
U.S. Sanctions and the Myth of Helms-Burtonⁱ

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Some have argued that, even if President Obama is inclined to change policy, Congress has tied his hands by passing legislation on Cuba. The Obama administration should look beyond the false perception encouraged by current and former U.S. officials that virtually any change in U.S. policy must begin with Congress. Congress has a role to play, but it is unlikely to alter Cuba sanctions in any significant way without prodding from the president. Change—whether unilateral action, diplomatic initiatives towards Cuba or U.S. allies, or multilateral initiatives—can and should be led by the White House. The idea that Congress has limited the president through legislation such as Helms-Burton is largely a myth.

Shaping the Cuba sanctions program

The Cuba sanctions program is contained in the Cuba Assets Control Regulations (CACR), issued by OFAC in 1963 under the authority of the Trading with the Enemy Act. Virtually every U.S. president has changed these regulations to reflect various policy priorities. Since the end of the Cold War, Congress has also become involved in shaping policy, passing three major pieces of legislation that have required changes to the regulations.

During the Cold War, Congress had little to do with shaping U.S. regulations on Cuba. There were some exceptions, including Congress's appropriation of money for Radio Marti at President Ronald Reagan's urging and passage of the Cuban Adjustment Act under President Lyndon Johnson. For the most part, however, the president controlled policy. President Jimmy Carter used his authority to remove travel restrictions and allow U.S. citizens to spend money in Cuba. Reagan used his to prohibit the ability of U.S. citizens to spend money in Cuba and reinstitute the travel ban.

In the 1990s, Congress began to take a more active role in foreign policy. Republicans and Democrats, led by the Florida and New Jersey delegations, introduced legislation aimed at tightening the embargo to "turn the economic screws" even more, as Representative Lawrence Smith (D-Fla.) suggested in June 1990.¹ The 1992 Cuban Democracy Act was the first successful attempt by Congress to put its stamp on U.S. Cuba policy. The act authorized the president to impose sanctions against foreign countries doing business in Cuba, restricted U.S. subsidiary operations in Cuba, and curbed travel and remittances. The bill required that the president certify that Cuba was respecting human rights and moving towards free elections within six months of the certification before any normalization of relations could take place. The act also included statements of policy that the United States would take into account the willingness of other countries to cooperate in U.S. policy goals regarding Cuba as a matter of foreign policy. In

ⁱ Excerpt from The Case for a New Cuba Policy, March 2009, available at www.usaengage.org.

addition, the bill authorized the Treasury Department to enforce the act and to establish an office in Miami to improve enforcement.²

In 1996, sanctions proponents in Congress succeeded in imposing tougher measures on Cuba and third countries doing business with the Cuban government through the passage and enactment of the Cuban Liberty and Democratic Solidarity (Libertad) Act, otherwise known as the Helms-Burton Act. Helms-Burton, which passed easily after Fidel Castro shot down two U.S. airplanes flying close to Cuba, called for increased enforcement of current sanctions and a string of new measures. The legislation required federal agencies to oppose loans to Cuba in international organizations and instructed the president to take steps to improve assistance to human rights groups in Cuba.³ Title III of the act permits U.S. nationals to sue in U.S. court any foreign person who deals in U.S. property that was confiscated by the Cuban government. Title IV instructs the Department of State to withhold visas from foreign businessmen doing business with Cuba. (Titles III and IV have stirred controversy with U.S. allies and have not been implemented fully.)

The piece of Helms-Burton that tends to get the most attention is Section 102(h), “Codification of Economic Embargo.” The section reads:

The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect upon the enactment of this Act, and shall remain in effect, subject to Section 204 [“Termination of the Economic Embargo Against Cuba”] of this Act.⁴

This provision has led to a widespread—although incorrect—perception that the executive branch lacks the authority to change the terms of the embargo on Cuba. Members of Congress and U.S. officials have encouraged this view. During the consideration of the conference report for Helms-Burton, Senator Paul Coverdell (R-Ga.) said that the act “codifies—this is very important—it codifies the existing embargo on Cuba, making it law unless a transition government is in place.”⁵ A congressional working group on Cuba suggested in 2002 that, because of Helms-Burton, “The president lost the ability to modify the embargo in calibrated ways in response to incremental reforms that could take place in Cuba.”⁶ More recently, in an interview with Reuters, one State Department official suggested that “[Cuba] is one of our most regimented policies. Our hands are tied by laws.”⁷

Current executive branch discretion

Although a formal end to the embargo would likely require either an act of Congress or the transition by Cuba to a free and democratic system of government, the administration’s hands are far from tied when it comes to shaping policy. Based on a plain reading of Helms-Burton statute, actions taken by the Clinton and Bush administrations after Helms-Burton was enacted, interpretation of the law by government agencies, and analyses by sanctions law experts, the executive branch retains wide discretion to make significant changes to U.S. Cuba policy.

In codifying the embargo, “including all restrictions under part 515 of title 31,” Congress captured in Helms-Burton the president’s discretion to change the restrictions.⁸ This licensing authority is stated throughout the CACR. Section 201(a) and (b) and Section 204(a) specify that

transactions involving Cuba are prohibited “except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise.” Section 202 indicates that securities transactions with Cuban nationals are prohibited “unless authorized by a license expressly referring to this section.” The regulations restrict holding blocked property “except ... as authorized by the Secretary of the Treasury or his delegate by specific license.”⁹

“The regulations, when made statutory [by the Libertad Act], left in place the ability to issue regulations and licenses—either general or specific,” according to former Office of Foreign Asset Controls (OFAC) Deputy General Counsel Serena Moe. “If that were not the case, no little leaguers could go to Cuba and no aid could be given to Cuba without an act of Congress.”¹⁰

Congress has acknowledged this discretion. In its “Overview and Compilation of U.S. Trade Statutes,” the House Committee on Ways and Means wrote, “Title I of the Act provides that the Cuban embargo as in force on March 1, 1996 (*including the executive branch discretion contained therein*) is to remain in effect until the president takes certain steps outlined in section 204 of the Act to suspend or terminate the embargo based on the existence of a transition government or a democratically elected government in Cuba” (emphasis added).¹¹ The committee’s own handbook, which is also known as the House Ways and Means Blue Book, recognizes the ability of the president to alter the terms of the embargo.

Both Clinton and Bush utilized this discretion to modify the Cuba sanctions regulations following the passage of the Libertad Act in 1996. After Pope John Paul II visited Cuba in January 1998, the Clinton administration changed the rules to permit Cuban Americans to send money to relatives in Cuba and to allow direct flights between the United States and Havana. On January 5, 1999, Clinton announced that his administration would expand remittances to Cuba; increase people-to-people exchanges with Cuban academics, athletes, and scientists; and allow sales of agricultural products to independent groups in Cuba.

In a letter explaining the decision to authorize remittances and direct flights to Cuba, officials from the State and Treasury Departments indicated:

OFAC interprets section 102(h) of the [Helms-Burton] Act to permit the continued exercise of reasonable licensing authority in OFAC’s implementation of the prohibitions contained in the CACR as of March 1, 1996, and in the CDA and the Act.¹²

Administration officials went on to say that the issue of remittances “remains subject to presidential discretion in weighing the humanitarian purpose of allowing U.S. residents and citizens to support family members in Cuba against the resulting flow of hard currency to Cuba.”¹³ Ambassador James Dobbins, senior director for inter-American affairs at the NSC, echoed this sentiment in response to a question about whether certain Clinton administration actions went against the act:

Helms-Burton codified the embargo and at the same time it codified the president’s licensing power. That is, it codified a process by which there was an embargo to which exceptions could be granted on a case-by-case basis by the

president in cases in which it was deemed to be consistent with U.S. policy. Of course, we issued hundreds, probably thousands of licenses for different things since Helms-Burton was signed without any complaint—any complaint on the grounds that it was inconsistent with Helms-Burton. In some cases, people didn't agree with a particular licensing decision. But the concept that the president would be able to license travel, remittances, other things, such as the steps he took with March, is well accepted.¹⁴

The Bush administration has also made significant changes to the rules governing travel, trade, and remittances to Cuba, which further highlights the discretion available under current law. In 2003, the Treasury Department issued rules that eliminated people-to-people educational exchanges and changed other rules governing travel and remittances. Technical amendments also narrowed a general license unblocking the assets of Cubans resident in the United States and ended the automatic unblocking of Cuban expatriates resident in countries other than U.S. sanctions targets and the United States itself.¹⁵ Such expatriates must now apply individually to OFAC to be licensed as “unblocked nationals.”¹⁶ In 2005, the administration clarified rules governing shipment of agricultural products to Cuba, requiring that U.S. exporters be paid prior to shipment rather than before the title changed hands, as is normally the case in international commerce.

The administration's most dramatic changes to policy came in 2004, when it used its rulemaking authority to severely limit contact with the Cuban people. The Treasury Department issued a rule that further curtailed educational programs, removed the presumption of “fully hosted” travel by which additional exchanges took place, limited the ability of Americans to send money to Cuba, and restricted visits by Cuban Americans to family on the island. These changes were based on recommendations from the interagency Commission for Assistance to a Free Cuba that the administration established in 2003.¹⁷

The rules narrowed the definition of family, limited visits to 14 days once every three years, and removed the exception to the regulations that allowed additional visits for humanitarian reasons. Under these regulations, Cuban Americans can no longer legally visit aunts, cousins, or other extended family on the island and must obtain a specific license to travel to visit immediate family. A Cuban American cannot return to Cuba legally within a three year period even if, for example, his mother or father were to die within that timeframe. In explaining the policy, a State Department official said, “if [Cuban Americans] have a dying relative, they have to figure out when they want to travel.”¹⁸

In this case, the administration went from authorizing travel under a general license, with which advance permission was not necessary in individual circumstances, to requiring that each potential traveler apply for a specific license from the Treasury Department in order to be able to visit relatives in Cuba. Having demonstrated the authority of the executive branch to switch from a general to a specific license via a simple Federal Register notice, the discretion clearly exists to do the opposite.

More recently, in response to the notice by Raúl Castro that Cubans would be allowed to own cell phones for the first time, the Bush administration announced it would permit Cuban Americans to distribute them to relatives on the island. In explaining the policy, NSC Senior

Director for Western Hemisphere Affairs Dan Fisk said, “in this case the State Department and the Department of Commerce will work together to change the regulatory structure. It’s a Federal Register [notice] ... Most of the embargo is actually contained in federal regulations.”¹⁹

This example is significant. The Bush administration used its discretion to exempt U.S.-origin electronics on the Commerce Control List (CCL)—which are specially controlled by the Department of Commerce for reasons of anti-terrorism—to a country that the State Department says is a sponsor of terrorism. It did so even though the CACR, which spells out the list of items authorized to be sent in gift parcels, does not include mobile phones.²⁰ “From a licensing standpoint, this is a major step,” says William A. Reinsch, a former Undersecretary of Commerce for Export Administration.²¹ “Items subject to the CCL are controlled for a reason. Now we’re not exactly talking about sending shoulder-fired rocket launchers, but the move to exempt items on the CCL highlights that discretion over licensing policy extends far beyond things like toothpaste or baseball gloves.”

Both administrations have taken pains to indicate that their actions are consistent with current policy and congressional intent. Clinton characterized his administration’s measures as in line with acts of Congress, which “enable and encourage the administration to conduct a program of support for the Cuban people.”²² In announcing the recent cell phone plan, Fisk argued that the move is “consistent with our existing regulations on gift parcels.”²³

The Clinton administration took this view even though its moves to allow travel by Cuban Americans and remittances expressly contradicted the sense of Congress in the Helms-Burton Act. The act indicated that remittances should not be granted until the Cuban government allows the “unfettered operation of small businesses” and that, before allowing generally licensed travel by Cuban Americans to Cuba, the president should “insist on such actions by the Cuban Government as abrogation of the sanction for departure from Cuba by refugees, release of political prisoners, recognition of the right of association, and other fundamental freedoms.”²⁴ Similarly, the Bush administration’s attempt to portray its action on mobile phones as routine belies the significant export exception it has made.

Such arguments demonstrate how little deference to Congress is necessary to alter the terms of the embargo. Only the most unimaginative of administrations would have difficulty explaining how any particular initiative it might wish to pursue would further the intent of Congress to show solidarity with the Cuban people. The Obama administration easily could seek to further the cause of assisting the Cuban people by, for example, exempting goods such as agricultural machinery or computers from U.S. sanctions, permitting services such as direct banking or micro-lending, or allowing imports of Cuban agricultural products.

The Trade Sanctions Reform and Export Enhancement Act of 2000

Ironically, the only piece of legislation that may restrict executive authority is the one that was designed to loosen the trade embargo. In 2000, a bipartisan group of lawmakers helped enact the Trade Sanctions Reform and Export Enhancement Act (TSRA). The law, which was championed by the likes of Attorney General John Ashcroft, Senator Max Baucus (D-Mon.), and Representatives Charlie Rangel (D-N.Y.) and George Nethercutt (R-Wash.), has had a greater practical effect on the Cuba embargo than has Helms-Burton or the Cuban Democracy Act.

The law exempts exports of food, medicine, medical products, and agricultural products from U.S. sanctions. It is because of TSRA that U.S. farmers can sell lentils and poultry to Cuba and medicine and defibrillators to Sudan and the Palestinian Authority. Despite the embargo, the United States is now Cuba's largest source of foreign agricultural imports to the tune of nearly \$500 million per year.

In exchange for exempting humanitarian trade from the embargo, pro-embargo members of Congress championed a provision that prohibits the executive branch from licensing "travel to, from, or within Cuba for tourist activities."²⁵ As a result, one of the most logical steps the president might wish to take, lifting the travel ban, likely would require an act of Congress. "This time, Mr. Diaz-Balart got it right," says Robert Muse, an attorney based in Washington, DC who advises businesses on Cuba.²⁶

The trouble with Congress is that it is unlikely to act without signals and serious leadership from the president. According to an aide to Senate leadership, "Cuba's a tough issue, and I don't think the Senate would take up legislation without some consensus in the caucus."²⁷ Faced with two wars, a troubled economy, and a host of foreign policy problems, it will be difficult to convince Congress to change policy except in very minor ways—for example, by reinstating family travel—that already are sure to be on the mind of the president.

Congress will need to play a role in the full normalization of relations, but it is likely going to be up to the president to initiate change within the boundaries of current law. Luckily for President Obama, the confines put in place by Congress are not terribly limiting. The executive branch has the authority to make significant modifications to the Cuba sanctions program.

About the Author

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Notes

¹ Elizabeth Palmer, “Exiles Talk of PACs and Power, Not Another Bay of Pigs,” *CQ Weekly*, June 23, 1990, p.1929.

² P.L. 102–484, Cuban Democracy Act of 1992 (October 23, 1992), <http://www.treas.gov/offices/enforcement/ofac/legal/statutes/cda.pdf>.

³ “P.L. 104-114, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (March 12, 1996) <http://www.thomas.gov> (herein after: LIBERTAD Act).

⁴ “Section 102 of LIBERTAD Act.

⁵ *Congressional Record*, March 5, 1996, S1480.

⁶ U.S. House of Representatives Cuba Working Group, “A Review of U.S. Policy Toward Cuba,” May 15, 2002, <http://ciponline.org/cuba/uspolicy/hcwg.htm>.

⁷ Saul Hudson, “Castro Handover Seen Unlikely to Change US Policy,” Reuters, August 1, 2006.

⁸ Section 4 of LIBERTAD Act.

⁹ “Part 515: Cuban Assets Control Regulations” Electronic Code of Federal Regulations, 31CFR 515, http://www.access.gpo.gov/nara/cfr/waisidx_08/31cfr515_08.html

¹⁰ Serena Moe, email to author, September 29, 2008.

¹¹ United States House of Representatives Committee on Ways and Means, “Overview and Compilation of U.S. Trade Statutes, the ‘2005 Blue Book,’” p.233.

¹² *Cuban Embargo: Selected Issues Relating to Travel, Exports and Telecommunications: Report to the Honorable Dan Burton, Chairman, Committee on Government Reform and Oversight*, (Washington, D.C.: GAO, 1998), p. 30.

¹³ *Ibid.*

¹⁴ “Transcript: Senior U.S. Officials Speak on Cuba Policy,” USIS Washington File, January 5, 1999, http://www.fas.org/irp/news/1999/01/99010506_lpo.html.

¹⁵ See 31 CFR § 515.505(a)(1)(1989-2002) and 31 CFR § 515.506 (1964-1984).

¹⁶ See 31 CFR § 515.505(b).

¹⁷ Commission for Assistance to a Free Cuba, <http://www.cafc.gov>.

¹⁸ “Delahunt Introduces Legislation to Lift Restrictions on Americans Traveling to Cuba,” January 31, 2007, http://www.house.gov/apps/list/press/ma10_delahunt/cubamediaadvisory.html.

¹⁹ Office of the Press Secretary, The White House, “Press Gaggle by Dana Perino and Dan Fisk, NSC Senior Director for Western Hemisphere Affairs,” May 21, 2008, <http://www.whitehouse.gov/news/releases/2008/05/20080521-2.html>.

²⁰ See 31 CFR § 515.533(d). Transactions incident to exportations from the United States and re-exportations of U.S.-origin items to Cuba. “This section does not authorize any exportation under License Exception GFT, 15 CFR 740.12, except gift parcels that contain only food, vitamins, seeds, medicines, medical supplies and devices, hospital supplies and equipment, equipment for the handicapped, clothing, personal hygiene items, veterinary medicines and supplies, fishing equipment and supplies, soap-making equipment, or certain radio equipment and batteries for such equipment, as specifically set forth in 15 CFR 740.12, and that otherwise comply with the requirements of that section.”

²¹ William A. Reinsch, email message to author, October 27, 2008.

²² William J. Clinton, “Statement on Cuba,” The American Presidency Project, March 20, 1998, <http://www.presidency.ucsb.edu/ws/index.php?pid=55654&st=cuba&st1=>.

²³ “Press Gaggle by Dana Perino and Dan Fisk.”

²⁴ “Section 112 of LIBERTAD Act.

²⁵ Title IX of P.L. 106-387, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, October 28, 2001, <http://www.thomas.gov>; Ted Barrett, “House Leaders Agree to Lift Food and Medicine Embargo Against Cuba,” CNN.com, <http://archives.cnn.com/2000/ALLPOLITICS/stories/06/27/cuba.sanctions/index.html>.

²⁶ Robert L. Muse, “The Current Embargo on Cuba: What is Required to End it and How Might that Happen?” (remarks, Imperatives for a New Cuba Policy conference, Washington, D.C., October 16, 2007).

²⁷ Senate leadership aide, email message to author. October 7, 2008.