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Committee on Foreign Affairs.

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Subcommittee Hearing: The Future of Property Rights in Cuba

Thank you Mr. Chairman, Ranking Member, and members of the Subcommittee.

It is an honor to be before this great Committee, where I used to work. I have worked to help victims of confiscations from different countries for over 26 years, including eight years as chairman of the Foreign Claims Settlement Commission at the Department of Justice.

It has been decades since these claims against Cuba have been given this much public attention. The House Committee on Foreign Affairs is the committee of jurisdiction and oversight over these certified claims of our fellow Americans against the government of Cuba. I commend this Subcommittee for convening this hearing and hope it continues to play an active role in the long overdue resolution and full settlement of these certified claims.

It is my hope that the testimony provided by all the witnesses appearing before you today will help the Committee, the Congress, and the Administration resolve and settle the certified claims before any further concessions are offered to the government of Cuba.

I will summarize my remarks and ask that the full text of my testimony be placed in the record.

## **Background on Confiscations by Cuba.**

Over fifty-five years ago, the revolutionary communist government of Cuba confiscated the real and personal property of thousands of Americans, and others, who were living and doing business in Cuba. To this day, that chapter in U.S. history represents the largest confiscation ever of American property, and there has been no progress in settling these certified claims.

These confiscations by the Cuban government had a profound impact on thousands of American families. You can hear the pain in the claimants voices as they tell others about how their families were forcibly removed from their homes and businesses. Their lives were shattered; destroyed. Their grandparents and parents struggling to hold their families together and rebuild what took them a lifetime to create. Many never recovered economically and emotionally.

Confiscations like these, where one's entire life is uprooted, without warning; without compensation, scar the victims for life. I believe, they affect families the same way that the loss of a child would. Many don't fully understand this, because they think it was just property, but they would be wrong. It was not just property, it was their lives. They poured everything into that business and life they knew; then everything they owned was taken from them.

They can never forget it and they seek understanding and closure from the U.S. government who promised them justice. Justice they have yet to receive.

## **New Negotiating Opportunity Over Certified Claims**

There are reports about serious talks in the making between the United States and Cuba regarding the certified American claims. But we should remain guarded and concerned that this will not materialize or that negotiations will not reach a settlement of these claims. The Administration is priming the pump with a number of goodwill gestures and gifts to Cuba in order to get the conversation started, but historically, before these sort of favorable US actions are taken, there is, at least, an outline of an agreement for settling certified claims.

Some will often refer to Libya as an example for the Administration's actions on Cuba. It is true that the US removed Libya from the State Sponsors of Terrorism list before the U.S. - Libya claims settlement agreement was signed and paid by Libya. However, there was at least a basic outline of an agreement before Libya came off the terrorism list—not to mention that the Qaddafi government had already dismantled its weapons of mass destruction programs and had met other requirements laid out in US law and UN resolutions.

Even so, I am cautiously hopeful that these current talks will bear the long awaited fruit of a fair and just claims settlement agreement. But no one should be under any delusions. Just as in the case of Libya, these talks will be very difficult and could still take a long time.

It is important to American victims that our negotiating team be well prepared for the talks, that they make this matter a top priority, and that they are firmly committed to making these certified claimants whole. Settlement of these claims is not only important to the individual American claimants. There are economic and strategic reasons why Cuba must pay these certified claims. If the world, and especially Latin America, observes that the United States has allowed Cuba access to the US market and to conduct normal trading relations with Americans, regardless of the \$7 billion of stolen property owned by US citizens, then Americans elsewhere around the world may suffer even larger confiscations in the future which could dwarf the Cuba certified claims.

I think we are already seeing this happen as certain Latin American countries are seizing the property of American corporations with impunity. It can spread further and hurt US competitiveness. When American families and corporations who go overseas have their property taken, or have their contracts interfered with by a foreign government, that results in the loss of jobs and capital here in the states. Other countries look out for their citizens and companies overseas, and the US must do the same.

### **Background on Certified Claims Process**

The Foreign Claims Settlement Commission of the United States at the Department of Justice has been adjudicating American claims for over sixty years. The Commission has adjudicated over 48 different claims programs against 22 different countries.

Once the Commission has completed its work on a claims program, the Commission certifies the claimants and the values of their claims to the State Department whose responsibility it is to negotiate a settlement agreement with the other country. These negotiations usually are very difficult and take a long time. The other country may seek to challenge some aspect of the certified claims such as the valuation, or the nationality. The other country may also have counter claims against the United States. Typically the U.S. has something the other country wants and tradeoffs occur. That is why the Commission is an independent agency and not under the control of any Department or outside government official and why the Commission's decisions are not subject to review or appeal by any agency or to any court. Additionally there is no cost to the American taxpayer for administering the claims process because a portion of each settlement agreement pays such costs of the Commission.

The claims process is conducted with complete transparency, in a non-adversarial proceeding, in which the claimant must show support for his claim. He must prove he or she owned the property when it was seized, and prove what the value of the property was at the time it was taken. He or she must also show proof of American citizenship at the time the property was taken, and prove that it was taken, or interfered with, by the Cuban government.

The transparency aspect of the Commission's claims process is very important and I believe the main reason this process works so well. The Commission's Decisions states clearly how the value of each certified claim was calculated. The Commission's Decisions also state clearly how it uses accepted accounting practices to determine the true value of the certified claim amounts.

Other countries have their own commissions, which evaluate the claims of their own citizens. Under international law, each country advocates and espouses the claims of its own citizens against the wrongful injury, interference or takings by another country. A claims process is used when there is no independent or reliable judiciary in the other country for Americans to find justice or a fair hearing.

The Foreign Claims Settlement Commission has a three-member tribunal, composed of one full time chairman (currently vacant) who also serves as the administrator of the Commission, and two part-time commissioners. They are each appointed by the President for three year terms and are confirmed by the Senate. The Commission can only adjudicate and certify American claims when it is authorized to do so. That authorization can come from the Congress through legislation, by a treaty, or by referral of a category of claims by the Secretary of State.

### **Certified American Claims Against Cuba**

We have heard different numbers as to how many certified claims there are. There are in fact 5,913 certified claims against the government of Cuba. Of those, 5,911 were adjudicated by the Commission in the first Cuba Claims Program during the 1960s and the 1970s and two more were added in the Second Cuba Claims Program in 2006.

There are several types of certified claims against Cuba. Most are for confiscation of personal property, such as bank accounts, stock shares, bonds and debts. Some claims are for the confiscation of real property or land, some are personal injuries, and a number of them are for wrongful death claims.

When the claims were originally certified by the Commission they were valued at \$1.8 billion dollars. Today, they are valued at around \$7 to \$8 billion due to the 6% simple interest called for under international law and certified by the Commission. Only around 300 claims are corporate but they represent roughly 80% of the total value, and the rest are individuals or families representing roughly 20% of the total value. Another interesting statistic is that the top 124 claims represent 90% of the total value, or \$1.6 out of the total \$1.8 billion.

No other American claims program has been left pending and unpaid for this long, 55 years. I don't count the Soviet / Russian claims program because it was partially settled. As an aside, I urge the Committee take action on those Soviet, (now Russia), certified claims as well.

## Settlement Proposals and Discussion

There have been suggestions of a settlement agreement with Cuba that would use restitution of the old confiscated property or substitution of comparable property to settle the certified claims. We have also heard over the years certain Cuban government officials warn the Cuban people that the Americans are coming for your houses.

The media also seem to like the optics of this and keeps asking the same type of questions about restoring the land to old owners and have asked my opinions on the “property problem between the US and Cuba”. My answer to all these comments and arguments is that there is no property problem, because there is no property. Under international law the American property is gone. The Cuban government confiscated it. But the same international law section states that, what remains is the debt that Cuba must pay. The U.S. has a right, under international law, to fair compensation for its citizens.

Cuba is a sovereign nation and as such it controls its own land and who owns it. As to the possibility of a settlement agreement, which may include some land as repayment or restitution, that really is up to Cuba, not the United States. But I would caution that any such settlement, if offered by Cuba, is very difficult to pull off and would require a high degree of confidence between both countries.

Settlement agreements that involve a property restitution option have been successful in the past, but in special circumstances. In a few settlement agreements to which the U.S. was a party, such as the agreement with the German Democratic Republic and the current Albania Program, an opt-out provision allowed claimants to go into the foreign country’s court process for restitution of their land.

But one key element, which would be needed, is a property court or property commission in the foreign country with a reasonable guarantee of due process protection and an independent judiciary, something that does not remotely exist in Cuba today

Other suggested settlement approaches would break up the certified claims into separate categories, to be handled differently in the settlement negotiations process, such as by big value versus smaller value claims, or commercial land claims versus residential land claims, or land claims verses personal property claims, thinking these may speed up the negotiations or make it easier to reach a settlement.

Equal treatment of all the certified claims is the simplest, less complicated, approach and is the quickest and most likely way to succeed

Any effort along the lines of creating different categories of claims are much more likely to result in divisions amongst the claimants, pulling in different directions and significantly reducing the likelihood of a settlement of these certified claims. It is also

completely unnecessary as the government of Cuba is capable, if it wants to, come up with the \$7 to \$8 billion it needs to pay all the certified claims.

I have over the years heard a number of investment speculators in these claims and some financial experts opine that the US and the certified claimants must be prepared to receive pennies on the dollar for their claims. They are plain wrong.

Sometimes these same experts have tried to illegally purchase or transfer the certified claims from the claimants, without the proper license from the Office of Foreign Assets Control at the Treasury Department. That sort of behavior is not helpful to this claims settlement process. In fact, I recall from my years at the Commission that we always had to be very careful never to say anything publicly that could put the State Department negotiating team at a disadvantage when the day should come to negotiate the settlement agreement.

Not only do I believe that the US should settle for nothing less than the full price with 100% of the interest but I call on the Administration and the Congress to hold fast and not remove key elements of the embargo or the sanctions that remain unless the claimants receive full and fair payment for the settlement of their certified claims.

I also hear that Cuba is poor and cannot afford to pay these claims amounts. Cuba keeps crying poverty, saying it has no money. That is just not true. Cuba has ample funds. It is not for lack of money that Cuba has been a high risk for investors and creditors for so many years. It is just that Cuba's leadership have other plans for their revenue. Fidel Castro is rumored to have a net worth of over \$900 million, probably the same amount for Raul Castro, and the rest of Cuba's generals and leadership class also are all rumored to be quite rich.

Accurate or reliable information as to the Cuban economy and their budget revenues is hard to come by but there is enough empirical data available that leads me to conclude that Cuba has the financial resources to pay the full price of these claims or it could easily finance the settlement. According to the World Bank, Cuba's GDP is more than \$69 billion. We also know that Cuba receives over \$2 billion annually from the US alone, in the form of remittances and commodities and gifts and trade. Plus maybe the same from amount Venezuela. We hope shortly to have access to the recently announced Paris Club - Cuba agreement in principle, which would likely shed more light on Cuba's assets and revenues in much more detail.

The present value of the certified claims, \$7, to \$8, billion, in today's global economy, is really not that hard to finance. Private investment and financial sectors could, and probably would, extend Cuba those funds if they saw that Cuba's economy would be free of the U.S. embargo. I agree with those finance experts in that Cuba's economy would expand dramatically if it were able to restore a normal trading relationship with the United States, and Cuba's government allowed it. So realistically financing the settling of certified claim would not be a problem for Cuba.

## **Recommendations To The Congress, The Administration, & Certified Claimants.**

**First**, and foremost, of these is to urge the Congress not to lift the credit, finance and banking restrictions and sanctions (still in effect) on trade with Cuba. Congress must not pass any legislation further easing the embargo unless these certified claims are paid and settled. We should remember our American certified claimants. I repeat, Congress must not lift the current embargo on Cuba unless these certified claims are paid in full.

I have zero confidence in any promise made by the government of Cuba to pay these claims at some future time after the embargo is lifted. That's not the way settlement agreements are made. That is not the way the Vietnam Settlement Agreement was made. And please keep in mind that comparing past claims programs to the Cuba program is just not a reasonable or fair comparison. The world has changed quite a bit since some of the Cold War-era programs were concluded.

We only get one shot at this. We only have one thing Cuba wants. It is access to the US market and the lifting of the embargo. If the Congress gives that away without getting these claims paid, then Congress will have failed to protect and defend these American families and companies.

Such a failure by the U.S. government will also condemn other American companies and families around the world to suffer the same fate because the same thing will happen to them. Solving the Cuba program correctly will send a message to the world that the United States stands by property rights, no matter how long it takes. This is more than just a Cuba problem.

**Second** I urge the Congress to enact legislation to grant limited authority to the Foreign Claims Settlement Commission to update the certified claims as to who is the current holder in interest of each certified claim. As I have already explained, claims programs are not designed to go unpaid for 55 years. Multiple generations of individual and corporate claimants have come and gone and the information needs to be updated to expedite the resolution of the certified claims. Not only is it good governmental housekeeping but it sends a message to Cuba. This legislation should also do the same for the Soviet claims program.

During my tenure as Chairman, the Commission took it upon itself to research and update, as best we could, the claimant contact information the Commission has on record for each claimant. Technically, the Commission's authority over the claims ended by statute in 1972, when it certified the claims to the State Department. Lacking authority to demand proof, the Commission really does not know if it has the correct person listed as the claimant.

When the Treasury Department tries to distribute the settlement funds paid by Cuba, it will have a very difficult time documenting and ascertaining the true owner of each

claim. The U.S. can put this time, during the negotiations, to good use by updating our government records so we will be better prepared for the day of settlement and distribution of payments.

Reauthorizing a Cuba program for this necessary purpose would also send a signal and message to the Cuban government that the US is seriously standing behind its certified claimants and insist that the Cuban government pay its bills.

The Commission is perfectly suited to administer this review and revision of all the certified Cuba claimants. It has the claim files and the staff and expertise to conduct such a program, and I believe it could do so with its current staff, thereby it would not add any cost to the U.S budget.

**Thirdly**, this recommendation is to Congress but first I need to provide some background of the problem.

As I have already stated, I believe these talks are extremely difficult. I am not only concerned that the Cuban government will continue with its intransigence, but also that with the US government's level of commitment in forcing the Cuban government to pay the certified claims. I am hopeful that the debts will be settled, but you never know, we have been waiting 55 years we may get more of the same status quo.

Lets face it, the embargo, such as it is, is full of holes. Even with the current credit and banking restrictions, there is a great deal of trade and commerce going on between Cuba and the United States. The current Cuban embargo is the only hope of forcing Cuba to pay the certified claims. What about the promise made to the certified claimants? The travel and commerce of the U.S. with Cuba is using stolen American property. That has been taking place for many years under Republican and Democratic administrations.

We know that stolen American property is trespassed upon because at least one runway expansion at Jose Marti Airport is on land which is the subject of a certified claim. It is most likely true of other Cuban airports as well, and every major port in Cuba, including the Port of Mariel is subject of a certified claim. All make use of land which is the subject of multiple American certified claims, and the list is much longer than this.

How can the US government license or allow travel and trade which trespasses on the property stolen from American citizens? Certain large special interests in the US show no hesitation on doing business with Cuba, even if it means using the property stolen from their fellow American citizens.

I urge the Congress to seriously consider enacting a trespass penalty of 10% on all trade, commerce, remittances, toll calls, gifts, fly over fees, port duty, - everything. This trespass penalty would be paid by all those conducting business, buying or selling goods, or giving anything, which pays any revenue or fee to the Cuban government or agents of the Cuban government. The proceeds collected from the trespass penalty



would go into a fund which would pay all certified claimants equally their full amount including interest.

This trespass penalty would not release Cuba of its debt to the US, but now the debt would be owed to the U.S. government and not the certified claimants. The U.S. government should also consider adding additional penalties on the government of Cuba for every month or year that it fails to make, as required by current U.S. law, progress on the claims issue.

If the settlement negotiations are successful and these claims are paid by Cuba, then there will be no need for this unilateral action by Congress. But if the settlement negotiations fail in paying the certified claims, then it is time to end the suffering of the certified claimants. Justice demands that a trespass penalty be paid by all Americans doing any business with Cuba.

Those traveling and trading should consider this trespass penalty as the cost of trafficking in someone else's stolen property. I suggest this trespass penalty be enacted into law should we fail to achieve a settlement agreement, by a certain date, which would pay the American certified claims and while continuing the current embargo. The present ongoing and never-ending waiting by the certified claimants is unacceptable and intolerable. It is the responsibility of the US Congress to bring an end to this embarrassing 55 year wait by our fellow Americans. We would be happy to assist the Congress in drafting the trespass penalty legislation.

**The Fourth** and final recommendation is more of a call to action to all those American families and companies who are holding certified claims against Cuba. I urge you to get engaged in this discussion and write to your congressman, your senators, the President, and the State Department, and keep writing and calling them.

American certified claimants need to demand that their claims be settled and if they are not going to be settled then they should be paid by the trespass penalty. This is no longer the time to sit on the sidelines. Let your voices be heard.

I urge the Congress and the Administration to forcefully advocate for Americans, defend their rights, and finally settle these certified claims.

Thank you.