

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

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- Let's keep international pressure on Castro, not focus it on ourselves.

Questions and Answers on
The Cuban Liberty and Democratic Solidarity Act
(The Helms/Burton Bill)

1. Isn't Helms/Burton just what we need to get rid of Castro? Shouldn't we toughen U.S. policy?
2. Haven't recent changes in the Helms bill taken care of all the Administration's problems?
3. Would Title III lawsuits really violate international law?
4. Shouldn't we try to move international law in the direction of penalizing "traffickers?" Wouldn't U.S. business be better off?
5. Will Title III help U.S. claimants get their properties back, or get compensation for their losses?
6. Is there any hope U.S. claimants will get compensation from Cuba without Title III? What about Cuban-Americans who weren't U.S. citizens when their property was taken?
7. Can the Cuban Government be sued under Title III? Does international law permit that?
8. How many lawsuits are likely to be filed?
9. How will Helms/Burton affect Cuba's transition process once a transition government is in power?
10. What do U.S. allies think about the bill?

Question:

Won't the Helms/Burton legislation give Castro the "final push" necessary to get rid of him? Shouldn't U.S. policy be toughened?

Answer:

- o The Helms bill would NOT promote a peaceful transition in Cuba. The bill's attempts to increase existing pressure on the Cuban government would likely be counterproductive.
- o 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 political and economic reforms.
- o The bill would also create serious frictions with our allies at a time when they are becoming more active and helpful in promoting human rights in Cuba.
- o It is difficult to find new, constructive ways to apply pressure on the Castro regime because 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 taking place in Cuba.
- o While the U.S. discourages foreign investment in Cuba, particularly when it would involve expropriated U.S. properties, such investment will not ultimately determine the fate of the Cuban regime. Our efforts to deter it should not prompt us to sacrifice our broader interests or undermine valuable principles of international law.

Question:

Haven't the revisions made in the Helms Bill resolved all the concerns the Administration expressed about the bill earlier?

Answer:

- o No. The Administration still opposes the bill in its current form.
- o The Helms bill would not promote a peaceful transition in Cuba. (see previous question.)
- o In addition, many of its provisions recklessly disregard broader U.S. interests and relationships and could be difficult to defend under international law.
- o We are particularly concerned about Title III, which would create a "right of action" for U.S. nationals with property claims in Cuba to sue those who invest ("traffic") in those properties in U.S. courts.

Question:

Would Title III lawsuits really violate international law?

Answer:

- o The right to sue created in Title III would represent an unprecedented extra-territorial application of U.S. law that would be very difficult to defend under international law. The principles behind Title III are not consistent with the traditions of the international system.
- o U.S. allies have already objected to what they see in Title III as an improper extra-territorial extension of U.S. law.
- o This right to sue is different from existing provisions of law which permit U.S. courts to apply principles of international law in that it involves an extra-territorial application of U.S. law.
- o The provisions permitting suits against agencies and instrumentalities of foreign states present still other legal difficulties.
- o The Department of State has prepared a more detailed discussion of legal considerations regarding Title III, which is attached.

Question:

Shouldn't the U.S. try to "move" international law in the direction of Title III? Wouldn't U.S. business be better off?

Answer:

- o U.S. business interests abroad would be significantly damaged if the rest of the world were to follow the precedent that would be established by Title III.
- o It is well-settled international practice that questions of ownership of property is determined by the state in which that property is located.
- o It is the expropriating government that is responsible for confiscations in violation of international law, not subsequent investors.
- o Businesses and investors worldwide rely on the determinations of title made by the governments in the countries in which property is located.
- o U.S. businesses engage in more international investment than those from any other country, and profit from these established "rules of the game."
- o If other countries adopted laws like Helms/Burton, however, U.S. businesses investing in China, the former East Germany or Israel, for example, could find themselves subject to unforeseen lawsuits by disgruntled property claimants from third countries in the courts of those third countries.

Question:

Will Title III help U.S. claimants get their property back, or get compensation?

Answer:

- o Just the opposite. Title III will enormously complicate the U.S. Government's ability to settle property claims against Cuba. That's why most U.S. claimants are on record as strongly opposing these provisions.
- o A flood of pending lawsuits during Cuba's inevitable transition to democracy and market economics will delay privatizations and other reforms.
- o Pending lawsuits will also make it more difficult for the U.S. Government to negotiate a government-to-government claims settlement agreement because we will likely be required to determine, on a case-by-case basis, which of the nearly 6,000 U.S. claimants have availed themselves of the Title III provision.

Question:

Is there any hope for certified U.S. claimants to get compensation without Title III? What about Cuban American claimants?

Answer:

- o Yes. In the last several years, the U.S. Government has negotiated government-to-government claims settlement agreements in a number of countries that have resulted in significant compensation for U.S. claimants. We expect to do the same for -- or otherwise satisfactorily resolve -- U.S. citizen claims against Cuba when conditions are right. (The current Cuban Government would be unlikely to agree to appropriate terms.)
- o While a government-to-government claims settlement agreement would cover only expropriations that violated international law -- those involving claimants who were U.S. citizens when their property was taken, the U.S. Government intends to encourage future Cuban Governments to establish a mechanism under Cuban law to resolve all property claims, including those of Cuban Americans.

Question:

How many lawsuits are likely to be filed under Title III?

Answer:

- o The truth is that no one knows how many lawsuits will be filed under Title III, but the universe of potentially eligible claimants could number in the hundreds of thousands. While not all eligible claimants would file suits, if even a relatively small percentage of them did it could clog up U.S. courts and greatly complicate the tasks of resolving claims and assisting Cuba's economic recovery.
- o While it could be difficult for plaintiffs to obtain damages from defendants without assets in the U.S., that would not prevent plaintiffs from filing suits to obtain default judgments for use in later negotiations.

Question:

Could the Cuban Government be sued? Would that violate international law?

Answer:

- o Title III permits suits against "any person or entity, including any agency or instrumentality of a foreign state in the conduct of commercial activity." The bill thus appears to permit suits against agencies and instrumentalities of both the Cuban and other foreign governments in circumstances that go well beyond existing law and that would be highly problematic under internationally-accepted principles of foreign sovereign immunity.
- o Other ambiguities in the bill create at least the possibility that foreign states themselves -- not only their agencies and instrumentalities -- could be sued in U.S. courts. This would present even greater difficulties under international law and damage to the interests of the U.S. Government.

Question:

How will the Helms bill affect transition and democratic governments in Cuba?

Answer:

- o While the bill calls for the development of a "plan" for U.S. and international assistance to transition and democratic governments, it contains no authorization of funds to provide such assistance.
- o The bill suggests that only limited humanitarian assistance should be offered to a transition government in Cuba at the very moment it would most need U.S. help in consolidating democratic and free market institutions.
- o The U.S. would also be barred from supporting Cuban membership in the IMF, World Bank and IDB until there is a democratic government in power, effectively preventing many of the kinds of support for a transition government these sources could offer.
- o The requirement in section 104 that the President withhold U.S. contributions to these institutions if loans to Cuba are approved over U.S. objections could violate the U.S. Government's commitments to those organizations and undermine their effectiveness.
- o If the purpose of Title II of the bill is to offer hope and incentive to those inside Cuba who seek change, the current version offers little prospect for significant U.S. help.

- o Worse still, Title III of the bill will make it extremely difficult for a transition government to resolve property claims and privatize state enterprises, and so actively hamper the efforts of such a government to restore stability and prosperity to the Cuban economy.

- o Perhaps one of the most objectionable aspects of Title III is that it will hurt U.S. business seeking to enter the Cuban market once the transition to democracy begins. Ironically, the most likely targets of Title III lawsuits would be U.S. companies seeking to participate in the rebuilding of a free and independent Cuba.