korea was removed from the list in exchange for a promise from that government to declare its nuclear activities and open its nuclear facilities to inspections, a concession important to U.S. national security, but unrelated to the issue of terrorism.

Aside from resolving the fugitives issue, it is unclear what concessions the United States would seek as part of removing Cuba from the terrorism list. Cuban government critics hope the U.S. government will use Cuba's position on the list as leverage to achieve broader, non-terrorism related policy concessions (such as internal political reforms on the island). The Cuban government maintains that it does not deserve the terrorist designation, and so it may not be inclined to offer *any* gesture, particularly one aimed at changing its internal political policies.

¹⁴⁴ State Sponsors of Terrorism Overview. (2007, April 30).

XII. TRADE

In the summer of 1960, the new Cuban government under Fidel Castro began nationalizing U.S.-owned properties. Section 620(a) of the 1961 Foreign Assistance Act provided the President with the authority to impose “a total embargo upon all trade between the United States and Cuba.”¹⁴⁵ President Kennedy imposed a near-total embargo in February 1962. Then, as authorized under the 1917 Trading with the Enemy Act (TWEA), which gave the President additional sanctions authority during a time of war or national emergency, President Kennedy further tightened restrictions, including banning nearly all financial transactions and travel to the island. Together, these two laws form the basis of the embargo.¹⁴⁶

In 1963, comprehensive Cuban Assets Control Regulations (CACR) were promulgated to bar financial or commercial transactions with or relating to Cuba (including travel-related transactions) except as licensed by the Treasury or Commerce Departments. Export controls relating to Cuba are contained in the Commerce Department’s Export Administration Regulations (EAR). Over the years, the CACR and the EAR have been amended to reflect changes in regulatory policies or changes made by Congress. Authorities exercised pursuant to TWEA must be renewed annually by a Presidential determination.¹⁴⁷

Presidential authority and the Helms-Burton Act

Section 102 (h) of the 1996 Helms-Burton Act codified “the economic embargo on Cuba as in effect on March 1, 1996, including all restrictions under Part 515 of title 31, Code of Federal Regulations,” until such time as the President determines that a democratically elected government is in power in Cuba. However, what was codified is a matter of some debate.

Jake Colvin, Vice President for Global Trade Affairs with the National Foreign Trade Council, argues in a 2008 white paper, “The Case for a New Cuba Policy,”¹⁴⁸ that the Helms-Burton codification does not limit the President’s authority to adjust the economic embargo, as is often believed to be the case. Colvin argues that Helms-Burton requires the President to continue regulating Cuba-related transactions, but that it does not limit the President’s ability to ease many elements of the embargo using the regulatory authority that existed when the Helms-Burton Act passed. Colvin cites, as an indication of Congressional acquiescence, the Overview and Compilation of U.S. Trade Statutes published by the House Ways and Means Committee, which concluded that when the Helms-Burton Act codified the embargo, it “[included] the executive branch discretion contained therein.”¹⁴⁹

Colvin points out that the Bush Administration recently used its licensing authority in 2008 to *ease* the embargo last May when it exempted cell phones from the Commerce Control List of prohibited exports to Cuba.¹⁵⁰ At the time, then-National Security Council Senior Director for Western Hemisphere Affairs Dan Fisk told reporters, “in this case the State Department and the Department of Commerce will work together to change the regulatory structure. It’s a Federal Register [notice] ... Most of the embargo is actually contained in federal regulations.”¹⁵¹

Michael Krinsky, a foreign relations and international sanctions attorney who advises the Cuban government on U.S. law, agrees. In a December 2008 memorandum on Presidential authority and Cuba sanctions, Krinsky points to other instances in which both Presidents Clinton and George W. Bush asserted this authority, such as when President Clinton approved travel for secondary school and non-degree program academic exchanges in 1998, and when President Bush relaxed remittance regulations in 2003. “This Presidential licensing authority, confirmed by two Administrations,” writes Krinsky, “is broad enough to allow the new Administration to go well beyond the high water mark of the Clinton Administration’s measures in relaxing the embargo.”¹⁵²

¹⁴⁵ Rennack, Dianne and Sullivan, Mark P. (2005, March).

¹⁴⁶ Ibid.

¹⁴⁷ Presidential Determination No. 2008–27. (2008, September 12). Continuation of the Exercise of Certain Authorities with Respect to the Trading with the Enemy Act. Available: <http://edocket.access.gpo.gov/2008/pdf/E8-21861.pdf>

¹⁴⁸ Colvin, Jake. (2008, December). The Case for a New Cuba Policy. The New Ideas Fund. Available: http://usaengage.nonprofitsoapbox.com/storage/usaengage/colvin_thecaseforanewcubapolicy_final.pdf

¹⁴⁹ U.S. House of Representatives Committee on Ways and Means. *Overview and Compilation of U.S. Trade Statutes, Part I of II, 2005 Edition*, 109th Congress, 1st Sess. (2005, June). Washington, D.C.: U.S. Government Printing Office.

¹⁵⁰ Colvin, Jake. (2008, December).

¹⁵¹ Perino, Dana and Fisk, Dan. (2008, May 21). Press Gaggle by Dana Perino and Dan Fisk, NSC Senior Director for Western Hemisphere Affairs. The White House (online). Washington, D.C.: James S. Brady Press Briefing Room. Available: <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080521-2.html>

¹⁵² Krinsky, Michael. (2008, December 2). U.S. Economic Measures Against Cuba: Presidential Authority. (unpublished Memorandum). Rabinowitz, Boudin, Krinsky and Lieberman, Attorneys at Law. New York, NY.

The Obama Administration announced plans in April 2009 to use its regulatory authority to relax restrictions on commercial telecommunications links with the island, including to “license U.S. telecommunications service providers to enter into and operate under roaming service agreements with Cuba's telecommunications service providers,” and to “license U.S. satellite radio and satellite television service providers to engage in transactions necessary to provide services to customers in Cuba.”¹⁵³

The path to “normal” trade relations

If the United States were to lift its trade embargo against Cuba, this would not automatically confer “normal” status to the bilateral trade relationship. It would mean that the United States and Cuba have the opportunity to begin trading in more goods and services than they have in the last fifty years. Whether much expanded trade actually occurs depends on whether the United States were to take additional steps beyond lifting the embargo: the most important of which is the provision of Normal Trade Relations (NTR).

NTR is a technical term which refers to the provision of nondiscriminatory treatment toward trading partners. Cuba and North Korea are the only two countries to which the United States continues to deny “normal trade relations.” All other countries either have permanent normal trade relations or temporary, renewable normal trade relations with the United States.¹⁵⁴

Assuming that the Cuba-specific trade sanctions contained in the Cuban Assets Control Regulations (the continuity of which was codified by the 1996 Helms-Burton Act) were to be eliminated, achieving normal trade relations between Cuba and the United States would not be a simple matter. A first stumbling block could be the 1974 Trade Act provision dubbed “Jackson-Vanik,” which prohibits non-market economy countries from receiving normal tariff treatment, entering into a bilateral commercial agreement, or receiving any U.S. government credits or loan guarantees, until the President has reported to Congress that such a country does not: 1) deny its citizens the right to emigrate, 2) impose an unreasonable tax or fine for emigrating, and 3) impose more than a “nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.”¹⁵⁵

Thus, Cuba’s restrictions on its citizens’ emigration rights pose an obstacle to normalization of bilateral trade. Only once the requirements set forth by the Jackson-Vanik amendment have been met, (and absent any other Cuba-specific sanctions, such as the Export Administration Act controls on countries found to be supporting international terrorism), could the United States begin negotiations of a bilateral commercial agreement with Cuba.

To begin to extend normal trade relations to Cuba, the United States would need to enter into a reciprocal trade agreement with Cuba (not equivalent to a “free trade agreement”) that would provide a balance of trade benefits and protections to U.S. exports and commercial entities doing business with Cuba, at the same time it would provide such benefits to Cuba. Such an agreement would need to include protection for U.S. patents and trademarks and for “industrial rights and processes,” include a safeguard mechanism to prevent market disruptions due to trade, and provide that the agreement, and its continuation, be subject to the national security

TRADE

Policy options:

61) Using existing executive branch authority, **license the sale of U.S. products considered necessary for the rebuilding effort in Cuba after the 2008 hurricane season**, and for mitigation against future hurricane damages, to dwellings and public health installations in Cuba.

62) **Repeal Section 1705 (d) of the Cuban Democracy Act, requiring onsite verification of medicine and medical devices exported** from the United States to Cuba, or, ease regulatory interpretation of verification procedures.

63) Use existing executive branch authority to **ease licensing restrictions on imports of Cuban vaccines** and to facilitate U.S. clinical trials as necessary. Alternatively, Congress could mandate broad licensing authority for clinical trials and marketing of Cuban vaccines.

64) Use existing executive branch authority to **license U.S. individuals and entities to purchase and deal in newly produced private Cuban artwork and handicrafts**, and license the travel of art and handicraft dealers under the category dealing with support for the Cuban people.

65) Using existing executive branch authority, **reinstate an exemption** in the Treasury Department’s Cuban Assets Control Regulations **for the import of a limited amount of Cuban origin goods for personal use** for licensed travelers to Cuba.

¹⁵³ The White House: Office of the Press Secretary. (2009, April 13).

¹⁵⁴ Pregeli, Vladimir N. (2005, March 24). Country Applicability of the U.S. Normal Trade Relations (Most-Favored-Nation) S. (Congressional Research Service Report No. 96-463E). Washington, D.C. Available: <http://www.au.af.mil/au/awc/awcgate/crs/96-463.pdf>

¹⁵⁵ U.S. House of Representatives Committee on Ways and Means. *Overview and Compilation of U.S. Trade Statutes, Part I of II, 2005 Edition*, 109th Congress, 1st Sess. (2005, June).

interests of both parties.¹⁵⁶ Assuming bilateral relations had reached the appropriate milestones to begin discussing two-way trade, negotiating such an agreement could potentially take years, as both countries would need to adopt statutory and regulatory changes.

Trade preferences

Several factors would affect Cuba's potential receipt of benefits under U.S. trade preference programs such as the Generalized System of Preferences (GSP) or the Caribbean Basin Initiative (as amended by the Caribbean Basin Economic Recovery Act, CBERA). Both of these preference programs bar benefits for countries that are communist and that have expropriated U.S. property, unless the President determines that either adequate compensation has been made or that such country is making a good faith effort to negotiate such compensation. The GSP statute also requires beneficiary countries to be members of the International Monetary Fund (IMF), which Cuba is not.¹⁵⁷

CBERA contains multiple conditions for beneficiary countries, but most may be waived by the President. The two conditions that may not be waived are that Cuba must have an extradition treaty with the United States and that extension of benefits for Cuban imports would not harm U.S. commerce.¹⁵⁸

Trade in the short term

In the event that the trade embargo is not repealed, in whole or in part, by Congress, the President still retains the authority to license certain import and export transactions that, absent specific exemption, are otherwise prohibited under the Cuban Assets Control Regulations. For instance, the President could provide general or specific license authority for U.S. exports of items not otherwise banned (i.e. under the Export Administration Act) such as various electronics, construction materials, or equipment for use in Cuban offshore oil exploration in the Gulf of Mexico.

The Administration could also signal to American exporters that it will relax its interpretation of Section 1705 (d) of the Cuban Democracy Act, which requires on-site verification that medicine and medical devices exported from the United States to Cuba are used for their declared purpose. The United States does not have such stringent requirements for medicine or medical device exports to other countries. This requirement with respect to Cuba has resulted in almost no medicine or medical device sales to the island. If the Obama Administration wanted to encourage U.S. medicine or medical equipment sales to the island, it retains regulatory authority to define the practices which meet the requirement for onsite verification.

The ban on Cuban imports is also subject to Presidential regulatory authority. Some imports, such as sugar, spirits, or tobacco, might draw opposition from U.S. industries. But the Administration could begin by facilitating licenses for imports of Cuban vaccine therapies deemed safe and medically necessary in the United States. One Cuban vaccine that has generated significant interest in the U.S. market is a vaccine against a strain of Meningitis virus, which kills around a hundred Americans, mostly children, each year.

William LeoGrande, Dean of the American University's School of Public Affairs

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

66) Use existing executive authority to **license the sale or lease** to Cuban or third country parties of **U.S.-origin equipment for use in oil exploration** activities taking place in Cuban water. Alternatively, Congress could mandate licensing for such sales or leases.

67) Undertake a **government assessment of losses to the U.S. economy** of current trade and investment restrictions relating to Cuba.

and a specialist in Latin American affairs, wrote in a recent article, “In 2004 and 2006, President Bush authorized U.S. biotechnology firms to import Cuban pharmaceuticals for clinical testing, limiting payment to in-kind medical supplies and equipment. Licensing authority could be used to allow less-restrictive partnerships between U.S. biotechnology firms and the Cuban biotech industry in pursuit of medical advances with broad health benefits.”¹⁵⁹

Another opportunity would be for the Commerce Department to license individuals subject to U.S. jurisdiction to purchase and deal in artworks and handicrafts produced by Cuban artists, artisans and cooperatives (provided they are not part of confiscated art collections), for the purpose of sale in the United States or other countries. Licensing U.S. entities as dealers, brokers or wholesalers of private Cuban works would help increase the demand for such products in the United States, and would have a positive economic effect for Cuban producers.

Although the President does not have the authority to add a wholly new travel license category for such activities, he retains the authority to interpret the existing categories. Travel to Cuba of art and handicraft dealers could fit the definition of support for the Cuban people, which is one of 12 categories of allowable travel to Cuba codified by TSREEA.

The Obama Administration could also use its licensing authority to allow the import of a limited amount of Cuban origin goods for personal consumption for licensed travelers to Cuba. The Clinton Administration allowed Americans to bring back \$100 worth of Cuban-origin goods (though a law championed by Representative Howard Berman (D-CA) exempts artwork and informational materials from such restrictions), but the Bush Administration eliminated this exemption in 2004. Once again allowing Americans to bring back a limited amount of Cuban goods could be cast as a small gesture of good faith, particularly if the Obama Administration were to raise the amount above the Clinton Administration’s limit.

Even with an import ban and non-agricultural export ban in place between the United States and Cuba, there are still areas for constructive trade-related negotiations if the two sides are willing. For instance, the Administration could authorize the United States Trade Representative (USTR) to seek talks with Cuba to streamline customs and other procedures in order to facilitate the trade that is already legal.

The Burma model

Embargo Supporters expressed dismay that Cuba measures were enacted in the 2009 omnibus appropriations bill without what they considered to be sufficient prior consideration. “If you want to change Cuba policy, fine, let’s duke it out,” offered the highest-ranking Cuban American in Congress, Senator Robert Menedez (D-NJ). “Let’s duke it out on the floor and let’s have our debate and let’s have our amendments.”¹⁶⁰

One way for Congress to ensure the opportunity for such a debate would be to model the Cuba embargo on trade sanctions against the military government of Burma (Myanmar) first passed in 2003. That year, the Burmese military junta arrested leader and democracy activist Aung San Suu Kyi after she and her supporters were attacked by a pro-government mob (and some of her supporters were killed).

Then-Majority Whip Mitch McConnell (R-KY) and Senator Dianne Feinstein (D-CA), both admirers of Suu Kyi, pressed for new sanctions, including an import ban, against the Burmese government. Senators Chuck Grassley and Max Baucus, then-Chairman and then-Ranking Member on the Senate Finance Committee, which has jurisdiction over international trade, expressed sympathy with McConnell’s and Feinstein’s cause.

However, both Senators refused to support new open-ended unilateral sanctions, which they argued had enjoyed little success in U.S. foreign policy. They eventually struck a deal with McConnell and Feinstein that became the 2003 Burmese Freedom and Democracy Act. The Act included a one-year ban on Burmese-made imports which could only be extended annually by joint resolution of Congress, and would expire (with no annual renewal option) in 2006.

Congress voted to renew the import ban in 2004 and 2005. When the ban was set to terminate in July 2006, Congress extended the 2003 Act (and its yearly renewal procedures) until 2009, and then voted to renew the annual import ban in 2007 and 2008. In July 2009, the ban will again sunset, unless Congress extends the Act once more.

¹⁵⁹ LeoGrande, William M. (2008/09, Winter). Engaging Cuba: A Roadmap. *World Policy Journal* (online). World Policy Institute. Available: <http://www.mitpressjournals.org/doi/pdf/10.1162/wopj.2009.25.4.87?cookieSet=1>

¹⁶⁰ Murray, Shailagh and DeYoung, Karen. (2009, March 30). Momentum grows for relaxing Cuba policy. *The Washington Post*. (online). Available: http://www.washingtonpost.com/wp-dyn/content/article/2009/03/29/AR2009032902460_pf.html

To aid Congressional consideration of the policy, the Act requires the Secretary of State to report annually to Congress on:

- (A) bilateral and multilateral measures undertaken by the United States Government and other governments to promote human rights and democracy in Burma;
- (B) the extent to which actions related to trade with Burma taken pursuant to this Act have been effective in—
 - (i) improving conditions in Burma, including human rights violations, arrest and detention of democracy activists, forced and child labor, and the status of dialogue between the SPDC and the NLD and ethnic minorities;
 - (ii) furthering the policy objections of the United States toward Burma; and
- (C) the impact of actions relating to trade take pursuant to this Act on other national security, economic, and foreign policy interests of the United States, including relations with countries friendly to the United States.¹⁶¹

In May 2004, Senators Baucus (D-MT), Roberts (R-KS), Enzi (R-WY), Feinstein and others, joined by Representatives Otter (R-ID), Berman (D-CA), Flake (R-AZ), Delahunt (D-MA) and others, introduced the Cuba Sanctions Reform Act, which subjected the entire Cuba trade embargo to the same expiration and renewal procedures contained in the Burmese Freedom and Democracy Act.¹⁶² Baucus called the bill a “common sense, middle ground approach. Our bill would not lift the embargo,” he said. “It would simply give Congress and the American people a say in the process.”¹⁶³ The bill was referred to the Senate Finance Committee, and to House Committees on International Relations (now Foreign Affairs) and Ways and Means, among others, but it did not receive consideration.

¹⁶¹ The Burmese Freedom and Democracy Act of 2003. H.R. 2330, 108th Congress, 1st Sess. (2003, July 28). Available: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ061.108.pdf

¹⁶² In the Senate: S.2449; In the House: H.R.4457. Introduced bills available by search of 108th Congress: <http://thomas.loc.gov>

¹⁶³ Lawmakers challenge Bush. (2004, June 1). *Cuba News*. Available: <http://www.articlearchives.com/government-public-administration/government-procedure/1279544-1.html>

XIII. TRANSITION COORDINATOR

In 2004, President Bush asked then-Secretary of State Colin Powell and then-Secretary of Housing and Urban Development Mel Martinez, who was born in Cuba, to chair a Commission for Assistance to a Free Cuba. The Commission, the equivalent of a large inter-agency committee, was made entirely of Administration officials and contained no non-government members. Its goal was to hasten a transition to democracy in Cuba and to plan for a comprehensive aid and restructuring program that would be offered to a reformed Cuba. The Commission made recommendations in May 2004, focused on six areas:

- “To empower Cuban civil society;
- To break the Cuban dictatorship’s information blockade;
- To deny resources to the Cuban dictatorship;
- To illuminate the reality of Castro’s Cuba;
- To encourage international efforts to support Cuban civil society and challenge the Castro regime; and
- To undermine the regime’s ‘succession strategy.’”¹⁶⁴

In addition to increased aid to support Cuba’s political opposition, the Commission recommended the creation of a new position at the Department of State, that of Cuban Transition Coordinator. President Bush approved the Commission’s recommendations and a Transition Coordinator was named in early 2005.

The creation of a Transition Coordinator was meant to signal “the unwillingness of the United States to accept the Castro regime’s ‘succession strategy’” and would be the focal point of all U.S. government transition preparations. The Commission envisioned the coordinator to be a sign that the United States was “proactively preparing for a post-Castro era,” and that “by establishing a dedicated Transition Coordinator, the U.S. Government can be prepared to respond strategically and effectively to a transition in Cuba.”¹⁶⁵ Thus, U.S. planning regarding Cuba was premised on an outcome that never materialized and neglected the one outcome that did occur: a stable presidential transition from one Castro to another.

The Cuban government and official media lambasted what it called the “Plan Bush” and used billboards and other advertising to bring the message to the Cuban public. Ricardo Alarcon, President of the Cuban National Assembly, called the transition plan an “aberration, tantamount to a declaration of war.”¹⁶⁶

Cuban dissidents also panned the report. “It is not right, nor do we accept, any external element, whether from the United States of America, Europe or anywhere else, trying to design the Cuban transition process or supposedly becoming an actor in that process,” responded dissident Oswaldo Paya.¹⁶⁷

“It’s counter-productive. This will deepen tensions between Washington and Havana and allow Cuba’s totalitarian government to raise the specter of foreign interference in Cuban affairs,” said human rights activist Elizardo Sanchez.¹⁶⁸

Lexington Institute Vice President Philip Peters concluded that the Commission’s plans to help a democratic Cuba deal with property claims would be far more unsettling to average Cubans than the status quo under Fidel Castro’s government. Peters summed up the plan:

While Cubans may think they have title to their property, those titles are in doubt and need to be certified by a commission that the U.S. government will help Cuba to establish.

The commission may determine that current occupants of homes – now called “tenants” – might have to pay “rent” until they are evicted: “If the [commission] finds that the property is occupied as a home, then the claimant should be unable to evict the tenants and take possession of the property for a specified period of time.

¹⁶⁴ Powell, Colin L. (2004, May). Commission for Assistance to a Free Cuba: Report to the President. U.S. Department of State (online). Available: <http://www.state.gov/documents/organization/32334.pdf>

¹⁶⁵ Ibid.

¹⁶⁶ San Pedro, Emilio. (2006, July 1). Cuba concern over U.S. Castro plans. BBC (online). Available: <http://news.bbc.co.uk/2/hi/americas/5136736.stm>

¹⁶⁷ Anti-Castro groups slam Bush Cuba moves. (2004, May 11). Inter Press Service. Available: <http://www.globalexchange.org/countries/americas/cuba/1874.html>

¹⁶⁸ Boadle, Anthony, “Cuba bristles at Bush ‘transition’ plan,” Reuters, August 1, 2005. http://www.redorbit.com/news/international/193615/cuba_bristles_at_bush_transition_plan/

Can anyone imagine a single step that the U.S. government could take that would be more of an impediment to change in Cuba?¹⁶⁹

The notion that the United States would assume or even be offered such an expansive role in a transitional Cuba also overlooks a longstanding Cuban distrust for the U.S. government, dating back to the American intervention in Cuba's war for independence from Spain. After the Spanish were driven from Cuba, the United States occupied the island, installed the first president of the Cuban republic and withdrew its armed forces after the Cuban constitution included open-ended basing and intervention rights for the United States.

To date, the Cuba Transition Coordinator post remains unfilled in the Obama Administration. The Administration's decisions on this post will be central to Cuban perceptions of its intentions, and are likely to affect its ability to pursue policies of engagement that require Cuban government assent or collaboration.

Senator Richard Lugar (R-IN) suggested to President Obama in a letter dated March 30 the creation of a Presidential Envoy for Cuba.¹⁷⁰ The Envoy would be responsible for all aspects of U.S. Cuba policy, and would be tasked with beginning discussions with the Cuban government on issues of mutual concern, such as migration or anti-narcotics cooperation. Appointing such an Envoy would allow the Administration to gracefully retire the Transition Coordinator post.

TRANSITION COORDINATOR

Policy options:

68) **Abolish the Transition Coordinator post** and return long-range contingency planning functions to the respective agencies. Interagency coordination would be handled by the Cuba Coordinator already posted to the State Department's Bureau of Western Hemisphere Affairs.

¹⁶⁹ Peters, Philip. (2007, June 18). Tu casa es mi casa! *The Cuban Triangle* (online). Available: <http://cubantriangle.blogspot.com/2007/06/tu-casa-es-mi-casa.html>

¹⁷⁰ Letter from Senator Richard Lugar to President Barack Obama. (2009, March 30). Available: <http://lugar.senate.gov/sfrc/pdf/Cuba2.pdf>

XIV. TRAVEL RESTRICTIONS

Until 1977, the 1917 Trading with the Enemy Act (TWEA) was the basis for the President's authority to regulate international economic transactions, including the authority to prohibit Americans from spending money in (and, thus, traveling to) designated countries, in times of war or national emergency. Presidential authorities under TWEA were broad, required no congressional oversight or reporting by the President, and resulted in open-ended restrictions often unrelated to the original reason for the declared emergency.¹⁷¹

In 1977, Congress passed The International Emergency Economic Powers Act (IEEPA), which superseded TWEA's authority with respect to peacetime emergencies. Under IEEPA, the President could still initiate controls on international economic transactions (such as the currency controls that constitute the travel ban) in peacetime emergencies, but would have to declare a state of emergency, regularly report to Congress, and renew the emergency each year. IEEPA provided for continuation of economic sanctions already implemented under TWEA, including the currency controls and de facto 'travel ban' on Cuba, if the President continues to make an annual determination in favor of continuing such sanctions.¹⁷²

Travel restrictions with respect to Cuba pursuant to TWEA have been in place for more than four decades. For a short time, all Americans were allowed to travel to Cuba under the Carter Administration. President Carter used his broad licensing authority to allow all Americans to travel to Cuba, but the underlying authority for the travel ban remained in place. The authority to maintain the travel restrictions under TWEA remains in place until the President fails to make an annual determination to continue that authority.¹⁷³

Using the executive authority still in place under TWEA, President Reagan reinstated travel restrictions against Cuba, allowing a few exceptions of licensable travel (such as Cuban Americans). In 1996 Section 102 (h) of the Cuban Liberty and Democratic Solidarity Act (the Helms-Burton Act) codified the economic embargo against Cuba in its entirety. The travel ban on Cuba, which had been solely the prerogative of the President, became a matter of law.

In 2000, as Congress loosened restrictions on agricultural exports to Cuba in the Trade Sanctions Reform and Export Enhancement Act, Section 910 (b) of the Act limited the President's authority to materially relax the travel ban restrictions in place as of June 1, 2000. That meant that the President could not add new categories of travel beyond agricultural-sales related travel and the twelve other categories in existence, including travel for humanitarian organizations, families, journalists, professional researchers, academics and students and others.

Yet even with these statutory restrictions in place, the President retains broad authority over U.S. travel policy. For example, the President can allow more travel by broadening the definition of who qualifies under the existing travel categories, and by offering a general license to all eligible travelers.

In 2003, President Bush used his regulatory authority to curb legal travel to Cuba, by amending the federal regulations to eliminate people-to-people exchanges from among the licensable categories of travel (they had been allowed under the academic exchange category). He also used his regulatory authority to expand the definition of 'close' relatives that Cuban Americans could visit, including great-grandparents and second cousins.

In 2004, the Administration reversed itself on Cuban American family travel, restricting trips to nuclear family only, and excluding aunts and uncles, cousins, nieces and nephews, who had previously been considered 'close' relatives. President Bush endorsed this and other measures, as recommended in May 2004 by the President's Commission for Assistance to a Free Cuba.

¹⁷¹ U.S. House of Representatives Committee on Ways and Means. *Overview and Compilation of U.S. Trade Statutes, Part I of II, 2005 Edition*, 109th Congress, 1st Sess. (2005, June).

¹⁷² Ibid; see also, Rennack, Dianne and Sullivan, Mark P. (2005, March).

¹⁷³ The last such determination was made in September 2008. See: Presidential Determination No. 2008-27. (2008, September 12). Continuation of the Exercise of Certain Authorities with Respect to the Trading with the Enemy Act. Available: <http://edocket.access.gpo.gov/2008/pdf/E8-21861.pdf>

In 2005, the Treasury Department revised its guidelines for approving religious exchanges, citing abuse by some licensees to engage in tourist activities while in Cuba. New licensing policies favored licensing requests from a single congregation, rather than from multiple congregations and organized by national or regional denominational organizations. Many religious organizations with longstanding connections to churches on the island complained that the new policy discriminates against smaller Protestant churches – which rely on national offices to plan missions abroad – over much larger and self-sufficient evangelical “mega” churches.¹⁷⁴

On April 13, 2009, using its existing executive authority to regulate current categories of travel to Cuba, the Obama Administration announced it will allow virtually unrestricted travel by Cuban Americans with up to third degree relations on the island.¹⁷⁵

Potential policy effects

The George W. Bush Administration’s rationale for restricting travel was to deny hard currency income to the Cuban government. Proponents of restricted travel argue that the more economically stable Cuba becomes, the less likely the government will enact any reforms to improve Cubans economic and political openness. They point out that even if U.S. tourists stayed in foreign operated hotels, the hotel operators must pay the Cuban government in hard currency for local labor, and that the Cuban government keeps all but a small fraction of that wage, paying workers in Cuban pesos, rather than in hard currency. European and Canadian travel to the island has not resulted in political change in Cuba, so, travel opponents argue, U.S. travel should not be any different.

Skeptics of U.S. travel to Cuba argue that Cuba might try to restrict the flow of Americans, or that the government might take actions (such as a crackdown on dissent) to discourage the U.S. Congress or President from easing travel controls. Opponents also suggest that the United States should not lift its travel controls until the Cuban government eases its controls on the foreign travel of its citizens.

Proponents of easing travel controls argue that U.S. policy should be based not on Cuban policies but on U.S. rights and interests. A 2002 study that estimated up to \$1 billion in domestic economic output and tens of thousands of jobs for the U.S. tourism and related sectors, if the Cuba travel ban were repealed in its entirety.¹⁷⁶ In March 2009, American Farm Bureau Federation President Bob Stallman endorsed the Freedom to Travel to Cuba Act (legislation pending in both the House and Senate), noting that increased travel by Americans would result in increased agricultural exports to the island.¹⁷⁷

Some proponents of freer U.S. travel to the island challenge the notion that ordinary Cubans do not benefit from U.S. visits. Cubans who work in foreign operated hotels often receive hard currency bonus pay, either under the table or as negotiated with the Cuban government. The bonus pay practice is so widespread that in 2008, the Raul Castro government legalized foreign companies’ bonus payments and introduced taxes on that income.¹⁷⁸ Many Cubans also gain access to

TRAVEL RESTRICTIONS

Policy options:

69) Pass legislation to **limit the President’s authority to regulate or restrict the travel of any American citizen or permanent resident** to Cuba, except in a declared state of emergency following passage of the repeal of such authority. This option would eliminate travel restrictions on all Americans equally, rendering all of the following policy options unnecessary.

70) Using existing executive authority, **streamline the Treasury Department pre-trip specific license approval process for all currently approved categories of travel**, and instead issue a general license for all eligible Americans to travel to Cuba. Doing so would free up Treasury Department staff time for other sanctions or financial intelligence investigations.

71) Restore Clinton era academic institutional licensing policies: **explicitly authorize, through regulatory rule change or legislation, short-term trips for degree-seeking post-secondary students**. Include in such an authorization students at one university who must transfer to another for the purpose of joining a credit-earning course or program in Cuba.

¹⁷⁴ Banks, Adelle. (2006, March 14). Congress challenges OFAC to reconsider US Cuba travel restrictions. *The Washington Post*. Available:

http://havanajournal.com/politics/entry/congress_challenges_ofac_to_reconsider_us_cuba_travel_restrictions/

¹⁷⁵ The White House: Office of the Press Secretary. (2009, April 13).

¹⁷⁶ Robyn, Dorothy, Reitzes, James D. and Church, Bryan. (200, July 15). *The Impact on the U.S. Economy of Lifting Restrictions on Travel to Cuba*. Washington, D.C.: The Brattle Group. Available: http://www.ciponline.org/cuba/travel/cuba_final.pdf

¹⁷⁷ Statement by Bob Stallman, President of the American Farm Bureau Federation. (2009, March 31). Press conference for the Freedom to Travel to Cuba Act. Washington, DC. Video available: <http://www.youtube.com/watch?v=z3AG1DFAAfY>

¹⁷⁸ Boadle, Anthony. (2007, December 7). Cuba allows foreign firms to pay in hard currency. Reuters. Available: <http://uk.reuters.com/article/oilRpt/idUKN0731116520071207?sp=true>

hard currency working in state operated travel agencies, or in a private tourism-related business, such as driving private taxis, renting rooms, operating small restaurants in their homes, and serving as tour guides in informal ways.

It is also possible that American tourist demand (the USITC estimated that one million Americans might visit Cuba in the first years after lifting the travel ban), on top of current worldwide demand - roughly two million tourists annually - could lead the Cuban government to allow more private Cuban participation in the tourism sector. Cuba currently has fewer than 50,000 hotel rooms, with plans to increase its stock by another 10,000 rooms in the next several years.¹⁷⁹

Some supporters of U.S. travel to Cuba believe that American visits have unique significance. At an April 2009 press conference with Members of Congress and Cuban Americans supporting travel to Cuba, Ignacio Sosa, who helps to raise money for Caritas, a Cuban Catholic charity, insisted that Americans have long-standing cultural ties to Cubans that Canadian or European tourists do not have. Another participant, Silvia Wilhelm, Executive Director of the Cuban American Commission for Family Rights, noted that lifting U.S. travel controls is key to ending the Cuban notion of the U.S. “enemy.”¹⁸⁰

Allocation of security resources to administer travel controls

In 2003, the top Republican and Democrat on the Senate Finance Committee, Senators Chuck Grassley of Iowa and Max Baucus of Montana, conducted a joint investigation of the U.S. Treasury Department’s efforts to track and shut down global financial networks exploited by terrorists. As part of their investigation, they inquired into the focus and resources of the Treasury Department’s Office of Foreign Assets Control (OFAC), which is charged with sanctions enforcement against both countries and global terrorist and narco-terrorist groups.

The Finance Committee investigation revealed that in 2002 (shortly after the September 11th attacks and before the war in Iraq), in an office of about 128 staff and supervisory personnel, OFAC was dedicating roughly 15% of its resources to administering and enforcing the Cuba travel sanctions. OFAC had 21 staff assigned to the Cuba travel ban, while two were assigned to tracking the financial networks of Osama Bin Laden, and two were investigating Saddam Hussein’s finances.¹⁸¹ Senators Baucus, Grassley and a number of other members of Congress vigorously protested what they saw to be a misallocation of resources in the global financial war on terrorism.

Senator Baucus returned to the issue of OFAC resource allocations in April 2004. The Treasury Department informed him it had not reallocated the 21 staff working on Cuba, but showed 16 staff dedicated to tracking the global financial networks of Osama Bin Laden, Al Qaeda and affiliated groups.¹⁸² When Senator Baucus again asked for updated information on OFAC’s allocation of staff resources in 2005, the Treasury Department declined to say how many fulltime employees (or their

72) Restore Clinton era people-to-people academic exchange licensing policies: **Explicitly authorize, by regulatory action or through legislation, travel by groups and individuals engaged in people-to-people, or “purposeful” educational exchanges in Cuba.** Explicitly endorse travel by academics, scientists, performers, artists, athletes, civic organizations, non-degree seeking participants in post-secondary institution programs and by secondary school student groups.

73) Through a rule or through published guidance, revise Treasury Department policies adopted during the Bush administration, to **broadly encourage both single congregation and national organization religious exchanges and humanitarian visits** to Cuba. Avoid any political litmus test for approval of these visits.

74) Pass legislation requiring the Treasury Department to **allocate OFAC resources according to national security threat assessments**, and to report personnel hours dedicated to Cuba travel ban administration and enforcement.

¹⁷⁹ Adams, David. (2009, January 26). Cuba aims to become tourist magnet. *The St. Petersburg Times* (online). Available: <http://tampabay.com/news/world/article970531.ece>

¹⁸⁰ Sosa and Wilhelm’s comments came as responses to questions from the media at an April 2, 2009 press conference hosted by members of Congress for the Freedom to Travel to Cuba Act, which took place in the House Rayburn Office Building room 2255, Washington, DC. For videos of prepared comments: <http://www.youtube.com/profile?user=center4democracy&view=videos>

¹⁸¹ S.Hrg. 108-825: *The Treasury Department and Terrorism Financing, Hearing before the U.S. Senate Committee on Finance*, 108th Congress, 2nd Sess. (2004, May 19). (Prepared statement of Senator Max Baucus). Washington, D.C.: U.S. Government Printing Office. Available: <http://finance.senate.gov/hearings/95477.pdf>. See also: S.Hrg. 109-265: *Hearing before the Committee on Finance, U.S. Senate*, 109th Congress, 1st Sess. (2005, May 24) (Responses from Timothy Adams to Questions for the Record, p.35). Available: <http://finance.senate.gov/hearings/25654.pdf>

¹⁸² Baucus, Senator Max. (2004, October 6). Baucus OFAC Amendment Passes with Intel Reform Bill. U.S. Senate Committee on Finance Press Release. Available: <http://finance.senate.gov/press/Bpress/2004press/prb100604.pdf>

equivalent) worked on the Cuba travel ban. The Department said this was because all staff were cross-trained and often jumped from program to program.¹⁸³

In an effort to force greater accountability on OFAC's resource allocation, Senator Baucus, joined by Senator Pat Roberts, then-Chairman of the Senate Select Committee on Intelligence, authored an amendment that would have required the Treasury Department to justify and report on its allocation of OFAC resources. The amendment, which the Senate agreed to, was attached to S.2845, the National Intelligence Reform Act of 2004.¹⁸⁴ The provision did not become law (it was eventually struck from the bill in final conference negotiations between the House and Senate).

Despite the statutory requirement that the President regulate travel to Cuba, the Obama Administration could reduce the ban's administrative and enforcement burden at OFAC and free up resources that could be dedicated to other OFAC country programs, such as Sudan or Iran, or to designated terrorist groups. Currently, there are 12 categories of travelers who are allowed to travel to Cuba, most by specific license, or in some cases, such as for government officials, by general license authority (travelers have assumed authority but must prove their eligibility if challenged). Specific license applications can often take weeks or months to evaluate and approve. If all currently eligible non-tourist Cuba travel were subject to general license authority, rather than the time-consuming pre-trip licensing process, OFAC could redirect considerable resources to more urgent intelligence and enforcement missions.

Allocation of port of entry resources focused on travelers to and from Cuba has also become a subject of debate. In the fall of 2003, the Bush Administration stepped up port of entry inspections of travelers to Cuba, during which time authorities searched 85% of passengers' baggage returning from Cuba.¹⁸⁵ A 2007 GAO investigation found that U.S. authorities had stepped up enforcement after tougher travel regulations promulgated in 2004 increased the "risk" of embargo violations. The GAO concluded that the high level of scrutiny of Americans returning from Cuba "may strain CBP's [Customs and Border Protection] ability to carry out its mission of keeping terrorists, criminals, and other inadmissible aliens from entering the country."¹⁸⁶

¹⁸³ S.Hrg. 109-265: *Hearing before the Committee on Finance, U.S. Senate, on the Nominations of Alex Azar II, to be Deputy Secretary, U.S. Department of Health and Human Services; Timothy D. Adams, to be Under Secretary for International Affairs, U.S. Department of the Treasury; Suzanne C. DeFrancis, to be Assistant Secretary for Public Affairs, U.S. Department of Health and Human Services; Charles E. Johnson, to be Assistant Secretary for Budget, Technology and Finance, U.S. Department of Health and Human Services; and Shara L. Aranoff, to be a Member of the International Trade Commission*, 109th Congress, 1st Sess. (2005, May 24) (Responses from Timothy Adams to Questions for the Record, p.35). Available: <http://finance.senate.gov/hearings/25654.pdf>

¹⁸⁴ <http://finance.senate.gov/press/Bpress/2004press/prb100604.pdf>

¹⁸⁵ U.S. Department of Homeland Security. (2003, December 10). Under Secretary Asa Hutchinson Touts Cuba Enforcement Success. Washington, D.C.: Office of the Press Secretary. Available: http://www.dhs.gov/xnews/releases/press_release_0317.shtml

¹⁸⁶ U.S. Government Accountability Office. (2007, November). Economic Sanctions: Agencies Face Competing Priorities in Enforcing the U.S. Embargo on Cuba. (GAO Publication No. GAO-08-80). Washington, D.C.: U.S. Government Accountability Office. Available: <http://www.gao.gov/products/GAO-08-80>

CONCLUSION

When Fidel Castro first took power in Cuba fifty years ago, the United States recognized the new government, favoring stability and continuity of U.S. economic interests on the island. Later, as Cuba became an outpost of Soviet influence in the Western Hemisphere, undermining Fidel Castro's government was a matter of U.S. national security. After the collapse of the Soviet Union, the government of Cuba no longer had the means to support leftist rebel groups in Latin America or elsewhere, and lost its strategic importance to U.S. national security.

Since then, United States policy has singularly focused on how to bring political change to the island. Yet these efforts have not succeeded. Ten American Presidents have been unable to dispense with what Ford Administration official Harry Shlaudeman called an "intrinsically trivial" policy matter.¹⁸⁷

Nearly thirty years later, in January 2004, then-state Senator Barack Obama categorically rejected the policy: "I think it's time for us to end the embargo on Cuba." At the time, he reasoned that the policy has "squeezed the innocents in Cuba and utterly failed in the effort to overthrow Castro."¹⁸⁸

Just over four years later, as a candidate for President, U.S. Senator Obama again addressed Cuba policy, this time in the heart of Miami's Cuban American neighborhood. He criticized the status quo Cuba policy as an approach "that's done nothing to advance the cause of freedom for the Cuban people." But he went on to say that as President, he would not lift the embargo on Cuba.¹⁸⁹

On April 13, 2009, the Obama Administration announced it would keep the campaign promise to lift all restrictions on family travel and remittances to Cuba. When pressed to comment on calls for broader action, particularly on travel restrictions remaining in place for non-Cuban Americans, NSC Senior Director for Western Hemisphere Affairs Dan Restrepo said the President intended to "begin with family," and repeatedly noted that "U.S. policy toward Cuba is not frozen in time." Still, Restrepo gave no indication what, if any, additional measures the President may be considering beyond these initial changes.¹⁹⁰

Even with the core of the trade embargo remaining in place over the near term, there is much the President and the Congress can immediately do to move U.S. Cuba policy in a more constructive direction. In particular, the President retains broad authority with respect to initiating or increasing security cooperation and to ease certain financial and commercial restrictions, without lifting them entirely.

This policy assessment explores more than 70 policy options that President Obama and the 111th Congress could take separately and together to renovate U.S. policy toward Cuba – without lifting the entire embargo. All of the options presented would serve a new policy of American engagement – cultural, professional, economic and humanitarian – with the Cuban people, of building a positive U.S. influence on the island, and of protecting U.S. security, economic and ethical interests.

Whichever options the President and the Congress may choose to exercise, suggested herein or elsewhere, each should avoid embracing a condition-based policy on Cuba. The government of Cuba has indicated that it is not moved by U.S. "offers" in exchange for internal political changes. U.S. efforts are likely to see greater success if they center on protecting and advancing American security and economic interests, nurturing a constructive bilateral dialogue on difficult issues, and broadly contributing to greater economic and political openness and opportunity on the island.

¹⁸⁷ U.S. Department of State. (1975, March 27). Normalizing Relations with Cuba. Available: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB269/doc07.pdf>

¹⁸⁸ Obama, Barack. (2004, January 20). Remarks at Southern Illinois University. January 20, 2004. Video clip available: <http://www.youtube.com/watch?v=11FoZyRIDFE>

¹⁸⁹ Obama, Senator Barack. (2008, May 23).

¹⁹⁰ Gibbs, Robert and Restrepo, Dan. (2009, April 13). Press briefing by Press Secretary Robert Gibbs and NSC Senior Director for Western Hemisphere Affairs Dan Restrepo. The White House. Washington, D.C.: James S. Brady Press Briefing Room. Available: http://blogs.orlandosentinel.com/news_hispanicaffairs/2009/04/full-transcript-of-white-houses-briefing-on-cuba.html

GLOSSARY OF ACRONYMS

CACR	Cuban Assets Control Regulations
CBERA	Caribbean Basin Economic Recovery Act
CBP	Customs and Border Protection
CGLO	Coast Guard Liaison Officer
CIA	Central Intelligence Agency
CRS	Congressional Research Service
EAR	Export Administration Regulations
IRA	Irish Republican Army
FARC	Revolutionary Armed Forces of Colombia
FBI	Federal Bureau of Investigation
FCSC	Foreign Claims Settlement Commission
GAO	Government Accountability Office
GSP	General System of Preferences
HCH	Havana Club Holdings
ICE	Immigration and Customs Enforcement
IEEPA	International Emergency Economic Powers Act
IMF	International Monetary Fund
NFTC	National Foreign Trade Council
NTR	Normal Trade Relations
OAS	Organization of American States
OCB	Office of Cuba Broadcasting
OFAC	Office of Foreign Assets Control
TSREEA	Trade Sanctions Reform and Export Enhancement Act
TWEA	Trading with the Enemy Act
SOUTHCOM	U.S. Southern Command
USAID	U.S. Agency for International Development
USITC	U.S. International Trade Commission
USPTO	U.S. Patent and Trademark Office