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The Cuban Embargo: Should It Go the Way of Prohibition?

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A. Introduction

The United States has a series of laws the effect of which is to create an embargo on Cuba. Travel to Cuba and commercial activity is substantially curtailed. A codification of the embargo is called the Helms Burton Act, passed in 1996.³ This article will discuss repeal of the complex embargo legal structure.

B. Arguments and Counterarguments against Repeal

1. Arguments for Helms Burton Act

First, Fidel Castro is a cruel tyrant. He expropriated private property after consolidating his 1959 revolution. United States corporations and individuals were affected. Later, bourgeois (i.e. rich) Cubans suffered expropriation. Helms Burton calls for compensation for the takings which has not been forthcoming.⁴ The Helms Burton Act created sanctions on any company in the world that permits trade with Cuba. The Helms Burton Act also allows U.S. companies to sue foreign investors who used property that was taken from U.S. owners many years ago by the Cuban Revolutionaries.⁵

Second, one U.S. reaction to Fidel’s assumption of control in 1959 was refusing to buy their sugar crop, a major money earner for Cuba at the time. The U.S.S.R. bought the sugar shortly thereafter, and later established missile bases on Cuba. A love affair thus developed
between the vicious tyrant and the Evil Empire. The so-called Cuban Missile Crisis resulted. And years after the end of the Cold War, this anachronistic remnant persists.

The third argument is the “Cuba deserves punishment” argument and the hope that Cuba will eventually be forced to come around to a democratic regime. U.S. tourists used to be the number one source of tourist income to Cuba. Now, few U.S. tourists are allowed to go to Cuba legally. Cuba also loses investment from the rich commercial and industrial groups in the U.S. This argument concedes that perhaps individual Cubans are hurt, but this embargo will eventually be effective.

The fourth argument is ideological: Castro has run a Communist regime. (Emphasis added.) Billboards and other signs often displayed refer to keeping the Revolution going, or simply “Socialismo.” The present Cuban Constitution reflects the philosophies of Marx, Lenin, and a dose of Fidel Castro thrown in for good measure. It is true that liberalization has occurred under Raul Castro since 2005. But any reference to a Communist government is likely to be received with displeasure by Americans. Cuba is a one party state that shows little sign of interest in two or more party democracy. As is usual with such regimes, dissenters are likely to find their way to jail (or worse). Part of the U.S. law is said to be designed to encourage a transitional Cuban government with a democratic nature. Cuba inherited the Spanish Civil Code, but Castro’s “social legality” has led to that Code being ignored. Recent commentators have concluded that the commercial or business law is not in place that would support more internal and foreign trade.
Fifth, Cuba is a controlled society. The Pope visited Cuba when I was there. He criticized the Cuban Communist form of government. Quickly, a high Cuban government official advised the Pope to stick to spiritual matters. Free speech and human rights are not in the forefront of governmental priorities. A quick example: Cubans cannot travel outside Cuba without governmental permission which is not easy to get. Also, Cubans find their news sources limited and are usually forbidden access to the internet. Freedom of speech and academic freedom would not be goals at the forefront of Cuban government policy. So, the embargo can be seen as a righteous statement of principle from the free world leader. Cuba Libre indeed!

2. Arguments for Repeal of Helms Burton

Could we pause a moment and calm and collect ourselves to look at counter arguments? First, the embargo has not worked and shows no sign of working. The prohibition against U.S. tourist travel is flaunted. Reportedly close to 100,000 U.S. tourists go to Cuba illegally yearly. The U.S. apparently does not want seriously to police this illegality. Cuba benefits economically from the presence of many Canadian and European tourists.

Second, foreign investment in Cuba since the passage of the Helms Burton Act has risen to 185 billion U.S. dollars in 2008. While no doubt U.S. investment is limited by the embargo, according to The World Factbook prepared by the CIA, the United States is Cuba’s sixth largest import partner, only slightly behind Canada and Brazil. And U.S. expatriates now legally contribute over 2 billion dollars to Cuban family and friends. Where is this “embargo” when we need it? But the goals of the embargo are contradictory: promoting a “transition” government leading to a democratic government versus providing exceptions for humanitarian aid (medical
and agricultural) and allowing dollar support for families and others from expatriate sources as a means of decreasing Cuban citizen dependency on the Cuban government. Moreover, U.S. law states that policy is directed to achieve a peaceful transition to democracy by helping resume economic growth and the careful application of sanctions directed at the Castro government and support for the Cuban people.\textsuperscript{xiv}

Third, the costs of Helms Burton to the U.S. are substantial. Estimates have been made that the embargo costs the U.S. up to 4.84 billion U.S. dollars annually. By the year 2000 the estimate reached 67 billion U.S. dollars in economic loss, while foreign investment in Cuba in 2008 had reached $185 million U.S.D.\textsuperscript{ xv} Moreover, the embargo restrictions are not affecting commerce with other nations and Cuba. For example, there are nice big yellow school buses from Montreal, cars from Europe, and alcoholic products. The “French train” from Havana to Santiago de Cuba uses French rail cars, and though admittedly discards, I found it moderately comfortable. So while the U.S. complains about lack of jobs, other countries are creating jobs by establishing themselves in the Cuban market.

Fourth, it is doubtful that the embargo will cause Cuba to fall to its knees and do what the Yankees want in the relatively near future. It is true that the plight of Cubans at the low end of the economic spectrum should not be understated. As the average wage is no more than $25 per month, what can pensioners be living on? One American I talked with visited a pensioned couple in the countryside. The chicken he bought for that family might have been the only meat, fish or poultry they saw for that month. Even a Cuban newspaper I saw when I was there seemed to be concerned about life in the countryside. However, Cuba has avoided the deep
poverty experienced by many developing countries. Medical care is universally available, education is free, the literacy rate is very high, and some basic commodities and services are cheap.

Moreover, at the upper end, someone is making a lot of money. There are many luxury hotels and a lot of money is being made on the tourist trade. City tour buses are top of the line and intercity buses which tourists are required to take are comfortable and punctual. There are many good restaurants, particularly in Old Havana, that are apparently holding up nicely. Some people are living quite well in the beautiful houses in Veradero and Miramar. The Military is said to be invested substantially in the tourist and agricultural industries. Maybe some of this wealth will trickle down.

Fifth, since when did having a Communist government prevent the U.S. from trading with a country? Is anyone proposing an embargo on China or Viet Nam? Arguments about one party states, human rights records and so on become a bit problematic as reasons for embargoes. The last time I looked, America’s number one trading partner and creditor, China, was not a leader in protecting rights of dissidents, free speech, academic freedom, or other human rights nor is China on the fast track to democracy.

C. Context and Perspective

1. Personal Observations

One might expect the Cubans to be anti-U.S. because of the embargo. I was frequently asked by people on the street where I was from. When I told them, the usual, if not universal,
response was favorable. Typically, they want to go to the U.S., have tried to go and were turned back, or have friends or relatives here. There is a large reservoir of good will to U.S. citizens despite the embargo. And even though the economy is producing a pitiable wage, the friendliness and good humor of Cubans one meets casually or otherwise is remarkable. One American critic of the regime writes this off, preferring to see it only as a remarkable resilience, in view of the 50 years of Castro tyranny.

I suppose I expected to see crumbling buildings and crumbling people. Personally I did not see much of that. I saw an elegant Habana Viejo (Old Havana), monuments, museums, public buildings, churches, an opera, and ballet centers, plus a lot of restoration going on. The usual answer from U.S. skeptics is, well, you were a tourist and saw nothing of the real Cuba. These critics often have not seen the “real Cuba” themselves. And I did spend one month totally unprogrammed, most of it with a Cuban family in Havana. And I spent hours walking in Havana, and took public buses (5 cents a ride) and collective taxis (50 cents a ride).

Other observers see the opposite. A young German tourist I met on the train and the daughter of an F.S.U. library assistant, who spent all her time in Christian-related activities solely in the countryside, saw mostly poverty and a crumbling Cuba. Yes, even in the cities there are some people going through the trashcans. I hope it is for recycling material, but I do not know. By the way, I see that in the U.S. While a few people in Cuba had a homeless look about them, I see that in the richest country in the world.
2. Observations on Cuba as a Controlled Society

My U.S. Treasury-approved project was to study the Cuban Legal System. I was advised by a Cuban employee of the de facto U.S. Embassy in Havana not to undertake such research without a visa issued by the Cuban government allowing such research. My repeated attempts to find a local Cuban sponsor, which seemed necessary to change my visa from tourist to a category permitting my research was futile. This futility was despite the previous email contacts and welcome from a highly placed Cuban legalist. I conclude that since no Cuban official knew me, they were not willing to risk sponsoring me. When I was back with my wife, friends and cats in Florida, they might face questioning at a minimum of why they sponsored this “dissident,” if that is what I turned out to be. Perhaps even this somewhat equivocal article could be subject to Cuban censorship. Moreover, if the subject of politics ever came up in casual conversation with waiters or waitresses, casa particulares owners, collective taxi drivers, or casual greetings exchanged on the Malecon, no one would discuss politics. Unless you are an academic with privileged access to Cuban sources, no “studies of the legal system” can occur without substantial risk.xviii

E. Conclusion

So should the Cuban embargo be repealed? Humanitarian aid is allowed by U.S. law, which has provided and continues to provide an opening for the United States President to continue to relax the embargo. A leading study has concluded the President’s Constitutional authority over foreign affairs supports President Obama’s liberalization, and could support a substantial amount more.xix Almost every U.N. member has criticized the Helms Burton Act as a
violation of Cuban sovereignty. The Act has not achieved its purposes and is not likely to. The Act may have aided the Castros by giving them the U.S. embargo to blame when things are not going so well, and encouraged nationalism. Many policies of the Act have not been enforced. Nevertheless, Congress will not repeal the Cuban embargo. But de facto repeal is evolving. Helms Burton and its accompanying legislation is a perfect vehicle for self-destruction. Congress can blame the President for allowing too much “humanitarian aid” and allowing the billions of dollars to be sent to Cuba from expatriates. The President can blame Congress for passing a law with exceptions that could swallow up the rule. And the President can remind the Congress that he controls foreign affairs. In any event, several factors indicate the desirability of the repeal, de facto or de jure, of the Cuban embargo. These factors include the high economic cost to the U.S., the substantial de facto exceptions, and the open flouting by U.S. citizens of the law. Moreover, the right to sue entities in foreign countries dealing with owners of property expropriated after the Cuban revolution, if allowed, seems extra-territorial, and could jeopardize U.S. foreign relations. Hopefully, the U.S. President will continue this evolution so that the Cuban embargo will go the way of Prohibition, ignored and ultimately repealed.

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i Thanks to my wife, Sonia Crockett, for help on editing, footnote sources, and typing. Also Ms. Trisha Simonds, Florida State University College of Law Library Assistant Director for ILL/Serials, helped with sources.

ii Professor Emeritus Florida State University College of Law; J.D. 1959, Yale Law School; A.B., 1956, Harvard College. I received a specific license from the United States Treasury to visit Cuba, which I did during the month of March 2012. See cubatravel.ofac.trea.gov. The designation was entitled “noncommercial academic research.” My project was to study the Cuban legal system. I was greatly surprised to receive approval from the U.S. Treasury to stay in Cuba for three months as a private individual. No expensive group tourist travel for me. (See Insight Cuba for these expensive tours, staying at four star hotels for about a week for $3500 and more.) I travelled from Tampa
to Havana on a chartered flight approved by the Treasury, and the travel agent issued a tourist visa, which I planned to convert to a work visa once there. It cost less than $400 roundtrip, with the airfare, visa ($50), and compulsory Cuban medical insurance of $3 per day.


iv The Helms Burton Act provides for compensation for property of U.S. companies in Cuba owned before the seizure. Has the U.S. ever been similarly guilty and accused? The U.S. had a revolution against Britain and took over British property without substantial compensation. And let’s not even think about the U.S. removal of the native Americans from their property.

v See note iii supra.

vi See Legal Systems, supra, note iii at 398.


viii See Presidential Authority supra, note iii at 6.

ix See Foreign Law Guide at 2, 3.

x Id. at 2, 3, 6.

xi See infra, section C.2. Observations on Cuba as a Controlled Society.


xiv See Presidential Authority, supra, note iii at 6, 7, 9, 13, 14 (supporting this and previous sentence).

xv See Beardon, supra, note xiv, notes 17-20 and accompanying text.

xvi Legal Systems, supra, note iii at 401 (reliance on affordable diet, health care, housing, and education which are being provided by the Cuban government).

xvii Bus fares in Havana are 5 cents, vegetables brought from the farms are plentiful and not very expensive, bread is cheap, etc

xviii This is according to my Cuban advisor at the “U.S. Embassy” in Havana. I will not mention that person’s name. See also the case of Alan Gross at http://cipcubareport.wordpress.com/2012/01/17/the-cases-of-alan-gross-and-the-cuban-five/. (USAID employee seeking to aid Cuban dissidents on Cuban tourist visa imprisoned in Cuba).

xix See Presidential Authority, supra, note iii at 18.
See Legal Systems, supra, note iii at 398.

See Beardon, supra, note xiii, notes 17-20 and accompanying text.

Id. at note 21 and accompanying text.

Id. at Conclusion.

This is my conjecture. I would compare it to Prohibition in the 1930’s. In the 1930’s, when U.S. citizens were ignoring Prohibition, the sponsors kept it as long as possible as a symbol of “moral correctness” despite the wholesale noncompliance.

The small group of Cuban expatriates primarily in South Florida should not be allowed to prevent this. See John M. Kirk and Peter McKenna, Trying to Address the Cuban Paradox, 34 Latin American Research Review number 2, 225-226 (1999)(more interference is not needed from a powerful minority of Cuban Americans who have turned the issue into a veritable super-polarized obsession and are largely out of touch with sentiments in Cuba).