



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Real Change on Cuba

by Jacob G. Hornberger

A good place for Barack Obama to begin his program of change would be U.S. policy on Cuba. The change would move America toward three important principles on which our country was founded: economic liberty, civil liberty, and a limited-government republic.

Economic liberty

First, the Obama administration should lift the U.S. government's 40-year-old embargo against Cuba. Not only has the embargo failed to achieve its purported end — regime change in Cuba — it has contributed to the misery and impoverishment of the Cuban people. Perhaps most important, the embargo constitutes a direct infringement on the economic liberty of the American people.

Economic liberty includes the right to do whatever one wants with his own money. The right to dispose of one's wealth is as fundamental a right as freedom of speech, freedom of the press, and freedom of religion. Government no more has the legitimate authority to punish a person for spending his money in unapproved ways than it has to punish a person for his expression of political or religious views. What a person does with his own money reflects his value judgments as much as what he reads or publishes or how he worships.

Thus, under what moral authority does government prohibit a person from spending his own money the way he wants and punish him for violating the prohibition?

Yet that's precisely what the U.S. government has done for nearly 45 years with its Cuba embargo. While the embargo is ostensibly directed toward Cuba, the attack is actually on the economic liberty of the American people. The embargo prohibits Americans from spending money in Cuba without official permission, on pain of both criminal and civil prosecution by U.S. authorities.

The reason that I include the words "without official permission" is that if an American citizen requests permission of the federal government to spend money in Cuba, under the law the government has the discretionary authority to grant such permission. Thus, the act of spending

money in Cuba is obviously not considered bad per se, as are such acts as murder, theft, and robbery. Spending money in Cuba is considered bad only when it's done without federal permission.

Thus, in order to exercise a fundamental right, one must first ask permission of government officials. In other words, while people have been endowed by the Creator and by nature with the inherent right to do whatever they want with their own money, they are required to ask permission of the government to exercise it. What kind of fundamental and inherent, God-given, natural right is that? Imagine that the same principle were employed with respect to one's decisions about religion.

Many people believe that it's illegal for Americans to travel to Cuba. That's not the case. In fact, it's perfectly legal for Americans to travel to Cuba. It's just illegal for them to spend money when they get there.

Why didn't U.S. officials simply make it illegal to travel to Cuba? Well, that's where a bit of hypocrisy comes in. While U.S. officials concede that freedom of travel is a fundamental right, they maintain, with straight faces, that they are not infringing it. Americans are free to exercise their inherent right to travel to Cuba whenever they want, U.S. officials say; they just may not spend their money when they get there — not on food, hotels, transportation, or anything else.

Lifting the embargo would enable American tourists to immediately begin traveling to Cuba. While some of the money spent would inevitably end up in the coffers of the Cuban government, much of it would also end up in private hands. That accumulation of wealth would gradually serve as a counterweight to the Cuban communist regime.

Not only would Americans be bringing their money, ideas, and perspectives to the Cuban people, they also would be bringing the possibility of investment and business opportunities. Granted, under Castro's tightly controlled economy, there is not much room for private enterprise, but as more and more Americans began flooding the island, the chances for private enterprise to develop would magnify. In fact, the people who would begin demanding it most would very likely be the Cubans.

Moreover, Americans concerned about the economic plight of the Cuban people would finally be free to send donations to help them out. It's difficult to believe but under the U.S. embargo, civil and criminal sanctions are imposed upon those who donate to Cubans without official permission.

Finally, just as Americans should be free to travel to Cuba, Cubans should be free to travel to the United States. That would enable the United States to finally abandon its ridiculous and hypocritical immigration policy toward Cuba, a policy that enables U.S. officials to attack Cuban refugees and repatriate them to the communist homeland if they're caught on water, but that lets refugees stay if they make it to land. By ending travel restrictions between Cuba and the United

States, Cubans and Americans would retain their respective citizenships and simply be free to travel back and forth for tourism, business, or other reasons.

Civil liberty

Second, the U.S. government should immediately close its prison camp at Guantánamo Bay and shut down the alternative “judicial” system that the Pentagon has established there. That would be an important first step in the restoration of civil liberties that Americans lost after 9/11.

Many people think that the general principles of the U.S. government’s “war on terrorism” apply only to foreigners, not to Americans. Since the Pentagon has chosen to jail only foreigners at Guantánamo, the popular belief is that Americans could never be sent there for imprisonment and punishment as “enemy combatants” in the “war on terrorism.”

Not so. The decision to limit Guantánamo to foreign citizens was entirely political in nature. As long as the place remains open, the federal government could quickly change course and subject Americans to the same Gitmo treatment that foreigners have received — indefinite incarceration, torture, sex abuse, sensory deprivation, isolation, denial of counsel, denial of trial by jury, denial of due process, kangaroo military courts, denial of the right to confront witnesses, denial of the right to summon witnesses, the use of coerced testimony, and the presumption of guilt.

In other words, in the midst of any future crisis, Americans suspected of terrorism could be denied all the rights guaranteed by the Bill of Rights to criminal suspects, without even the semblance of a constitutional amendment.

Let’s examine how this came to be.

Prior to 9/11, terrorism had always been considered a criminal offense. That’s why, for example, Ramzi Yousef was indicted and convicted of conspiracy to commit terrorism in the 1993 terrorist attack on the World Trade Center. It’s also why Timothy McVeigh was indicted, convicted, and executed for committing federal criminal offenses relating to terrorism when he bombed the federal building in Oklahoma City.

In fact, terrorism is still a federal criminal offense. It’s still listed in the U.S. Code as a criminal offense. That’s why Zacarias Moussaoui, one of the 9/11 coconspirators, was indicted and convicted of terrorism in federal district court. It’s also why 100 or so other cases involving terrorism have been brought in federal district court since 9/11.

Thus, those who argue that terrorism is an act of war rather than a criminal offense have a big hole in their reasoning. Given that they don’t challenge or oppose the criminal prosecutions for terrorism brought by the Justice Department, what the proponents of this argument really mean is that they want federal officials to have the discretion to treat terrorism as either an act of war or a criminal offense.

There is at least one big problem with that formulation: it would be difficult to find a better example of a violation of the rule of law and the principle of equal treatment under law than that.

While some people claim that the “rule of law” means that people should obey the law, that’s just not true. What it means is that people should have to answer only to a well-defined, well-enunciated law for their conduct rather than to the arbitrary decisions of government officials. The corollary to the rule-of-law principle is the principle of equal treatment under law — that the law should apply equally to everyone regardless of race, color, creed, or nationality.

Let’s assume that two people are accused of conspiracy to commit the same terrorist act. Prior to the 9/11 attacks they would be treated as criminal defendants. That’s what the rule of law and the principle of equal treatment under law require.

Ever since 9/11, however, U.S. officials have had the authority to send one of them down the “enemy combatant” route and the other one down the federal-district-court route. In other words, the same offense but two completely different systems to determine guilt or innocence. The decision of which to use depends on the “rule of men.” The arbitrary judgments of federal officials decide which track each suspected terrorist will be sent down. It’s that type of discretion and arbitrariness that the rule of law and the concept of equal treatment under law are designed to avoid.

How did this double-track system develop? Immediately after the 9/11 attacks, U.S. officials simply announced that the attacks weren’t really criminal offenses but rather acts of war. At the time they made that announcement Ramzi Yousef was in a federal penitentiary as a criminal for having committed a criminal act of terrorism against the WTC, one of the same targets on 9/11.

Thus, what U.S. officials did was simply convert a criminal offense into an act of war. What’s wrong with that? Suppose they did the same thing with the war on drugs that they’ve done with the war on terrorism. Suppose suspected drug dealers were to be treated as enemy combatants in the war on drugs, subject to being tortured for information relating to pending drug deals, and subject to being sent to Guantánamo for treatment as “enemy combatants.” Suppose also that U.S. officials had the discretionary authority to send some suspected drug dealers to Guantánamo as enemy combatants and to send others into the federal court system as criminal defendants, as they do today.

If you’re having trouble seeing why that would be problematic, then let’s simply expand the enemy-combatant concept to other crimes. Let’s have the federal government declare war on organized crime. That way, Mafia members would no longer have to be indicted in court and accorded the rights and guarantees of the Bill of Rights.

But why stop there? Why not give the feds and, for that matter, state officials the power to convert all crimes into acts of war, enabling federal and state officials to have the option of

treating suspected murderers, rapists, thieves, and robbers as either enemy combatants or criminal defendants?

Do you see the problem here? Our American ancestors insisted on the passage of the Bill of Rights to ensure that people who were accused of crimes by federal officials could not be deprived of fundamental procedural rights and guarantees. Yet, once federal officials are given the discretionary authority to treat crimes as acts of war and suspected criminals as enemy combatants, the Bill of Rights goes right out the window.

That's in fact what happened when the Pentagon established its prison camp at Guantánamo. Some people think that the Pentagon set up its camp in Cuba to protect Americans from the possibility that suspected terrorists could escape and do them harm. Not so. The reason that the Pentagon — whose officials ironically all take oaths to support and defend the Constitution — set up its camp in Cuba was to avoid the application of the Constitution and the Bill of Rights to its operations.

In an ordinary war between nation-states, prisoners can be held until the war is over. The treatment of prisoners is also subject to the principles of the Geneva Conventions, which prohibit, among other things, the torture of prisoners.

The Pentagon, however, took the position that its prisoners at Guantánamo were not entitled to the protections of the Geneva Conventions because, as terrorists, they were illegal enemy combatants, as opposed to uniformed soldiers in an ordinary war between nation-states.

Never mind that CIA agents, who are engaged in this war, also don't wear uniforms. More important, we need to recognize the clearly sleight-of-hand reasoning employed by the Pentagon.

The federal government took a criminal offense — terrorism — and converted it into an act of war. It claimed the authority to treat anyone suspected of terrorism as an enemy combatant involved in war. Then it said that in this particular war, the enemy combatants are illegitimate because they are engaged in terrorism. Yet the only reason that terrorism is an act of war in the first place is that U.S. officials decided to define it that way.

But that wasn't the end of this sham. The Pentagon then decided to establish its own judicial system to do the same thing that the federal courts do in the United States: try people for terrorism. In other words, what the Pentagon is doing with its military tribunals in Cuba is no different in principle from what the Justice Department is doing with its prosecutions in federal district court. In both forums, prosecutors are prosecuting people accused of committing terrorism.

Thus, what the 9/11 attacks enabled U.S. officials to get away with, without the semblance of a constitutional amendment, is the establishment of alternative judicial systems for trying criminal cases relating to terrorism. One system — the Pentagon system — bears a remarkable resemblance to the one employed by the Soviet Union, China, North Korea, and, yes, even Cuba.

The one employed by the Justice Department is the one the Framers established in the Constitution.

Empire or republic?

Third, the U.S. government should vacate its Guantánamo Bay Naval Base, abandon all its leasehold rights in the Guantánamo Bay property, and relinquish the property back to Cuba.

The Guantánamo Bay property is an imperial relic from the Spanish-American War. That was the war in which America began its abandonment of a limited-government republic and its turn toward becoming an imperial power. At the end of the war, which supposedly was intended to help the Cuban people free themselves from Spain's control, U.S. officials extracted a perpetual lease around Guantánamo Bay. The man who signed the lease on behalf of Cuba was Cuba's first president, a man named Tomas Estrada Palma, who just happened to be an American citizen.

The U.S. government has no more business owning a leasehold right to Guantánamo Bay than the Cuban government would have owning similar rights around Miami Harbor. It's high time that the Pentagon was required to abandon its imperial outpost on Cuba. In fact, that would be a good first step to finally bringing an end to America's tragic experiment with imperialism and to restoring a limited-government republic to our land.

Conclusion

President Obama will have the opportunity to initiate real change when it comes to Cuba. Will he follow the same, tired, well-worn road of his predecessors? Will he maintain the cruel and inhumane embargo that has not only infringed on the economic liberty of the American people but has also contributed enormously to the misery and desperation of the Cuban people? Will he continue the Pentagon's cruel prison camp at Guantánamo and its arbitrary and unjust system for trying terrorists? Will he maintain the vestiges of U.S. imperialism that stretch back to the Spanish-American War by maintaining possession and control of Guantánamo Bay?

Let's hope not. Let's hope that he instead raises his vision to a higher level — toward ending the embargo, closing the Pentagon's prison camp, and giving Guantánamo Bay back to Cuba.

Jacob Hornberger is founder and president of The Future of Freedom Foundation.

This article was originally published in the February 2009 edition of *Freedom Daily*.