



U.S. PRESIDENTIAL ACTION ON CUBA:

The New Normalization?

Normalizing relations between the two nations will
require a series of presidential actions.
Here's a roadmap for how that could happen...whenever.

BY ROBERT MUSE

Hillary Clinton said in a recent interview that she would like to see the United States “move toward normalizing relations” with Cuba. This remarkable statement—from quite possibly the next president—came at the end of a critique of the current U.S. policy that insists on political and other reforms in Cuba as a precondition for modifying the current sanctions the U.S. imposes on that country.

In Clinton’s view, the U.S. embargo on Cuba has “propped up the Castros because they can blame everything on it.” In adopting this new position, she has diverged importantly from her husband’s policy of “carefully calibrated” responses to “positive developments [by the government] in Cuba.” Instead, she now favors a unilateralist policy that would unconditionally normalize relations, thereby depriving the Cuban government of long-standing grievances with the U.S. that—in her view—it exploits to maintain the support of the Cuban people.

However, when she spoke of normalizing relations with Cuba, Clinton focused exclusively on the embargo. In doing so, she seemed to conflate an absence of punitive measures levied on a country with normal relations. But normalization is more than that.

A metaphor that pictures nationstates as neighbors living in the same community may be useful in illustrating what normalized relations look like. To begin with, such relations involve considerably more than refraining from active hostilities. They also include extending to one another the rights, privileges and courtesies that flow from the principle that all residents share equally in the benefits of belonging to a neighborhood.

What would that look like in the case of the U.S. and Cuba?

Normalization: A How-To

For the U.S. to have normal relations with Cuba, it must do two things: first, remove the punitive measures imposed on that country; and second, extend to Cuba the benefits all nations at peace with one another share. An example of the latter is granting equal access to one another’s markets. This means going beyond lifting the current U.S. ban on Cuban imports and the corollary ban on U.S. exports to Cuba. It will require the U.S. to extend to Cuba—a member of the World Trade Organization (WTO)—the same favorable market access that it extends to other WTO member nations’ products. (As we will see in a moment, this is much simpler than it might sound.)

First, it is necessary to dispose of any misapprehension that the president has no authority to normalize relations with Cuba. The long and close involvement of Congress in U.S.-Cuba policy fostered the mistaken belief that presidential authority with respect to Cuba had been preempted by Congress. An example of how far this mistaken belief spread is that in 2006, when then-President Fidel Castro transferred head-of-state authority to his brother Raúl, the U.S. State Department claimed to be unable to respond to that event with any adjustments to U.S.-Cuba policy. According to a Reuters report of a State Department briefing, there “would be no change in policy toward Cuba, whether Castro or his brother Raúl were in charge, because of American laws restricting U.S. dealings with the communist government.” According to the State Department official cited in the report, “This is one of our most regimented policies. Our hands are tied by laws.”

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ENDING PUNITIVE MEASURES APPLIED TO CUBA

The first step in normalizing relations with Cuba is to cease punishing the country. There are a set of punitive measures that most rankle Cubans and that serve as rallying points against the United States. They are:

The extraterritorial application of the embargo to disrupt Cuba's trade with third countries.

This aspect of the embargo involves such things as the U.S. insistence on regulating third-country exports to Cuba of items containing small amounts of U.S.-origin components or content. For example, Cuba could not purchase civilian aircraft from European company Airbus SAS because some U.S.-origin technology is incorporated into the company's airplanes. Nor, for the same reason, could Cuba, without considerable difficulty, find and lease an oil exploration rig to drill in its territorial waters. Also, the U.S. seizes funds and imposes huge penalties on otherwise legitimate transactions between Cuba and third-country nationals that use dollar transfers processed through U.S. financial institutions. Most recently, as part of a nearly \$9 billion settlement, the U.S. extracted an agreement from the French bank BNP Paribas, requiring it to terminate all transactions involving Cuba and prohibit new business in any currency (e.g. euros) with that country. Cubans are aware of all this and believe such extraterritorial applications of U.S. embargo measures only make their lives harder.

The inclusion of Cuba on the Department of State's list of terrorist-sponsoring nations.

Over a dozen years ago, President Bill Clinton's former special advisor on Cuba, Richard Nuccio, said, "Frankly, I don't know anyone in or outside of government who believes in private that Cuba belongs on the terrorist list. People who defend it know it is a political calculation. It keeps a certain part of the voting public in Florida happy, and it doesn't cost anything."

However Cubans may view their government, they find their country's designation as a supporter of terrorism simultaneously untrue, defamatory and dishonest.

The Cuban Refugee Adjustment Act of 1966 gives the U.S. attorney general the discretion to grant permanent residence to any Cuban national who sets foot on U.S. soil.

While some Cubans welcome this unique dispensation, many more see it as a U.S. policy anomaly that leads family members and neighbors to risk death on rafts in attempting to reach Florida.

The continued long-term incarceration of three Cuban intelligence officers in U.S.

As most Cubans see it, these men have been in prison for the crime of attempting to gain information on groups in the U.S. that were conspiring to put bombs in hotels in Cuba to frighten off foreign tourists. While the Cuban agents were not blameless (they violated the U.S. Foreign Agents Registration Act and not all targeted Cuban exile organizations), their continuing incarceration is seen by Cubans as excessive. They have now served over 16 years in maximum-security prisons, with much of that spent in solitary confinement.

The continuing occupation of Cuba's national territory at Guantánamo Bay without the consent of the Cuban people.

Patriotic Cubans see the holding of prisoners as an exertion of U.S. power made worse by violations of the terms of a treaty that permitted the use of Guantánamo Bay for "coaling or naval stations only, and for no other purpose."



The U.S. president's authority to rescind or otherwise modify the trade embargo on Cuba is essentially unfettered.

The embargo bans U.S. citizens and companies from "engaging in transactions" with the government of Cuba and Cuban nationals or entities. The statute that authorizes the embargo is the Trading with the Enemy Act, which gives the president, in the broadest of terms, the authority to institute and maintain economic sanctions on countries deemed hostile to the United States. That authority has been delegated to the Treasury Department's Office of Foreign Assets Control (OFAC). As a practical matter, the embargo is a set of provisions promulgated individually through OFAC rulemaking and other assertions of executive authority. Collectively, those rules and executive orders are set out in the Cuban Assets Control Regulations (CACR).

The executive branch's power to extend, revise and modify the CACR's embargo provisions is unfettered. The first words of the first section of the CACR are: "all [...] transactions are prohibited *except as specifically authorized by the Secretary of the Treasury [...] by means of regulations, rulings, instructions, licenses or otherwise [...]*" [emphasis added].

Given OFAC's express power to modify the embargo through the creation of new regulations (either by rulemaking or the creation of new generally licensed exceptions to the embargo), prohibitions on the importation of Cuban-origin products, for example, may be rescinded in one of two ways: (1) deletion of the current provision prohibiting such imports from the CACR through OFAC rulemaking; or (2) the promulgation of a general license authorizing such imports.

Similarly, the president possesses the executive authority to rescind restrictions on U.S. exports to Cuba. President John F. Kennedy prohibited such exports by issuing Presidential Proclamation 3447. President Barack Obama or a successor is just as free to rescind the proclamation that Kennedy made. And once Cuba is removed from the State Department's list of terrorist-sponsoring nations, the statutory requirement that U.S. exports must be licensed by the Commerce Department will no longer apply. (See below an explanation of how Cuba may be removed from the list.)

It follows that if the president has the authority to rescind altogether restrictions on U.S. exports to Cuba, he has the power to eliminate such punitive extraterritorial measures as the one that prohibits exports to Cuba from third countries of foreign-made products containing 10 percent or more U.S.-origin material.

Removing Cuba from the State Department list of terrorist-sponsoring nations requires nothing more than a report from the president to Congress.

Removing Cuba from the list can be accomplished easily, in one of two ways. The first option is for the president to submit a report to Congress certifying that (1) there has been a fundamental change in the leadership and policies of the Cuban government; (2) the government is not supporting acts of international terrorism; and (3) the government has provided assurances that it will not support acts of international terrorism in the future. The second option is to submit a report at least 45 days before the removal of the country from the list certifying that (1) the government has not provided any support for international terrorism during the preceding six-month period; and (2) the government has provided assurances that it will not support acts of international terrorism in the future.

The certifications may be given easily because Cuba has met both criteria. Cuba's president at the time it was listed (1982) is of course no longer in power, and Cuba no longer supports leftist guerrilla movements, the policy that got it listed in the first place. Cuba has certainly provided no support for international terrorism in the past six months, and the Cuban government has provided the necessary assurances that it will not provide such support in the future. For example, in April 2013, Josefina Vidal, director of Cuba's North American Affairs Division in the Foreign Ministry, delivered a note from the country's government to the U.S. Interests Section in Havana, saying Cuba "rejects and condemns unequivocally all acts of terrorism, in any place, under any circumstance, and with whatever motivation."

The privileged status given to Cuban nationals under the 1996 Cuban Refugee Adjustment Act of 1966 can be rescinded at any time by the president.

The Act says that "any alien who is a native or citizen of Cuba [...] who has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion, [...] to that of an alien lawfully admitted for permanent residence." All it takes to end the present policy is a directive from the president to the attorney general ordering him or her to cease granting permanent residence to Cubans who enter the U.S. without visas.



A president can exercise his or her pardon powers set out in Article II, Section 2 of the U.S. Constitution to end the incarceration of the three remaining Cuban intelligence officers.

Commutation of sentences (reducing them to time served) is inherent in the president's power to pardon. In the case of the three remaining members of the original "Cuban Five" who are still in prison, a commutation of their sentences would, at this date, mean they will have served 16 years in prison. An additional advantage, apart from addressing the Cuban people's sense of injustice, is that a commutation could help facilitate the release of USAID contractor Alan Gross, who is jailed in Cuba and not yet one-third of the way through a 15-year prison sentence.

And yes, the president can also resolve Cuba's grievance over the continued U.S. presence in Guantánamo Bay.

The right of the U.S. to establish and occupy a naval base at Guantánamo Bay dates to 1901, with modifications in 1903 and 1934. In the latter year, the U.S. and Cuba signed a treaty stipulating that, "So long as the United States of America shall not abandon the said naval station at Guantánamo or the two governments shall not agree to modification of its present limits, the station shall continue to have the territorial area it now has [...]."

The U.S. Constitution gives the president the power to make treaties on behalf of the U.S., but says nothing about the power to terminate treaties. That power is nevertheless held by the president. Article II, Section 1, provides the president with the "executive power" of the United States. That power finds its principal application in the execution of the nation's laws. Under Article VI of the Constitution, treaties are considered laws of the United States. Should the president decide, in the language of the 1934 treaty, to "abandon" Guantánamo, his execution of that prerogative of the treaty would, at the same time, terminate the treaty itself. Legal precedent supports the conclusion that Congress would be powerless to overturn such action. In *United States v. Curtiss-Wright Export Corp.* (1936), the Supreme Court said:

"It is important to bear in mind that we are here dealing [with...] the very delicate, *plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations*—a power which does not require as a basis for its exercise an act of Congress [...]" [emphasis added].

Relying on that authority, then-President Jimmy Carter was able in 1980 to terminate the mutual defense treaty with Taiwan following his recognition of the Chinese government in Beijing. Similarly, President George W. Bush in 2001 gave Russia notice and withdrew from the Anti-Ballistic Missile (ABM) Treaty ratified by the Senate in 1972.





MOVE TO FULL NORMALIZATION OF RELATIONS

Trade

Cuba and the U.S. are founding members of the World Trade Organization (WTO). When the WTO was established in 1995, both the U.S. and Cuba accepted the General Agreement on Tariffs and Trade (GATT) as binding on all members. Article I of the Agreement prohibits signatories from discriminating among signatory nations when extending trade benefits. For example, if a nation grants another nation a lower customs duty rate on a product, it must extend that rate to all WTO members. This means both the U.S. and Cuba must extend Most-Favored-Nation (MFN) treatment to other members' exported products, with the result that Cuban goods must be allowed into the U.S. on terms as favorable as those extended to other WTO members' goods.

However, in 1962, the U.S. invoked the Article XXI exemption of GATT when Kennedy issued Proclamation 3447 (referred to above) to establish the current embargo on Cuba. Under this article, any nation can opt out of its obligations under the GATT by claiming such action "necessary for the protection of its essential security interests." All it will take for MFN status to apply to Cuba-origin products is a presidential rescission of the U.S. invocation of Article XXI.

Intellectual Property Protections

Currently, intellectual property protections between the U.S. and Cuba are covered by an 85-year-old agreement, the General Inter-American Convention for Trademark and Commercial Protection. A number of developments in intellectual property (cybernames, etc.) have occurred in the intervening years. One of the more useful first steps in restoring normal relations with Cuba would be to negotiate a new agreement that reciprocally protects the intellectual property of each country's nationals.

Environmental Cooperation

The U.S. and Cuba share the Caribbean. As an element of normalized relations, it makes sense for the two countries to enter into agreements ensuring reciprocal cooperation to protect Caribbean waters and the fragile environments of its islands.

CONCLUSION

Some aspects of normalized relations—although very few—require Congress to act. For example, any ambassador the U.S. president appoints to Cuba would require confirmation by the U.S. Senate. The current representation by heads of the Interests Sections degrades bilateral relations. The U.S. maintains diplomatic relations with Russia, Nicaragua, Venezuela, and other countries while having no fondness for the governments of those nations. It can do the same with Cuba. Another area in which Congress would play a role is the enactment of investment protection measures for U.S. investors in Cuba. Congress has a role in this because such protections are most often secured by bilateral investment treaties that require Senate ratification. But again, the role of Congress in the normalization process is a small one.

It is clear that a president, using the inherent authority of the office, can take the United States there. When the moment arrives, there remain a series of steps that the U.S.—and Cuba—must take to truly establish normal relations between the one-time Cold War enemies that go beyond just lifting the embargo. However, some of the most punitive elements of the embargo could become the tools of creative, focused diplomacy by executive action. The question is when, not how.

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