

THE U.S. CONSTITUTION AND PRIVATE PROPERTY: REFLECTIONS FOR CUBA

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This paper is not meant to be a scholarly treatise on such a momentous topic. Pretending to do that would be arrogant. Among its purposes are:

- to remind the reader of the key role natural law principles played in the drafting of the Declaration of Independence and the U.S. Constitution, with emphasis on the importance of private property rights; and
- to argue that there are numerous U.S. citizens, many in high positions, who either do not know about this or act as if they did not know about it, and that some of these are “Washington mandarins” and seem to believe that private property is a type of luxury only suitable for countries that are developed rather than a necessity for the future welfare of a country, regardless of its level of development.

I am sure many would say: “who cares what these ‘Washington mandarins’ think?” My answer is that whether you like it or not, such people often play a role in “transition processes” and that these deficiencies of knowledge or understanding could be harmful to the future welfare of Cuba. If you do not believe what I am saying, ask a Nicaraguan who is still suffering from Jimmy Carter’s ill-fated mediation in that country and his tacit support for the “piñata.”

I believe it is inevitable that there will be a transition to democracy in Cuba. The final and most important purpose of this paper is to make a plea to Cubans who may be involved in a transition process to remain vigilant so that important principles of natural law are not traded away by some mediator.

INTELLECTUAL ORIGINS OF THE DECLARATION OF INDEPENDENCE AND THE U.S. CONSTITUTION AND SOME IMPORTANT PRINCIPLES THAT EMERGED FROM THOSE ORIGINS

To understand better the principles that underlie the U.S. Constitution one has to begin with the Declaration of Independence, promulgated July 4, 1776. The immediate aim of the Declaration of Independence was to justify to the world at large the decision to declare independence. To achieve this, the signers set forth a theory of legitimate government that was influenced by Natural Law theorists such as Burlamaqui and Vattel, but primarily by John Locke, and his “*Two Treatises on Government*,” written in 1679-1680 and first published in 1690. It can be said that John Locke was the intellectual father of the United States, as he probably had a greater influence on Thomas Jefferson, author of the Declaration of Independence, than any other writer.

1. The opinions expressed in this paper are the author’s, and they do not necessarily reflect the point of views of the Inter-American Development Bank or its Board of Directors. Some of the ideas presented here are from an article Jorge Sanguinety and I wrote in May 2002.

The political philosophy of Locke was based on natural law. Men were presumed to be born with natural rights and not receive them from the government. According to Locke, men unite in a society “for the mutual preservation of their lives, liberties, and estates, which I call by the general name ‘property’” (Locke, *op cit*, pp. 356-368). He also said: “Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men, but to be a judge of and punish the breaches of that law.” In summary, John Locke believed that property rights are the basis of human freedom and that the Government exists to protect them. These “Lockean” principles were reflected in the Declaration of Independence.

Later, during the Constitutional Convention, the “Framers of the Constitution” agreed with the importance of protecting private property.² Madison said “the primary objectives of civil society are the security of property and public safety.” Hamilton stated that “one great objective of Government is personal protection and the security of property.” According to Forrest McDonald, George Mason and Luther Martin concurred. Additionally, “Gouverneur Morris, John Rutledge and Rufus King put the protection of property ahead of liberty as the primary object of society.”³

John Adams spoke eloquently on the subject. He said:

The moment is admitted into society, that property is not as sacred as the laws of God, and there is not a force of law and public justice to protect it, anarchy and tyranny commence. If thou shall not covet and

thou shall not steal were not commandments of Heaven, they must be made inviolable precepts of every society, before it can be civilized or made free.⁴

Another thinker that influenced the Framers of the Constitution was Adam Smith, particularly with respect to the limits of Government action. Adam Smith wrote:

According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance indeed, but plain and intelligible to common understandings: first, the duty of protecting society from the violence and invasion of other independent states; secondly, the duty of protecting, as far as possible, every member of society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and thirdly, the duty of erecting and maintaining certain publick works and publick institutions, which can never be for the interest of any individual or small number of individuals, to erect and maintain, because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.⁵

Putting Adam Smith in the language of modern public finance, the Government should be limited to national defense, to the administration of justice and to the provision of public goods.

Section 8 of Article I of the U.S. Constitution enumerates the powers of Congress, and follows closely the principles established in the Adam Smith passage quoted above.⁶ An indication of how strongly the Framers believed in the strength of Section 8 is the debate on the necessity of having a Bill of Rights (Amendments 1 to 10 of the Constitution). Alexander Hamilton, for example, argued that it was not necessary, because Section 8 did not explicitly give Congress the power to establish a religion, or to restrain the freedom of the press, and that therefore the

2. This paragraph and the quotes are from Forrest McDonald, *Novus Ordo Seclorum*.

3. Forrest McDonald, *op. cit.*

4. John Adams, *The Works of John Adams*, Volume 6.

5. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776.

6. The text of Section 8 is reproduced in Annex A.

Bill of Rights was superfluous and perhaps even dangerous, as it could actually weaken that Section.

The Constitution of the United States, drafted by the Constitutional Convention that met in Philadelphia between May 25 and September 25, 1787, is the world's oldest written constitution still in effect. Besides limiting the scope of Government action, and protecting private property, it has a number of important features:

- The U.S. Constitution essentially codifies the rules to access power, it details how officials can be removed from office, and specifies the ways in which the Constitution can be modified.
- The U.S. Constitution does not mandate special benefits to citizens, as do some constitutions in Latin America. For example, a fairly recent constitution in Latin America states that all citizens have the right to a “dignified dwelling,” and that the “rights of all persons to recreation, to engaging in sports and to the enjoyment of leisure time is recognized.” In this particular country, property rights are not well protected, and the value of a human life is, *de facto*, negligible, but the constitution “guarantees” the right to engage in sports!
- The U.S. Constitution is simple and practical and has been able to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.

An important feature of the Constitution is the separation of power and the system of “checks and balances,” something the Framers learned from Montesquieu. John Adams listed eight balancing mechanisms contained in the Constitution. These were:

- the states vs. the central government;
- the House vs. the Senate;
- the president vs. Congress;
- the courts vs. Congress;
- the Senate vs. the president (with regard to appointments and treaties);
- the people vs. their representatives;

- the state legislatures vs. the Senate (in the original election of senators); and
- the Electoral College vs. the people.

Natural law, property rights, limited Government, and checks and balances were important principles embedded in the Declaration of Independence and the U.S. Constitution. The next section discusses the treatment of private property in the U.S. Constitution.

PROTECTION OF PRIVATE PROPERTY IN THE U.S.

The protection of property is enshrined in the Fifth Amendment of the U.S. Constitution. It reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, approved in 1868, after the Civil War, was initially enacted to protect freed slaves from the abrogation of their rights by the Southern states. One of its main effects, however, has been to protect private property against state regulatory legislation in the years after 1880. Section 1 of the Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The protection of private property, and a commitment to economic freedom, remained very important features of the U.S. Government during more than a century and a half, and one could argue that this per-

mitted the U.S. to grow rapidly. Forrest McDonald concludes that the more basic changes came during the presidency of Lyndon Johnson and the chief justiceship of Earl Warren, when the Supreme Court began to legislate rather than adjudicate and a growing bureaucracy attempted to run economic activity through a myriad of regulations. Some of these regulations clearly “take” property without compensation by reducing the value of assets such as real estate. In any case, the century and a half of relative economic freedom that the U.S. enjoyed permitted the country to grow rapidly and to reach unprecedented levels of welfare. And recently, the courts have begun to give greater importance to the protection of property rights.

EXAMPLES OF LACK OF COMMITMENT TO THE PRINCIPLES OF THE FOUNDING FATHERS BY AMERICANS

The most obvious case of case of a prominent American acting as if property rights were not important is Jimmy Carter’s ill-fated intervention in the transition to democracy in Nicaragua. Mark Falcoff, of the American Enterprise Institute, documents Carter’s intervention in Nicaragua in an article in which he says:⁷

Once ejected by popular vote, they (the Sandinistas) rushed with indecent haste to ‘privatize’ the vast property holdings they had confiscated after 1979, with themselves as the beneficiaries. But not even this looting expedition—a huge *piñata*, as it was called—was enough to unmask them once and for all in the eyes of their well-wishers. Immediately after the elections of 1990, former President Jimmy Carter rushed to Violeta Chamorro’s house in the capital city of Managua to urge her, in the name of ‘national reconciliation,’ to retain for the Sandinistas a measure of power in the new government. She graciously, but mistakenly, concurred: until very recently, the Nicaraguan army remained the Sandinista army, and its commander, General Humberto Ortega, was the same man who had commanded it in the 1980’s. The result has been truly lamentable: neither genuine na-

tional reconciliation nor, thanks largely to unresolved claims to expropriated property, a serious recovery of Nicaragua’s economy.

Jimmy Carter is a politician, and was not an U.S. Government official when he visited Nicaragua. In the rest of this section I will give two other examples of U.S. Government career officials who also seem to disregard the teachings of the Founding Fathers. One example is documented in *The Wall Street Journal* and the other is something from my own experience as a member of the U.S. Senior Foreign Service.

- *The Wall Street Journal* documents the bizarre and unwarranted attacks by the U.S. Embassy in Guatemala against the Francisco Marroquín University and its founder, Manuel Ayau.⁸ Essentially, the U.S. Embassy circulated to several ambassadors accredited to Guatemala a cable drafted by an Embassy official labeling Mr. Ayau and the University as enemies of freedom. This is quite strange, given the commitment of this University to the ideals of freedom enshrined in the U.S. Constitution. As Ms O’Grady, the author of the article puts it, “classic Marroquin teaching, ... argues that the foundation of a free society is a rule of law prohibiting arbitrary government intervention.” My own experience, teaching at the University and having professional contact with its graduates, would lead me to conclude that the University adheres much more closely to the principles of the “founding fathers” than most universities in the United States.
- During my career in the U.S. Foreign Service, I encountered many colleagues who did not seem to believe very strongly in the principles of the “founding fathers.” I could give a number of examples but will not as I do not want to personalize this paper.

LESSONS FOR CUBA

Cuba will some day be free. I am sure of it. Hopefully, the people and their representatives will choose to

7. Mark Falcoff, “Nicaragua on the Brink—of What,” *AEI Latin American Outlook* (October 2001).

8. Mary Anastasia O’Grady, “A Guatemalan Free-Market Reformer is Under Fire from the U.S.,” *The Wall Street Journal*, August 3, 2001.

establish a political and economic system based on natural law, including a strong emphasis on the protection of property rights. It is important to note that the protection of property rights and political freedom go together. For example, protecting freedom of speech is meaningless without protecting property, as the threat to take your property is a powerful silencer.

I believe ASCE and other institutions interested in the welfare of Cuba should make every effort to distribute in Cuba the writings of the great thinkers of natural law, including Locke and others. Other interesting books to distribute would be Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* and *The Theory of Moral Sentiments*. Books by

more modern writers, such as Milton and Rose Friedman, should also be distributed.⁹

My main recommendation is for any Cuban who would be involved in a transition to democracy process to remain vigilant of foreign mediators who may be seeking Nobel Peace Prizes, or promotions in the U.S. State Department, or other types of benefits that would result from participation in the transition process. These individuals can afford, à la Carter, to negotiate a reduction in economic freedom and in the protection of property rights, knowing that in the end, their assets, peanut farms or whatever are in the U.S. and protected by the Fifth and Fourteenth Amendments of the U.S. Constitution.

ANNEX A U.S. CONSTITUTION—SECTION 8, ARTICLE I

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

- To borrow money on the credit of the United States;
- To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
- To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
- To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
- To provide for the punishment of counterfeiting the securities and current coin of the United States;
- To establish post offices and post roads;
- To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
- To constitute tribunals inferior to the Supreme Court;
- To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
- To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
- To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
- To provide and maintain a navy;
- To make rules for the government and regulation of the land and naval forces;

9. A member of the Board of the Francisco Marroquín University visited Cuba once and showed a Spanish version of "Free to Choose," the documentary about Milton Friedman's book. Additionally, they provided scholarships to students from the University of Havana.

- To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions;
- To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
- To exercise legislations in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states,

and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

- To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

ANNEX B

FOURTEENTH AMENDMENT, ADOPTED JULY 28, 1868

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3

No person shall be a senator or representative in Congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

SECTION 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.