



Missing the Target *The Failure of the Helms-Burton Act*

by Mark A. Groombridge

Executive Summary

One of the most ill-advised policies of the United States toward Cuba is embodied in the Cuban Liberty and Democratic Solidarity Act, signed into law in March 1996. Popularly known as the Helms-Burton or Libertad Act, this legislation not only targets Cuba but also punishes U.S. allies who trade with and invest in Cuba.

The bill tightens the four-decade-old economic embargo against Cuba and seeks, in Title III, to punish foreign-owned companies that engage in the “wrongful trafficking in property confiscated by the Castro regime.”

The Helms-Burton law is legally and practically flawed. First, because we have no formal diplomatic relations with Cuba, the United States remains the one country with which Cuba has not settled claims. Second, Helms-Burton establishes a dangerous precedent by allowing U.S. courts to rule on actions of parties who were not U.S. citizens when the offending action took place. Third, Helms-Burton will actually make it more

difficult to settle property claims by dramatically raising the number and value of U.S. property claims against Cuba from their current total of about \$6 billion to as much as \$100 billion.

The United States claims that Helms-Burton is allowable under the national security exemption to our World Trade Organization commitments, but it is difficult to argue that sanctions against Cuba and its foreign investors serve any genuine national security interest.

Helms-Burton has failed to promote democracy in Cuba and has strengthened the hand of the Castro regime by providing an excuse for its own failed economic system. This summer President Bush will have the opportunity to remove a painful thorn from the side of U.S.-Canadian and U.S.-European bilateral relations. He can do so by urging Congress to repeal the Helms-Burton Act. At a minimum, Bush should continue to waive implementation and enforcement of the most egregious provisions stipulated in Title III of the act.

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Introduction

After several decades of seeking to isolate Cuba by a variety of economic and diplomatic means, it is clear that the United States has less of a "Cuba policy" than a "Fidel Castro policy." Despite the U.S. obsession with ousting the leader through economic and political isolation, Castro remains in power. George W. Bush will be the 10th U.S. president who has had the opportunity to acknowledge that U.S. policy toward Cuba is a failure, driven largely by electoral politics in Florida, a state now populated with close to 1 million anti-Castro exiles from Cuba. Sound political strategies, however, are not synonymous with sound foreign policies.

It is increasingly clear that our policies have only served Castro's ends and provided him with an excuse for his own failed policies. While there has been some relaxation of tension and thawing in relations between the two countries, several policies remain in place that serve to undermine long-term U.S. interests with regard to both Cuba and many of our key allies.

One of the most ill-advised policies of the United States toward Cuba is embodied in the Cuban Liberty and Democratic Solidarity Act, signed into law in March 1996. Popularly known as the Helms-Burton or Libertad Act, this legislation targets not only Cuba but also U.S. allies who trade with and invest in Cuba.

This summer President Bush will have the opportunity to remove a painful thorn from the side of U.S.-Canadian and U.S.-European bilateral relations. He can do so by urging Congress to repeal the Helms-Burton Act. At a minimum, the president should continue to waive implementation and enforcement of the most egregious provisions stipulated in Title III of the act. In response to a chorus of opposition from our allies in Canada and Europe, President Clinton suspended those provisions by executive order after the legislation passed. Such waivers must be renewed, however, every six months. President Bush has made it clear that the overall embargo will remain in place, but implementation of Title III provisions will undermine our commercial relationships with our allies and will do nothing

to remove Castro from power.

Even if the Title III provisions of Helms-Burton are waived, however, many other provisions in the act undermine our long-term goal of promoting democratic change in Cuba. In early 2001 Sen. Jesse Helms (R-N.C.) began pushing again for more vigorous enforcement of the other provisions, many of which will prove counterproductive. Although Cuba's destiny will ultimately be determined by its own people and not outside forces, the United States is in a position to effect positive change, however small, in that country through increased trade and investment. By so doing, the United States could begin to strengthen the elements that will be most critical to fostering the growth of democratic institutions in Cuba.

Origins of the Helms-Burton Act

When the Helms-Burton legislation was first introduced in the mid-1990s, there was a strong, bipartisan chorus of opposition. President Clinton and Secretary of State Warren Christopher strongly opposed the legislation. The tide turned, however, on February 24, 1996, when a plane operated by the Cuban exile group Brothers to the Rescue was shot down by Cuban forces over international waters. The furor that followed forced President Clinton to reverse course.

The timing could not have been worse: it was a presidential election year and an important bloc of voters in electoral-vote-rich Florida strongly favored passage of the Helms-Burton Act. After the shooting down of the plane, Helms-Burton quickly moved through Congress and President Clinton signed the legislation into law on March 12, 1996.

The goal of Helms-Burton is twofold. First, the law is designed "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime."¹ Second, the law is supposed "to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere."²

The first two titles of Helms-Burton address tightening the overall embargo on Cuba and the circumstances under which a U.S. president may repeal the embargo. Titles III and IV are at the center of international controversy. Title III creates a new private right of legal action for U.S. citizens against foreigners who knowingly "traffic" in property confiscated by the Castro regime. The act provides that, after March 1998, that right of action will be extended to Cuban immigrants who became U.S. citizens after Castro's takeover. Title IV of the act bars the granting of U.S. entry visas to corporate officers, agents, or shareholders with a controlling interest in firms that traffic in expropriated property, as well as the spouses and minor children of those individuals.

Both the legality and the wisdom of Titles I and II are questionable, and the instruments authorized by Titles III and IV amount more to extortion of our most important allies than to persuasion. Consequently, continued implementation will greatly damage relations between the United States and its closest allies. Finally, Helms-Burton will not achieve either of its goals. It is disingenuous to say that the law is designed to protect private property rights; it is more likely to undermine efforts to bring Cuba into the club of democratic nations.

Domestic Constitutional and Legal Concerns

By creating a privat right of action against a foreign government, Helms-Burton appears to violate the Act of State Doctrine, which "generally precludes U.S. courts from inquiring into the validity of public acts that a recognized sovereign power has committed within its own territory."³ Although the Act of State Doctrine is mandated neither by international law nor by the U.S. Constitution, it does have constitutional underpinnings in the division of powers. Indeed the drafters of Helms-Burton must have felt that it was important, given that the act specifically says that "State Doctrine does not apply."⁴

Why did the authors of Helms-Burton bother to include a provision on this point? They did so because many Americans are fearful of the U.S. court system's becoming a foreign policy weapon for Congress. Moreover, there is a long history of deference to the executive, regardless of the occupant of the White House, with regard to conducting foreign policy. For that reason, former secretary of state Warren Christopher argued (before the Brothers to the Rescue incident) that implementation of Helms-Burton would "infringe upon the President's authority under the Constitution to conduct foreign policy."

Three other legal problems plague Helms-Burton. First, the United States has no formal diplomatic relations with Cuba and thus cannot negotiate settlement claims. It is therefore entirely disingenuous to say that the act is about protecting private property rights. Suppose that France and Vietnam had not settled claims for expropriated property after Vietnam nationalized its industries (although in reality the two countries have done so). Imagine how U.S. companies that are now investing in Vietnam would react if France said it would sanction those firms for investing in property the claims to which could not be resolved because France refused to settle. Not surprisingly, many companies would consider that a gross infringement on our sovereignty.

Second, Helms-Burton establishes a dangerous precedent by allowing U.S. courts to rule on the actions of parties who were not U.S. citizens when those actions took place. It is one thing for the U.S. court system to rule that Cuba's expropriation of the property of U.S. citizens violates U.S. law and to give standing to U.S. claimants in U.S. courts. But Helms-Burton also provides standing for Cuban Americans who were not U.S. citizens at the time the expropriation took place. Never before has U.S. domestic law been used for such purposes.

Third, State Department officials have argued that Helms-Burton will actually make it more difficult to settle property claims. It is well-known that it is difficult to get full repayment out of foreign governments (take, for example, U.S. efforts to settle claims against

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Iran). Then-secretary of state Warren Christopher argued that allowing such a claim “would exponentially increase the number and value of U.S. property claims against Cuba from their current total of about \$6 billion to as much as \$100 billion.”⁷ Even the smaller amount would be difficult for Cuba to repay. Consequently, as the Christopher letter makes quite clear, Helms-Burton “could have far-reaching adverse effects on the U.S. Government’s ability to resolve U.S. claims against Cuba and other states.”⁸ Because the law applies to other states generally and not just to Cuba, it raises the possibility that Chinese Americans and Vietnamese Americans might be able to file class action suits against governments they believe illegally expropriated their property.

Extorting Compliance from Our Allies

The authors of Helms-Burton were clever in drafting the legislation, given the uproar they knew it would cause with our allies such as Canada and the European Union. It is impossible to state definitively whether or not Helms-Burton violates our international obligations. The reason is that two very murky terms, “substantial effect” and “reasonability,” are not defined.

The drafters of Helms-Burton were prepared to be criticized for writing extraterritorial legislation. For that reason they made a point of stipulating, “International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.”⁹

That statement is derived—indeed almost quoted—from the U.S. Restatement of Foreign Relations Law of 1987.¹⁰ Two points, however, are in order. First, by applying sanctions to foreign companies, Helms-Burton pushes the Substantial Effects Doctrine, or reasonability provisions, further than the U.S. government has ever done. The exercise of jurisdiction over persons found to be “trafficking” in U.S. prop-

erty punishes foreign corporations investing in Cuba without touching the Cuban government. But the effect was caused by the Cuban government, not by the persons over whom Helms-Burton would exercise jurisdiction.

The second concern is that there is no necessary connection between the value of the property on which the claim is based and the value of the transaction on which the assertion of “trafficking” rests.

An example is a case pending against the Sol Melia hotel group of Spain, one of the world’s 10 largest hotel chains. Currently, a Cuban family, which owned a sugar plantation, valued at \$3,000 in 1962, is seeking compensation of close to \$10 million from Sol Melia, which has built a hotel on the property. The case is on hold because of a European law that forbids European companies from negotiating a settlement in any case related to Helms-Burton.

As noted earlier, the Helms-Burton Act quotes almost directly from the U.S. Restatement of Foreign Relations Law of 1987. Somewhat suspiciously, however, the authors of Helms-Burton left out a key subsection of the Substantial Effects Doctrine. Specifically, the Foreign Relations Law stipulates that: “Even when one of the bases for jurisdiction is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”¹¹

To be sure, “reasonability” is an ambiguous term and inherently subjective. Perhaps one way to test “reasonability” is to examine our own past opposition to extraterritorial claims. Peter Tarnoff, while under secretary of state, pointed out before its passage that Helms-Burton “would likely be viewed as a secondary boycott, similar to the Arab League boycott on Israel that the U.S. has vigorously opposed.”¹² In 1977 Arab nations essentially imposed a secondary boycott on other countries by blacklisting firms that conducted business with Israel. Simply put, the Arab League said that any firm doing business with Israel could not do business in the Arab world. In 1977 the United States passed strong legislation to block

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U.S. firms from complying with the Arab tactic, just as our allies have done in reaction to Helms-Burton.

It should come as little surprise, then, given past U.S. opposition to secondary boycotts and extraterritorial legislation, that our allies view our position as hypocritical. The response of the world community to the Helms-Burton Act, particularly Title III, has been unanimous and resolute. In the words of former European Union president Jacques Santer: "We remain firmly opposed to all extraterritorial legislation, whatever its source,"¹³ and will continue to defend our interest."

The U.S. government claims that Helms-Burton is legal, given exemptions within the WTO that stipulate exceptions for protection of U.S. essential security interests relating to fissile materials, the traffic of arms, and actions taken in time of war or other emergency in international relations.¹⁴ It is difficult to imagine how Cuba poses an emergency in international relations under any of those criteria, which is why some observers have concluded that "the greatest threat is not to the EU from Helms-Burton or to the United States from Cuba, but to the world trading system."¹⁵

Many countries, for example, have adopted retaliatory, or what is sometimes referred to as "clawback," legislation in response. The European Union unanimously approved retaliatory legislation that would allow Europeans to bring suit to recover damages assessed in U.S. courts pursuant to the Helms-Burton Act. Similarly, Canada, in its Foreign Extraterritorial Measures Act, adopted provisions that are a specific retaliation against Helms-Burton. Canadian companies may seek damages from U.S. claimants in the Canadian court system. Moreover, Canadian firms can be fined \$1.5 million (Canadian) for complying with Helms-Burton.

Title III is currently not being enforced because former president Clinton issued a series of six-month waivers suspending it. Whether or not President Bush continues the waiver remains to be seen, but the current waiver expires in July 2001. President Bush has made it clear that he will not seek to remove

the embargo, but he has not spoken specifically on the question of Title III. It is widely acknowledged that there is a sharp split among Republicans over policy toward Cuba.¹⁶ The signs are mixed concerning the likely course of events under the current administration. The appointment of Otto Reich as assistant secretary of state for Latin America portends a more hard-line position on Cuba. Reich, who was born in Cuba, strongly favored the passage of Helms-Burton (and lobbied for its passage on behalf of Bacardi & Co., Ltd., a company owned and operated by Cuban exiles who fled Castro's oppression). His hard-line views might be tempered by the views of others within the Bush administration who see the futility of unilateral sanctions, particularly sanctions that might increase trade tensions with our European allies.

Regardless, there are many other problematic provisions of the legislation. For example, the provisions of Title IV, which denies U.S. visas to certain people connected with companies deemed to be in violation of the act, border on petty and are difficult to administer. Essentially, federal agencies must now invest time and money to find out, for example, whether the spouse and children of a foreign executive are on holiday in the United States. While open to debate, there is a strong case to be made that such a provision is a great waste of resources, given that it imposes new responsibilities on federal agencies, many of which are not equipped to handle such an onerous task. Before the election in 1996, the State Department agreed, arguing that "implementation of these (new responsibilities) would require significant reprogramming and off-setting reductions in other programs, including possible reductions in other embargo enforcement activities."¹⁷ Then-secretary of state Warren Christopher added that "the provisions of the bill that would deny visas to traffickers in expropriated property, which are global in scope and not limited to Cuba, will create enormous frictions with our allies and be problematic to administer."¹⁸

Although it is impossible to definitively resolve the legal questions surrounding Helms-Burton, it is clear that it will increase frictions

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with our most important allies. It is also patently hypocritical of the U.S. government to take this position in light of our long-standing objection to other countries pressuring U.S. firms with secondary boycotts.

Helms-Burton Does Not Promote Cuban Democracy

The other stated goal of the Helms-Burton Act is to foster the growth of democracy in Cuba. Once again, there are reasons to be skeptical that the act will do much in this regard. Indeed, it is more likely that the act will backfire.

There is very little evidence to suggest that unilateral sanctions work, as Vice President Richard Cheney himself has forcefully argued.¹⁹ In an age of economic integration, it is much more difficult to isolate a regime if other countries will not join us. And there is clear evidence that other countries will resist the efforts of Helms-Burton to bring them into the fray. Cuba already has 165 joint ventures with more than 35 countries. The major investors in Cuba are Australia, Canada, France, Germany, Great Britain, Greece, Israel, Italy, Mexico, and Spain—our closest allies.

Put more bluntly, the United States is doing little to keep other countries out while providing a convenient pretext for Cuban officials to ignore the root cause of Cuba's economic woe—namely, their own failed socialist policies. Although statistics are difficult to come by, given the closed nature of Cuba's economy, a variety of reports indicates that Cuba's economy is muddling along at best—neither performing well nor performing so badly that starvation is imminent.²⁰

If Helms-Burton and the embargo at large were removed, Castro would no longer cite U.S.-imposed isolation as an excuse for Cuba's troubles. This is not to say that repealing Helms-Burton or the embargo will lead to democracy in Cuba. That is a decision that the Cuban people must ultimately make for themselves. But U.S. policy is keeping money out of the hands of those on whom we will rely most when Castro is no longer in power. Even a cur-

sory glance at regimes the United States has sought to isolate, such as Burma (now Myanmar) and North Korea, suggests that this is true. Cuban clergymen frequently talk about how they hope for an increased U.S. presence in Cuba because Americans "would permeate this place with the idea of a free society."²¹ A greater U.S. presence would also bolster the 150,000 or so Cuban citizens who work outside of the state economy.

Castro is using Helms-Burton to his advantage. Specifically, there is evidence that he has used the act to manipulate the fears of ordinary Cuban citizens, who currently exercise partial property rights to their homes. To some extent, of course, those are merely squatters' rights. But, although those property rights are insecure, Castro has made moves to secure some of them. Why would he do that? He is well aware, to once again quote the Clinton administration, that Helms-Burton "might arouse concerns among Cubans on the island that their property interests will be ignored under a future democratic government. Such fears, fed by the regime, could retard the process of democratic change."²² Indeed, the State Department has already reported, "We know that this right to sue is already being used by the Castro regime to play on the fears of ordinary citizens that their homes and work places would be seized by Cuban Americans if the regime falls."²³

Other provisions of Helms-Burton could backfire as well because they tie the hands of the president of the United States. Under Title II of Helms-Burton, the U.S. president is authorized to lift the embargo on Cuba or provide foreign assistance only when a "transition" government is in place. However, the United States has set forth a number of conditions to be met before Cuba can be classified as a transition government. One stipulation, for example, states that a transition government in Cuba "is a government that does not include Fidel Castro or Raul Castro."²⁴

Two points are in order. First, while we may deplore the actions of Castro, that portion of the act is *prima facie* anti-democratic. Just as the citizens of Washington, D.C., can elect a

mayor who is widely criticized outside the city, the citizens of Cuba have the right to elect their own leader. Of more concern, though, is that the United States is forcing any democratic movement in Cuba to take the extremely hard-line position of calling for Castro's ouster and refusing to allow him to serve in any capacity in a transition government.

Regime transitions, almost by definition, are processes rather than single events. Many of the recent peaceful transitions from authoritarian to democratic rule have shown this to be true. One notable feature, which stands out in virtually every peaceful transition from military to democratic rule, is that pacts are negotiated between the old regime and the new leadership. No one has done more work on this matter than Stanford political scientists Terry Karl and Philippe Schmitter. It is worth quoting their findings:

Where democracies that have endured for a respectable length of time appear to cluster are in cases defined by relatively strong elite actors who engage in strategies of compromise. This category includes, for example, the historical cases of Venezuela and Colombia, and the recent redemocratizations in Spain and Uruguay. What unites these other diverse cases is the presence of foundational pacts, that is, explicit (though not always public) agreements between contending elites, which define the rules of governance on the basis of mutual guarantees for the "vital interests" of those involved. . . . In essence²⁵ they are anti-democratic mechanisms.

The danger of the U.S. position on transition is that it might back both Fidel and Raul Castro into a corner. First, to quote the Clinton administration's original position, the provisions "limit the [U.S.] President's flexibility" and are "overly rigid, and could leave the U.S. on the sidelines during a rapidly evolving situation 90 miles from Florida." Consequently, the strict guidelines prevent a U.S. president from responding intelligently to fluid events, which, if history is

any guide, are the norm in regime transitions rather than the exception. It was with this in mind that the Clinton administration originally argued that Helms-Burton would "leave the United States on the sidelines, unable to support clearly positive developments in Cuba when such support might be essential."²⁶

Conclusion

Most Americans share the goal of seeing a Cuba with a government based on the principles of free enterprise and democracy. But we should choose our policy tools carefully to bring about this situation. Helms-Burton has antagonized our allies, further isolated ordinary Cubans from the influence of American ideas, and strengthened the hand of the very government the policy was supposed to undermine.

The election of a new U.S. president presents an opportunity to reflect on the policy failings of past administrations—in this case the nine dating back to President Eisenhower. The United States stands alone in its attempt to isolate Cuba. Attempts by the United States to draw our closest allies into the fray have not been successful, and, in fact, have backfired. European officials routinely point to Helms-Burton as a turning point in U.S.-European trade relations, and U.S. intransigence helps to make a mockery of some of our valued international institutions, notably the WTO. Although the most offensive provision of Helms-Burton, Title III, which allows extraterritorial sanctions, is suspended, other provisions remain in place. And there is no guarantee that Title III will not come into play in the future. This policy greatly disrupts our relations with our most valued allies.

Nor is there evidence to suggest that Helms-Burton will advance the cause of Cuban democracy. Indeed, there is strong reason to believe that it will do the opposite. Helms-Burton ties the hands of the American president and prohibits him from responding to fluid situations.

There is, of course, no one blueprint for successful democratization. As things stand now, it appears that the inevitable regime transition in

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Cuba will be gradual. It is time for U.S. policy to reflect that reality. Cuba will undergo a major transition shortly, given Fidel Castro's age. And while capitalism and money will not be the final arbiters of Cuba's democratic fate, the United States can position itself more effectively by promoting investment in Cuba, as our allies are attempting to do. Such ventures will help to get capital into the hands of the Cuban people, a prerequisite for an effective civil society—one that will play an important role after Castro is gone, whether through death, revolution, or peaceful political transition.

Notes

1. Cuban Liberty and Democratic Solidarity Act of 1996, P.L. 104-14, sec. 3(6). Cited hereinafter as Helms-Burton.
2. Ibid., sec. 3(1).
3. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court reviewed the Act of State Doctrine, as applied to Cuba's nationalization of property pursuant to Cuban Law No. 851. The Act of State Doctrine was expressed succinctly by Justice Fuller in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The *Banco Nacional* court upheld the Act of State Doctrine as articulated in *Underhill* and a line of other cases dating back to an English court decision in 1674.
4. Helms-Burton, sec. 302.
5. Warren Christopher, Letter to Newt Gingrich, September 20, 1995. Copy in author's file.
6. A similar argument was made by Andreas Lowenfeld in "Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act," *American Journal of International Law* 90 (1996): pp.429-31.
7. Christopher.
8. Ibid.
9. Helms-Burton, sec. 302(9).
10. Restatement (Third) of the Foreign Relations Law of the United States of 1987. Title 2, p. 444, www.access.gpo.gov.
11. Ibid, p. 402.
12. Peter Tarnoff, Prepared statement, Hearing on Cuban Liberty and Democratic Solidarity Act before the Subcommittee on Western Hemisphere and Peace Corps Affairs of the Senate Committee on Foreign Relations, 104th Congress, 16th session, 1995, p. 26, *Weslaw* 306730.
13. Jacques Santer, quoted in *U.S. Cuba Policy Report* (Washington: Institute for U.S. Cuba Relations, January 31, 1997), p. 3.
14. General Agreement on Tariffs and Trade of 1947, article 21.
15. John Jackson and Andreas Lowenfeld, "Helms-Burton, The U.S., and the WTO," *American Society of International Law Flash Insight*, March 1997, p. 2.
16. Laurie Goering, "GOP's Split over Cuba Leaves Bush on Tightrope: Support for Sanctions Runs Headfirst into Desire for More Trade," *Chicago Tribune*, February 15, 2001, p. 1.
17. Wendy R. Sherman, assistant secretary for legislative affairs, U.S. Department of State, Letter to Benjamin A. Gilman, Committee on International Relations, House of Representatives, April 28, 1995. Copy in author's files.
18. Christopher.
19. Richard B. Cheney, "Defending Liberty in a Global Economy," in *Economic Casualties: How U.S. Foreign Policy Undermines Trade, Growth, and Liberty*, ed., Solveig Singleton and Daniel T. Griswold (Washington: Cato Institute, 1999), pp. 19-28.
20. See, for example, Stephen A. Lisio, "Helms-Burton and the Point of Diminishing Returns," *International Affairs* 72, no. 4 (1996): 691-711.
21. Philip Peters, "Let Yankee Dollars Rain Down on Cuba," *Wall Street Journal*, February 9, 2001.
22. Tarnoff, p. 26.
23. Sherman.
24. Helms-Burton, sec. 205 (A7).
25. Terry Lynn Karl and Philippe C. Schmitter, "Modes of Transition in Latin America, Southern and Eastern Europe," *International Social Science Journal* 128 (1991): 281.
26. Executive Office of the President, Office of Management and Budget, Statement of Administration Policy, H.R. 927—Cuba Liberty and Democratic Solidarity Act, September 20, 1995, www.usinfo.state.gov.

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