



Robert Schuman



*Whither Helms-Burton? A Retrospective on
the 10th Year Anniversary*

- Shoshana Perl



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Whither Helms-Burton? A Retrospective on the 10th Year Anniversary

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Introduction

The United States passed the Helms-Burton Act (also known as Libertad) on 12th March 1996, hardening the long-standing embargo against Cuba, a poor, inconsequential country struggling under one of the last communist dictatorships in the post-Cold War world.

Helms-Burton's formal title, the Cuban Liberty and Democratic Solidarity Act, conveyed the impression of seeking to deliver the oppressed Cuban people from the darkness of Castro's communist police state into the light of a democracy that safeguarded civil liberties and human rights. In fact, the bulk of the legislation was devoted to extending and strengthening the embargo against Cuba, and to protecting the property rights of American nationals that were expropriated by Castro.

Furthermore, Libertad transferred executive powers over the Cuban embargo to the legislature, effectively strengthening parochial domestic interests in pursuing their narrow foreign policy agenda at the expense of the more cosmopolitan view of world affairs of the White House. Moreover, Libertad granted Cuban-Americans, who were not American citizens at the time their property was nationalised by Castro, the right of action in American courts to seek redress from multinational companies who were trading in their expropriated assets. Added to these jurisdictional and constitutional problems, Helms-Burton sought to extend American sanctions to third countries' legitimate rights to engage in commerce and trade. The European Union was sufficiently irritated by the extraterritorial implications of Helms-Burton to request a World Trade Organization (WTO) hearing.

This paper is written as Helms-Burton celebrates its 10 year anniversary, a significant milestone and an appropriate time to analyze what this bill has achieved. Helms-Burton has clearly not accomplished its stated aims of either internationalizing the embargo or of bringing democracy to Cuba, as Castro continues to rule Cuba with his iron fist, and the US remains as isolated as ever in its embargo against Cuba. This paper argues that Helms-Burton was a controversial bill that provoked widespread fears of negative repercussions both on Capitol Hill and in the Clinton White House, many of which were realized, including a prolonged dispute with the European Union. It is therefore no surprise that Helms-Burton has been sparingly implemented; indeed, this paper will highlight evidence of collusion between Washington and Brussels in emasculating the bill.

Historical Context

The United States and Cuba have long had an ambivalent relationship. Their physical proximity, with Cuba only ninety miles from the Florida coast, has bound the two countries together in an intimate, psychologically charged love-hate association. Cuba increasingly fell under American commercial and cultural hegemony during the twentieth

century. Cuban prosperity depended on American technology, capital and markets, despite American policies that discouraged anything but a sugar monoculture. Cuban elites often held dual-citizenship and sent their children to American universities; their adoption of American baseball in 1874 symbolized their affinity for 'enlightened' and modern North American culture.

By the 1950s, Cuba had the highest standard of living in Latin America after Venezuela, but suffered under the double burden of a politically corrupt regime that was culturally and economically dependent on Washington. Fidel Castro rode to victory in 1959 on the romantic nationalism of the nineteenth century to which was added a strong twentieth century anti-American component as revolutionaries were increasingly convinced that national self-determination could only be fulfilled by severing all links with the United States. Carlos Eire recalls in a poignant memoir of his Cuban childhood, that children marched daily in the streets, clad in red berets and red neckerchiefs, chanting, *“Uno, dos, tres, cuatro, Cuba sí, Yanquis no, Cuba sí, Yanquis no...”* (Eire 2003: 269)

Castro's initial liberalism attracted a degree of foreign admiration before the revolution gave way to rigid central control, censorship and large-scale nationalization of private property. A comprehensive American embargo against Cuba has been in place since early 1962, when it became clear Castro was establishing a Marxist state. Washington sought various Cold War objectives through the use of sanctions against Cuba, among them instrumental goals such as destabilization of the Castro regime and expressive goals such as domestic and international signaling of disapproval of the human rights abuses in the country.

The collapse of the Soviet Union in 1989 left Cuba bereft of support, and forced Castro to liberalize his command economy sufficiently to attract foreign investment. For example, Cuban government brochures advertised properties like the "Hermanos Díaz" petroleum refinery in Santiago de Cuba, highlighting the American technology, but failing to disclose that the refinery had been confiscated from Texaco in July 1960. International interest in Cuban ventures in the early 1990s alarmed Washington; American embassies repeatedly warned against investing in Cuban properties subject to certified claims by American nationals.

In Washington, the sanctions discourse over the relative efficacy of “carrots versus sticks” provoked heated debate. The effectiveness of positive versus negative sanctions varies in accordance with the level of dependence of the main actors, and with the baseline of expectations each has in that relationship. Thus, incentives are more likely to work with a political adversary rather than an ally due to the lower levels of both dependence and baseline of expectations inherent in this relationship.

For this reason, many argued for the lifting of Cuban sanctions and the gradual normalization of relations, as the US had done with many former Cold War adversaries, China and Viet Nam to name but two. They were supported by corporate and agricultural interests who were eager to take advantage of the commercial ventures offered by Castro.

But the consideration of modifying the forty-year old Cuban embargo entailed significant negative political and economic ramifications. Hard-liners, prominent among them the highly politicized and rabidly anti-Castro Cuban-American exile community, saw the Cuban economic distress engendered by the loss of the annual \$6 million in Soviet support as an opportunity to hammer the final nail into Castro's coffin. Cuban GDP was an estimated \$334 per capita in 1986, plummeting to just \$61 by 1996. The fall in living standards was accompanied by rising discontent among Cuba's military and ruling elite, and a growth of civil society opposition. Sensing Castro's vulnerability, the end of the Cold War brought a strengthening rather than a moderation of the American trade embargo against Cuba, as symbolism was replaced with substantive expectations.

Promotion of democracy and respect for human rights provided the new rationale for the intensification of the embargo in the nineties. Amid fears on Capitol Hill that Clinton was preparing to moderate the Cuban embargo after his re-election in 1996 (Falk 1996: 17), Senator Jesse Helms and Congressman Dan Burton introduced their bill in early 1995, euphemistically called the Cuban Liberty and Democratic Solidarity Act or Libertad, as its stated purpose was "to assist the Cuban people in regaining their freedom and prosperity." But the lofty democratic intent was no more than a smokescreen to legitimize the tightening of the embargo as Washington sought redress for its expropriated properties.

The Helms-Burton Act

The Helms-Burton Act significantly extended the American embargo and harassed Castro in many ways. For example, Title I mandated that if any international financial institution approved a loan to Cuba over the opposition of the US, Washington would withhold payment to that institution by an amount equal to the sum total of the loan. Title II laid out a number of extremely strict criteria that must be met by a post-Castro Cuban government for the embargo to be suspended, including the establishment of an independent judiciary and free trade unions. Most provocatively, Helms-Burton targeted foreign companies that acquire or otherwise 'traffic' in Cuban properties that were expropriated from their American owners without compensation. Such firms could become subject to lawsuits brought by American claimants to the expropriated properties (Title III), and their executives (and families) could be denied entry visas to the United States (Title IV). Title III controversially extended the right of action to Cuban-Americans who had lost property to Castro's revolution, but who were not American citizens at the time of their loss. It is significant that Libertad labeled businessmen trading in questionable Cuban assets as 'traffickers,' a deliberately pejorative term generally associated with the illegal drug trade.

The preferences of the American domestic constituency diverged as Helms-Burton faced stiff opposition from the Clinton White House and the Democratic leadership on Capitol Hill. The State Department concluded an interagency study of Libertad by late April 1995, broadly arguing that Libertad was counter-productive both to the promotion of

democracy in Cuba and to Washington's wider interests; among its specific objections were:

- Title I prohibited the importation of sugar from any country that imports sugar from Cuba, but this collided with America's long-standing opposition to secondary boycotts, and raised fears of a Canadian/EU challenge under NAFTA/WTO rules.
- Title II unduly restricted the President in determining both Cuban transition to and formation of a democratic government, and should offer a clearer program of benefits the US would provide to Cuba under those circumstances.
- Title III's definition of 'trafficking' was too broad, and the right of action conferred jurisdiction that went well beyond accepted precepts of international law. Furthermore, the granting of retroactive rights to Cuban-Americans was contrary to standard US practice and principles of international law.
- Title IV's visa denial of aliens suspected of 'trafficking' in American assets could unfairly affect persons who are not directly responsible for those business decisions. (Sullivan 1995: 7-11)

Secretary of State Warren Christopher argued robustly against Libertad. Title II could damage a peaceful transition to democracy in Cuba by instituting an overly rigid list of requirements. Title III would create tensions with US allies, was difficult to defend under international law, could jeopardize the certified claimants' cases, and was already being used by Castro to frighten ordinary Cubans with the specter of Cuban-Americans returning to re-claim their homes. Christopher concluded that the State Department could not support Libertad, and "if it were presented to the President, would urge a veto." (Christopher 1995) Indeed, as congressional deliberations heated up in the autumn, the Clinton Administration repeatedly threatened to veto Libertad. Senior presidential advisors recommended deletions of Title III for its dubious standing in international law and Titles III and IV for fear of creation of friction with US allies. (Administration Policy 1995)

The Clinton Administration thus made its opposition to Libertad abundantly clear, based on legal, political, constitutional and diplomatic considerations. In anticipating many of the concerns of the international community, Clinton correctly predicted that Libertad would create tensions with Washington's closest trading partners.

The powerful GOP leadership of the House of Representatives obtained approval of Libertad on a strongly partisan vote in September 1995. But the Senate Democratic leadership mounted a sustained filibuster to halt the legislation, forcing Senator Helms to withdraw the more controversial paragraphs of Title III and IV, before securing passage of an emasculated bill in October.

Castro's brutal shooting down of two American civilian aeroplanes on February 26, 1996, killing all four Cuban-Americans on board, created what Cuba scholar Jorge Domínguez calls a "mobilizing incident," (Domínguez 1997: 61-63) temporarily uniting Washington's divided constituency in seeking an appropriate and swift response. The Libertad Conference Report produced a bill that was significantly harsher than the previous bills. Not only did it re-instate the contentious Titles III and IV, Cuban-

American Congressman Lincoln Díaz-Balart succeeded in incorporating and putting into law all existing economic sanctions against Cuba. This 'codification' of the embargo removed an important presidential power in the conduct of foreign policy, revoking his authority to lift the embargo and granting this right to Congress, which has traditionally been very sensitive to the most conservative elements in the Cuban exile community. The extraordinarily inept White House negotiators obtained only one concession for Clinton: executive waiver rights over Title III, which were so restricted as to be considered not viable by the Conference Report.

The Helms-Burton Act was passed by overwhelming majorities by both Houses of Congress, and signed into law with great fanfare by President Clinton on March 12, 1996.

European Union Reaction

Having universally condemned Castro's brutality in killing civilian pilots, the international community diverted its anger from Cuba to the US. The European Union (along with Canada and Mexico) expressed dismay at the unilateral nature of the measure, particularly in view of the New Transatlantic Agenda concluded the previous December that pledged consultation in matters of mutual interest. EU Commission President Jacques Santer argued that Helms-Burton was inconsistent with widely accepted principles of international law, contradicted WTO rules and OECD codes, and would jeopardize the reputation of the US as a safe market for foreign investment. Furthermore, prosecuting American allies would do nothing to further the bill's stated objective of promoting democracy in Cuba. (Santer 1996)

What was perhaps most extraordinary about the EU's reaction to Helms-Burton was the remarkable degree of unity that it fostered. The European Union acted decisively on several fronts to defend itself from the extraterritorial reach of the Helms-Burton Act. Internally, its Council of Ministers passed a 'blocking action' in October 1996 to protect European companies from Libertad's extraterritoriality. To formally confirm its policy towards Cuba, the Council approved the Common Position in December 1996, strongly conditioning EU economic co-operation with Cuba on democratic reforms.¹ Externally, Brussels requested a World Trade Organization (WTO) Dispute Settlement Panel in late 1996, challenging the extraterritorial reach of the bill. Bilateral negotiations led to a suspension of the WTO action on 11th April 1997, as Washington and Brussels agreed to hold further talks to settle their differences; the United States meanwhile pledged to take no action against European companies under the provisions of Helms-Burton.

On 18th May 1998, the US and the EU reached a comprehensive agreement, in which Brussels allowed its WTO challenge to lapse in return for an American undertaking not to prosecute any European companies under Helms-Burton, and to seek

¹ This was one of the first acts of the nascent Common Foreign and Security Policy (CFSP) of the EU.

an amendment to make Title IV subject to presidential discretion. The accords planned the development of protocols to inhibit future investment in illegally expropriated assets world-wide, and encouraged co-operation and multilateral dialogue over unilateral action. The 15 Member States of the EU ratified the agreement within the week, but, as Congress has not made the requisite amendments to Helms-Burton, the US has defaulted. There is a *de facto* truce as no European entity has been prosecuted under Helms-Burton, but *de jure*, the Helms-Burton episode remains unresolved.

As the international furore predicted and feared by the White House gathered pace, President Clinton applied Libertad exceedingly cautiously. He fully exercised his authority to suspend Title III, and only a handful of businesses were cited under Title IV, despite many dozens potentially in violation of this section of Libertad. Clinton was endlessly harassed by Libertad supporters unhappy with his implementation of the bill. This paper will consider the evidence suggesting that Clinton colluded with the EU to justify his ambivalent implementation of Libertad.

The Waiver and the Common Position: Transgovernmental Collusion?

The Common Position of December 1996 was substantially based upon the Spanish initiative hardening the EU stance against Cuba the previous May. It represented a sea-change from the long-standing EU policy of 'constructive engagement,' whereby Brussels had sought unconditionally to promote the growth of democracy and respect for human rights in Cuba through informal cultural and economic exchanges. Many ministers, France and Italy foremost among them, objected to the very extreme conditionality of aid which they saw as representing a U-turn from established European policy to Cuba, leading it closer to American policy.

Libertad allowed presidential waiver of Title III on the narrow grounds that such action was in the national interest, and would expedite a transition to democracy in Cuba. The waiver was purposely designed to be unworkable, but President Clinton nevertheless suspended Title III with predictable regularity every July and January. Announcing the first waiver in July 1996, that pre-dated the Common Position of December 1996, Clinton called upon allies to help "accelerate change" in Cuba, promising that he would decide whether to end the suspension "based upon whether others have joined us in promoting democracy in Cuba." (Clinton 1996) In the next suspension in January 1997, Clinton referred explicitly to the EU Common Position enacted the previous month declaring, "I would expect to continue suspending the right to file suit so long as America's friends and allies continue their stepped-up efforts to promote a transition to democracy in Cuba." (Clinton 1997)

Although Brussels repeatedly denied that Europe's new hard-line Cuba policy had been influenced by Washington, Ambassador Hugo Paemen, head of the EU's delegation to Washington, disclosed that, in trying to "de-politicize" the situation, the Common Position was prepared "in close contact with some members of the US administration (State Department with EU Presidency and Commission)." (Paemen 2001) This was an astonishing and significant admission, corroborated by the Spanish, who first proposed

the Common Position to the Council of Ministers on 14th November, 1996, and who conceded that the document "incorporated all the requests put forward in September by the special US envoy [Stuart Eizenstat]." (Arenal 2004)

This paper argues that this quid-pro-quo was essential in providing Clinton with a basis upon which to waive Title III. The Common Position significantly enhanced Clinton's limited Title III executive waiver authority, enabling him to proclaim that the suspensions fulfilled congressional criteria. In a near-perfect solution, the Europeans were temporarily protected from prosecution as Clinton consistently deferred Title III's right to action. This understanding represented an extraordinary transgovernmental link whereby European and American officials colluded to empower Clinton to prevail over his divided domestic constituency.

Spanish Role

The Spanish role in promoting the new EU policy was critical. The May 1996 election of José María Aznar, the first conservative government in Spain for fourteen years, heralded a radical about-turn: a hard-line Spanish policy toward Cuba through the direct linkage of bilateral cooperation agreements with political reform, much to Castro's displeasure. The new Spanish policy was announced on 25th May at a joint press conference at the end of an official visit by American Vice-President Al Gore, and was predictably praised by Gore. Spain applauded Clinton's first waiver of Title III in July 1996, with the Aznar government announcing that it would cut \$3 million in aid to Cuba unless Castro began to institute democratic reforms. Furthermore, Aznar was responsible for initiating the hardening of the EU's Cuba policy, as Madrid presented a draft resolution to the EU Foreign Ministers in November 1996 that became the Common Position, making European cooperation with Cuba proportional to its democratic reforms. *El País* reported that Aznar's proposal "*se alinea estrechamente a la actual política norteamericana.*"²

Spain, the major European trading partner of Cuba, was certainly threatened by Helms-Burton but it seems that the Spanish cut a deal. With its Prime Minister publicly calling for democratic reforms in Cuba, a major Spanish newspaper claimed that the US pledged Spain immunity from Helms-Burton; the Clinton Administration denied the report. (Kiger 1997: 65-66) If indeed such a side-payment were offered, it would explain why, with such a large number of Spanish companies operating in Cuba, none was cited under Libertad.

Implementation by Clinton Administration

² Vidal-Folch, Xavier (1996). "España Propone a La Unión Europea Cortar El Crédito y La Cooperación con la Habana; Aznar Urge a Los Quince se Eleve El Nivel de Diálogo con La Oposición a Castro." *El País* (13th November): p. 3.

Not only did Clinton consistently waive Title III, his weak implementation of Title IV, banning executives of entities trading in expropriated American assets in Cuba and their families from entering the US, resulted in endless harassment from Capitol Hill. Helms reminded the president that Title IV carried no waiver and that "through its failure to enforce this provision, the administration has issued what amounts to an effective, and in fact, an unlawful waiver."³

The executives of three firms were sent exclusion notices (letters of 'determination') in early July 1996: STET, the Italian state-owned communications firm, and Grupo Domos, a Mexican communications conglomerate both of whom were joint venture partners in the Cuban telecommunications systems, and allegedly 'trafficked' on property belonging to ITT, and Sherritt International, a Canadian mining and energy group, who allegedly used facilities belonging to Freeport-MacMoRan Co of New Orleans.

The cited officials faced exclusion from the United States with effect 45 days after the date on the letter, the time allowed by Libertad to divest themselves of the Cuban properties. Grupo Domos relinquished its stake in the Cuban venture due to financial difficulties related to the collapse of the Mexican peso, although Libertad supporters proclaimed it showed the bill was a significant deterrent.⁴ STET paid compensation of some \$26m in the summer of 1997 to ITT for the use of its cables for a period of ten years. STET's action was characterized as an 'immunization' against Libertad, for ITT agreed not to sue STET under Title III and the State Department removed STET from its exclusion list. The State Department concluded that the ITT-STET agreement "constitutes authorization of [a] United States national who holds a claim to the property consistent with Title IV." It claimed that the settlement reinforced respect for property rights and was an incentive to foreigners to seek authorization from American claimants before investing in Cuba. (Burns 1997)

The STET deal highlighted a glaring contradiction in American policy vis-à-vis Cuba, severely undercutting the lofty principles of promoting democracy and respect for civil rights that Helms-Burton purportedly espoused. Payments transformed 'traffickers' to legal partners of Castro, embodying the worst American stereotypes and considerably weakening Washington's position. (Roy 2000: 113)

Of the three cited companies, only Sherritt suffered the indignity of exclusion. Nine Sherritt executives and their families were banned from the United States, including two prominent Britons, Sir Patrick Sheehy, former chairman of BAT Industries of Britain, and Rupert Pennant-Rea, former deputy governor of the Bank of England and former editor of *The Economist*. At House implementation hearings, Congressman Robert Menéndez stated, "Title IV offers companies a clear choice: observe U.S. law or have

³ Schweid, Barry (1997). "Cuba, US: Helms Says He Is Dismayed, Accuses Clinton of Ignoring the Law." Associated Press. (16th July).

⁴ "Domos Drops Cuban Phone Stake: Mexican Firm Hit by Sanctions and Financial Problems," International Herald Tribune, 1st July 1997, p 16.

your rights to visit and conduct business in the United States revoked. Sherritt has made its choice." (Menéndez 1996: 4.)

In a letter to *The Times*, (Mrs.) Helen Pennant-Rea complained, "I and my children, who have done nothing to offend the US, have been banned since 1996. I regard this as most un-American."⁵ Pennant-Rea, when asked whether he had considered resigning from his position at Sherritt, answered that it was a matter of principle to stay the course and not give up, particularly when the UK was pressing the US to stop applying Libertad.⁶ Did financial remuneration more than offset the inconvenience of exclusion from the United States? As of December 2005, the ban remains in force against the Pennant-Reas, although it has been lifted from their three children, who are no longer minors.⁷

Executives of Grupo BM, an Israeli agricultural company, received advisory letters in September 1996 that they may be in violation of Title IV. In September 1997, Grupo BM announced a 10-year, \$200m project to build an office complex in Havana, under a Panama-based subsidiary called Monte Barreto, a move guaranteed to annoy Washington. Grupo BM received 'letters of determination' notifying them of their exclusion from the United States, dated 13th November 1997, with effect in 45 days time,⁸ (McClenny 1997) thus joining Sherritt in an exclusive pariah club.

State Department officials assured a sceptical Congress that their vigorous enforcement of Helms-Burton was having a significant deterrent effect, with at least a dozen companies disengaging from Cuba; they cited as an example the Mexican cement company Cemex⁹, which had terminated its involvement to avoid falling foul of Title IV. (Davidow 1996, Eizenstat 1997) Notwithstanding these assurances, the Clinton Administration implemented Title IV exceedingly sparingly. To this day, Grupo BM and Sherritt remain the only companies whose executives are still excluded from the United States, despite the evidence that there were some 200 companies from 26 countries who had commercial dealings with Cuba, many of whom were potentially in violation of Title IV. (Dodd 1996)

Implementation by Bush Administration

⁵ Pennant-Rea, Helen (2000). US Embargo on Trade with Cuba. Letter to the Editor, The Times. London. (7th November).

⁶ Ryle, S. (2001). "America's Door Policy: Red Light; Banned in the USA." The Observer: 5. (3rd June).

⁷ Helen Pennant-Rea confided that they had a "farcical" time getting the State Department to agree that the definition of "minor" is age 18. (Email correspondence 23rd November, 2005)

⁸ Grupo BM's Miramar trade centre was inaugurated in October 1999. See Pascal Fletcher, "Israeli Office Venture is Launched in Cuba," Financial Times, 13th October 1999, p 7.

⁹ It was unclear why Cemex reversed its decision, with some suggesting it was due to a sharp drop in its share value. See George Gedda, "US Moves to Implement Cuba Sanctions against Investors." Associated Press. 29th May, 1996.

When President George W. Bush acceded to the White House in 2001, there was a degree of apprehension in Washington over whether he would continue his predecessor's practice of suspending Title III so as not to break the uneasy truce with the EU. The anxiety was heightened because as a Republican, Bush would come under greater pressure to enforce Libertad. Furthermore, Bush felt indebted to Florida for its remarkable role in the presidential elections, and to his brother Jeb, Florida's governor. This unease was shared in Europe. An EU Commission official expressed hope that the US would "maintain and fully implement" the Understanding at the Gothenburg Summit in June 2001. The *Financial Times* urged Bush to bury "this pointless and troublesome law."¹⁰

President Bush pragmatically chose to maintain the ceasefire. On 16th July 2001, he announced the suspension of Title III, following Clinton's well-established precedent of arguing that it "is necessary for the national interest of the United States and will expedite the transition to democracy in Cuba," and specifically linking the continuing American waiver to the continuing European renewal of the Common Position with regard to Cuba. Bush conceded that "real differences remain" between the US and its allies, but argued that this action "will encourage support for the embargo." (Bush 2001)

In continuing Clinton's policy of ten consecutive suspensions of Title III, George W. Bush tactically presented the Cuban-American hardliners with side payments: tightening the embargo by, for example, greater travel restrictions, and nominating right-wing Cuban-American Otto Reich to the position of Assistant Secretary of State for Western Hemisphere Affairs.¹¹ Bush succeeded in gaining hard-line support; Jesse Helms declared that those who criticised the suspension should "consider the other salutary initiatives that the president is putting into force."¹² To date, President Bush has continued to exercise the global Title III waiver every six months.

Overall, President Bush has presided over a tightened Cuba policy characterised as "rejection, isolation, and pressure" (Fisk 2004) and has made key appointments of widely recognised hard-liners commensurate with this aim. Following his failure to secure Reich's Senate confirmation, Bush appointed another well-known ideologue, Roger Noriega, who was confirmed in July 2003, ably assisted by Deputy Assistant Secretary Daniel Fisk. Fisk was responsible for the drafting of Libertad in his role as senior staffer to Helms' Senate Foreign Relations Committee, and Noriega served as a Helms staffer during that period. Caleb McCarry completed the triumvirate of hard-line former congressional staffers with his appointment on 28th July 2005 to the position of Cuba

¹⁰ "Bush and Cuba," *Financial Times* Editorial, 16th July 2001, p. 16.

¹¹ Reich's nomination was extremely controversial, given his paid lobbying on behalf of hard-line Cuban-Americans, and his questionable association with the 1980s Iran-Contra Affair, which illicitly sought to gain support for the anti-Sandinista Contras in Nicaragua. The Democratic Senate predictably delayed Reich's confirmation, leading Bush to make a 'recess appointment' during the second session of the 107th Congress (2002). In early 2003, Reich was appointed 'Special Envoy' for Latin America, a post that needs no confirmation; although the Senate was Republican again, there was strong bipartisan antipathy to Reich on Capitol Hill. See Larry Birns, "Reich Re-surfaces Again – This Time at the NSC," Press Memorandum, *Council on Hemispheric Affairs* (COHA), 15th January 2003.

¹² De Young, Karen (2001). "Bush Continues A Clinton Policy on Cuba." *The Washington Post*: A10. (17th July).

Transition Coordinator; the creation of this post was recommended in May 2004 by Bush's Commission for Assistance to a Free Cuba (CAFC) that "proposed a comprehensive strategy to prepare for a peaceful transition to democracy in Cuba...empowering Cuban civil society ...to deny resources to the Castro regime to break its blockade on information..." (Rice 2005).

CAFC recommended further tightening Cuba policy by restricting the definition of immediate family members to *exclude* aunts, uncles and cousins, anathema to the family-minded Cuban-Americans. By June 2004, President Bush had announced that cash remittances could only be sent to immediate family members, and that annual visits to immediate family members would be restricted to once in three years. (Sullivan 2005) Speaking in Miami in October 2004, Fisk estimated that the flow of remittances amounted to \$1.5bn annually, and characterized family visits as having been abused due to lack of effective controls. He claimed that the new restrictions could deny Castro up to \$0.5bn annually, and urged Cuban-Americans to remember "that these are a means to an end: the end of the Castro dictatorship." (Fisk 2004)

With regard to Title IV determinations, the State Department cited a Jamaican hotel, SuperClubs, in April 2004; no sanctions were imposed as SuperClubs divested rapidly. Deputy Assistant Secretary Fisk proudly proclaimed "This was the first determination in five years. The law was implemented; the law worked." (Fisk 2004) In July 2005, Fisk disclosed that the State Department was actively reviewing 26 cases of 'trafficking' in addition to closely monitoring the directors of Sherritt International and Grupo BM, where sanctions were imposed against four new officers of these two firms, and one officer was removed from the sanctions list.¹³ Impudently ignoring Helms-Burton, Sherritt International continues to expand its production on the island, oblivious to the continuing Title IV sanctions against its executives. In March 2005 Sherritt announced that its Cuban joint venture plans to spend \$450m to increase production of nickel and cobalt.¹⁴

Grupo Sol Meliá

It is noteworthy that SuperClubs was a Jamaican entity, not a European one. Despite unremitting campaigns by Libertad supporters, demands to sanction European entities, particularly Spanish companies, have never been successful; such action risked torpedoing the uneasy truce between Washington and Brussels, as both Spain and the EU warned that they would re-instate a WTO appeal if its firms were sanctioned.

Perhaps the most extraordinary pressure that both the Clinton and the Bush Administrations have endured centered on efforts to sanction the Spanish hotel group Grupo Sol Meliá (GSM), one of the leading hotel chains in Cuba. GSM allegedly built hotels on beachfront property formerly owned by the Sánchez family, owners of a 100,000-acre sugar plantation. The family formed an American company, Central Santa Lucia, LC (CSLLC) to represent their unified claims. Their attorney Nick Gutiérrez claims

¹³ Email correspondence, 15th July 2005.

¹⁴ "Sherritt, Cuba to Spend \$450 Mln to Boost Mine Output," Bloomberg 4th March 2005.

GSM opened two hotels in January 1996, which pre-dated Helms-Burton, but there was new construction after March 1996. GSM therefore received a very mild State Department letter in June 1996, followed by an official advisory letter on 30th July 1999. Finally, GSM received an expanded advisory letter in March 2001, advising them that the five-year management contract on the two hotels that were opened in January 1996 had expired, and warning that renewal would place GSM in breach of Libertad.¹⁵

GSM claimed it was cleared by the State Department for infringement of Libertad in 1996, and did not understand why it was the subject of a further inquiry three years on, especially as they managed, rather than owned, the hotels. Undeterred, GSM was operating fourteen hotels by 1999, with plans for expansion of five more hotels in 2000.¹⁶

GSM held the EU's Blocking Action as a shield against settling compensation with CSLLC. However, Gutiérrez claimed that both the Spanish Embassy in Washington (in mid-2000) and the European Commission (in late 2001) declared that a compensation agreement would be acceptable in principle. Gutiérrez further claimed he had been urged by the State Department to settle the claims of the Sánchez family against GSM, for this would "get them off the hook," characterizing a settlement as a "win-win" scenario for all,¹⁷ following the precedent set by STET's compensation to ITT in 1997. A European Commission official confirmed that the Clinton Administration had a vested interest in GSM brokering a deal with the Sánchez family, as it offered an elegant escape.

As bilateral negotiations commenced between the Sánchez family and GSM, CSLLC demanded \$10 million compensation. GSM's attorney claimed that the disputed property was worth a mere \$3,000 in 1962, and accused the State Department of mounting an extortion game on behalf of the claimants. GSM hoped that mounting EU pressure would deter further US action as the European Commission had warned the US that it would vigorously defend GSM.¹⁸

Nick Gutiérrez was guardedly optimistic that citations would be forthcoming against Grupo Sol Meliá with Noriega¹⁹ and Fisk ensconced in the Bureau of Western Hemisphere Affairs, complemented by McCarry in his new role as Cuba Transition Coordinator. Gutiérrez claims GSM is operating three hotels on land belonging to the Sánchez family: the two neighboring hotels, since merged into one, which GSM became liable for in January 2001 upon renewal of their management contract; a hotel built in 1999; and a hotel opened in 2002, and billed as a Cuban hotel, rather than as Sol Meliá. Gutiérrez claims that the State Department recently sent GSM a letter of determination, and he feels that Sol Meliá is somewhat vulnerable now that it is managing a hotel in

¹⁵ Interview, 31st January 2002.

¹⁶ García-Zarza, Isabel (1999). "Spain's Sol Meliá Undeterred in Cuba by US Threat." Reuters. Havana. (4th November).

¹⁷ Interview, 31st January 2002.

¹⁸ Alden, Edward (2001). "Signals of Harder Line on Cuba Give Castro Opponents Cause for Jubilation." Financial Times: 11. (3rd March).

¹⁹ Noriega resigned his State Department position in July 2005. The *New York Times* attributed his resignation to the McCarry appointment, which removed responsibility for Cuba from him.

Miami.²⁰ Sol Meliá is widely viewed as a test case whose Title IV citation could open the flood gates to many more determinations.

It is nothing short of extraordinary that the Sánchez family and Nick Gutiérrez continue to harbor such wildly unrealistic expectations after so many years. With explicit warnings from Spain and the European Union that the WTO Panel would be re-activated, what has the State Department to gain from such folly? Washington is understandably reluctant to open this Pandora's Box, risking a transatlantic dispute with close trading partners, over as insignificant a country as Cuba.

Conclusion:

This paper has shown that the Helms-Burton Act has never been actively implemented by either the Clinton or the Bush Administrations. The reservations predicting needless provocation of close allies and trading partners voiced by the Clinton White House during the Helms-Burton debates in 1995 came to fruition. Clinton successfully persuaded Washington's European trading partners to act as proxies in propelling Castro to move towards democracy, with the side-payment being that Title III was repeatedly waived and Title IV was invoked only against five companies in ten years (of whom only one was European, STET, the Italian telecommunications company), despite some 200 companies being accountable under it. The only two entities whose executives continue to endure exclusion from the US under Title IV are the Canadian Sherritt International and the Israeli Grupo BM.

Moreover, the European Union's strategy of challenging American unilateralism and extraterritorial tendencies with a World Trade Organization hearing was successful. Although the EU was castigated for negotiating a settlement with the US rather than litigating before a WTO Panel, the EU won the protection it sought; the European threat of a WTO renewal continues to constrain the State Department, effectively immunizing its entities from Libertad. The political settlement, though delicate and inchoate, diffused the dispute and remains respected by both Washington and Brussels.

Helms-Burton has atrophied rather than encouraging democracy in Cuba and heralding a robust new era in Cuban-American relations. Indeed, Professor Joaquín Roy claims that high-ranking Cuban officials called Libertad a *regalo del cielo*, a gift from heaven for Castro. William Ratliff and Roger Fontaine argue that, aside from the fact that the embargo allows Castro to blame his catastrophic economic position on the Americans, it enables him to play a role on the world stage. Lifting the embargo would humiliate Castro by announcing how irrelevant he is in the 21st century. (Ratliff and Fontaine 2000: 18-19) Even as Libertad withers, its greatest legacy could be the acknowledgement that the time has come for Washington to courageously and unilaterally modify Cuba policy. Unfortunately, with Washington's announcement that the Commission for Assistance to a Free Cuba is to reconvene and issue a report in 2006, the early likelihood of any real changes in Cuba policy remains bleak.

²⁰ Phone conversation, 14th July 2005.

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