Getting to Normal: A Legal Pathway for U.S. – Cuba Policy Reform

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Presidential Power to Normalize Relations: Protection of New U.S. Investment

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Robert has asked me to consider what steps a willing President might take to normalize relations with Cuba on his own authority under the Constitution and existing law without further measures by Congress. As a teacher of U.S. foreign relations law, I know this to be a complex question and a fluid one. Congress and the Executive have been debating the scope of Presidential power in foreign affairs since the first days of the Republic when Hamilton and Madison argued over the legality of Washington's Neutrality Proclamation in 1793.

While the Congress has important enumerated powers, including control of appropriations, foreign commerce and the power to declare war, as John Marshall famously said, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[i] In modern times, as the United States became a world power, the President has become the dominant force in the formulation of U.S. foreign policy, and has frequently made critical decisions on his own authority as Chief Executive and Commander-in-Chief.

To cite just a few examples, the Yalta and Potsdam agreements that reshaped Europe after World War II, the Korean Armistice Agreement, and dozens of instances dating back to Commodore Perry when the President has engaged U.S. forces abroad without prior Congressional authorization. Presidential power can be dramatic in peace as well. In September, 1945, President Truman issued the historic Proclamation on the Continental Shelf asserting U.S. jurisdiction over the natural resources of the seabed and subsoil underlying large areas of international waters off our coasts.[ii] This unilateral Executive action, accepted as authoritative at home,[iii] was welcomed by the international community and transformed the international law of the sea. President Reagan followed the precedent in 1988 when he extended the U.S. territorial sea from three to twelve miles by Executive Proclamation.[iv]

Executive power is not unlimited, however, even in external affairs. Congress makes the laws and controls appropriations. When the Supreme Court barred President Truman from seizing the steel mills during the Korean War, it emphasized that Congress had implicitly prohibited such action by declining to provide that authority in law.[v] Further, Justice Jackson declared that "Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."[vi] Elaborating on Jackson in the Iran claims litigation,[vii] the Court concluded that Congress had implicitly approved Executive action under the Algiers Accords even though no statute actually authorized the settlement. The Jackson framework is applied by the Roberts Court,[viii] so we can be sure that the Court will consider Helms-Burton[ix] in any litigation challenging future Executive action to normalize relations with Cuba.

There is much the President can do, however, under existing law. Executive authority has long been recognized in key areas relevant to U.S. - Cuba relations: (1) recognition and diplomatic relations; (2) international claims; (3) maritime boundaries; and (4) law enforcement. In my service as a State Department legal adviser, I participated in negotiating an executive agreement with Cuba on aircraft hijacking,[x] a *modus vivendi* on maritime boundaries,[xi] and a Maritime Boundary Agreement, transmitted to the Senate for advice and consent as a treaty, but implemented provisionally by renewable executive agreements.[xii] With imaginative lawyering, a willing Administration can find a way to move forward.

The Hijacking Agreement concluded with Cuba in February 1973 is a good example. President Nixon made the decision to negotiate with communist Cuba in October 1969 - early in his administration. Relations with Cuba were not friendly and Castro was not trusted. But the repeated hijacking of American aircraft to Havana by political dissidents was causing havoc in commercial aviation. We wanted Cuba to return hijackers to the United States for prosecution, or to prosecute them in Cuba, the policy adopted in the multilateral anti-terrorism treaties of the era. Cuba was willing, but Castro insisted on reciprocity requiring the U.S. to return or to prosecute Cubans who hijacked vessels and brought them to Florida.

This was a difficult issue for the Administration. Considerable effort and some tortured drafting was necessary to bridge the differences. In a few years, conflicts on this point brought the agreement to an untimely end, but not before it contributed to a dramatic reduction in hijackings. For present purposes, the

important point is that these commitments were made by executive agreement based on the President's constitutional powers and standing statutory authority. Hearings were held by the Senate Foreign Relations Committee, but I don't recall anyone suggesting that a treaty was required. Law enforcement is an issue today in U.S. relations with Cuba, and I would think the Executive has ample authority to make progress in that area.

Diplomatic Relations

The first issue on any normalization agenda would be restoration of diplomatic relations. President Eisenhower closed the U.S. Embassy in Havana and suspended diplomatic relations on January 3, 1961, but that action did not affect U.S. recognition of the Castro regime as the *de jure* government of Cuba. The same situation obtains with Iran; the U.S. recognizes the regime, but does not have diplomatic relations with it. Switzerland has acted as protecting power for the United States in Cuba, and formal diplomatic communications generally are made through the Swiss Embassy in Havana. The Swiss Ambassador played that role in the Hijacking negotiations, and I recall smoking a Cuban cigar with him in Miami.

Early in his administration, Jimmy Carter made some moves to normalize relations with Cuba, including the establishment of the U.S. Interests Section in the Swiss Embassy. Since 1977, the Section has done the work of an Embassy without the status. Should President Obama or his successor decide to resume diplomatic relations with Cuba, he can do so on his constitutional authority as Chief Executive. Under Article II of the Constitution, the President has plenary authority to decide on recognition and diplomatic relations. In 1933, FDR established relations with the Soviet Union and made a comprehensive claims settlement by executive agreement. Jimmy Carter did the same with China in 1979.

If Congress is unhappy, however, there could be push-back. The Executive will need funds to sustain the Embassy, and the Senate could block appointment of an Ambassador. If the latter should happen, however, the State Department can appoint a Charge d'Affairs to run the Embassy.

Claims Settlement

Historically, resumption of diplomatic relations with communist regimes has been linked with an executive agreement providing a comprehensive claims settlement because both countries wanted such linkage – the U.S. to obtain

compensation for American claimants; the other government to terminate or avoid litigation in U.S. courts. The pattern with the Soviet Union, Eastern Europe and China has been limited compensation for American claimants from foreign assets in the United States that had been seized by the U.S. government. These executive agreements, based on the Presidents sole authority, have been upheld by the Supreme Court as the supreme law of the land.[xiii]

Likewise, in the *Dames & Moore* case,[xiv] the Supreme Court upheld President Reagan's Executive Orders implementing the claims settlement with Iran negotiated by President Carter in the last hours of his Administration. As previously mentioned, however, in that case the Court found that Congress had implicitly approved international claims agreements by Executive action by many years of acquiescence. The question is whether Helms-Burton breaks that implied consent and restricts the President's freedom of action regarding Cuban claims.

There is a more fundamental problem, however. It is hard to see how the United States and Cuba could reach agreement on claims settlement. U.S. claims against Cuba run to billions of dollars; we do not have sufficient frozen Cuban assets to settle those claims; and it is difficult to imagine Cuba offering foreign exchange to pay U.S. claimants. Is there another option? Possibly. If U.S. sanctions regulations were relaxed and the Cubans were prepared to create the right opportunities for private investment, American entities with large claims against Cuba might be able to recoup some of their losses through new investment. Absent a comprehensive settlement, however, investors would have to worry about political risk in Cuba and in the United States.

Here, too, a willing President could find ways to be helpful through active diplomacy looking towards normalization of relations and, possibly, by negotiating a bilateral executive agreement, providing an inter-governmental framework dealing with sanctions, claims and investment issues. The President probably could not, on his own authority, conclude a traditional investment agreement with reciprocal liability for the U.S. government, but he certainly could negotiate an executive agreement with Cuba providing Cuban protections for American investors who chose to take advantage of the arrangements. The Foundation Agreement that the Clinton Administration made with Germany concerning Holocaust claims is a precedent. The Supreme Court held unconstitutional a California statute deemed inconsistent with Executive policy embraced by the agreement.[xv]

An investment agreement with Cuba could offer willing investors Cuban guarantees, impartial procedures for resolution of disputes, and assured funding for the expenses of a claims tribunal and for payment of awards that might require contributions from both Cuba and participating investors. Commercial insurance could also be engaged to cover some of these risks. Significant legal work would have to be done to develop these concepts, not to mention economic analysis, consultation with stake holders, and exploration of diplomatic possibilities in a highly charged political environment. The primary requisite, however, is political will in both Washington and Havana.

One note of caution before closing: As we speak, the nation is deeply divided over President Obama's actions on immigration, and the Supreme Court is deciding whether the President can disregard a statute allowing an American citizen born in Jerusalem to insist on a U.S. passport that describes his place of birth as Israel.[xvi] Such a statement in a formal diplomatic communication would be inconsistent with the long-established U.S. position that the legal status of Jerusalem remains to be determined. This position is an expression of U.S. recognition policy held by every American President since Harry Truman.

At oral argument, however, the Court was sharply divided on ideological grounds, and the outcome is in doubt. Contrary to traditional expectations, the conservative Justices were strongly resistant to the government's foreign policy concerns, while the liberals were supportive. The Justices also directed a surprising amount of attention to current events in the mid-east. We have to wait for the decision, but I worry that political divisions between a democratic President and a republican Congress might be reflected in a more political judicial process that could influence constitutional jurisprudence in coming years.

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[i] *U. S. v. Curtiss-Wright,* 299 U.S. 304 (1936).

[ii] Proclamation 2667, September 28, 1945.

[iii] Executive Order 9633, reserving and setting aside the resources of the continental shelf and placing them for administrative purposes, pending legislative action, under the jurisdiction and control of the Secretary of the Interior, was released with the foregoing proclamation. For text see 3 CFR, 1943-1948 Comp., p. 437.

[iv] Proclamation 5928, December 27, 1988.

[v] *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

[vi] *Id*. at

[vii] *Dames & Moore v. Regan*, 453 U.S. 654 (1981)

[viii] *See Medellin v. Texas*, 552 U.S. 491 (2008)

[ix] Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, P.L. , U.S.C. .

[x] Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses (brought into force on February 15, 1973 by exchanges of diplomatic notes in Washington and Havana between each government and the foreign embassy representing the other's interests in the host country), TIAS 7579, 24 U.S.T. 733.

[xi] Maritime Boundary Modus Vivendi for 1977 effected by exchange of letters between the Unites States and the Republic of Cuba, April 27, 1977.

[xii] Maritime Boundary Agreement between the United States of America and the Republic of Cuba, signed at Washington, December 16, 1977 (by Mark Feldman and Olga Miranda), See DOS, Limits in the Seas, No. 110, February 21, 1990.

[xiii] U.S. v. Belmont, 301 U.S. 324 (1937); *Dames & Moore v. Regan*, supra, n 7; *Accord American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Cf. Goldwater v. Carter*, 444 U.S. 996 (1979).

[xiv] *Supra*, n vii.

[xv] *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003

[xvi] *Zivotofsky v. Secretary of State*, 725 F. 3d 197 (D.C. Cir. 2013) *cert. granted*, decision pending as of 12/2/14.