

THE EXCEPTION SHOULD NOT BE THE RULE

QUICK STATS

- ✘ **CONFERENCE:** Regulation
- ✘ **TEAM:** Departments of Commerce and the Treasury
- **FUMBLE:** Invoking “foreign affairs” exceptions in the rulemaking process to issue rules quickly and without deliberation
- **HOW TO RECOVER THE BALL:** Only use the exception in instances where it is truly necessary

In 1946 Congress enacted the Administrative Procedure Act (APA), which lays out the process for administrative rulemaking. The APA has exemptions for several categories, one of which is foreign affairs. Any rules that involve a “foreign affairs function” are exempt from the rulemaking procedures, which means the Administration does not have to provide any notice and the public is not given an opportunity to comment on the proposed rule. The rule can just be announced and enforced. While the exception is important for matters of national security—especially those that are time sensitive and necessary to quickly protect citizens—it is not intended to be an absolute. It was designed to be used in cases that would “clearly provoke definitely undesirable international consequences.”³²⁶

To meet President Obama’s announced policy changes regarding travel and trade with Cuba on December 17, 2014, both Treasury³²⁷ and DOC³²⁸ used the foreign affairs exception to publish new rules on the U.S.’s relationship with Cuba. The U.S. has not had formal diplomatic relations with Cuba since 1961, and as the President noted, Cuba remains a nation governed by the Communist Party. After multiple letters back and forth among the agencies involved, neither could identify a

time-sensitive reason to invoke the foreign affairs exception. Given this drastic shift in American foreign policy, the public should have been afforded an opportunity to comment—especially those Cuban-American families who have been impacted by the Castro regime. Providing notice and seeking input from the American people is surely not an undesirable consequence.

RECOVERY

Congress should work with the Administration to tighten the foreign affairs exemption to ensure that necessary leeway remains when making foreign policy decisions and that rules that change decades of U.S. policy are created with public input. The President cannot just create a new policy that allows him to make any change in any regulation as long as he says it is for “foreign affairs.”

We are still a nation of the people, by the people, and for the people. If anyone in Washington, DC, cuts out the American people from the process, we have centralized power and silenced the voices of millions of people. There is a right thing to do and a right way to do it.

[For more information, please visit:](#)

[DOJ: Administrative Procedure Act: Report of the Committee on the Judiciary](#)

[DOC: Fact Sheet: U.S. Department Of Commerce and U.S. Department Of The Treasury Announcement Of Regulatory Amendments To The Cuba Sanctions](#)