

CONFERENCE REPORT ON HELMS-BURTON

Although it is unclear whether the draft Conference Report on Helms-Burton legislation accurately reflects what the Conference will ultimately decide, the draft report adopts significant portions of the more radical House bill. It will closely resemble the bill that Secretary Christopher has recommended that the President veto. In all but two or three areas in which there is a substantive difference between the House and Senate versions, the Conference Report adopts the version that is more objectionable to the Administration.

Title III

While the number of lawsuits likely to be brought under Title III has been reduced as a result of Conference changes, these changes do address our underlying principled objections. The impact of Title III on our relations with allies, prospects for settling certified claims, our broader international claims practice, and for Cuba's transition would still be extremely negative. Our international law objections remain applicable. (See separate description of the revised Title III.)

Title IV (Visa Ineligibility for "Traffickers")

It appears certain that Conferees will include some version of the House provision, global in scope, barring entry into the U.S. by "traffickers" in expropriated property. It is possible, however, that the language may be softened to allow that Administration flexibility in determining when to apply the exclusion. In either case, implementation would be problematic and would create serious friction with our allies.

Requirements for Transition and Democratic Governments

Conferees will adopt the strict requirements, closer to the House version, for both a transition and a democratic Cuban Government. Among the requirements for a transition government are that it dissolve the Department of State Security and that Fidel or Raul Castro not be included in such a government (regardless of whether they had agreed to elections and other democratic reforms.)

IFI Programs during a Transition

While conferees will adopt Senate language allowing U.S. support for IFI loans during a transition in Cuba, the requirement to oppose Cuban memberships in IFIs until a democratic government is in power could -- depending on the rules of the applicable IFI -- make it effectively impossible to approve loans.

Assistance Plan for Cuba Under Transition/Democratic Governments

The draft report indicates the Conference will adopt the House version of the provisions concerning assistance to Cuba under

- 2 -

future governments. Although the House version contains a provision which appears to permit planning for assistance determined to be "essential to the successful completion of the transition to democracy," which could cover democracy-building and other types of assistance beyond humanitarian aid, the provision is so badly drafted as to create considerable ambiguity about its scope. The House version still would require additional authorizing legislation before the USG could provide any assistance. This latter element would reduce the attractiveness of Title II as a "carrot" for change in Cuba.

#### Remittances

The Conferees will adopt the Senate's sense of Congress provision concerning circumstances under which the USG should generally license remittances or travel-related transactions. There is no indication, however, that the Conferees will delete the House language which appears to prohibit any remittances until there is a transition government in Cuba.

#### News Bureaus

The authorization for news bureaus stipulates that the authorization is available only if, among other things, Radio and TV Marti journalists are allowed to gather news in Cuba without interference before any news bureaus are established. This would essentially contradict our statements to both the public and the Cuban Government regarding implementation of the President's October 6 measures. Although we may, as a technical legal matter, be able to proceed with the President's news bureaus decision on the basis of separate statutory authority, the inclusion of the purported requirements could create a significant political difficulties for our news bureaus policy.

#### Support for the Cuban People

Language will be included authorizing U.S. assistance to support democratic groups in Cuba, but with a requirement that "no funds or assistance be provided to the Cuban Government." Since the GOC or its entities (such as state-run hotels) could derive limited, indirect financial benefit from assistance, this language could interfere with our grant to Freedom House or other projects.

#### Russian Aid

Conferees will adopt Senate version of the restrictions (which are broader in scope than those in the House version) on assistance to NIS states for involvement with SIGINT facilities in Cuba and will include the House provisions restricting assistance to countries or entities that assist in the completion of a nuclear power plant in Cuba. The Conferees will preserve the waiver/carve-out provisions which make these provisions less problematic.

- 3 -

Sugar/Trade

The mild Senate version of the provision concerning trade with countries which import Cuba sugar, which simply exhorts the Administration to enforce current law, will be adopted.

Civil Penalties

The Conference report would preserve the Senate language authorizing the Administration to make use of civil penalties in enforcing embargo regulations on educational, religious and other travel. This would be useful.

Helms-Burton Title III - Conference Version

The revised version of Helms-Burton Title III likely to be approved by House-Senate conferees includes several significant changes. While these changes will reduce in practical terms the scope of problems the bill would cause by either limiting the numbers or delaying the filing of lawsuits, they do not address the central objections the Administration has expressed.

Significant Changes

- o During the first two years after enactment, only certified claimants could file suit against "traffickers." Cuban Americans with claims could file them after that time.
  - This change would for a time significantly reduce the potential number of Title III suits filed.
- o Court judgments against the Cuban Government and its agents and instrumentalities would not be enforceable against transition or democratic governments. (Because of ambiguities in the language, courts might rule that judgments against Cuban governmental agencies and instrumentalities could be enforced against those entities -- but not the government itself -- even after a transition.
  - This change would address to some extent our concerns that such judgments would burden future governments while they are trying to resolve property issues and begin Cuba's economic reconstruction. It would also discourage suits against the current Cuban Government, since there would be little possibility of recovering damages.
- o A filing fee would be established to defray the costs of processing cases in federal courts.
  - While it is not clear that such a filing fee would cover all costs nor eliminate all the administrative problems the suits, this change will allow proponents to argue that Title III will be "budget neutral."
- o The "threshold" property value requirements for a Title III is \$50,000, not including interest. Our reading of the bill suggests that a suit could be filed if EITHER the value of the property at the time of the taking of property OR its current "fair market value" exceeds \$50,000.
  - While this new threshold may reduce the number of eligible claimants somewhat, there would still be a large pool of eligible plaintiffs. The Foreign Claims Settlement Commission certified 259 claims with a principal value over \$50,000. The value of many properties on which other certified claims are based will likely have appreciated to more than \$50,000 since then. We have no record of how many properties now claimed by Cuban-Americans would be valued at more than \$50,000.

- 2 -

- o Several changes to the bill would in effect allow almost all claimants, particularly certified claimants, to seek treble damages.
- o The authority of the President to suspend Title III suits after a transition government is in power is clearer now.
  - Any exercise of this authority by the President would be extremely difficult in practical terms, and could give rise to takings litigation against the U.S.
- o Certified claimants would get first priority if a pool is established, e.g. a class action settlement fund, to pay Title III lawsuits.
  - This change attempts to address the concerns of certified claimants.
- o The bill now sets a two-year statute of limitations period, such that suits may not be brought more than two years after trafficking occurs.
  - While this could preclude some old cases, the broad definition of "trafficking" to include "use" of property means that ongoing trafficking, even if it began more than two years ago could still serve as the basis for a lawsuit.

#### Central Administration Concerns that Remain

- o The right of action, no matter how limited, still will be challenged by our allies as an improper extra-territorial application of U.S. law. We would strenuously object if other countries sought to deter U.S. investment in Germany or China in this fashion.
- o Even a more limited number of suits will still constitute a dangerous precedent that, if followed by other countries, would increase the litigation risks of U.S. businesses abroad.
- o In current form, the bill would in fact permit lawsuits against U.S. companies investing in U.S.-claimed properties in Cuba after a transition government is in power.
- o Title III still circumvents, and so undermines, the internationally recognized and accepted claims resolution process. It will still complicate USG efforts to seek compensation for certified claimants.

- 3 -

- o The new version of Title III still damages prospects for a transition to democracy. It will allow the Cuban Government to depict the U.S. -- and particularly Cuban Americans -- as poised to take away homes and schools. It sends the wrong signal to the Cuban people about how the U.S. intends to seek resolution of claims, and what role the U.S. is prepared to play during a transition.
- o Title III might still generate a large number of lawsuits in U.S. federal courts. Fees might not fully cover added costs, and the administrative burden will still likely be onerous.
- o Title III still permits suits against agencies and instrumentalities of foreign states -- and perhaps foreign states themselves, in a manner which is not supported under international law.

## Talking Points on Revised Title III

- o The right of action, even if limited, is an improper use of federal courts and an improper extra-territorial application of U.S. law. Our allies will still strongly object to this version of Title III. We would strenuously object if other countries sought to deter U.S. investment in other countries in the world in this fashion.
- o The bill will still constitute a dangerous precedent that, if followed by other countries, would increase the litigation risks of U.S. businesses abroad.
- o Title III still circumvents, and so undermines, the internationally recognized and accepted claims resolution process. The U.S. Government has been very successful in obtaining compensation for U.S. claimants in other countries under this process.
- o Title III will still complicate USG efforts to seek compensation for certified claimants. It will be difficult and time-consuming to sort out which claimants have received damages under Title III, which have not, which cases are still pending, etc. These delays will hurt both U.S. claimants and Cuban efforts to privatize assets.
- o Among the primary targets of lawsuits could be U.S. businesses investing in Cuba after a transition government is in power.
- o The new version of Title III still damages prospects for a transition to democracy. It will allow the Cuban Government to depict the U.S. -- and particularly Cuban Americans -- as poised to take away homes and schools on the island.
  - The bill sends the wrong signal to the Cuban people about how the U.S. intends to seek resolution of claims, and what role the U.S. is prepared to play during a transition.
- o Title III might still generate a large number of lawsuits in U.S. federal courts. Fees might not fully cover added costs, and the administrative burden will still likely be onerous.

**What's Wrong with Helms/Burton?  
Administration Talking Points**

- o The Helms bill would not promote a peaceful transition in Cuba. New sanctions against foreign investors ("traffickers") would provide a rallying point for Castro inside Cuba, and allow him to keep the focus on "U.S. aggression" rather than on the need for reforms.
- o The bill's attempts to increase existing pressure on the Cuban government would likely be counterproductive, and could be more damaging to U.S. interests than to Castro.
- o The bill would create serious frictions with our allies at a time when they are becoming more active and helpful in promoting human rights in Cuba. Because of its extra-territorial reach, the Helms bill will focus allies' attention on opposing U.S. policy, rather than on pressing for democracy in Cuba.
- o While U.S. policy is to discourage foreign investment in Cuba, particularly when it would involve expropriated U.S. properties, our efforts to deter it should not prompt us to sacrifice our broader interests or undermine valuable principles of international law.
- o Title III of the bill, which would allow U.S. nationals with expropriation claims against Cuba to sue in U.S. courts third country nationals who invest ("traffic") in those properties, is a bad idea.
  - It could clog up U.S. courts with a flood of lawsuits, filed mainly by Cuban-Americans.
  - It would complicate prospects for resolving the claims of certified U.S. claimants (and hamper future Cuban privatization efforts) by tying up properties in court. Certified U.S. claimants oppose this bill.
  - It would create a dangerous precedent that, if followed by other countries, could expose U.S. investors in Eastern Europe, China or elsewhere to lawsuits in third countries anywhere in the world brought by disgruntled property claimants.
  - It would be extremely difficult to justify under international law and has already drawn harsh criticism from our allies.
- o The U.S. expects to negotiate successful resolution of certified claims with a future Cuban Government under existing international law, and assist other U.S. claimants as well.
- o The U.S. already has in place against Cuba its toughest and most comprehensive economic embargo. The embargo has helped to force the limited but positive economic changes.
- o Let's keep international pressure on Castro, not focus it on ourselves.





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(House)

## STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 927 - Cuban Liberty and Democratic Solidarity Act  
(Burton (R) IN and 43 cosponsors)

The Administration supports the central objective of H.R. 927, i.e., to promote a peaceful transition to democracy in Cuba. However, H.R. 927 contains a number of seriously objectionable provisions that would not advance U.S. interests in Cuba and would damage other U.S. interests. Therefore, the President's senior advisers would recommend that H.R. 927 be vetoed unless the following provisions are deleted or amended:

- The bill would encroach upon the President's exclusive authority under the Constitution to conduct foreign affairs, or otherwise unduly limit the President's flexibility, by purporting to require the President or the Executive branch to pursue certain courses of action regarding Cuba. Mandatory provisions should be replaced with precatory language in the following sections: 102(b); 104(a); 110(b); 112; 201; 202(e); 203(c)(1); and 203(c)(3).
- The exemption in section 102(d) from civil penalty authority for activities related to research, education and certain other purposes, and the burdensome requirement for an agency hearing for civil penalties in other cases, greatly limits the effectiveness of civil penalties as a tool for improving embargo enforcement. Section 102(d) should be amended to address this shortcoming.
- Section 103 should be amended to make the prohibition of certain financing transactions subject to the discretion of the President.
- Section 104(a) should be amended to urge U.S. opposition to Cuban membership or participation in International Financial Institutions (IFIs) only until a transition government is in power to enable the IFIs to support a rapid transition to democracy in Cuba. Section 104(b), which would require withholding U.S. payments to IFIs, could place the U.S. in violation of international commitments and undermine their effective functioning. This section should be deleted.
- Sections 106 and 110(b), which would deny foreign assistance to countries, if they, or in the case of

section 110(b), private entities in these countries, provide certain support to Cuba, should be deleted. Section 106 would undermine important U.S. support for reform in Russia. Section 110(b) is cast so broadly as to have a profoundly adverse affect on a wide range of U.S. Government activities.

- Section 202(b)(2)(iii), which would bar transactions related to family travel and remittances from relatives of Cubans in the United States until a transition government is in power, is too inflexible and should be deleted.
- Sections 205 and 206 would establish overly-rigid requirements for transition and democratic governments in Cuba that could leave the United States on the sidelines, unable to support clearly positive developments in Cuba when such support might be essential. The criteria should be "factors to be considered" rather than requirements.
- By failing to provide stand-alone authority for assistance to a transition or democratic government in Cuba, Title II signals a lack of U.S. resolve to support a transition to democracy in Cuba.
- Title III, which would create a private cause of action for U.S. nationals to sue foreigners who invest in property located entirely outside the United States, should be deleted. Applying U.S. law extra-territorially in this fashion would create friction with our allies, be difficult to defend under international law, and would create a precedent that would increase litigation risks for U.S. companies abroad. It would also diminish the prospects of settlement of the claims of the nearly 6,000 U.S. nationals whose claims have been certified by the Foreign Claims Settlement Commission. Because U.S. as well as foreign persons may be sued under section 302, this provision could create a major legal barrier to the participation of U.S. businesses in the rebuilding of Cuba once a transition begins.
- Title IV, which would require the Federal Government to exclude from the United States any person who has confiscated, or "traffics" in, property to which a U.S. citizen has a claim, should be deleted. It would apply not only to Cuba, but world-wide, and would apply to foreign nationals who are not themselves responsible for any illegal expropriation of property, and thus would create friction with our allies. It would require the State Department to make difficult and burdensome determinations about property claims and investment in property abroad which are outside the Department's traditional area of expertise.