



CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

256 SOUTH OCCIDENTAL BOULEVARD
LOS ANGELES, CA 90057
Telephone: (213) 388-8693
Facsimile: (213) 386-9484
www.centerforhumanrights.org

December 17, 2014

Cuba-US Relations: The Hopefully Not So Long and Winding Road Ahead

Peter Schey, President, Center for Human Rights and Constitutional Law

Today, President Obama and President Raul Castro jointly announced historic changes in Cuban-US relations. In secret negotiations that were encouraged by Pope Francis and took place over the last 18 months, Presidents Obama and Raúl Castro of Cuba agreed to take the first steps towards improvement of bilateral relations between the two countries. President Obama rejected what he called a “rigid policy that is rooted in events that took place before most of us were born.”

Most would agree that for more than five decades, U.S. policy towards Cuba has failed to bring about the kind of results that are in the best interest of American national security.

This report briefly explains the nature of the steps taken by President Obama today, and the additional substantive steps he could take to begin to repair damage done by five decades of a failed policy aimed at assassinating the leaders of Cuba, precipitating the violent overthrow of the Government, and causing economic suffering among the Cuban people.

The pivotal role of the Alan Gross and Cuban Five cases

The turning point for a major change in relations came in December 2009 with the arrest in Cuba of Alan P. Gross, an American government contractor secretly working for the U.S. Agency for International Development (AID) to deliver satellite telephone equipment capable of cloaking Internet connections to dissident Cubans. While AID obviously did not intend for Gross to get arrested, the agency unwittingly created the very circumstances that would pave the way for steps towards normalization of relations.

Gross was sentenced to 15 years in prison and thus started a well-orchestrated public campaign by his wife and lawyer, faith-based leaders throughout the

country, and key members of Congress to secure his release. It soon became clear that Mr. Obama could not take steps towards normalization of relations with Cuba unless a deal involved Mr. Gross's humanitarian release and return to the United States.

For the Cubans, the cornerstone of any deal to begin normalization of relations with the U.S. would have to involve release of the three remaining members of the Cuban Five imprisoned in the U.S. The Five were Cuban intelligence officers arrested in 1998 after spending several years infiltrating groups in South Florida involved in plotting terrorist attacks against Cuba. Two of the Five were released after serving long prison sentences and returned to Cuba but three remained in U.S. prisons, including Gerardo Hernandez, who received a life sentence for alleged involvement in Cuba's 1994 shutdown of two planes operated by the Florida-based Brothers to the Rescue group. A review of the court records indicates that Hernandez had no role in the shutdown. His conviction and life sentence, as well as unfair procedures adopted during the trial of the Five, were widely criticized by human rights organizations, Nobel Prize laureates, and foreign government officials around the world. In May 2014, the Center for Human Rights and Constitutional Law submitted a comprehensive report to Obama Administration officials on Hernandez's obvious innocence on the shutdown charge and the indefensibility of his life sentence.

Part of the arrangement reached between the U.S. and Cuba resulted in the "humanitarian release" of Gross and the remaining three members of the Cuban Five serving prison terms in the United States. In addition, both countries will exchange ambassadors, the United States will somewhat ease restrictions on remittances to Cuba, travel and banking relations, and Cuba will release 53 prisoners identified as political prisoners by the United States Government. Another unnamed prisoner of importance to the U.S. will be released by Cuba after serving 20 years in prison for providing the U.S. with intelligence information.

The steps taken by President Obama are of major importance and yet are limited in nature. Much remains to be done by the Obama Administration and the U.S. Congress to more substantially normalize relations with Cuba and end the United States' five-decade long failed policy of enmity towards Cuba. President Raúl Castro said in his public statements, made simultaneously with President Obama's announcement: "This in no way means that the heart of the matter has been resolved ... The economic, commercial and financial blockade, which causes enormous human and economic damages to our country, must cease."

What are the possible next steps in Cuban-U.S. relations? In particular, what can President Obama do to more substantially normalize relations with Cuba?

Cuba is not a state sponsor of international terrorism

First, President Obama should take immediate steps to remove Cuba from the State Department's list of states that sponsor "international terrorism." Cuba's inclusion is an absurdity that virtually no foreign diplomat of any country finds credible. There is no evidence that Cuba is a sponsor of international terrorism. *Cuba's actions and policies do not meet the statutory requirements under existing U.S. law to be included as a state sponsor of international terrorism.*

Pursuant to the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act, each year the U.S. State Department designates governments that are "sponsors" of international terrorism. The designation imposes restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions. Designation also implicates other laws that penalize persons and countries engaging in certain trade with state sponsors of terrorism. Currently there are four countries designated under these authorities. Cuba has been designated as a state sponsor of terrorism since March 1, 1982. Interestingly, President Bush delisted North Korea in 2008.

There is no serious argument today that Cuba is a state sponsor of international terrorism. In 2013 all the State Department could muster in support of Cuba's designation was that *a small number of members of the Basque Fatherland and Liberty (ETA) and the Revolutionary Armed Forces of Colombia (FARC) have sought refuge in Cuba.*

Probably a larger number of wanted terrorists have been granted refuge in the United States, including many wanted in Cuba for terrorist acts in which civilians were killed, not to mention various military leaders from Central and South America involved in crimes against humanity in their home countries. Even if a few ETA or FARC members were living in Cuba, this would not qualify Cuba as a state sponsor of international terrorism under U.S. or international law.

In fact, throughout 2013, the Government of Cuba hosted negotiations between the FARC and the Government of Colombia aimed at brokering a peace agreement between the two.

The most recent U.S. State Department report on state sponsored terrorism concedes that in 2013 "[t]here was no indication that the Cuban government provided weapons or paramilitary training to terrorist groups."

Under U.S. law designation of a country as a state sponsor of terrorism should only take place when that country has in fact supported international terrorism and has offered its territory as a sanctuary for terrorist organizations.

For these reasons, the U.S. Department of State should not include Cuba in the upcoming 2014 list of countries engaged in the sponsorship of international terrorism. In addition, pursuant to Section 6(j) of the Export Administration Act of 1979, the President should submit to the Speaker of the House of

Representatives, the chairman of the Committee on Banking, Housing, and Urban Affairs and the chairman of the Senate Committee on Foreign Relations a report certifying that Cuba has “not provided any support for international terrorism during the preceding 6-month period” and has provided assurances that it will not support acts of international terrorism in the future. Upon the presentation of this report, Cuba will no longer be treated as a state sponsor of terrorism under the Export Administration Act.

Next, Section 620A of the Foreign Assistance Act (FAA) prohibits any U.S. foreign assistance, or assistance under the Food for Peace Act, the Peace Corps Act, or the Export-Import Bank Act, to any country the government of which has repeatedly provided support for acts of international terrorism. Like the Export Administration Act, the FAA requires that before a designation by the Secretary of State may be rescinded, the President must submit to the Speaker of the House of Representatives and the chairman of the Senate Committee on Foreign Relations a report certifying that the foreign government is *not* supporting acts of terrorism and has provided assurances that it will not support acts of international terrorism in the future.¹ Upon the presentation of this report, Cuba will no longer be treated as a state sponsor of terrorism under the Foreign Assistance Act.

Any and all “covert” operations against Cuba should be terminated

Second, the Obama Administration should adopt a public policy of ending any and all covert actions aimed at the overthrow of the Cuban Government. These failed efforts date back to shortly after the Cuban Revolution.

On December 11, 1959, then-CIA Chief Allen Dulles approved “thorough consideration” of all possible ways to stop Castro, including his “elimination.” In May 1960, the CIA initiated a program to recruit anti-Castro Cuban exiles in Miami and provide them with weapons and infantry training at a CIA-run base code-named *JMTrax* near Retalhuleu in the Sierra Madre on the Pacific coast of Guatemala. On July 21, 1960, the CIA issued an order calling for operatives to “neutralize” Fidel Castro. On April 17, 1961, an unsuccessful military invasion of Cuba was undertaken by the CIA-sponsored paramilitary group Brigade 2506. About 1,334 members of Brigade 2506 traveled by sea from Guatemala and an additional 177 airborne paratroops landed in Cuba.

Since these early efforts to overthrow the Cuban Government failed, the U.S. Government has sponsored, financed and trained numerous exile groups in

¹ Alternatively, portions of the FAA may be waived if the waiver is supported by national security interests or humanitarian reasons and the President “consults” with the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations regarding a waiver and submits a report describing the national security interests or humanitarian reasons which justify the waiver, the assistance to be provided, and the period of time during which the waiver will be effective.

Florida to engage in terrorist acts aimed at the overthrow of the Cuban Government.

As these efforts all stalled or failed, the U.S. Agency for International Development set up front companies, routed money through overseas bank transactions and established elaborate cover stories to bring about regime change in Cuba. These projects recently included Alan Gross's 2009 failed effort to smuggle illegal technology into Cuba, a derailed plan to establish a Twitter-like service for Cubans, and a now disclosed program that infiltrated Cuba's "hip-hop" artist community. These covert projects are not only an affront to Cuban independence but also put at risk AID's cooperation with foreign governments to deliver aid to the world's poor.

Over the past fifty years the U.S. Government's secret programs to overthrow the Cuban Government have all backfired. Predictably, once made public, these covert programs have increased the enmity of Cuban citizens towards the U.S. Government, making it unlikely ordinary Cubans will look to the U.S. for honest leadership on matters of democracy and justice.

As part of the Obama Administration's new approach to Cuba, it should terminate all ongoing covert programs and renounce any future covert programs aimed at Cuba. The two countries will inevitably engage in intelligence gathering. That is not the same as planning and implementing proactive covert programs aimed at the overthrow of the other country's government.

The Obama Administration can do more to normalize relations with Cuba

While Congress is responsible for enacting various laws that gave rise to the Cuban embargo, the President along with the Secretary of the Treasury and the Secretary of Commerce are responsible for the bulk of the sanctions imposed on Cuba.

There is far more the Obama Administration can do to normalize relations with Cuba. As announced today by President Obama, travel to Cuba will be loosened but only for business, school, religious or artistic reasons, and such visitors will have some ability to use credit cards in Cuba. It will be somewhat easier for U.S. companies to export certain products to Cuba. The U.S. Administration is raising the level of remittances Cubans are allowed to send to relatives in Cuba to \$2,000 every three months from the current limit of \$500.

More can be accomplished under President Obama's executive powers.

The Obama Administration should as promptly as reasonably possible expand the availability of licensing for travel to Cuba for a range of experts as may be needed and requested by Cuba, including U.S. citizens employed by non-governmental and international organizations.

Under current law and regulation, Americans wishing to travel to Cuba face restrictions in the form of licensing. The Treasury Department's Office of Foreign Assets Control can grant licenses that fall into certain categories if the travel advances certain goals, such as education and cultural exploration. Current regulations (31 C.F.R. § 215.560(a)) describe twelve categories of people who may travel to Cuba. These categories may be more broadly (or narrowly) interpreted by the U.S. President, and the licensing procedure made more efficient. Presidents, including President Obama, have done so in the past (President Obama previously amended the Cuban Assets Control Regulations (CACR) expanding the meaning of each travel category). The President clearly has wide latitude in general licenses authorizing travel to Cuba.

Restrictions should be minimized so that students, teachers, trade union members and leaders, business leaders, religious missionaries, tourists participating in cultural events, and others could easily travel to Cuba as long as such travel would not negatively impact on the U.S. national security or promote terrorism or other international criminal conduct. Both the "professional meeting" and travel in "support of the Cuban people" categories in the existing regulation can easily be expanded by the President or categories added to permit far wider and more frequent travel by U.S. citizens to Cuba.

The President could also amend existing regulations (31 C.F.R. § 515.204) that state that no person subject to the jurisdiction of the United States may "purchase, transport, import, or otherwise deal in" any transaction with respect to any merchandise of Cuban origin, or that is made of anything grown, produced or manufactured in Cuba. President Obama could authorize an amendment to this regulation to allow individuals and businesses in the United States to import products produced by individuals or certain businesses in Cuba. An amendment of this regulation could open up markets in the U.S. for independent entrepreneurs, artisans, or other Cuban entities, while making U.S. consumers aware of the activities of and goods produced by Cubans.

Given that both Cuba and the U.S. claim to have interest in expanding independent economic activity in Cuba, President Obama could also amend licensing regulations to substantially expand exports to Cuba. Licenses may now be obtained for the export of certain agricultural products, communications equipment, and some medicines and medical devices. Restrictions imposed by the Cuba Democracy Act (CDA) of 1992 do not limit the ability of the President to issue new licensing exceptions for exports. President Obama has previously added a new licensing exception to permit the export and re-export to Cuba of donated consumer communications devices. The list of products that may be exported to Cuba should be expanded in the Export Administration Regulations (EAR) to include a wide range of goods and services useful to businesses and farmers in Cuba.

The level of allowable remittances should be substantially increased above \$2,000 every three months. US citizens and lawful permanent residents have

traditionally sent remittances to their families in their home countries. This is a way in which they can support aging parents, grandparents or siblings in their home countries. There is no reason why Cubans and Cuban-Americans living in the U.S. should not be permitted to send remittances to their immediate family members in Cuba to the same extent as U.S. citizens or foreign nationals from other countries are allowed to do.

President Obama should normalize migration policy between the U.S. and Cuba, such that Cubans are eligible to obtain asylum or residency in the same manner as migrants from other countries. Under current policy, the U.S. Coast Guard returns to Cuba those migrants who are intercepted at sea (“wet foot”). Those who reach land, whether dropped off on a south Florida shore or appearing at a border station on the U.S.-Mexico border, are permitted to enter and later to adjust their status (“dry foot”). No other class of migrants is treated this way in U.S. immigration policy. Current U.S. policy encourages irregular migration from Cuba to the United States, often resulting in deaths and injuries as migrants attempt to reach the United States in small boats. President Obama should direct Department of Homeland Security officials to initiate discussions with their migration counterparts in Cuba and promptly arrive at a policy and practice that treats Cuban migrants in the same manner as all other migrants and discourages further efforts by Cubans to reach the United States by dangerous ocean crossings.

Congress should reconsider and repeal its embargo of Cuba

It is unlikely that in 2015 the Congress will consider any substantial revisions of the embargo law. Rather, when Congress reconvenes some Republicans will propose measures to block funding for any initiatives President Obama may take to improve U.S.-Cuban relations. These defunding efforts are unlikely to succeed as most of what the President may accomplish can be done without budget appropriations. No Congressional allocation will be needed to get Alan Gross back to the U.S. or to send home the three members of the Cuban Five.

Nevertheless, there are good reasons why Congress should consider ending the embargo.

The embargo was largely a response to Cuba’s expropriation of about \$1.8 billion of U.S. property following the Cuban Revolution. The U.S. Government has established a list of several thousand people and entities with alleged claims to that property. If the Congress believes addressing these claims is of critical importance, then it should develop procedures for determining the validity of these claims, their value, and a reasonable method for compensating individuals or U.S. corporations with valid claims.

The United States is the only major country that has an embargo against Cuba in place. The policy appears to have accomplished little other than to increase the enmity Cubans feel towards the U.S. Government. By passing legislation

that also tries through coercive measures to force third-party countries into embargoing Cuba, the U.S. has decreased its position as a leader on issues of democracy and justice, while deepening further the suffering of the Cuban people.

In her last report to the Human Rights Council, the Personal Representative of the United Nations High Commissioner for Human Rights on the situation of human rights in Cuba described the effects of the U.S. embargo on the economic, social and cultural rights of the Cuban people as “disastrous.”

At the same time, according to the U.S. Chamber of Commerce, the embargo causes U.S. companies to lose an estimated \$1.2 billion annually, while Cuba estimates that the island’s enterprises lose about \$685 million annually. The non-partisan Cuba Policy Foundation estimates that the embargo costs the U.S. economy \$3.6 billion per year in economic output.

On June 10, 2010 seventy-four of Cuba's most visible dissidents signed a letter to the United States Congress in support of a bill introduced by Rep. Collin Peterson that would have barred the president from prohibiting travel to Cuba or blocking transactions required to make such trips. It also would have prohibited the President from blocking direct transfers between U.S. and Cuban banks. The signers stated “any opening serves to inform and empower the Cuban people and helps to further strengthen our civil society.”

The Congress also cannot ignore that polls show a significant shift among Cuban-Americans in Florida and Americans nationally in support of diplomatic relations with Cuba. According to a poll conducted by the Florida International University in June 2014, 68 percent of Cuban-Americans favored reestablishing diplomatic relations with Cuba, and 69 percent favor lifting travel restrictions. The poll found that 71 percent of Cuban-Americans now say the embargo has not worked, and 52 percent oppose the embargo. An Atlantic Council poll conducted in February 2014 found that 56 percent of members of the public are in favor of normalizing relations with Cuba, including 62 percent of Hispanics nationwide.

In short, ending the embargo and permitting the free exchange of ideas with Cubans and visits to Cuba would be consistent with human rights and U.S. public opinion, and show solidarity with the Cuban people. However, as discussed above, there is much the Obama Administration can do to improve Cuba-U.S. relations regardless whether Congress has the political will and wisdom to soon dismantle the failed embargo.

Much like the Berlin Wall, the U.S. embargo of Cuba has become an odd historical anomaly that will inevitably be abandoned in favor of a forward-looking, humanitarian, respectful policy towards Cuba and its people.

* * * * *