

ARCHIVE COPY

97-E-31

C. 1

Trying to Legislate Foreign Policy

The Story of Helms-Burton

Course 5603

Seminar Leader Dr Botsai

Faculty Adviser John Treacy

Larry Wohlers

December 16, 1996

Report Documentation Page

Form Approved
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE 1997		2. REPORT TYPE		3. DATES COVERED 00-00-1997 to 00-00-1997	
4. TITLE AND SUBTITLE Trying to Legislate Foreign Policy. The Story of Helms-Burton				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) National War College, 300 5th Avenue, Fort Lesley J. McNair, Washington, DC, 20319-6000				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT see report					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 15	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

The history of the Cuban Liberty and Democratic Solidarity Act, popularly known as Helms-Burton, is perplexing from several vantage points. To begin with, international relations theory generally holds that foreign policy formulation focuses on new, or at least changing, threats. Helms-Burton, however, was proposed and enacted at a time of general consensus that Cuba was no longer a serious threat to American national security interests. Inceed, it was the Castro regime's very weakness that became a principal justification for increasing pressure on the island.

Secondly, it would be reasonable to expect that the history of legislation from conception to enactment would be issue-consistent i.e., the issues central to a bill's conception carry through to its Congressional debate and passage, and then to its implementation. How then to understand Helms-Burton, a bill that originated in a philosophical dispute over foreign policy, was debated and initially defeated largely on the basis of domestic issues, was finally enacted in order to make a political statement, and has in its implementation phase, become the centerpiece of an international law dispute? For different political actors, then, Helms-Burton clearly meant different things.

Finally, a study of Helms-Burton suggests a third question that goes to the heart of the constitutional framework now successful over time is Congress likely to be in legislating foreign policy, particularly one to which the executive and its bureaucracy are hostile? Although its prospects for success are still unclear, the ink was not dry on the new legislation before the administration began a concerted campaign to neutralize key elements.

In sum, Helms-Burton is no ordinary bill. The story of its emergence into law, and the still-unfinished saga of its implementation, is a study in complexity and contradiction. In the process, the evolution of Helms-Burton makes clear just how much the reality faced by the foreign policy-maker differs from conventional political theory.

Foreign policy .or moral virtue?

In the early spring of 1995, American policy toward Cuba held less interest as a topic of national debate than at any time since the Castro

takeover. The 1990's had not been kind to the Communist regime. Internally, the end of the special relationship with the Soviet Union had plunged the country into a prolonged depression. Externally, the regime's Communist model had lost much of its prestige and appeal. Once a staunch enemy of all-things American, therefore, Castro was now not only moving toward a market economy, he was all but begging for American investment as well.

In 1995, it fell to Congress to choose between two quite different philosophies to guide the American policy-response to Cuba's difficulties. In February, Republicans Jesse Helms and Dan Burton introduced a bill designed to squeeze the regime yet further. Inceec, Helms-Burton was conceived with the avowed aim of forcing an accelerated economic deterioration in Cuba in order to force out, non-violently or otherwise, the Castro regime. Helms did not justify his policy on national security grounds. Instead, he argued that the time was right to do away with "the cruel and bloody tyranny that Castro has inflicted for so long upon the Cuban people."¹ The issue, then, was a moral one.

However, since the U.S.' long-standing embargo gave it little direct economic leverage in Cuba, the Helms-Burton bill needed a new approach. It found one in the unresolved issue of compensation for property nationalized at the time of the Communist takeover. The bill contained three main planks -- Title III permitted U.S. nationals with claims to property expropriated in Cuba to bring suit in U.S. courts against persons who "traffic" in that property.

--Title IV, meanwhile, provided for the exclusion from the U.S. of 3rd country nationals if they are deemed to have so "trafficked".

--Finally, the bill significantly reduced the President's freedom of action by giving the force of law to the existing American embargo. Thus, the President would henceforth be unable to retract the embargo unless specific conditions were met -- including, notably, Fidel's departure from power.

Of course, any bill affecting Cuban policy would need support from the powerful Cuban-American community, and inceec Helms-Burton appealed to that

group in two ways. It defined a U.S. national in the present tense -- thus, an immigrant who was actually a Cuban national at the time his property was expropriated could still file suit if he had subsequently received U.S. citizenship. Secondly, by keeping the monetary threshold low -- only \$50,000 in claimed expropriation compensation -- the bill opened the judicial process to a large number of Cuban-Americans.

Squaring the circle. the administration's conflicting objectives

Ironically, the administration did not noticeably disagree with Helms' depiction of the Cuban government as reprehensible. The White House, too, had reasons to court Cuban-American support. Indeed, the President had his own Cuban-American connection -- through the First Lady's Cuban-American sister-in-law, the administration was in regular contact with key Cuban-American leaders.² Moreover, Clinton had only narrowly lost Florida in the '92 elections, and had grounds for optimism about his chances there in 1996.

Pleasing Florida voters wasn't as simple as it appeared, however. Key Florida politicians had warned the President about the dangers of another wave of immigration from Cuba -- polls had showed that a large majority of the state's voters, and even a near majority of Cuban-Americans there were adamantly opposed to another influx. Given Cuba's desperate economic straits, continued efforts to strangle it economically could easily set off just such a refugee crisis.³

In addition to that serious, but nonetheless hypothetical scenario, the administration faced in the near term a very real problem. Some 20,000 Cubans remained confined at Guantanamo Bay as the result of the President's 1994 decision to end automatic access to refugee status. Conditions there were deplorable and the White House was receiving strong pressure from the military to find a solution before the internees' grievances exploded.⁴ A solution to the refugee crisis, however, was not only difficult, absent some kind of understanding with the Cuban government to control any future exodus, it was probably impossible.

Finally, the administration was itself in the difficult position of

justifying the continuation of the economic embargo to the liberal foreign policy community. A series of op-ed pieces and articles throughout 1994 and 1995 clearly spelled-out the liberal viewpoint that the embargo was an anachronism and that economic engagement with Cuba was the most viable means for nudging the Castro regime toward political liberalization.⁵ This position had also the support of a significant sector of the business community, which had begun to visit, quasi-illegally, the island in large numbers. Given the recent diplomatic recognition of Vietnam, many observers felt that it was only a question of time before recognition of Cuba followed.

In the end, White House policy-makers chose a middle road they devised a two-track policy of continuing economic sanctions, while simultaneously easing restrictions on the sorts of individual contacts that could both ease the economic suffering of ordinary Cubans and provide them with greater access to external sources of information.

Overlapping arenas of conflict

As Congress moved, in June of 1995, to take up consideration of the Helms-Burton proposal, the alternatives to Cuban policy were therefore relatively clear: either further isolate Cuba or edge toward constructive engagement. However, Congressional debate on the bill quickly moved beyond its impact on Cuba. In fact, key elements of the bill would also affect a number of other political arenas, involving not only other foreign policy issues but serious domestic questions as well. Some of the questions included.

--legal implications of the bill: led by the State Department, the bureaucracy was warning that the legislation would unleash a flood of new litigation. The extension of retroactive lawsuit rights to only one class -- naturalized Cuban Americans -- was unprecedented, warned opponents. What, they asked, would happen if other ethnic groups demanded similar treatment?⁶

--American business interests American business, with its own long-standing claims, worried that a new flood of lawsuits would completely cloud title to Cuban property.⁷ Moreover, American business worried that Helms-Burton promised to polarize attitudes, leaving American businessmen to sit on the

side-lines while other countries grabbed lucrative contracts to overhaul Cuban infrastructure.⁸

--**damage to our multi-lateral commitments** the State Department expressed concern, quickly echoed directly by the affected nations themselves, that the legislation would wreak havoc with our relations with Canada and the European Union. Those countries would not easily accept an American effort to constrain their investments in Cuba and would likely challenge the law as inconsistent with our multi-lateral obligations to NAFTA and the WTO.

--**damage to our own long-standing opposition to coercive embargoes**

ironically, the U.S. itself continued to pressure Saudi Arabia and other Arab allies to end the Arab embargo of companies that invest in Israel. Passage of the Helms-Burton bill would certainly weaken the logic of that argument.⁹

Winning Florida: the other agenda

However, Helms-Burton most important potential impact was outside the legislative arena entirely. For Republicans, it offered a ready avenue to dominate Florida politics in the run-up to the elections. It, therefore, became a legislative priority. In June, House Speaker Gingrich held an unusual, closed-door session to push the bill with Republicans on the mark-up committee. The bill then sailed through committee hearings and, in September, easily passed the House. The administration, meanwhile, made several political missteps. The first was an agreement in May, made with the President of the Cuban Parliament, to return future refugees to Cuba in return for a Cuban government pledge not to mistreat them. The White House's motives were pragmatic: such an accord paved the way from releasing the Guantanamo Bay internees while ending the threat of future refugee problems. It hoped that this solution would be well-received in Florida. Instead, however, the new policy was hit by a barrage of criticism, both from the Hill and the Cuban-American community. Cuban-American leaders were particularly incensed that Clinton, by dealing directly with the Castro regime, had lent it new legitimacy.¹⁰

Surprisingly, the White House soon walked into another political

firestorm. In October, the President decided to relax the embargo in order to permit more travel to Cuba, more financial transactions, and an exchange of press bureaus. The administration insisted that the relaxations represented merely a continuation of U.S. policy to use greater press contact and travel to lay the groundwork for political liberalization. However, Congressional Republicans immediately accused Clinton of trying to subvert the embargo. Within an hour of the announcement, Majority Leader Dole vowed to set an early Senate vote on the Helms-Burton bill. Indeed, Dole had a powerful incentive to burnish his anti-Castro credentials: only weeks away lay the Florida GOP straw poll, and Dole was locked in a tight struggle there with Senator Phil Gramm. "There is a whiff of politics in all this," noted fellow Republican Senator Robert Bennett.¹¹

So close to victory

Eight months after a relatively obscure birth, therefore, the Helms-Burton bill was on the crest of a powerful political wave. Administration missteps had cost it much of its support within the Cuban-American community. Moreover, the Republican campaign for the bill had coalesced around three simple but powerful themes:

- Castro's continued rule was an outrage,
- the Clinton administration was "supporting" Castro (noted Senator Dole, "I wish the Clinton administration would spend more time supporting democratic change in Cuba and less time honoring the requests of this hemisphere's last remaining dictator."¹²), and
- our allies' willingness to do business with Castro was morally outrageous. (Helms later compares Canadian policy to "precisely what Neville Chamberlain advocated about dealing with Hitler."¹³) If our allies were upset, they need only cease trafficking in expropriated policy noted an unapologetic Helms staffer.¹⁴

Victory, however, was not to be. Twice in the following month the Republican leadership attempted to bring the bill to the floor -- twice it failed to obtain the 60 votes needed for cloture. Critical to defeat was the

decision of a number of moderate Republicans to side with a determined White House effort to halt the bill. Though an angry Senator Dole blamed "a White House blitz" for the defeat, the Republicans had no choice but to go back to the bargaining table. Only after the critical property claims section is removed does the bill successfully reemerge. Furthermore, with its political momentum now thwarted, even the reduced bill now appeared to have little prospect of passage.¹⁵

What happened? What accounted for the bill's sudden change of fortune? There certainly had been no senatorial change of heart on the merits of a tougher Castro policy. Nor had the bureaucracy's concerns about its implications for multi-lateral trade agreements had much impact. Trade issues, noted one former staffer, "were a State Department problem", and thus had no resonance on the Hill.¹⁶ What ultimately persuaded a critical group of Republican senators to break with their own party, therefore, was the bill's potential impact on the domestic judicial system. Noted Senator Kassenbaum in voting against cloture, "we should be hesitant to take steps that may politicize the courts".¹⁷

Success at last

Yet another twist of fortune awaited Helms-Burton, however. Following the February, 1996, Cuban downing of two civilian planes piloted by Cuban-Americans, Helms-Burton was resurrected and passed by overwhelming majorities. Ironically, some have speculated that the shoot-down itself was engineered by regime hard-liners anxious to head off efforts by reformists to revive relations with the U.S. If so, the plan succeeded. Although the Clinton administration tried briefly to interest Congress in less severe alternatives, it was quickly forced to yield to demands for a strong, immediate response. In days, Helms-Burton had been resurrected, original language reinserted, and passed. Only a few of the bill's original opponents continued to hold-out. The Helms-Burton bill, noted Kassenbaum, "was the only game in town" at a moment when politics demanded a clear message. "Farewell Fidel, that's the message of this bill," Senator Helms declared at a crowded press conference

following the final vote.¹⁸

The devil is in the (implementation) details

Senator Helms, however, may have spoken too soon. Eight months after President Clinton signed Helms-Burton into law, its real impact remains unclear. Three foreign companies have been formally certified as traffickers under the law. Nonetheless, bolstered by their own nations' threats to retaliate against Helms-Burton, none of the three has considered divesting its Cuban assets. In addition, the lawsuit provisions have yet to see the light of day, as the President quickly invoked his authority to waive Title III for six month periods based on a finding that "progress" was being made on the Cuban human rights agenda. With the waiver in effect, no lawsuits could be filed.

Thusfar, therefore, the principal effect of Helms-Burton has been not so much on relations with Cuba as on relations with Europe and Canada. Those countries have reacted with a two-pronged counter-attack, on the one hand arming their companies with the legal ability to countersue at home should they be pulled into American courts, while on the other hand initiating formal complaints against the U.S. in the WTO and NAFTA. Of particular concern to the administration is the WTO complaint which, if successful, would require the U.S. to compensate the injured countries. Its fear is that Congress would react strongly to an adverse ruling, possibly even demanding a unilateral American withdrawal from the organization.¹⁹ For the administration, such a scenario would strike at the core of a long-standing U.S. effort to strengthen international trade organizations.

Hardly had the President signed Helms-Burton, therefore, than the administration began a convoluted effort to enlist Europe in a coordinated effort to neutralize the law's impact. In a flurry of visits to European capitals, a special presidential envoy argued that both sides will inevitably lose if the WTO complaint is carried through. Far better, therefore, to work together to pressure the Castro regime on human rights record and political liberalization. Such an effort would serve to justify yet another administration extension of the Title III waiver, thus forestalling a direct

confrontation with the E.U.²⁰

Winners and losers

The saga of Helms-Burton, therefore, is not yet concluded. It is not obvious that the President will be able to waive Title III indefinitely: yet its implementation would further provoke allies already angry about American unilateralism. Domestically, the waiver has left unresolved the law's impact on the judicial system, the issue central to its initial defeat in the Senate.

However, identifying this story's winners and losers is complicated for another reason: Helms-Burton touched several political arenas, and the importance of each issue depended upon the perspective of the particular actor. For many, Helms-Burton was more a domestic political issue than a foreign policy one. For these players, the record is mixed: though the Republicans did trumpet passage as a major political victory, in the end the President too succeeded in taking the credit -- and in the process won sufficient support among Cuban-Americans to pull off a rare Democratic victory in Florida.

As a foreign policy issue, the record is even murkier. Clearly, the bill did not originate out of a Morgenthauian tradition of national security interests. Indeed, the two bureaucracies most associated with such viewpoints -- State and DOD -- both made strong cases for opposing this approach. The Gramscian model notwithstanding, however, the bureaucracy was simply not a significant player in this dispute.

If Helms-Burton goes against the grain of traditional international theory, however, that does not mean that the bill's authors did not have foreign policy objectives. Indeed, the law's most important legacy is that it has incorporated into American law the authors' perspective on Cuban policy. That in turn has forced governments in the U.S. and Europe to focus far more resources on promoting human rights in Cuba than ever before. Indeed, the bill's most concrete result thusfar may be the explicit human rights linkage that European governments have sought to attach to their political relations with the Cuban government.²¹ For ordinary Cubans, that is a positive trend.

Paradoxically, however, the authors' ultimate objective -- the ouster of Castro himself -- may not be furthered by this trend. The new concert of U.S.-European emphasis on human rights issues may indeed foster more political liberalization in Cuba, but the result could easily lead to increased trade, investment, and an improved economic climate that could as easily bolster Castro as harm him.

In the end, therefore, Helms-Burton illustrates both the power of Congress to influence foreign policy -- and the limitations of that influence. Though Congress can use its power to legislate effectively, a resourceful executive branch can use its control of implementation to significantly modify a law's intended impact. The result, therefore, can be a policy-making mishmash where policies emerge from an interplay of domestic struggles, conflicting foreign policy perspectives and pure chance. Though that is not a new phenomenon in American politics, it does raise a troubling question about how the system in the future will reconcile short-term political needs that conflict with the long-term international commitments, particularly those dealing with economic coordination, on which American foreign policy is increasingly based. If, for example, Congress continues to ignore such commitments -- including those that Congress itself has approved through its advice and consent process -- then other nations' may eventually come to question the value of making such agreements in the first place. If so, the long term loser will be not just Morgenthauian political theory, but an international economic system based on multi-lateral cooperation.

Encnotes

1. Jesse Helms, "Castro Needs A Final Push." Op-ed, Washington Post, 4 May 1995, p. A21.
2. Douglas Waller, "Clinton's Cuban Road To Florida." Time Magazine, 28 October 1996.
3. In fact the Pentagon had sponsored a study which warned of the potential dangers of a violent changeover in Cuba. See Dana Priest, "Economic Liberalization Of Cuba Favored In Study Of U.S. Stance." Washington Post, 19 May 1995, p. C7.
4. Ibid. and Douglas Waller, "Clinton's Cuban Road To Florida." Time Magazine, 28 October 1996.
5. In the first six month of 1995, the Washington Post ran six op-ed articles supporting liberalization of Cuban relations. Only the Jesse Helms op-ed piece took the opposite tack.
6. Carroll J. Doherty, "House Panel Approves Measure To Curt Foreign Investment." Congressional Quarterly Weekly Report 15 July 1996, p. 2085.
7. Ibid.
8. John Pearson, "Cuba Trade: This Hornets' Nest Is Really Buzzing." Business Week, 25 November, 1996.
9. State Department, interview, anonymous.
10. Thomas Lippman, "Sanctions Move Reignites Volatile Debate on Cuba." Washington Post, 7 October 1995, p. A1, A24.
11. Carroll J. Doherty, "Senate GOP Falls Short In Bid To Tighten Screws On Castro." Congressional Quarterly Weekly Report 14 October 1995, p. 3156-3157.
12. Richard Sammon, "Senate Passes Sanctions Bill Minus Toughest Provision." Congressional Quarterly Weekly Report 21 October 1995, p. 3219.
13. Carroll J. Doherty, "Congress Ignores Objections In Push To Punish Castro." Congressional Quarterly Weekly Report 9 March 1996, p. 632-633.
14. Daniel Fisk, Congressional staffer.

15. Congressional staffer Fisk noted that he believed that the bill would simply be shelved until the next Congress.
16. Michael Pelletier, former USIA Congressional Fellow.
17. Doherty, "Senate GOP Falls Short In Bid To Tighten Screws On Castro."
18. Doherty, "Congress Ignores Objections In Push To Punish Castro."
19. State Department interview.
20. The administration was fortunate to have available, the former ambassador to the E.U., who is well known and liked in the European capitals. Nevertheless, preliminary reports from his visits indicated that the Europeans were upset and were not going to be easily mollified.
21. One State Department official involved in European issues noted that had come from nowhere to become of the priority issues in discussions with the Europeans.

Bibliography

Berger, Sandy, and Tarnoff, Peter, White House Press Briefing (transcript), 16 July 1996.

Degorge, Gail, and Crock, Stan, "Cuba-Bound? See Your Lawyer." Business Week, 12 August 1996.

Devroy, Ann, "Clinton To Ease Controls On Travel To Cuba." Washington Post, p. A1, A31.

Donerty, Carroll J., "Clinton Fires Warning Shot In Cuba Trade Crackdown." Congressional Quarterly Weekly Report 13 July 1996, p. 1983.

Doherty, Carroll J., "Congress Ignores Objections In Push To Punish Castro." Congressional Quarterly Weekly Report 9 March 1996, p. 632-633.

Donerty, Carroll J., "Planes' Downing Forces Clinton To Compromise On Sanctions." Congressional Quarterly Weekly Report 2 March 1996, p. 565-566.

Donerty, Carroll J., "House Panel Approves Measure To Curb Foreign Investment." Congressional Quarterly Weekly Report 15 July 1996, p. 2085.

Donerty, Carroll J., "Senate GOP Falls Short In Bid To Tighten Screws On Castro." Congressional Quarterly Weekly Report 14 October 1995, p. 3156-3157.

Fecarko, Kevin, "This Cold War Is Back." Time Magazine, 11 March 1996.

Fisk, Daniel, Congressional staff, interview, 26 November, 1996.

Helms, Jesse, "Castro Needs A Final Push." Op-ed, Washington Post, 4 May 1995, p. A21.

Kirschten, Dick, "Good Politics Maybe, But So-So Policy?" National Journal, 10 February 1996, p. 311.

Lippman, Thomas, "Sanctions Move Reignites Volatile Debate on Cuba." Washington Post, 7 October 1995, p. A1, A24.

"Markup On Cuba Sanctions Off To A Slow Start." Congressional Quarterly Weekly Report 1 July 1995, p. 1943.

Pearon, John, "Cuba Trade: This Hornets' Nest Is Really Buzzing." Business Week, 25 November, 1996.

Pelletier, Michael, USIA Congressional Fellow for 1995-96,

interview, 11 December, 1996.

Priest, Dana, "Economic Liberalization Of Cuba Favored In Study Of U.S. Stance." Washington Post, 19 May 1995, p. C7.

Sammon, Richard, "Senate Passes Sanctions Bill Minus Toughest Provision." Congressional Quarterly Weekly Report 21 October 1995, p. 3219.

State Department, interview (anonymous), 25 November, 1996.

Sullivan, Mark P., "Cuba: Issues For Congress." CRS Issue Brief, 29 October 1996.

"U.S. Business Isn't Afraid To Shout Cuba Silence!" Business Week, 6 November 1995.

Waller, Douglas, "Clinton's Cuban Road To Florida." Time Magazine, 28 October 1996.

Williams, Daniel, "Continued Cuba Sanctions Pressed By GOP Leaders." Washington Post, 8 March 1995, p. A22.

Williams, Daniel, "Cuba Becomes Hot Foreign Policy Topic." Washington Post, 23 March 1995, p. A24.

Note: magazine articles without page numbers were retrieved via Internet.