

THE ROLE OF CONGRESS IN U.S. POLICY TOWARD CUBA

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Many thanks Helena, Gary, and the rest of the ASCE Board, for the invitation to speak here today. It's a real honor to be here for many reasons—but I'd like to mention two. First, I've been coming to the ASCE conference off and on for many years and find the conference and the published conference proceedings really useful in my work on Cuba for Congress—so in essence this is a payback for ASCE's many years of contributions to my work informing Congress on Cuba. And the second reason that it's an honor for me is that this is the Ernesto Betancourt Address—way back when I was just out of graduate school I had the opportunity to meet Ernesto a couple of years before he became the first director of Radio Martí. I never envisioned that some 35 years later I'd have the opportunity and honor to be giving the Ernesto Betancourt Address.

I'd like to focus my remarks today on the role that Congress plays in U.S. policy toward Cuba. I'll look at the policy changes under the Obama and Trump Administrations in the context of Congress, and examine the continuity of policy in both Administrations on security-related engagement with Cuba. Then I'll close by providing a snapshot of legislative activity on Cuba in the current Congress and a look ahead.

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U.S. economic sanctions have been the main focus of U.S. policy toward Cuba dating back to the 1960s.

Let me talk a bit about how they developed and the role of Congress.

In 1961, U.S. relations with Cuba were deteriorating over Cuba's expropriation of U.S. properties and as Fidel Castro was moving the country closer to the Soviet Union—we had severed relations with Cuba in January under the Eisenhower Administration and in April 1961 we had sponsored the ill-fated Bay of Pigs invasion. Well in August of that year, Congress approved the **Foreign Assistance Act of 1961** with a provision that gave the President authority to impose a trade embargo on Cuba.

President Kennedy first proclaimed a comprehensive trade embargo in February 1962 under authority of that provision in the Foreign Assistance Act. Subsequently, that same year, the President expanded the legal authority of the embargo to include the **Trading with the Enemy Act**, a 1917 law authorizing the President to prohibit, limit or regulate trade and financial transactions during times of war or national emergency.

In July 1963, the embargo was broadened to include a prohibition on most financial transactions with Cuba. Thus, it became much more than a trade embargo. At that time, the Treasury Department issued the **Cuban Assets Control Regulations**, or the CACR. They remain the main body of embargo regulations and have been amended many times over the years to reflect changes in policy. The CACR also require that all exports to Cuba be licensed by the De-

1. Editor's Note: This is the text of the Ernesto Betancourt Keynote Address, delivered on July 27, 2018.

partment of Commerce, under the **Export Administration Regulations**, or the EAR.

In 1982, the Reagan Administration designated Cuba as a county that supported international terrorism because of its assistance to insurgent groups in Latin America. This was done pursuant to three laws with state sponsor of terrorism act provisions (most significantly the Export Administration Act of 1979, but also the Arms Export Control Act, and the Foreign Assistance Act). As a result Cuba became subject to additional anti-terrorist sanctions or restrictions, particularly in the Export Administration Regulations.

Since the early 1990s, Congress has shaped policy toward Cuba through the enactment of three major laws:

- The first is the **Cuban Democracy Act of 1992** or CDA. It was enacted in the aftermath of the Cold War and as the Cuban economy was reeling from the loss of support from the Soviet Union. The law included both sanctions and measures of support for the Cuban people, like direct phone service and medical exports, and it stated that the United States should be prepared to reduce sanctions in carefully calibrated ways in response to positive developments in Cuba. Among its sanctions, the CDA prohibits U.S. foreign subsidiaries from engaging in trade with Cuba. It permits medical exports to Cuba, but includes some restrictions, including a requirement for onsite verification that the exports are being used only for the benefit of the Cuban people. It also prohibits—except pursuant to a Treasury Department license—ships entering the United States to load or unload freight if they had been involved in trade with Cuba within the previous 180 days, albeit with some exceptions. (I should note that in 2016 the Treasury Department authorized a general license waiving this restriction for vessels carrying low-technology consumer goods, but otherwise this restriction remains in effect.)
- The second major law is the **Cuban Liberty and Democratic Solidarity Act of 1996**, also known as the LIBERTAD Act.
 - It was enacted in the aftermath of Cuba’s shoot down of the two Brothers to the Rescue planes in February 1996. It combined a variety of measures to increase pressure on Cuba and provides for a plan to assist Cuba once it begins a transition to democracy. Most significantly, the act codified the Cuban embargo as permanent law, including all restrictions imposed by the executive branch under the CACR. This provision is noteworthy because of its long-lasting effect on U.S. policy options toward Cuba. The executive branch is prevented from lifting the economic embargo without congressional concurrence through legislation or until certain democratic conditions set forth in the law are met, although the President retains broad discretionary authority to amend the regulations because the regulations themselves provide that authority. Another significant sanction in Title III of the law holds any person that traffics in U.S. property confiscated by the Cuban government liable for monetary damages in U.S. federal court. Acting under a waiver provision of the law, however, all Administrations (including the Trump Administration) have suspended the implementation of Title III at six-month intervals, most recently in June 2018.
 - The third major law is the **Trade Sanctions Reform and Export Enhancement Act of 2000** or TSRA. While TSRA authorizes U.S. agricultural exports to Cuba, it also includes prohibitions on U.S. assistance and private commercial financing and requires “payment of cash in advance” or third-country financing for the agricultural exports. Significantly, the act also tightened economic sanctions on Cuba by adding a statutory prohibition on tourist travel.
 - In addition to these acts, Congress has enacted numerous other provisions of law over the years that impose additional sanctions on Cuba, including restrictions on foreign aid, on support from the international financial institutions, and on trade, including the denial of nondiscriminatory trade treatment and a prohibition on sugar imports.

CUBA POLICY CHANGES UNDER THE OBAMA AND TRUMP ADMINISTRATIONS

Let me talk a bit about the Cuba policy changes under both the Obama and Trump Administrations and how Congress has reacted.

Obama Administration—Continuity and Change

During its first six years, the Obama Administration largely continued the dual-track U.S. policy approach toward Cuba that has been in place for many years—economic sanctions aimed at isolating Cuba and influencing its behavior and a second track of efforts to support the Cuban people. These support measures for the Cuban people include U.S. funding for human rights activists and democracy-building efforts, U.S.-sponsored radio and television broadcasting to Cuba, and authorization for U.S. private humanitarian donations to Cuba. Medical exports under the Cuban Democracy Act and agricultural exports under TSRA can also be viewed as support measures for the Cuban people as can authorization for U.S. travel and cash remittances to Cuba, although these measures have often been the subject of intense congressional debate.

From the beginning of his Administration, President Obama started to put more emphasis on efforts to support the Cuban people. In April 2009, the President fulfilled a campaign pledge by lifting all restrictions on family travel and remittances. It's important to note a month earlier Congress actually enacted appropriations legislation with provisions easing restrictions on family travel and travel for the marketing and sale of agricultural exports to Cuba. This was pretty significant since it was the first congressional action in almost a decade that eased U.S. sanctions on Cuba. But President Obama's subsequent action on family travel went much further. And in 2011, the Obama Administration introduced new measures to reach out to the Cuban people through increased purposeful travel (which included the restoration of people-to-people educational travel that had been first introduced by the Clinton Administration) and an easing of restrictions on other cash remittances to Cuba.

Obama's Major Shift in Policy. And then in December 2014, President Obama announced a major shift

in U.S. policy toward Cuba, moving away from a sanctions-based policy toward one of engagement and a normalization of relations.

There were three major components to the Administration's change in policy:

- The first policy change was a review of Cuba being designated a state sponsor of terrorism; the State Department undertook the review, which led to a presidential report to Congress and ultimately **the rescission of Cuba's state sponsor designation in May 2015**. No Members or Senators introduced resolutions of disapproval to block the rescission, which could have happened pursuant to the state sponsor of terrorism provisions of law that I mentioned earlier.
- The second policy change was the **restoration of diplomatic relations**, which occurred in July 2015. This led to significant government-to-government engagement through numerous agreements and dialogues over the next 18 months. There were several attempts by the House of Representatives in the annual State Department and Foreign Operations appropriations bills over three years to prevent the expansion of a U.S. diplomatic presence in Cuba, but these efforts were not successful.
- The third policy component was the easing of U.S. economic sanctions in order to increase travel, commerce, and the flow of information to and from Cuba. This third component is the one that has most affected U.S. economic sanctions. It required changes to U.S. embargo regulations administered by the Treasury and Commerce Departments. The two agencies eased sanctions related to travel, remittances, trade, telecommunications, financial services, and other financial transactions. The changes fell within the scope of the President's discretionary licensing authority to make changes to the embargo regulations. There were attempts in House appropriations bills to roll back some of the Obama policy changes and introduce new sanctions, but these were not successful.

While President Obama made numerous changes to the embargo regulations, the President didn't have

the authority to lift the embargo because it is codified in law. As I mentioned before, the LIBERTAD Act ties the lifting of the embargo to conditions in Cuba, including that it has a democratically-elected government. Lifting the overall economic embargo would require Congress amending or repealing portions of the LIBERTAD Act as well as provisions of other statutes that have provisions impeding normal economic relations with Cuba, such as the CDA, and TSRA.

Trump Administration: Partial Rollback

In June 2017, President Trump unveiled his policy on Cuba. The policy leaves most of the Obama-era policy changes in place, but rolls back some efforts to normalize relations, including restrictions on people-to-people educational travel to Cuba, and new sanctions on financial transactions with companies controlled by the Cuban military.

In order to implement President Trump's Cuba policy changes, the Treasury and Commerce Departments amended the embargo regulations in November 2017. The amended regulations require people-to-people travel to be under the auspices of an organization specializing in such travel—individual people-to-people travel is no longer authorized. The regulations also prohibit financial transactions with entities controlled by the Cuban military, intelligence, or security services, albeit with several exceptions. The State Department took complementary action by publishing a list of 180 such entities, including 2 ministries, 5 holding companies and 34 of their sub-entities (including the Mariel Special Development Zone), 84 hotels, 2 tourist agencies, 5 marinas, 10 stores in Old Havana, and 38 entities serving the defense and security sectors.

It's important to note that the Trump Administration's policy change of restricting transactions with entities controlled by the Cuban military were similar to provisions in legislation introduced, but not acted upon, in both houses in the 114th Congress in 2015 and 2016. They were also similar to provisions in House Financial Services appropriations bills for FY2016 and FY2017 that were ultimately dropped in final enacted legislation.

U.S.-CUBAN SECURITY COOPERATION

What I'd like to do now is discuss U.S.-Cuban security cooperation as an illustration of continued U.S. engagement with Cuba under the Trump Administration.

- U.S.-Cuban security cooperation has gone on dating back a good number of years. What is remarkable to me is that during times when U. S.-Cuban relations were pretty awful, there was still ongoing security cooperation. Cooperation on migrant interdiction began in 1995 pursuant to a migration accord negotiated between the two countries—the U.S. Coast Guard took the lead on this issue and for many years there has been cooperation between the Coast Guard and the Cuban Border Guards.
- In 1996, the same year as the shoot down of the Brothers to the Rescue planes, Cuba cooperated with the United States in the seizure of 6.6 tons of cocaine aboard a Miami-bound Honduran-flag ship. Cuba turned over the cocaine to the United States and cooperated fully in the investigation and prosecution of defendants.
- In 1999, U.S. and Cuban officials met in Havana to discuss ways of improving antidrug cooperation. Cuba accepted an upgrading of the communication link between the Cuban Border Guards and the U.S. Coast Guard and the stationing of a U.S. Coast Guard drug interdiction specialist at the then-U.S. Interests section in Havana in 2000.
- For many years, the coast guard interdiction specialist was not only the key U.S. interlocutor with the Cuban government on antidrug cooperation, but at times on other security or law enforcement issues.
- With the normalization process that that began under the Obama Administration, cooperation on anti-drug efforts and other security areas intensified with bilateral agreements signed on counternarcotics cooperation, oil spill preparedness and response, law enforcement, and search and rescue. Bilateral dialogues were held on these and other security-related topics such as counterterrorism, trafficking in persons, and migration.

- Despite the Trump Administration's new policy on Cuba partially rolling back some aspects of engagement, there has been a lot of continuity in U.S. policy between Administrations, particularly on security issues. In fact, the national security presidential memorandum issued by President Trump identifies "protecting the national security" of the United States as one of several U.S. interests that should be advanced through engagement with Cuba.
- Under the Trump Administration, bilateral dialogues and exchanges have continued on many topics. This has included semiannual migration talks, which for many years have provided a forum to review and coordinate efforts to ensure safe, legal, and orderly migration between the two countries; in fact the most recent round of migration talks occurred earlier in July 2018. Other security-related meetings and exchanges have covered cyber security and cybercrime, counternarcotics efforts, anti-money laundering efforts, counterterrorism, trafficking in persons, search and rescue, and law enforcement matters.
- The State Department has reported on some positive aspects of security-related engagement that I'd like to point out. The State Department issues an annual report the antidrug efforts of countries worldwide. The 2018 report issued in March discusses how Cuban authorities and the U.S. Coast Guard share tactical information on vessels transiting through Cuban territorial waters suspected of trafficking and coordinate responses. It noted the establishment of direct communications in 2016 between the U.S. Drug Enforcement Administration and their Cuban counterparts, and that such cooperation led to Cuba's arrest of a fugitive wanted in the United States. More broadly, the report noted that Cuba has demonstrated a willingness to cooperate on law enforcement matters, which has included assisting U.S. state and federal prosecutions by providing evidence and information.
- Another semi-annual State Department report to Congress on migration issues from April 2018 lauded bilateral U.S.-Cuban cooperation that has helped reduce dangerous irregular migration

flows between the two countries. It notes that the U.S. Coast Guard and the Cuban Border Guards routinely cooperate in all aspects of Cuban maritime migration. "Active target hand off" operations are common in which the Cuban Border Guards pursue a vessel until it leaves Cuba's territorial waters and then allows the U.S. Coast Guard to interdict it.

In some respects, continued U.S. engagement with Cuba is all the more remarkable given the political rhetoric on Cuba during the presidential campaign and surrounding the President's announcement of his new Cuba policy last year. Such engagement has continued despite that fact that the downsizing of the U.S. Embassy in Cuba since last October has complicated dialogues and exchanges on security-related issues; as a result, many of these meetings have taken place in the United States rather than in Cuba.

What's the outlook for security-related cooperation going forward? I think the track record I've described lays down a good foundation for continued cooperation. However, such cooperation could become more difficult in the next 2 ½ years if the overall tenor of U.S.-Cuban relations deteriorate significantly, or if the White House decides to impose new significant economic sanctions on Cuba. At this juncture, it appears that both countries believe it is in their interests to continue such engagement. And it doesn't appear that Congress will try to curb or impede such cooperation. There had been efforts to curb U.S. military engagement with Cuba in the Fiscal Year 2017 National Defense Authorization Act; ultimately a much weaker version of the provision was enacted applying to just that fiscal year and the provision has not appeared since in defense authorization legislation for FY2018 or FY2019.

LEGISLATIVE ACTION IN THE 115TH CONGRESS

Let me sketch out congressional action on Cuba in the 115th Congress, which concludes this year, including what decisions lie ahead for the remainder of the year. As in past congresses, debate over Cuba policy has continued, especially with regard to economic sanctions. Numerous freestanding bills have been introduced that would ease or lift sanctions, and several

House appropriations bills have had provisions that would tighten or introduce new sanctions.

The 115th Congress has rejected efforts to cut funding for democracy and human rights programs for Cuba—it provided \$20 million in each of FY2017 and FY2018. And for FY2019, while the Trump Administration has requested \$10 million for Cuba democracy funding, the House appropriations bill would provide \$30 million, triple the request, while the Senate bill would provide \$15 million.

Congress has also continued to fund Cuba broadcasting at levels similar to those provided in recent years. It appropriated about \$28 million in FY2017 and almost \$29 million in FY2018. For FY2019, the Trump Administration requested \$13.7 million for Cuba broadcasting—the rationale for the proposed cut was to achieve efficiencies between the Broadcasting Board of Governors’ two Spanish-language services, the Office of Cuba Broadcasting and VOA’s Latin America division, but both the House and Senate appropriations bills would reject that and continue to fund Cuba broadcasting at about \$29 million.

As I mentioned earlier, for both FY2017 and FY2018, the final enacted omnibus appropriations measures did not include provisions tightening sanctions that had been included in several House appropriations bills. For FY2019, to date, two House appropriations bills (Commerce and Financial Services) have provisions that would tighten sanctions on Cuba, setting up another showdown with the Senate during conference.

There are also two pending broader bills with Cuba provisions.

- The Senate-passed version of the 2018 Farm Bill would permit funding for certain U.S. export promotion programs for agricultural products in Cuba—the Market Access Program and Foreign Market Development Cooperation Program. If the provision makes it into law, it would demonstrate congressional willingness to support an easing of Cuba sanctions, albeit a minor easing, in order to support U.S. farmers.
- The conference report to the FY2019 National Defense Authorization Act has a provision that would require a Defense Intelligence Agency re-

port on security cooperation between Russia and Cuba. This reflects growing congressional concern about Russian activities in the Western Hemisphere. The report would be required to include a description of any military or intelligence infrastructure, facilities, and assets developed by Russia in Cuba and any associated agreements or understanding between Russia and Cuba.

In general, there have been different views on U.S. policy toward Cuba—some Members strongly supported the Obama Administration’s policy of engagement and some were strongly opposed but could do nothing about it legislatively. The same goes for the Trump Administration policy—some have opposed his policy changes and some supported them. In the end, Congress has been unable to reach agreement and has not taken significant action in either policy direction. This essentially has resulted in the Executive Branch dominating Cuba policy.

Over the past several years, the Senate has generally wanted to ease sanctions while the House has wanted to strengthen them. For the remainder of this year, I think that the same dynamic will be in place, but it could change in the next Congress if control of either house changes hands.

Regardless of the election, however, it’s possible that some Members of Congress will seek to influence the Trump Administration in adopting stronger sanctions on Cuba. Just as the Administration adopted new restrictions on financial restrictions involving the Cuban military, a policy that had been advocated by some Members of Congress, the Administration could take measures to tighten or impose additional sanctions on Cuba. For example, some Members of Congress and others have advocated sanctions targeting Cuban officials responsible for significant human rights abuses, corruption, or undermining democratic processes or institutions in Cuba or in Venezuela.

Overall, however, I wouldn’t expect much legislative action on Cuba happening for the rest of this Congress. In the next Congress beginning in January 2019, if the House or Senate changes parties, there could be stronger efforts to ease some U.S. sanctions on Cuba. I’ve always thought that one of the sanc-

tions whose elimination or softening might receive significant support in Congress would be the prohibition against private commercial financing for U.S. agricultural exports to Cuba. But I think chances for broader legislation to ease or lift sanctions on Cuba are slim under the current Administration.

Looking further down the line, what's important to remember is that Congress plays a key role in the U.S. sanctions-based policy toward Cuba. Unless Cuba adopts a democratic system of government, which would trigger a lifting of the economic embargo, congressional action would be needed to repeal sanctions in U.S. law if policymakers want to fully normalize relations.

IMPORTANCE OF CONGRESSIONAL OVERSIGHT

I'd like to close with something off topic. Most visitors to the Library of Congress go to the Library's Jefferson building; it was completed in the late 1800s and really is one of Washington's treasures. I work, however, in the Library's Madison building, which

dates to just 1980. It was named after one of founding fathers and fourth president, James Madison, who also was a strong advocate for public education and the diffusion of knowledge.

One of my favorite quotes from Madison (and one that probably gets overused or misused) is carved on the front of our building on Independence Ave. It's from a letter he wrote in 1822 to W.T. Barry, at the time the Lieutenant Governor of Kentucky. Madison wrote: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives" (James Madison to W.T. Barry, August 4, 1822.)

I think the quote speaks for itself. Many thanks to ASCE's work over the years in contributing to our knowledge of what's happening in Cuba. And thanks again for the privilege of speaking with you here today.