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BEYOND THE LAW: THE BUSH ADMINISTRATION'S RESTRICTIONS ON EDUCATIONAL TRAVEL TO CUBA

WAYNE S. SMITH*

[J]udges as a class are naturally sympathetic toward arbitrary power, for their own authority rests on it.

—H.L. Mencken, *Vive le Roi!* (1933)¹

For the past quarter of a century, I have been an Adjunct Professor of Latin American Studies at the Johns Hopkins University, from 1983 until 1992 at its School of Advanced International Studies (SAIS) in Washington, D.C., and since 1992 at the main campus in Baltimore.

From 1994 forward, I was director of the exchange program with Cuba. During all those years, until 2006, Hopkins had a very active academic exchange program with Cuba, initially with their Center for the Study of the United States. We did conferences with them, took our students to Cuba for study programs, and brought their scholars to the U.S. for periods of two to three months to do various research projects. Unfortunately, in 1996, this two-way flow came to an end as the State Department by and large stopped giving visas to Cuban scholars intending to come to the U.S.² We, however, continued to take our students to Cuba for intersession programs. Some fifteen to twenty students would spend three weeks in Cuba in January, between semesters, to study some aspect of Cuban politics, culture, history, or its economy. In January of 1998, for example, we were able to hold the program during the Pope's visit to Cuba, and so the focus that year was of course on

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1. Reprinted in H.L. MENCKEN, *ON POLITICS: A CARNIVAL OF BUNCOMBE* 287 (1956).

2. See, e.g., Joseph L. Birman & Joel Lebowitz, Editorial, *Cuban Scientists Are Still Barred From U.S.*, N.Y. TIMES, Apr. 29, 1997, at A22 (complaining that Cuban academics and scientists, despite promises made by Clinton in 1995 that he would ease travel difficulties, were being denied visas). Since Clinton's promise, two planes belonging to American activist group Brothers to the Rescue were shot down by Cuban fighter planes on February 24, 1996, prompting an anti-Cuban legislative response. See Jerry Gray, *President Agrees to Tough New Set of Curbs on Cuba*, N.Y. TIMES, Feb. 29, 1996, at A1.

religion in Cuba.³ We often took a smaller group, usually six to eight students, for a three-week course in June on Cuba's Public Health System.

These intersession programs were a great success and were especially popular because they led to wide exchanges between Cuban scholars and programs, and because they were sharply focused and did not interfere with graduation. Our students were not interested in semester-long courses which would have delayed their graduation schedules.

I. OFAC ACTION ENDS MOST STUDY PROGRAMS IN CUBA

For all practical purposes, the program came to an end on June 16 of 2004, when the Treasury Department's Office of Foreign Assets Control (OFAC) changed the rules (by amending 31 C.F.R. § 515.565). There were three major changes:

First, short term courses were now ruled out. All courses now had to be at least ten weeks in duration, i.e., semester long programs.⁴

Second, now only full-time professors would be allowed to teach courses in Cuba. Adjuncts, such as myself, were barred from participation.⁵

Third, students could now only take courses in Cuba if those courses were offered by their own colleges or universities, i.e., where they were actually enrolled in a degree program.⁶ This wildly departed from the norm. Study abroad programs offered by one academic institution had traditionally been open (if there was space) to the students of other institutions. And everywhere else, whether it be in France, Russia, the U.K., Brazil, China, or any other country in the world, that continued to be the case. But not in Cuba.

Preventing me from teaching, however arbitrary and prejudicial to my constitutional rights as that was, did not in itself mean the termination of our courses in Cuba. Other Hopkins professors could possibly have taught them. But as stated earlier, our students did not want to take semester-long courses that would have delayed their graduation. Hence, as the 2004 amendments became effective, Hopkins could not offer the intersession programs it had offered since 1997. In effect, it had to put on hold the bulk of its Cuba Exchange Program.

3. See Joanne Cavanagh, *Back From Cuba*, *JOHNS HOPKINS GAZETTE*, Feb. 2, 1998, available at <http://www.jhu.edu/~gazette/janmar98/feb0298/cuba.html> (describing the intersession trip during the Pope's historic visit to Cuba).

4. 31 C.F.R. § 515.565(a)(1).

5. *Id.* § 515.565(a)(4). When we took this to court, the defendants argued that this requirement existed prior to 2004, and that the amendments only attempted to "further clarify]" this condition. *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treas.*, 498 F. Supp. 2d 150, 154 (D.D.C. 2007).

6. 31 C.F.R. § 515.565(a).

Nor was Hopkins the only academic institution affected. As our lawyer, Robert Muse, and I looked into the matter, it became apparent that the impact of the rule changes dictated by OFAC had been little short of cataclysmic. In the period preceding the changes on June 16, 2004, some 760 licenses had been issued to colleges and universities authorizing their faculties and students to teach and study in Cuba.⁷ Within six months of the OFAC action, all but a handful had closed their programs in Cuba.⁸

A. *The Formation of the Coalition to Defend Educational Travel (ECDET)*

We communicated with many of these institutions and in an effort to address our mutual problem (being brought on by OFAC's rule changes) we formed an Emergency Coalition for the Defense of Educational Travel (ECDET). Some 450 academics from colleges and universities across the country joined. I became Chairman. ECDET's purpose from its inception was to make every effort to have these new rules removed, as we considered them arbitrary in the extreme and in violation of our academic freedoms.⁹

B. *Why the OFAC Rule Changed on June 16, 2004*

OFAC's rule changes were based on recommendations made by the President's Commission for Assistance to a Free Cuba.¹⁰ The recommendations were authored principally by two State Department appointees, Dan Fisk and Roger Noriega, both of whom had worked for Senator Jesse Helms.

The report was released a few months before the 2004 presidential elections.¹¹ The formation of the Commission and its recommendations were seen by many as an electoral ploy designed to shore up the Presi-

7. *Castro's Cuba: What is the Proper U.S. Response to Ongoing Human Rights Violations in Our Hemisphere?: Hearing Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Gov't Reform*, 108th Cong. 66 (2003) (prepared statement of R. Richard Newcomb, Office of Foreign Assets Control) [hereinafter *Castro's Cuba*].

8. This information was obtained through a mass email survey conducted by ECDET's attorney in 2004–05. Cf. ECDET Report on Educational Trips to Cuba That Have Been Cancelled, <http://www.ecdet.org/tripscanceled.htm> (last visited Jan. 20, 2009) and ECDET Links, <http://www.ecdet.org/links.htm> (last visited Jan. 20, 2009) (listing only five "Existing Exchange Programs").

9. See ECDET Talking Points: How Does The Travel Ban Affect Educational Travel and Academic Freedoms?, http://www.ecdet.org/talking_points.htm (last visited Jan. 8, 2009).

10. See 69 Fed. Reg. 33,768; 2004 WL 1330092 (June 16, 2004) (discussing the background of the rule change).

11. COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT (May 2004), <http://www.state.gov/documents/organization/32334.pdf> [hereinafter 2004 Report].

dent's support in the Cuban-American community.¹² Certainly the Commission offered no evidence at all that there had in fact been any abuses of the regulations governing educational travel. It simply stated that "academic institutions regularly abuse [the] license category and engage in a form of disguised tourism."¹³

Having created its pretext, the Commission Report went on to its pre-ordained recommendation to the President:

Eliminate abuses of educational travel by limiting educational travel to only undergraduate or graduate degree granting institutions and only for full-semester study programs, or for shorter duration only when the program directly supports U.S. policy goals[,] requiring that the travelers be enrolled in a full-time course of study at the licensed institution.¹⁴

But not only was there no evidence of abuses pointed to in the Report, the testimony of OFAC Director Newcomb suggested the exact opposite—that all was going well. For example, in testifying before Congress on October 16 of 2003 concerning his Office's enforcement of the regulations, Newcomb said that:

OFAC continues to authorize academic study in Cuba pursuant to a degree program at an accredited U.S. academic institution. To date, OFAC has issued 760 two-year specific licenses to accredited U.S. colleges and universities for this purpose, as well as numerous licenses to individual undergraduate and graduate students seeking to pursue academic study in Cuba where their academic institution has not applied for an institutional license. OFAC will continue to license educational exchanges pursuant to accredited academic activities.¹⁵

It is striking that the OFAC Director made no mention at all of abuses—only months before these programs were terminated precisely because abuses were allegedly so widespread!

II. ECDDET FILES SUIT

Having carefully reviewed the case and determined that OFAC's actions were arbitrary and in violation of our constitutional rights, ECDDET brought suit to have the rules imposed in June of 2004 removed. We were represented by Robert Muse, a Washington D.C. lawyer with many years of experience in such matters.

12. See, e.g., Christopher Marquis, *Bush Proposes a Plan to Aid Opponents of Castro in Cuba*, N.Y. TIMES, May 7, 2004, at A6 (quoting Rep. Robert Menendez as stating, "The need and timing of a White House Cuba Commission and its release of a report today is highly dubious and politically transparent").

13. 2004 Report, *supra* note 11, at 30.

14. *Id.* at 32.

15. See *Castro's Cuba*, *supra* note 7, at 66.

I was a plaintiff. Of course I was, given OFAC's arbitrary rule banning adjunct professors from teaching in Cuba, a rule which OFAC never made any effort to justify or explain. Dr. John Cotman of Howard University was also a plaintiff. He had been injured by OFAC's prohibitions on teaching another institution's courses in Cuba (he had been a guest lecturer) and also by its rule that courses be at least ten weeks in duration.

And, finally, three Hopkins students, at first Jessica Kamen and Adnan Ahmad, and then Abbie Wakefield, were plaintiffs inasmuch as they had been denied the opportunity to take Hopkins intersessional courses in Cuba.¹⁶

A. *Our Case*

As Muse put forward our case, it challenged the new regulations because they interfered with our academic freedom and thus violated the First Amendment to the Constitution, and also interfered with freedom to travel and thus violated the Fifth Amendment as well.¹⁷ We also challenged the new regulations under The Administrative Procedure Act (APA),¹⁸ arguing that the restrictions on educational travel were not rationally related to the purpose of the Trading With the Enemy Act (TWEA)¹⁹ and were arbitrary, capricious, and otherwise not in accordance with the law.²⁰

B. *First and Fifth Amendment Protections*

OFAC's June 2004 rule changes violate what Supreme Court Justice Felix Frankfurter called the "four freedoms" of a university, i.e., the freedom to determine who may teach, what may be taught, how it should be taught, and who may study.²¹

First, the regulations violate the freedom to determine "who may teach" by decreeing that only a "full-time employee" of a licensed college or university may teach a course in Cuba.²² The consequences of this new rule are as obvious as they are deleterious to academic freedom. For

16. *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treas.*, 498 F. Supp. 2d 150, 154–55 (D.D.C. 2007); Compl. ¶¶ 5–8, 498 F. Supp. 2d 150 (D.D.C. June 13, 2006) (No. 1:06CV01215).

17. *Cf. Kent v. Dulles*, 357 U.S. 116 (1958) (establishing a right to international travel in the Fifth Amendment liberty interest).

18. 5 U.S.C. § 706.

19. 50 U.S.C.App. § 5(b).

20. 498 F. Supp. 2d at 155.

21. *See Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, JOHANNESBURG, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Witwatersrand Univ. Press 1957)).

22. 31 C.F.R. § 515.565(a)(4).

example, a Johns Hopkins course in Cuba on that country's political history can no longer be taught by myself, Wayne Smith, a recognized authority on that subject, since I am an Adjunct Professor. That is capricious and arbitrary in the extreme and certainly does not contribute in any way to the seriousness and professionalism of the courses.

Second, the regulations only permit students enrolled on a full-time basis in a degree program at a licensed college or university to attend a course in Cuba.²³ The inequity of this provision is apparent. How will students attend a course in Cuba if their college or university has not established an academic program in that country? They now cannot. The result will be that students at large, wealthy universities will be far likelier to find a course available to them in Cuba than students at smaller colleges that cannot afford the cost of developing and maintaining academic programs there. Hence, the students at these smaller institutions will be deprived of virtually any opportunity to study in Cuba.

By restricting who may teach courses in Cuba, OFAC also determines what may be taught. And, finally, the requirement that all OFAC-licensed courses in Cuba must be of at least ten weeks duration²⁴ clearly intrudes on an academic institution's right to determine how its courses in Cuba are to be taught, in terms of their content and organization.

Further, as to the right to travel, Congress addressed specifically the question of permitted travel to Cuba by U.S. citizens when it enacted the Trade Sanctions Reform Act (TSRA) in 2000,²⁵ section 910 of which expresses endorsement of and a desire to preserve, free of Executive Branch interference, the twelve categories of travel to Cuba that were in effect on June 1, 2000.²⁶ Educational travel to Cuba was one such category of travel.

C. *Arbitrary Nature of the Rule Changes*

Clearly, any restrictions should have been in response to clear abuses that adversely affected the Executive Branch's restricted legislative mandate under the Trading With the Enemy Act to deny Cuba hard currency. Rather, looked at in the context of the Administrative Procedure Act, the rule changes can only be seen as arbitrary, capricious, and based on no evidence at all.

23. *Id.* § 515.565(a).

24. *Id.* § 515.565(a)(1).

25. Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549, 22 U.S.C. § 7201.

26. 22 U.S.C. § 7209. As explained by TSRA's chief sponsor, Representative George R. Nethercutt, Jr. (R-WA), "Codification eliminated the flexibility of regulators to make further changes to the travel regulations . . . [by] locking in the very limited categories of travel permitted at that point in time." George R. Nethercutt, Jr., Statement Prepared for Freedom to Travel to Cuba Forum (July 15, 2003), available at <http://www.ciponline.org/cubaforum/nethercutttestimony.htm>.

The rule changes at issue here were not the result of a federal agency (OFAC) independently identifying and remedying problems within a program it administered. Rather, the source of its action was entirely external to OFAC. Again, that source was the Report of the President's Commission for Assistance to a Free Cuba.²⁷ This Report, drafted in relevant part by political appointees of the Department of State, is the sole item in the administrative record submitted by the government to the District Court in defense of their challenged action.²⁸ It claimed that there had been "abuses,"²⁹ but no evidence of any kind was advanced to support that conclusion. Moreover, the bare claim of abuses was refuted by the public record of OFAC enforcement actions initiated up to the point of the Report's issuance, a record which showed no violations whatever of OFAC's rules governing academic programs in Cuba.³⁰ Indeed, government defendants never claimed in the District Court that OFAC exercised any independent judgment in denying the right to teach and study in Cuba. Rather, their Statement of Undisputed Material Facts says of the origins of the rule changes: "In response to the President's directive, OFAC modified several portions of the Regulations to incorporate the recommendations of the [Commission's] Report."³¹

In other words, the rule changes were based on the Report and on nothing else, and as indicated above, the Report brought forward no evidence whatever of abuses that would have justified the changes.

But there is no clear justification either for the changes in terms of their supposed purpose, i.e., to deny hard currency to the Cuban government. How, for example, does the new rule that Adjunct Professors cannot teach courses in Cuba in any way reduce the amount of hard currency that might flow to the Cuban government? As I have noted on several occasions, if OFAC is under the impression that Adjunct Professors earn more than their full-time colleagues and are such high-rollers that they would spend more in Cuba, I can disabuse them of that illusion!

Nor is there any logic behind the idea that a ten-week course would result in less revenue to the Cuban government than a three-week course. On the contrary, obviously the very opposite is true. The longer the course goes on, the more money will be spent.

27. See text accompanying notes 10–13 *supra*.

28. See Administrative Record by U.S. Dep't of Treas., 498 F. Supp. 2d 150 (D.D.C. Feb. 2, 2007) (No. 1:06CV01215).

29. 2004 Report, *supra* note 11, at xvii, 32.

30. See U.S. Dep't of Treas., Office of Foreign Assets Control, Civil Penalties and Enforcement Information, <http://www.treas.gov/offices/enforcement/ofac/civpen/index.shtml>. Penalties have been made publicly available since April 2003.

31. Def. Statement of Undisputed Material Facts ¶ 19, 498 F. Supp. 2d 150 (D.D.C. July 19, 2007) (No. 1:06CV01215).

Thus, we argued that the June 2004 restrictions on educational travel failed to advance any genuine economic purpose under the Trading With the Enemy Act. Rather, we suggested that the real purpose, in addition to possible electoral considerations, was to cut off educational contact between Cubans and Americans as part of the Bush administration's general policy of isolating that country and its nationals. Evidence of that is seen in the fact that over the years under the Bush administration only a handful of Cuban academics have secured visas to come to the U.S. None were allowed even to attend the Latin American Studies Association (LASA) conference in San Juan in 2006,³² and in 2007, LASA moved the conference from Boston to Montreal so that a Cuban delegation could attend.³³ And LASA has said that it will hold no more conferences in the U.S. until the barrier to the participation of Cuban scholars is removed.³⁴ That is a shameful position for the United States of America to be in.

D. *The Courts Rule Against Us*

On July 30, 2007, the U.S. District Court for the District of Columbia ruled against us. Among other things, it held that our First Amendment rights to academic freedoms had not been infringed by the new regulations issued in 2004 because the latter were "content neutral."³⁵ They did not interfere with what or how professors teaching short-term courses in Cuba taught their students, nor place any restrictions on what universities and their professors might teach their students about Cuba. They only, said the Court, "restrict them in limited circumstances from teaching students in Cuba."³⁶

Thus, says the Court, "the 2004 CARC [sic] amendments are content neutral, and only incidentally, if at all, burden plaintiffs' First Amendment rights."³⁷

It is a mystery how a court could find that a government regulation that decrees who may teach and attend academic courses and how those courses must be structured only "incidentally" burdened academic freedoms!

32. See DeWayne Wickham, *U.S. Pushes Foolish Policy of "Baseball, Si, Academics, No,"* USA TODAY, Mar. 6, 2006, available at http://www.usatoday.com/news/opinion/columnist/wickham/2006-03-06-wickham-edit_x.htm.

33. See Olga Wojtas, *Better Safe Than Sorry*, TIMES HIGHER EDUC., Mar. 23, 2007, available at <http://www.timeshighereducation.co.uk/story.asp?storyCode=208184§ioncode=26>.

34. See Sanford G. Thatcher, *Promoting Democracy While Suppressing Ideas*, SAN FRAN. CHRON., Sept. 30, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/09/30/EDGBSAN0B.DTL>.

35. 498 F. Supp. 2d 150, 161.

36. *Id.* at 162.

37. *Id.* (citing *Capital Cities/ABC v. Brady*, 740 F. Supp. 1007, 1013–14 (S.D.N.Y. 1990)).

The Court goes on to hold that “given the conclusions of the Commission that the educational travel provisions of the CACR were being abused by some travelers and educational institutions as ‘disguised tourism,’” it “is clear . . . that such restrictions on travel are unquestionably economic” in “purpose”—by “denying hard currency to” Cuba.³⁸

But, as indicated above, they can present no evidence of abuses, nor demonstrate that the regulations in fact have an economic purpose, i.e., that they in fact reduce revenues that might be flowing to the Cuban government. The whole thing is a sham.

In a decision dated November 4, 2008, the U.S. Court of Appeals for the District of Columbia essentially went along with the rulings of the U.S. District Court. It too held that the 2004 regulations were content-neutral and thus did not violate the First Amendment rights of the plaintiffs.³⁹

And in a demonstration of outright intellectual dishonesty, the Appeals Court notes that “appellants also argue that the amendments were promulgated without factual support and therefore violate the [Administrative Procedure Act]. We take it that they are challenging the supposed factual premises of the Commission Report, but these factual issues are intertwined with policy judgments that we have no basis to question.”⁴⁰

Under the APA, an agency must create a record that supports, with real evidence, the action it takes. We pointed out in our Appellant’s Brief that

*[t]he [Commission] Report claimed there were “abuses” in U.S. academic programs in Cuba, but gave no evidence to support that conclusion. In fact, as the District Court was informed by Plaintiffs, the bare claim of abuses in U.S. academic programs in Cuba was refuted by OFAC’s own public record of its enforcement actions initiated up to the point of the Report’s release. That public record (i.e. OFAC’s website) of enforcement actions undertaken and penalties meted out to violators of its Cuban regulations revealed no violations of OFAC’s rules governing academic programs in Cuba.*⁴¹

So, the Court of Appeals simply ignored the indisputable fact that there was no evidence—as required by the APA—to support OFAC’s action in curtailing U.S. academic programs in Cuba because of claimed “abuses” in those programs; and instead found, with no legal support for

38. *Id.* at 165–66 (quoting *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991)).

39. *Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of Treas.*, 545 F.3d 4, 12–13 (D.C. Cir. 2008), *affirming* 498 F. Supp. 2d 150.

40. 545 F.3d at 14 n.6.

41. Brief of Appellant at 10, 545 F.3d 4, No. 07-5317 (D.C. Cir. May 30, 2008) (emphasis added).

such a position, that such evidence was not required if it was “inter-twined” with policy judgments. In any event, what did the Appeals Court think is legal reasoning if it is not the intertwining of facts with policy judgments to determine if evidence existed to support those judgments? The motive in the Court’s action would seem to be to deflect attention from the fact that there was no evidence in the administrative record to support the government’s policy judgment to shut down the U.S. academic programs in Cuba.

E. *Our Response to the Courts*

As the judges of the Appeals Court must of course know, the Administrative Procedure Act requires that an agency produce a record that supports, with “substantial evidence,”⁴² the action taken. But the government produced not a shred of evidence that there had been abuses to the regulations that had existed prior to June 16, 2004. The District Court and the Appeals Court simply ignored the indisputable fact that there was no evidence—as required by the Administrative Procedures Act—to support OFAC’s action in curtailing U.S. academic programs in Cuba because of alleged “abuses” in those programs.

This is a position which will not withstand the light of day.

CONCLUSIONS

If one expected fair and honest judgments on the part of the courts, one would come away from this case disillusioned. The judgments in this case were anything but fair and honest. Fortunately, the elections of November 2008 have produced a change of Administrations and there is now every possibility of having the offending regulations arbitrarily imposed by the Bush Administration on June 16, 2004 removed by the executive order of the incoming Obama Administration.⁴³ Justice may yet be done, but no thanks to our federal courts.

42. 5 U.S.C. § 706.

43. See, e.g., William Booth, *In Cuba, Pinning Hopes on Obama*, WASH. POST, Jan. 7, 2009, at A8 (noting the expectations of many that Obama will promote more open relations with Cuba).