

Repealing the US Embargo on Cuba: The Legislative Process in the US Congress

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When President Obama announced he would direct his administration to start normalizing relations with Cuba several weeks ago, there was one giant catch: the embargo against Cuba would still remain in place. As Obama noted, the embargo has been codified in legislation. He announced his intention to engage with Congress about lifting the embargo. But with both chambers of Congress now in the hands of a party whose entire platform for the last six years has been opposing Obama, it doesn't appear likely. But the reality is that Obama doesn't need Congress's permission. As he did when he announced he would defer deportation for certain undocumented residents, Obama can – and should – act on his own.

The embargo against Cuba started in October 1960 after Cuba exercised its sovereign right to nationalize U.S. properties. The move came as a response to the Eisenhower administration's cancellation of the sugar quota, which stipulated the import of 700,000 tons of sugar from Cuba. The administration had also prohibited delivery of oil to the island, forcing Cuba to buy from the Soviet Union. On Washington's orders, multinational oil companies refused to refine the Soviet oil, leaving Cuba no choice but to nationalize the companies.

The embargo was formalized by President John F. Kennedy on February 3, 1962 by executive order. The Foreign Assistance Act the previous year had declared that "the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba." When Kennedy proclaimed a total embargo, he applied the Trading With the Enemy Act of 1917 to impose it.

The Trading With the Enemy Act (TWEA) prohibits trade or attempt to trade, directly or indirectly, with an enemy. Pursuant to this act, the U.S. government issued the Cuban Assets Control Regulations on July 8, 1963. These regulations apply to all individuals and entities subject to U.S. jurisdiction, whether they are in the United States or abroad. The regulations prohibit "all dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person." They also prohibit transfer of credit, payments through banking institutions, and other restrictions.

Travel to Cuba is banned without an OFAC license, which may be granted to people visiting close relatives, journalists, professionals conducting research, or people pursuing certain educational programs. Violation of the regulations may lead to criminal penalties of up to 10 years in prison, \$1 million in corporate fines, and \$250,000 in individual fines. Additionally, civil penalties of up to \$65,000 per violation may be imposed.

Since Kennedy first implemented the Cuban Assets Control Regulations, each subsequent President chose to extend them. In 1996, Congress enacted the Helms-Burton Act (Cuban Liberty and Democratic Solidarity Act of 1996). Bill Clinton signed the act into law, eager to pander to the politically influential right-wing Cuban exile population in Miami and New Jersey, notorious for their fanatical opposition to Castro – and social justice.

Helms-Burton enshrined the power to enforce the embargo with Congress itself. The act states that “The President shall instruct the Secretary of the Treasury and the Attorney General to enforce fully the Cuban Assets Regulations set forth in part 515 of title 31, Code of Federal Regulations.”

So to undo the embargo Congress would seemingly have to repeal the Helms-Burton Act, otherwise the President’s hands would be tied. Except in reality the regulations the President is ordered to enforce are not valid, and should not be legally binding on him. This is because there is no legal merit for the regulations against Cuba, which are written based on the application of enemy status to Cuba.

But Cuba does not meet the definition of an enemy. According to the TWEA, an “enemy” is defined as “any individual” or “the government of any nation with which the United States is at war.” The act specifies that the “beginning of the war” is “midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.”

In case you haven’t noticed, Congress has never declared war on Cuba. In fact, they haven’t declared war at all since they did so on Japan and Germany in 1941 – not on Korea, Vietnam, Cambodia, Laos, Grenada, Nicaragua, Panama, Afghanistan, Iraq, or any other country. So there is no legal authority for applying the TWEA to Cuba.

The entire set of Cuban Asset Control regulations in the Treasury code are illegitimate. If Cuba is not an enemy, you cannot use a law that only applies to enemies as the basis for a set of rules promulgated under that law.

The President can use his executive power to repeal regulations that have no legal force behind them. If Congress wants the President to continue enforcing the embargo, they would have to amend the TWEA to modify the definition of an enemy, or pass a new law that gives the President the power to enforce an embargo against a country when the United States is not at war with that country.

Repeal of the Treasury regulations would open up travel for American citizens to Cuba and allow most trade between the two countries. There are various other provisions of the embargo that would remain. However, many of these provisions are in direct violation of international law and are also illegitimate.

The Cuban Democracy Act of 1992, sponsored by Robert Torricelli, prohibits subsidiaries of U.S. companies in third countries from trading with Cuba. If a U.S. bank has a subsidiary in, say, France, then the subsidiary is a French company who is not subject to U.S. law, regardless of any affiliations. It would be subject only to French law, as U.S. subsidiaries of foreign companies are only subject to U.S. law.

The Torricelli act also calls for “sanctions against any country that provides assistance to Cuba” and prohibits ships that have docked in Cuba from docking anywhere in the United States for a period of 180 days. These provisions are both extraterritorial, in that they apply

to sovereign governments and entities outside of the jurisdiction of domestic U.S. law.

In the Helms-Burton Act, there is a provision that subjects foreign companies who took over nationalized properties that had belonged to Cuban citizens to prosecution in U.S. courts.

This is in clear contravention of the principles of the United Nations Charter and international law. The international community has long demanded that the United States follow its obligations under international law and stop enforcing the embargo against Cuba. In October, for the 23rd straight year the United Nations General Assembly voted nearly unanimously calling for the end to the “economic, commercial and financial embargo.”

“By the terms of the text, the Assembly reiterated its call upon States to refrain from promulgating and applying laws and regulations, such as the 1996 Helms-Burton Act, the extraterritorial effects of which affected the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation,” the General Assembly said in a press release.

Under the U.S. Constitution, treaties such as the United Nations Charter are to be considered the “supreme law of the land.”

Professor David Koplow writes that “treaties and international law ... occupy the apex of the legal pyramid and all domestic authorities of any particular country ... are subsidiary. A country may not, under this system, interpose domestic law as a justification for its failure to meet treaty requirements. If it could, there would not be much point in concluding such agreements.”

The Torricelli Act and Helms-Burton Act should not be given priority by the President over the U.S.’s treaty obligations - including the fundamental U.N. Charter - which they directly contradict.

If Obama were to invalidate the Treasury Regulations to do away with the embargo, he would still presumably have the authority under the Foreign Assistance Act to enforce an embargo against Cuba. But it would be just an option, not an obligation. If Obama wants to stop the embargo, he doesn’t need Congress’s permission. He can just direct his administration to remove the regulations that have been illegally applied by the U.S. government against its citizens and against Cuba for the last 51 years.

Obama has showed he is willing to use his executive authority on other issues, most recently on immigration in November. What he may not be willing to do is expose the fraudulent underpinnings of one of the most widely detested policies in the history of international relations.

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