

centerforconstitutionalrights

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Open Letter to President Obama regarding Travel to Cuba

August 26, 2010

Via Facsimile Transmission

The Honorable Barack H. Obama
President of the United States
Washington, DC 20500

Dear Mr. President:

We write to you concerning anticipated changes to United States-Cuba policy, and specifically the expansion of travel opportunities from the U.S. to Cuba. While we applaud the Administration's reinstatement of the general license for family travel and remittances last year, the U.S. has yet to eliminate the irrational and unlawful prohibition against travel to Cuba by non-Cuban Americans. The existing restrictions on travel raise serious constitutional and international human rights concerns. The Administration should take corrective measures which would bring the U.S. closer to compliance with the U.S. Constitution and international human rights law.

Constitutional and International Human Rights Implications

The Supreme Court has recognized that the United States Constitution's substantive due process guarantees include a limitation on the government's ability to restrict travel. Among other things, the Fifth Amendment requires that any restriction on a citizen's right to travel must be justified by a government interest important enough to outweigh that right. In the past, the Court has sided with the U.S. government and upheld Cuba travel restrictions based on the government's argument that "interests of national security" outweighed any right to travel to the island. However, since reimposing the travel restrictions in 1982, the U.S. government has consistently claimed that the restrictions on travel-related transactions are intended to cut off the flow of hard currency to Cuba.¹ Whether such a governmental interest could withstand constitutional challenge under even rational review, given the clear infringement of U.S. citizens' right to international travel, is highly dubious – particularly when considered against the \$600 million to \$1 billion sent to Cuba in recent years in the form of permissible remittances.²

¹ *E.g.*, 47 Fed. Reg. 17,030 (1982) (tightening travel restrictions "to reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba"); Statement of Alexander Haig, April 19, 1982 ("Cuba will not be allowed to earn hard currency from American tourists at a time when Cuba is actively sponsoring armed violence against our friends and allies."); *see also* *Walsh v. Brady*, 927 F.2d 1229, 1234 (D.C. Cir. 1991) (citing Declaration of Richard Newcomb, Director of OFAC to the effect that the "stated goals of the embargo program [were] (1) to deprive Cuba of hard currency, and (2) to make a political statement against the Cuban regime.")

² *See* <http://www.state.gov/r/pa/ei/bgn/2886.htm> (last visited August 26, 2010):



While we support the Administration's changes concerning remittances last year as a matter of principle and policy, the reality remains that a portion of that multi-million dollar export to the island nation inevitably returns to the Cuban state. Thus, to limit currency flows to Cuba by strictly limiting travel-related transactions remains irrational and unlikely to achieve even the averred goal of causing regime change within the country.

Finally, allowing permissible travel to Cuba would be one step in bringing the U.S. into compliance with the mandates of international law. The United Nations has passed near-unanimous resolutions condemning the U.S. embargo against Cuba, including its travel ban, as a violation of international law every year since 1992. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, recognize the fundamental nature and importance of protecting the freedom of movement. Article 13 of the Universal Declaration in part provides that: "Everyone has the right to leave any country, including his own, and to return to his country."³ Similarly, Article 12 of the ICCPR guarantees that "Everyone shall be free to leave any country, including his own," and further states that this right "shall not be subject to any restrictions except those provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."⁴ None of these exceptions are triggered in the case of travel by U.S. citizens to Cuba.

Statutory Framework

Contrary to recent reports, the Executive may tailor the current travel licensing scheme set forth in the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. Part 515. The Executive may, for instance, expand the definition of "educational travel," "journalistic activities," or "humanitarian projects" so as to include a wider range of academic programs, group travel, and people-to-people exchanges. Again, doing so would bring the U.S. close to compliance with constitutional imperatives and international law.

Remittances also play a large role in Cuba's economy. Cuba does not publish accurate economic statistics, but academic sources estimate that remittances total from \$600 million to \$1 billion per year, with most coming from families in the United States. U.S. regulation changes announced in April 2009 allow unlimited remittances to family members; they still cannot be remitted to certain Cuban Government officials and members of the Cuban Communist Party; and the total amount of family remittances that an authorized traveler may carry to Cuba is now \$3,000. The Cuban Government captures these dollar remittances by allowing Cuban citizens to shop in state-run "dollar stores," which sell food, household, and clothing items at a high mark-up averaging over 240% of face value.

³ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948)

⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200[B] (XXI), at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

*The LIBERTAD Act of 1996*⁵

While the LIBERTAD Act codified the embargo as it existed on March 1, 1996, the statute does not eliminate the President's authority to license transactions that were not in existence as of that date. This codification provision does not speak to the actions an Executive may or may not take, if they fall short of a full abrogation of the embargo.⁶ Nor does any other provision of the LIBERTAD Act expressly eliminate the Executive's authority to alter the CACR's travel-related licensing regime. The statute's principal and clearly stated limitation of presidential power is that the President may not suspend or terminate the CACR as a whole, until certain conditions are met.⁷

*The Trade Sanctions Reform & Export Enhancement Act of 2000*⁸

The Trade Sanctions Reform & Export Enhancement Act of 2000 ("TSRA") preserves the Executive's authority to permit travel that fits within the existing 13 categories of licensed-travel to Cuba. The TSRA's limitation on presidential authority in this regard is its proscription against authorizing travel-related transactions that are otherwise prohibited under the CACR, if the transactions concern "travel to, from, or within Cuba for tourist activities."⁹ Acknowledging this point, the Bush Administration took the position in litigation over the Cuba travel regulations that Section 910(b) of the TSRA does not "deprive OFAC of the authority to license *travel that is related to one of the 12 categories* of activities [set forth in the CACR.]"¹⁰ Thus, as under the LIBERTAD Act, the TSRA leaves untouched the Executive's responsibility for tailoring the existing licensing categories.

Previous Presidential Amendments the CACR Licensing Scheme

Both Republican and Democratic Administrations have altered the licensing regime in the CACR, reflecting a shared interpretation that neither the LIBERTAD Act nor the TSRA eliminate presidential power to do so.

Former OFAC Director Richard Newcomb and former Department of State Coordinator of the Office of Cuban Affairs Michael Rannenberger articulated this position in an October 16, 1998 correspondence to the GAO, stating in part that "OFAC interprets section 102(h) of the Act to permit the continued exercise of reasonable licensing authority in OFAC's implementation of the prohibitions contained in the CACR as of

⁵ 22 U.S.C. §§ 6021-6091.

⁶ *Id.* § 6032(h).

⁷ *Id.* § 6064.

⁸ 22 U.S.C. §§ 7201-7211.

⁹ *Id.* § 7209.

¹⁰ Reply Br. dated May 10, 2007, at 17 (emphasis added) in *Emergency Coalition to Defend Educational Travel v. Dept of the Treasury*, No. 06-1215 (D.D.C.)

March 1, 1996 and in the CDA [Cuban Democracy Act] and the [LIBERTAD] Act.”¹¹ Exercising this authority, President Clinton amended the CACR license categories by, among other things, vastly expanding the definition of permissible family remittances,¹² educational travel.¹³ The expanded license categories permitted travel-related transactions that were not part of the embargo as it existed on March 1, 1996.

Reaffirming the Clinton-era interpretation, the Bush Administration filed an *amicus curiae* brief in the Supreme Court in May 2006, expressly advising the Court that the Executive branch was within its lawful authority to amend the CACR to permit, by general license, transactions related to trademarks, even though such transactions were *never* before permitted. The Bush Administration amicus further stated that the Executive additionally possessed the authority to issue a specific license in such a matter.¹⁴

* * *

The Center for Constitutional Rights has long advocated for changes to the U.S. policy toward Cuba, based on international law, constitutional law, and moral principles. Expanding the ability of U.S. citizens to travel to the country would be a first step in reforming what individuals across the political spectrum have acknowledged to be a mistake if not total failure in foreign policy, and in keeping with this Administration’s efforts to restore U.S. relations abroad.

Sincerely,



Vincent Warren
Executive Director
The Center for Constitutional Rights

¹¹ Letter to GAO from Richard Newcomb & Michael Rannenberger, dated October 16, 1998, reproduced in U.S. GEN. ACCOUNTING OFFICE, CUBAN EMBARGO: SELECTED ISSUES RELATING TO TRAVEL, EXPORTS AND TELECOMMUNICATIONS, at App. III (Dec. 1998).

¹² 63 Fed. Reg. 27348 (May 18, 1998).

¹³ 64 Fed. Reg. 25808 (May 13, 1999).

¹⁴ Br. for United States as Amicus Curiae, at 16 in *Empresa Cubana del Tabaco, aka Cubatabaco v. Gen. Cigar Co., Inc.*, No. 05-417 (U.S.) (citing 31 C.F.R. 515.201).