

10-1-1994

Constricting the Clave: The United States, Cuban Music, and the New World Order

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Leslie José Zigel, *Constricting the Clave: The United States, Cuban Music, and the New World Order*, 26 U. Miami Inter-Am. L. Rev. 129 (1994)

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COMMENT

CONSTRICTING THE CLAVE: THE UNITED STATES, CUBAN MUSIC, AND THE NEW WORLD ORDER¹

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1. The description of events in this Comment is complete as of April 16, 1995.

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I. INTRODUCTION

Are politics our enemy?

Are governments our enemy?

Can music be our enemy?

Can we have a good time?

Is a music communist?

Can it be capitalist?

*Do you enjoy it more either way?*²

These questions, from the liner notes to a recent album of Cuban music, aptly raise the issue of whether current United States ("U.S.") immigration policy toward Cuban musicians is sensible. Under Proclamation 5377 —Suspension of Entry as Non-immigrants by Officers or Employees of the Government of Cuba or the Communist Party of Cuba ("Proclamation 5377")—,³ it is almost impossible for commercially popular Cu-

2. Liner Notes, CUBA CLASSICS 2, INCREDIBLE DANCE HITS OF THE 60'S & 70'S, DANCING WITH THE ENEMY (Luaka Bop/Warner Brothers 1991).

3. Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985) [hereinafter Proclamation 5377]. Proclamation 5377 was promulgated by President Ronald Reagan on October 4, 1985 and effectively bars the granting of visas to all Cuban non-immigrants. It states in part:

I, Ronald Reagan . . . [find] that the unrestricted entry of officers and employees of the Government of Cuba or the Communist Party of Cuba into the United States would, except as provided in Section 2, be detrimental to the interests of the United States, [and] do proclaim that:

Section 1. Entry of the following classes of Cuban nationals as nonimmigrants is hereby suspended: (a) officers or employees of the Government of Cuba or the Communist Party of Cuba holding diplomatic or official passports; and (b) individuals who, notwithstanding the type of passport that they hold, are considered by the Secretary of State or his

ban musicians to perform in the U.S. In special circumstances, the U.S. State Department may grant a waiver⁴ allowing Cuban musicians to perform. Unlike their colleagues from other lands, however, Cuban musicians cannot seek remuneration for their U.S. performances.⁵ This legal regime has effectively constricted the *clave*⁶ and barred U.S. citizens from hearing live perfor-

designee to be officers or employees of the Government of Cuba or the Communist Party of Cuba.

Sec. 2. The suspension of entry as nonimmigrants set forth in Section 1 shall not apply to officers or employees of the Government of Cuba or the Communist Party of Cuba: (a) entering for the exclusive purpose of conducting official business . . . (b) in the case of experts on a mission of the United Nations and in the case of individuals coming to the United States on official United Nations business . . . ; or (c) in such other cases or categories of cases as may be designated from time to time by the Secretary of State or his designee. *Id.*

Proclamation 5377, § 2(c) grants the State Department full discretion in deciding whether or not to waive the bar in any given case.

4. See Proclamation 5377, *supra* note 3, at § 2(c).

5. This is a direct result of the Cuban Assets Control Regulations, 50 U.S.C. §1701, which bar payments to Cuban nationals by U.S. citizens. See *infra* part IV.B.

6. The "*clave*" is the two bar rhythmic spine (notated in musical form as follows:

Rumba *clave* 3:2:  ; or alternatively,

Rumba *clave* 2:3: 

which underlies most Cuban music, including such popular musical styles as the Mambo (more commonly known as Salsa), Guaguanco, Cha-cha-cha and Rumba. *Clave* is used here to illustrate the ways in which Proclamation 5377 is constricting art from entering the musical marketplace of ideas for enjoyment and cultural interchange by those living in the U.S.

The *clave* rhythm is heard in many U.S. popular songs. The U.S. popular song *Louie, Louie*, by Richard Berry, takes its famous three-chord riff from *El Loco Cha Cha*, by Rene Touzet (Rene Touzet was a U.S. West Coast band leader in the 1940-50's and was of Cuban origin); the infamous *Hound Dog*, performed by Elvis Presley and written by U.S. composers Leiber & Stoller incorporates the characteristic *son* bass. Telephone Interview with Ned Sublette, Producer, *National Public Radio Afropop Worldwide*, and Founder, *QBADISC Records* (Mar. 25, 1995)[hereinafter Sublette Telephone Interview]; Telephone Interview with Arturo Gomez, Program Director, *WDNA Radio Miami* (Apr. 7, 1995). According to one commentator, "*Do You Want to Know a Secret* and *Hang on Sloopy* transform the *cha-cha-cha* into classic pop, and Bo Diddley's shave-and-a-haircut beat happens to be a textbook *clave*, the elegantly insinuating syncopated rhythm that defines Cuban *son* and *salsa*." *Cuban Music: Good to Go*, N.Y. NEWSDAY (Nassau and Suffolk Edition), October 31, 1993, § Fanfare, at 17.

Mardi Gras Indians in New Orleans have incorporated the rhythm into their music. And jazz musicians like Henry Roland Byrd (aka Professor Longhair) have incorporated the *clave* into their music. Sublette Telephone Interview, *supra*; hear generally ROCK N' ROLL GUMBO (Dancing Cat Records 1985); MARDI GRAS IN BATON ROUGE (Rhino/Bearsville 1991). See also, Robert Palmer, *The Cuban Connection*, SPIN MAG. (1989).

In more diluted forms, the *clave* is evidenced in songs made popular by BUD-

mances⁷ of the rich Afro-Cuban musical tradition.⁸

This effect is a by-product of the U.S. embargo against Cuba. The U.S. State Department argues that the embargo is justified given Castro's dictatorial rule,⁹ human rights record,¹⁰ and

BY HOLLY AND THE CRICKETS, *Not Fade Away*, on THE BUDDY HOLLY STORY (Relativity Records 1989), GRATEFUL DEAD, *Not Fade Away*, GRATEFUL DEAD (Warner Brothers 1971), and NEVILLE BROTHERS, *Brother John/Aiko Aiko*, on TREACHEROUS (Rhino Records 1988).

"From the Yoruba region of what is now Nigeria, Cuba got the slaves who worked the land that the conquistadores had stolen from the island's indigenous people. In its purest form, the rumba is living evidence of how the black Cubans grafted the vocal styles and Catholic trappings of their Spanish masters onto the rhythms and religion of their homeland." Jeff Kaliss, *Good Vibes from Cuba Rumba Masters Los Muñequitos de Matanzas*, S.F. CHRON., Aug. 7, 1994, at § Sunday Datebook, 29. For a description of African rhythmic influences in the Western Hemisphere, see generally VERNON BOGGS, *SALSIOLOGY* (1992); LINCOLN GOINES & ROBBIE AMEEN, *FUNKIFYING THE CLAVE* (Daniel Thress ed., 1990); CHRIS MCGOWAN & RICARDO PESSANHA, *BRAZILIAN SOUND* (1991); JOHN STORM ROBERTS, *THE LATIN TINGE* (1979).

The constitutionally protected right to free exercise of religion is implicated by this policy where adherents of Santeria, an Afro-Cuban religion, incorporate many Afro-Cuban musical elements into their daily practice. See Susan Benesch, *Amid Political Uncertainty, Cubans Put Faith in Religion*, SAINT PETERSBURG TIMES (Florida), June 1, 1992, at 1A; and Richard Gehr, *Cuban Music: Good to Go*, N.Y. NEWSDAY (Nassau and Suffolk Edition), October 31, 1993, § Fanfare, at 17. See generally, *Church of Lukumi Babalu Aye v. Hialeah*, 113 S.Ct. 2217 (1993).

7. See *infra* note 75 and accompanying text. See also *infra* part III; Pamela S. Falk, *Broadcasting from Enemy Territory and the First Amendment: The Importation of Informational Materials from Cuba under the Trading With the Enemy Act*, 92 COLUM. L. REV. 165 (1992).

8. The Afro-Cuban musical tradition crossed-over to American mainstream audiences in the 1950s by virtue of the *I Love Lucy* show, which featured musical performances by Desi Arnaz and his Orchestra. The era is well-documented in a Pulitzer Prize winning novel, OSCAR HIJUELOS, *THE MAMBO KINGS PLAY SONGS OF LOVE* (1990). While the main characters in this book are fictionalized, they interact with true musicians from the Afro-Cuban musical tradition of the 1950s. See also Wil Haygood, *Beat Author; With the shooting of the film version of The Mambo Kings Play Songs of Love starting this winter, Pulitzer Prize-winning author Oscar Hijuelos is singing his own song of success*, BOSTON GLOBE, Nov. 18, 1990, (Magazine), at 18p.

9. See generally PHILIP BRENNER, *FROM CONFRONTATION TO NEGOTIATION: U.S. RELATIONS WITH CUBA* (1988); MORRIS H. MORLEY, *IMPERIAL STATE AND REVOLUTION: THE UNITED STATES AND CUBA, 1952-1986* (1986); THOMAS G. PATERSON, *CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION* (1994); Juan A. Blanco, *Cuba: Utopia and Reality Thirty Years Later*, in *THE CUBAN REVOLUTION INTO THE 1990'S* (Centro de Estudios Sobre America ed., 1992).

10. *America's Watch, Tightening the Grip: Human Rights Abuses in Cuba*, Feb. 24, 1992; AMERICA'S WATCH REPORT, *THE TREATMENT OF POLITICAL PRISONERS IN CUBA AND THE AMERICAN RESPONSE* (Sept. 1983); AMNESTY INTERNATIONAL, 1993 REPORT (Annual report on the state of human rights by Amnesty International).

unlawful expropriation of property owned by U.S. citizens.¹¹ As stated by U.S. State Department Office of Cuban Affairs Coordinator, Dennis Hayes:

Cuba is today the only non-democratic regime in the Western Hemisphere. The U.S. Government has long pressed the Government of Cuba to end its pattern of widespread human rights abuses, to allow the Cuban people to select their government through free and fair elections,¹² to end its repression of free expression and the right of association, and to engage in meaningful economic reform. An integral component of current U.S. policy towards Cuba is maintaining the integrity of the comprehensive embargo against Cuba. . .

With the end in recent years of large Soviet subsidies to Cuba, the Cuban Government is exploring new ways to earn hard currency, which it uses to sustain its repressive structures. Accordingly, a central objective of the economic embargo and our overall foreign policy towards Cuba is to seek to deny the Castro regime hard currency. This policy has implications for the admission into the U.S. certain Cuban non-immigrant applicants, including professional Cuban musicians and entertainers. Even where they perform for no fee in the U.S., permitting professional Cuban musicians and entertainers to perform in the U.S. provides them with significant exposure and enhances their marketability worldwide. This provides support for the Cuban Government's entertainment industry, increases exports of Cuban commodities, and augments the Cuban Government's hard currency reserves.¹³

11. See *infra* part II.A.

12. While the U.S. has pressed Cuba for democratic change, it has often supported the non-democratic installation of dictatorial regimes in Latin America. See *U.S. Neighbors, The Big Stick, Major Intervention in the Americas*, MIAMI HERALD, Sept. 27, 1994, at 28A; see also *infra* notes 62 and 65.

13. Declaration of Dennis K. Hays, December 16, 1994, Coordinator of Cuban Affairs in the Department of State in declaration filed in *Encuentro Del Canto Popular, Accion Latina, Global Exchange, Pastors for Peace, et al, v. Warren Christopher, Secretary of State, Office of Cuban Affairs, a division of the United States Department of State, Dennis Hayes, Coordinator, Office of Cuban Affairs, et al* (N.D. Ca 1994) (No. C-93-4221 VRW) at paras. 4 & 5 [hereinafter *State Department Declaration*].

The Cuban Assets Control Regulations governing the embargo mirror the State Department assertions stating:

[The embargo's goals are] to isolate Cuba economically and deprive it of U.S. dollars . . . Goods and services of Cuban origin may not be imported into the United States either directly or through third countries, such as Canada or Mexico . . . The only exceptions are . . . publications, artwork, or other

The State Department grants waivers based on the commercial viability of the artist and whether the publicity will generate sales of that artist's records inuring financial benefits to the artist and ultimately bring hard currency to Cuba.¹⁴ Based on this policy, the State Department is more inclined to grant waivers to Cuban folkloric artists rather than popular artists.¹⁵

Is it logical to extend this anti-Castro policy¹⁶ against a piano player who performs a varied repertoire including renditions of American jazz standards and Lennon/McCartney songs¹⁷ simply because he is a Cuban citizen?¹⁸ If one believes

informational materials.

What You Need to Know About the U.S. Embargo. An Overview of the Cuban Assets [sic] Control Regulations, Title 31 Part 515 of the U.S. Code of Federal Regulations. (Information pamphlet supplied by the U.S. Department of the Treasury office of Foreign Assets Control) [hereinafter WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO]. "Penalties for violating the sanctions range from up to ten years in prison, \$1,000,000 in corporate and \$250,000 in individual fines." *Id.*

14. See State Department Declaration, *supra* note 13 at para. 5.

15. *Id.* at para. 7.

16. Anti-Castro sentiment raises heated passions, particularly in Dade County, Florida, an area labeled "the capital of the Cuban exile." Lisa Arthur, *Called Foul: July 4 USA vs. Cuba Game*, MIAMI HERALD, Mar. 16, 1995, at 1B (quoting Modesto Castaner, vice-president of the anti-Castro group Cuban Unity). Alarmed by the prospect of a baseball game to be held in Dade on the 4th of July between the Olympics-bound American and Cuban teams, anti-Castro groups fumed. South Florida Representative Ileana Ros-Lehtinen described the scheduled game as "just the cruelest of ironies," and Ninoska Perez, spokesperson for the Cuban American National Foundation, said, "[I]t's impossible for the exile community to view this as just a sports event. Castro will use the game as a propaganda tool." *Id.* at 3B. Castaner stated that if the game was held, the likely demonstrations would be "not against the players but against the Castro regime." *Id.* See also AMERICAS WATCH AND FUND FOR FREE EXPRESSION, DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY (1992); AMERICAS WATCH AND FUND FOR FREE EXPRESSION, DANGEROUS DIALOGUE REVISITED: THREATS TO FREEDOM OF EXPRESSION CONTINUE IN MIAMI'S CUBAN EXILE COMMUNITY (1994).

17. "Here, There and Everywhere" by John Lennon and Paul McCartney on GONZALO RUBALCABA, 4 Y 20, (Blue Note 1992). Rubalcaba's albums feature compositions by numerous jazz and pop musicians including Thelonious Monk and Ornette Coleman. *Weekend Edition/Sunday*, August 29, 1993, available in LEXIS, Nexis Library, NEWS/NPR file. *Hear, e.g.*, John Lennon's "Imagine," on GONZALO RUBALCABA, IMAGES (Blue Note 1991); J. Kosma and J. Prevert's "Autumn Leaves," on GONZALO RUBALCABA, IMAGES (Blue Note 1991); John Coltrane's "Giant Steps," on GONZALO RUBALCABA, IMAGES (Blue Note 1991).

18. The effect of Proclamation 5377 will be shown below to bar the granting of all non-immigrant visas to Cuban citizens because the U.S. State Department considers all Cubans to be employees of the Cuban government. See State Department Declaration, *supra* note 13. See also *infra* part III.B.

that music can be *communistic*, and therefore our enemy, then the answer is simple: All Cuban musicians should be banned from performing in the U.S.¹⁹ Furthermore, no waivers should be granted under Proclamation 5377.²⁰ Query, however, whether the current State Department view is more consistent with principles of democracy or with those of the U.S.'s ideological

19. In the case of Cuban musicians and dancers, the fear looms among anti-Castro activists that the performance will be transformed into pro-Castro propaganda, or that Castro will seize the funds earned abroad by Cuban citizens to support his vilified regime.

'It's not a good idea,' said Jose Garcia, the head of the Los Angeles chapter of the Cuban American [National] Foundation. 'It's propaganda for Fidel Castro. The U.S. doesn't need Cuban culture. This is the best country in the world. There is everything here.'

But there are other Cuban-Americans who would disagree with Garcia.

'The Tropicana show is the biggest entertainment event in the entire hemisphere,' said Jorge Rodriguez, a staff writer for *La Opinion* in Los Angeles. 'If you talk about the Tropicana from either a left or a right point of view, it's wrong. The Tropicana has nothing to do with politics and it's a mistake to use it as a political tool. It's popular culture.' Elizabeth Hayes & Victor Valle, *Cuban Troupe in L.A. Races INS Deadline*, L.A. TIMES, June 11, 1988, § Calendar, Part 6 at 1.

As discussed *infra* parts IV.B. & D., the rationale that Castro will seize the funds is substantially undermined by new Cuban financial rules that apply to such funds. As for the pro-Castro propaganda, it may be true—but to what effect? The victims of this policy are the musicians themselves—who must struggle against monumental odds merely to play in the U.S. and then cannot get compensation for the performances. Principally, however, the American public suffers, as it is deprived of the opportunity to hear and experience performances by the heirs to a rich musical culture that predates by hundreds of years the political culture it ostensibly represents. See *infra* part IV.

20. Music may indeed contain political or nationalistic overtones. For example, national anthems are crafted and/or selected by governments to represent a nation's pride in itself, and the works of certain composers have been crafted or interpreted to reflect specific social values, hear, e.g., STING, *They Dance Alone*, on NOTHING LIKE THE SUN, (A & M Records 1987) (addressing the plight of the mothers of those "disappeared" by the Pinochet regime in Chile; the regime banned the album in Chile, Michael Satchell, *Nemesis of Third World Thugs*, U.S. NEWS & WORLD REPORT, Aug. 26, 1991, at 60); CROSBY, STILLS, NASH AND YOUNG, *Ohio*, on FOUR WAY STREET, (Atlantic Records 1971) (eulogizing the four students killed at Kent State University in Ohio in 1970 during a Vietnam anti-war protest); RUBEN BLADES, *El Padre Antonio y el Monaguillo Andres*, on BUSCANDO AMERICA, (Electra Records 1984) (addressing the assassination of Catholic priest Arnulfo Romero by the military in El Salvador); and PETE SEEGER, *We Shall Overcome*, on PETE SEEGER'S GREATEST HITS, (Columbia Records 1987) (addressing the civil rights struggle to overcome segregation and racism in the U.S.). This phenomenon, however, is inapposite to the problem experienced by Cuban musicians because their music is not the inherent source of political contention. Here, what usually earns the attention of politics is the *act* of playing the music in a certain place. A close parallel may obtain in such "political" acts as Jesse Owens' appearance at the 1932 Berlin Olympics, or President Carter's boycott of the 1980 Olympic Games in Moscow.

foe.²¹ Stated differently, do foreign policy considerations justify the *de facto* censorship²² of music, given the First Amendment's

21. "The purpose of our meeting today is to fit art and literature properly into the whole revolutionary machine as one of its component parts, to make them a powerful weapon for uniting and educating the people and for attacking and annihilating the enemy and to help the people fight the enemy with one heart and one mind." Mao Zedong, *Talks at the Yenan Forum on Literature and Art*, in LITERATURE OF THE PEOPLE'S REPUBLIC OF CHINA 29 (Kai-yu Hsu ed., 1980). Cf., FRANK KOFKY, BLACK NATIONALISM AND THE REVOLUTION IN MUSIC (1970) (discussing jazz as a political form of expression in the United States).

In addition, recall the period in contemporary Chinese history known commonly as the "Cultural Revolution," during which all artistic things non-Chinese were destroyed or kept from the Chinese people, and where all literature was required to include certain State-defined characters and denouements. See generally JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA (1988).

In Miami, it is risky for Cuban artists to perform unless and until they leave Cuba permanently and denounce Castro. In 1986, playwright Dolores Prida's invitation to Miami's Hispanic Theater Festival resulted in bomb threats and the cancellation of the performance of her play. Luisa Yanez, *Freedom's Clash In Cuban Miami*, CHI. TRIB., May 16, 1988, at 16. An auction of works by Cuban artists who had not severed ties with Castro led the Cuban Museum of Arts and Culture in Miami's Little Havana to be accused of supporting communism, and resulted in several bomb threats against the museum (during the same period several bombs were either found planted near the museum or were actually exploded). *Id.*

Additionally, artists who have performed in Castro's Cuba at any point in their careers are met with vociferous protests. See e.g., the banning of Brazilian, Spanish and Puerto Rican artists by the Kiwanis Club of Little Havana at the *Calle Ocho* street festival because those artists had performed in Cuba. Jeffrey Schmalz, *Politics Add Sour Note to Miami Music Festival*, N.Y. TIMES, Mar. 11, 1989, at 1B.

Artists have always been hardest hit in Miami's overheated political climate. There is an unwritten list of artists not welcome in Miami because of their political views. Most notable are actress Jane Fonda and singers Ruben Blades, Massiel, Alberto Cortez and Oscar [D']Leon.

'For example, Picasso was a great artist, but he was a communist so I would not be interested in his works. Many Cubans feel that way about these artists,' said Tomas Garcia Fuste, news director of the influential WQBA-AM radio station in Miami.

Luisa Yanez, *Freedom's Clash in Cuban Miami*, CHI. TRIB., May 16, 1988, at 16.

Since defecting from Cuba, well-known trumpeter Arturo Sandoval is welcomed as a musical hero by the exile community, despite the fact that while he was in Cuba he worked hard to be a communist by his own admission (in order to gain the confidence of the Cuban government so that he could defect with his family). Jesse Hamlin, *Something Else; Trumpeter Recalls Fleeing Cuba*, S.F. CHRON., May 14, 1991, at E2. In effect, the type of passport he now carries changes his status in the eyes of both the State Department and the Cuban exile community, although his music and artistry remain constant.

Protests are not limited to Miami. When members of Cuba's famed *Tropicana* dance troupe came to New York to perform, ardent protests greeted them, including bomb threats, and they were forced to cut short their U.S. visit. Elizabeth Hayes & Victor Valle, *Cuban Troupe in L.A. Races INS Deadline*, L.A. TIMES, June 11, 1988, § 6, at 1.

22. Censorship is defined as "[r]eview of publications, movies, plays, and the

historic commitment to a free market place of ideas?²³ Since the U.S. criticizes governments like those of Fidel Castro for censoring artistic freedom,²⁴ is not our policy of censorship by denial of visas hypocritical?

This Comment analyzes the U.S. State Department's application of Proclamation 5377 to Cuban musicians in the context of Cuban pianist Gonzalo Rubalcaba's 1993 performance in New

like for the purpose of prohibiting the publication, distribution, [performance], or production of material deemed immoral . . . " BLACK'S LAW DICTIONARY 224 (6th ed. 1990).

23. It appears that current U.S. policy toward Cuban artists, though far less drastic than Cuba's own policies, is more in line with the ends of our Cold War ideological foes, i.e., constricting the free flow of cultural ideas and expression, than with the long U.S. jurisprudential history of advocating the free exchange of ideas. Recall, for example, Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937), opining on the freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every form of freedom." *Id.* In *Whitney v. California*, 274 U.S. 357 (1927), Justice Brandeis offered: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . [T]hey believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . ." *Id.*

Interpretations of the U.S. Constitution, as in law in general, vary among legal scholars. While it is beyond the scope of this article to discuss the intent of the Constitution's framers with respect to the issues raised, it is useful to discuss contemporary understandings of the Constitution's meaning, especially in relation to one's notions of justice and fairness. That is, does the government have a duty to pass laws that affirmatively guarantee free speech and the exchange of ideas, or is the role of government (and the Supreme Court as final adjudicator) to simply strike down laws abridging these values? For debate on the issue of whether government should affirmatively guarantee free speech, see *Rust v. Sullivan*, 500 U.S. 173 (1991); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 653 (1990); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

24. Chris Heim, *Free at Last Out of Cuba, Sandoval Explores Musical Horizons*, CHI. TRIB., Apr. 21, 1991, at 16C (quoting well-known Cuban trumpeter Arturo Sandoval, who defected to the U.S. in 1990).

'It was really hard for every musician over there [Cuba] to find the music,' Sandoval says. 'When I was in the army, for example, in '72, one day I was listening to the jazz hour from the *Voice of America* and some people from the army caught me and put me in jail for four months. To be a jazz lover there was kind of pro-American, pro-imperialism. It was a bit confused. Some people say jazz music is music of the imperialists, Yankee music. It's completely wrong. They don't know about the story of jazz.'

'It's very funny because what we really wanted was to play jazz. But the government [in Cuba], they really don't like us to play jazz. They don't like the cymbals. It was forbidden over there for a while to play with cymbals.'

Id.

York.²⁵ Part I.A. addresses how U.S. concert promoters obtain visas to present foreign performing artists. Part I.B. applies the visa procedure outlined in Part I.A. to Cuban jazz pianist Gonzalo Rubalcaba. Part II discusses the events leading to the passage of Proclamation 5377. Part III explores the effects of Proclamation 5377 on Cuban musicians, the recent changes in the Cuban economy, and the ensuing implications for current U.S. State Department policy. This policy categorizes Cuban musicians as Cuban government employees.²⁶ Part IV examines the Trading With the Enemy Act and corollary U.S. laws that continually inhibit the interchange of art between the U.S. and Cuba.

This analysis will show that Proclamation 5377's application to Cuban musicians represents an archaic foreign policy that contradicts the fundamental tenets of freedom espoused by the U.S. Constitution.²⁷ The logic of the Proclamation is further at-

25. See *infra* part I.A. In May, 1994 Cuban jazz pianist Gonzalo Rubalcaba relocated to the Dominican Republic with the Cuban Government's blessing. He is now a legal permanent resident there. Zan Stewart, *Jazz Notes: The Keys to Lifting an Embargo; Pianist Gonzalo Rubalcaba's Move to the Dominican Republic has Opened Doors to the U.S., Thanks to a Ruling by The Treasury Department*, L.A. TIMES, June 24, 1994, at F1. As such, he can now come to the U.S. through the normal O-1 visa process, avoiding the effect of Proclamation 5377. However, Rubalcaba's example in the analysis contained herein remains valid for Cuban artists hoping to perform in the U.S. See e.g., Jeff Kaliss, *Good Vibes from Cuba Rumba Masters Los Muñequitos Matanzas*, S.F. CHRON., Aug. 7, 1994 at § Sunday Datebook, 29.

26. See State Department Declaration, *supra* note 13 at para. 7 and *infra* part IV.D..

27. Effectively, when one examines legal doctrines, one begins with a certain baseline, i.e., a fundamental personal notion of justice, from which analysis of an issue devolves. Thus a Supreme Court decision ultimately depends on the baselines of five justices. This is also true in analyzing U.S. foreign policy, where personal notions of justice will often dictate how one comes out on an issue.

In the context of U.S. Cuban relations, one's baseline assumptions of Cuba and Castro may render anything Cuban evil and deplorable. In Miami, for example, intellectual discussions on the pros and cons of Castro's reign can lead to death and car bomb threats directed at major metropolitan newspaper publishers like David Lawrence of The Miami Herald. Larry Rohter, *Miami Journal; When a City Newspaper is the Enemy*, N.Y. TIMES, Mar. 19, 1992, at A16. See also AMERICA'S WATCH REPORTS, *supra* note 16; Nancy San Martin & Mabell Dieppa, *Report Finds Exiles Intolerant; Miami Lawyer Who Kissed Castro Called Community's Victims*, SUN-SENTINEL, Nov. 17, 1994, at 3B; Meg Laughlin, *Sealed With a Kiss*, MIAMI HERALD, Feb. 5, 1995, (Magazine), at 7 (both articles examining the plight of Cuban exile Magda Montiel-Davis, a Miami, Florida attorney and one-time contender in the Florida congressional race, who was ostracized by the Miami exile community for her contacts with Castro).

Taking a stand in favor of ending the U.S. embargo can also be financially

tenuated in light of the recent changes in the Cuban economy and music industry. Finally, this article advocates for Cuban artists performing in the U.S. an exception to Proclamation 5377 similar to the "Berman Amendment," which created an exception to the Cuban Assets Control Regulations for "informational materials."²⁸

dangerous. Comments by executives of public relations firm Burson-Marsteller urging an end to the U.S. embargo of Cuba cost the firm a million-dollar account with Miami-based Bacardi Imports Ltd. Vice Chairman Pierre Salinger, President Kennedy's former press secretary, wrote an editorial to the *New York Times* calling for an end to the embargo. And at a Georgetown University symposium he said "Anyone who supports the embargo is no friend of the Cuban people." The firm issued a press release saying that Bacardi and Burson-Marsteller "agreed to dissolve their relationship due to philosophical differences relating to business issues worldwide." W. John Moore, *From the K Street Corridor*, 26 *THE NAT. JOURNAL* 2850.

Intellectual discussions by College professors from Havana are also fair game for attack by the Cuban exile community. Cuban-American lawmakers spoke at the Florida House of Representatives to have the University of Florida cancel speeches by Cuban professors invited to speak on the legal hurdles foreign companies must surpass in order to invest in Cuba. Representative Carlos Valdes (R-Miami) asked, "What could these so-called professors possibly teach our students?" University President John Lombardi defended U.S. universities' history of inviting speakers from totalitarian regimes such as Poland, East Germany and Hungary saying "[i]t is critical to have an amount of direct information from these people." Karen Branch, *UF President: Cubans Will Speak at Forum*, *MIAMI HERALD*, Apr. 14, 1995, at 1B.

The legislators were unsuccessful in having the symposium cancelled. However, the University did invite Cuban-American professors as well as Rep. Jorge Rodriguez-Chomat (R-West Dade) to speak at the symposium. Representative Rodriguez-Chomat, however, refused to "sit at the same table with agents of Castro" and gave a 15 minute speech on the history of property expropriation under "that beast [Castro]" and ended with a high-volume directive to the Cuban professors: "I would like to extend an invitation for you to DEFECT!" Karen Branch, *Dissent and Dialogue Fill Cuban Forum*, *MIAMI HERALD*, Apr. 15, 1995 at 1B. A young Cuban American student perhaps best summed up the spirit of U.S. academic freedom, saying "We have to do as much as we can as exiles to inform people about what's going on in Cuba. But I think it's important to listen to the Cubans, too, because otherwise you'd only get one perspective." *Supra*. In other words, advocating the great American ideal of the free marketplace of ideas. Contrasting Representative Rodriguez-Chomat's view of banning dissenting viewpoints, Professor Camacho from Havana praised the debate and confrontation saying, "[i]t enriched the dialogue." *Id.*

Finally, on the chilling of intellectual debate on Miami university campuses, Florida International University is charging a student group, the Young Socialist Club, \$3,000 for additional security before they may present a Cuban speaker at the University. It is doing so because at a similar speech in October, 1992, Cuban-Americans rushed the stage, attacked a student, and necessitated a quick exit of the guest speakers. Ivan Rosero, President of the Young Socialist Club said: "[N]oncontroversial ideas get to be heard without a problem. Controversial ideas are being censored by this charging-for-security thing. This is a direct assault on free speech." Frances Robles, *Communist's Visit Will Cost FIU Students*, *MIAMI HERALD*, Apr. 15, 1995, at 1B.

28. See *infra* part IV.

A. The Travails of a U.S. Concert Promoter presenting Foreign Talent

To present concerts in the U.S. featuring foreign musicians, promoters must secure nonimmigrant visas for the performers according to the requirements of U.S. immigration laws.²⁹ Typically, a U.S. promoter contracts with foreign national musicians to determine the date, fee, time, and other details for a U.S. concert engagement. The promoter then applies to the Immigration and Naturalization Service ("INS") for an O-1 visa.³⁰ The O-1 visa applies to persons with "extraordinary ability"³¹ and extraordinary achievement³² in the arts.³³

29. IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 268 (4th ed. 1994).

30. 8 C.F.R. § 214.2(o)(1), (1993); see generally Frida P. Glucoft & Amy Lynne Pucker, *The O and P Categories for Entertainers, Athletes, Professors, Business Persons and Persons in the Arts*, *PLI Litig & Admin. Practice Course Handbook Series* No. 486, 297 (1993), available in WL, ALLREV Database (discussing transition from "H-1b" visa category for nonimmigrants to the newly created "O" and "P" categories, and examining new INS requirements for obtaining these visa categories). Nonimmigrant visas are issued to individuals entering the U.S. temporarily. These individuals are restricted to activities consistent with the scope of their visas. For a more detailed analysis of nonimmigrant visas see KURZBAN, *supra* note 29, at 268-409.

31. 8 C.F.R. § 214.2(o)(3)(ii) (1993) defines *Extraordinary Ability* as follows:

Beneficiary must prove sustained national or international acclaim by receipt of a major internationally recognized award or by providing documentation of at least three of the following eight factors:

- a) recipient of nationally or internationally recognized awards [these can include grammies or other industry accolades];
- b) membership in an organization that requires outstanding achievement;
- c) published materials in professional or major trade publications;
- d) judgment of the work of others in the field;
- e) original scientific or scholarly work of major significance in his/her field;
- f) evidence of authorship of scholarly work;
- g) evidence that s/he has been employed at an organization with a distinguished reputation;
- h) has commanded and does command a high salary which in the INS' view, prove sustained national or international acclaim.

32. 8 C.F.R. § 214.2(o)(3)(ii) (1993) provides for *Extraordinary Achievement* or *Distinction* as follows:

Beneficiary has been nominated or is the recipient of a significant international or national award or prize or can document at least three of the following six criteria:

- a) lead in production having a distinguished reputation;
- b) critical review in newspapers or trade journals;
- c) lead for organization that has a distinguished reputation;
- d) record of major or commercial or critically acclaimed successes;

As an internationally renowned artist, Gonzalo Rubalcaba overwhelmingly meets the "extraordinary ability" criteria in the INS O-1 visa regulations.³⁴ His track record includes international sales of his recordings,³⁵ performances at most of the major jazz festivals outside of the U.S.,³⁶ and a substantial number of feature articles in major U.S. publications.³⁷ To present

- e) significant recognition from organizations, critics, government agencies or other recognized experts in the field;
- f) commands or has commanded a high salary.

33. 8 C.F.R. § 214.2(o)(1)(i) (1993).

While art is concededly a qualitative discipline, the INS has attempted to quantify "extraordinary ability" by setting forth "objective" criteria demonstrating extraordinary achievement or distinction based on industry and press recognition of the artist. The INS must draw a line somewhere to create objective criteria in determining the admissibility of artists. The flaw in the current approach, however, is that it will consistently show a marked preference for those artists whose work is favored by mainstream audiences. Such artists are not necessarily the most brilliant or artistic performers.

History has shown that the general public often discovers artistic brilliance only posthumously. For example, Charlie Parker, commonly viewed as one of the inventors of modern jazz along with Dizzy Gillespie, approached his pinnacle of fame with the release of the biographical feature film "*Bird*," produced and directed by jazz aficionado Clint Eastwood three decades after Parker's death. See generally, ROSS RUSSELL, *BIRD LIVES: THE HIGH LIFE AND HARD TIMES OF CHARLIE (YARDBIRD) PARKER* (1976).

For better or worse, we all become mired in the dismal swamp of "artistic objectivity" whenever we attempt to rank our musical and artistic preferences. This clash of qualitative and quantitative approaches, however, is not surprising and is quite common where art and commerce intersect.

34. See Glucoft & Pucker *supra* note 30.

35. Of his four Blue Note recordings, Rubalcaba has sold 300,000 records world wide, 125,000 of them in the U.S.: SUITE 4 Y 20 (Blue Note 1992); IMAGES (Blue Note 1991); THE BLESSING (Blue Note 1991); DISCOVERY (Blue Note 1991). Telephone Interview with Stephen Schenfeld, Director, Artists and Repertoire, Blue Note Records (April 12, 1995).

A selected discography of other Rubalcaba recordings includes: RAPSODIA, (Toshiba/EMI 1993); GIRALDILLA (Messidor 1990); Mi Gran Pasion (Messidor 1988); LIVE IN HAVANA, (Messidor 1987); GILLESPIE/GONZALO RUBALCABA EN VIVO (Egrem - release date unknown); GRUPO PROYECTO DE GONZALO RUBALCABA (aka NUEVA CUBANA) (Egrem - release date unknown).

36. Rubalcaba has been touring international jazz festivals and jazz clubs since the age of seventeen. He has been a featured performer at the Montreux Jazz Festival in Switzerland, the Mount Fuji Jazz Festival in Japan, the Northsea Jazz Festival in Norway, the Montreal International Jazz Festival in Canada, Ronnie Scott's Jazz Club in London, England, and El Mocambo club in Toronto, Canada among many others. Live recordings were released from his performances at Montreux and Mount Fuji. ARTIST BIO, *Gonzalo Rubalcaba*, Blue Note (1993), on file at University of Miami Inter-American Law Review [hereinafter ARTIST BIO].

37. See, e.g., Fernando Gonzalez, *Gonzalo Rubalcaba: a Bud Powell for the 21st Century*, BOSTON GLOBE, July 19, 1992, at B2; Mark Holston, *Gonzalo Rubalcaba*, JAZZIZ MAG., Feb. 1992, at 78; Howard Mandel, *Gonzalo Rubalcaba, Ballads Beyond*

Cuban musicians, however, U.S. concert promoters must go beyond the laborious O-1 visa application procedure. They must also obtain a waiver of Proclamation 5377 from the State Department. This waiver is necessary because the State Department considers all Cuban nationals, including musicians, to be "employees"³⁸ of the Cuban government.³⁹ In practical effect, Proclamation 5377 suspends non-immigrant entry by virtually all Cuban nationals into the U.S. indefinitely, making it a draconian device that allows the State Department to prevent any Cuban citizen from traveling to the U.S. for business or other non-diplomatic purposes.⁴⁰

The problem with the State Department's application of Proclamation 5377 is it contradicts the essence of U.S. non-immigrant visa policy which grants visas to musicians based on their extraordinary ability and extraordinary achievement in the arts. In effect, the State Department is attempting to limit waivers to folkloric musicians who are not popular and won't sell many records as a result of a U.S. tour. As a result, very few Cubans will meet the threshold O-1 requirements which specifically look to popularity and record sales among other factors.

In the case of his New York performance, Rubalcaba's Cuban nationality triggered Proclamation 5377. In addition to applying for the normal O-1 performance visa, Lincoln Center had to request the assistance of many music industry luminaries⁴¹ to obtain a waiver⁴² of Proclamation 5377 in Rubalcaba's

Borders, JAZZTIMES, Sept. 1991, at 39; Jon W. Poses, CD REV., Mar. 1993, at 62; Jon W. Poses, *Cubanismo*, AUDIO MAG., Feb. 1992, at 94; Sheila Rule, *A Cuban's Respects*, N.Y. TIMES, Jan. 20, 1993, at C19; Gene Santoro, *Gonzalo Rubalcaba Mines Order From Chaos*, PULSE MAG., Dec. 1992, at 42; *Gonzalo Rubalcaba Images: Live at Mt. Fuji*, STEREO REV., Dec. 1992, at 113.

38. This assumption is based on an apparent ideological tautology: Cuba is a Communist country with a centralized economy; since all its citizens are on the state's payroll they are thus state employees. While superficially this logic may appear correct, I find it hard to extend to the artistic being. For regardless of where the artist is located, his artistry cannot be entirely co-opted. A government cannot own a painter's brush stroke nor a trumpeter's embouchure while blowing a high C.

39. See State Department Declaration, *supra* note 13. "As permitted by section 2(c) of the Proclamation, Department policy permits exceptions from ineligibility for admission under section 212(f) to be made for entertainers who are considered employees of the Cuban Government where their performing in the United States is unlikely to affect United States interests." *Id.* at para. 5.

40. *But see* State Department Declaration, *supra* note 13 at para. 3, and *infra* note 104 on the number of waivers granted by the State Department.

41. These included renowned musician Wynton Marsalis, Dizzy Gillespie's wid-

case. They embarked on a letter-writing campaign to the U.S. State Department, the Attorney General, and even President Clinton.⁴³

Lincoln Center's considerable influence and lobbying effort succeeded in obtaining the waiver. However, it was conditioned upon Rubalcaba and his band⁴⁴ not receiving compensation pursuant to the Cuban Assets Control Regulations ("CACR"),⁴⁵ which bar financial transactions between the U.S. and Cuban nationals.⁴⁶ Nonetheless, Rubalcaba agreed to perform, and the concert received an enthusiastic response from the U.S. national press.⁴⁷

B. New York City: Jazz Capital of the World

As the birthplace of Jelly Roll Morton, Fats Waller, Duke Ellington, Louis Armstrong, Charlie Parker and Dizzy Gillespie,⁴⁸ the U.S. is a mecca for all jazz musicians living abroad. In particular, New York, the jazz capital of the world, is an essential proving ground. Performing in New York is a rite of passage for the jazz artist.⁴⁹ Regardless of whether a jazz musi-

ow Lorraine Gillespie, Hal Milgram, president of Capitol Records, and Michael Greene, president of the National Association of Recording Arts and Sciences (NARAS)(the organization that oversees the Grammy Awards). *Weekend Edition/Sunday*, August 29, 1993, available in LEXIS, Nexis Library, NEWS/NPR file.

42. See Proclamation 5377, *supra* note 3, at § 2(c).

43. Robert Dominguez, *You Say You Want a Revolutionary*, *Cuban Jazzman Arrives on Political Note*, N.Y. DAILY NEWS, May 12, 1993; Howard Mandel, *I'll Take Manhattan*, DOWN BEAT, Sept. 1993, at 16; Gene Seymour, *Gonzalo Rubalcaba's Cubano Bop*, N.Y. NEWSDAY, May 14, 1993, at 83.

44. Rubalcaba's band members would have been admitted under O-2 nonimmigrant visas pursuant to 8 C.F.R. § 214.2(o)(2) which allows for admission of multiple beneficiaries where they are assisting the O-1 visa holder in the same performance during the same period. See KURZBAN, *supra* note 29, at 355.

45. 50 U.S.C. §1701, 31 CFR Ch. V §§ 515-540 (1993). See also discussion of Cuban Assets Control Act *infra* part IV.B.

46. *Id.*

47. Richard Guilliat, *Politics and the Pianist*, L.A. TIMES, May 20, 1993, at F1; Howard Mandel, *I'll Take Manhattan*, DOWN BEAT, Sept. 1993, at 16; Gene Seymour, *An Impassioned Piano Debut*, N.Y. NEWSDAY, May 19, 1993, pt. II, at 57.

48. See generally, CHARLES E. CLAGHORN, BIOGRAPHICAL DICTIONARY OF JAZZ (1982) [hereinafter JAZZ BIOGRAPHY].

49. "If I can make it here, I'll make it anywhere." Popular refrain from the song "New York, New York."

Playing in the United States 'is important.' Rubalcaba says that, as a musician, he needs to have 'direct contact with the public, the professionals, the

cian hails from France, Holland or Cuba, that musician always has eyes on the Big Apple.⁵⁰

The United States, and specifically New York, is for anyone linked to music and art a *must*. You have to go there at some point in your life. I'm trying at this moment to open up the possibility, because it is very important—and not just for my own sake—to create the link between the United States and Cuba. I hope I'll be the person to start it off, but I might not be.⁵¹

On May 14, 1993, Cuban pianist Gonzalo Rubalcaba⁵²

specialists of my world, jazz. The U.S., New York in particular, is a very important market—obligatory for any artist in the world, but much more for those linked with jazz.'

Fernando Gonzalez, *Gonzalo Rubalcaba: a Bud Powell for the 21st Century*, BOSTON GLOBE, July 19, 1992, at B2.

Jazz originated in New Orleans, which was the original jazz capital of the U.S. CHARLES NANRY, *THE JAZZ TEXT* 84 (1979). However, migration patterns moved many jazz musicians first to Chicago and finally to New York. *Id.* at 109-60.

50. For comments on the origins of New York's nickname, the Big Apple, see Martin Panzer, *N.Y. TIMES*, Apr. 1, 1978, at 20.

51. Howard Mandel, *Gonzalo Rubalcaba, Ballads Beyond Borders*, *JAZZTIMES*, Sept. 1991, at 39 (quoting Rubalcaba).

52. Describing Gonzalo Rubalcaba's talent, the 1993 *ARTIST BIO*, *supra* note 36, from Blue Note Records' press department states:

Prodigious. It's a word that describes the rich, ripe, lushly tropical talent pianist Gonzalo Rubalcaba has been growing since his early days. A heated Romantic, Rubalcaba doesn't so much play the piano as pour himself into it and flow through it. His labyrinthine runs, floating rests, suddenly bitten-off phrases reflect both the cauldron of inspiration and the years of rigorous training that shape his tidal wave of creativity. That passionate forging of art in the moment has won him critical acclaim that continues to mount, even though, he as a Cuban has not yet been allowed to tour the United States.

Born in Havana in 1963 to a world-class pianist father who played with Enrique Jorin's Orchestra, among others, Rubalcaba began studying music at age eight. Thanks to his father's connections, the youngster also participated in informal jams with Latin musical giants like Machito, Chico Hamilton and Paquito D'Rivera—pretty hot on-the-job training. By his mid-teens, he was playing dances, parties and small concerts sponsored by the Cuban Ministry of Culture. At 17, he started on the road to international stardom, touring Europe with his fusion band *Projecto*.

Prodigious. It's also a word that describes talent from many angles while re-enforcing the perception that this is a jazz musician who can translate the past and present into the future. As his reputation deservedly grows, perhaps his undeniable artistic merits will help him overcome the political liabilities he faces in the U.S. as a result of being born and raised Cuban. *Id.*

made his U.S. concert debut at New York City's Lincoln Center to a sold-out house.⁵³ Although it fulfilled his life-long dream of performing in New York, Rubalcaba's concert was even more remarkable because he and his Cuban sidemen received no compensation for their work⁵⁴—despite sales of over 1000 tickets at \$30 each.⁵⁵

The New York performance ended a long and arduous behind-the-scenes struggle by Rubalcaba and Lincoln Center to secure a nonimmigrant visa⁵⁶ for him to perform in the U.S. Why did this brilliant musician, whose sound has been described⁵⁷ as a combination of internationally renowned jazz musicians Art Tatum, Herbie Hancock, and Bill Evans,⁵⁸ have so much difficulty in obtaining a visa? The answer implicates the complexity of U.S. foreign relations with Cuba. The specific reason for Rubalcaba's visa troubles was Proclamation 5377, which came about as a result of the Mariel Boatlift⁵⁹ and the Radio and Television Martí broadcasts to Cuba⁶⁰ in the 1980's.

Rubalcaba is the descendant of three generations of Cuban musicians. His father played piano in the ballroom orchestra that first introduced the "Cha Cha Cha." Rubalcaba graduated from the Amadeo Rodan Conservatory in Havana, with a focus on nineteenth-century romantic and Russian composers. Rubalcaba has since toured the world with sponsorship from the Cuban government. *Weekend Edition/Sunday*, Aug. 29, 1993, *supra* note 41 (interview with Gonzalo Rubalcaba).

53. Rubalcaba performed both with his group of Cuban musicians and with U.S. jazz artists Charlie Haden on bass and Jack DeJohnette on drums in Alice Tully Hall at Lincoln Center. Arthur Spiegelman, *Famous Cuban Pianist Gets Chance To Play In New York*, Reuter General News, May 13, 1993, available in WL, INT NEWS Database.

54. Larry Rohter, *Pop Music; Jazz and Politics Meet Over the Keyboard*, N.Y. TIMES, May 9, 1993, § 2, at 30; see also discussion of Cuban Assets Control Act, *infra* part IV.B.

55. Gene Seymour, *An Impassioned Piano Debut*, N.Y. NEWSDAY, May 19, 1993, pt. II, at 57 (Rubalcaba played to a sold-out house). Dominguez, *supra* note 43, tickets were \$30.

Under the Cuban Assets Control Regulations, all of Rubalcaba's out-of-pocket expenses, airfare, hotel, per diem, ground transportation, etc. were permitted to be paid for by Lincoln Center. See *supra* note 5.

56. See discussion *supra* part I.A.

57. Larry Rohter, *Jazz and Politics Meet Over the Keyboard*, N.Y. TIMES, May 9, 1993, at 30 (quoting world-renowned jazz bassist Charlie Haden).

58. See generally, JAZZ BIOGRAPHY, *supra* note 48.

59. See *infra* part II.C.

60. *Id.*

II. THE HISTORY OF PROCLAMATION 5377

A. Fidel Castro's Rise and the U.S. Government's Response

On January 1, 1959, Fidel Castro assumed power over the island of Cuba when deposed dictator Fulgencio Batista fled the country with his family.⁶¹ Castro's rule has consistently clashed with U.S. hegemonic policies in the Western Hemisphere.⁶² While the Eisenhower and Kennedy administrations tacitly attempted to normalize relations with Cuba, Castro's 1962 conversion to Marxism, coupled with a Soviet Union alliance⁶³ and the

61. Peter Kihss, *Castro Superior in Arms, Batista Declares in Exile*, N.Y. TIMES, Jan. 2, 1959, at A1; R. Hart Phillips, *Army Halts Fire*, N.Y. TIMES, Jan. 2, 1959, at A1; Dana Adams Schmidt, *U.S. Aides Wary On Cuba's Future*, N.Y. TIMES, Jan. 2, 1959, at A1. Fidel Castro, a graduate of the Havana University Law School and the son of a wealthy sugar grower, first attempted to overthrow the government of Fulgencio Batista in a failed assault against the Moncada Barracks in Santiago de Cuba on July 26, 1953. Jailed on the Isle of Pines, Castro was released under a general amnesty in 1955 and went to Mexico. On December 2, 1956, he and a group of under 90 men returned by boat to the coast of the Oriente Province. Many of the men were killed upon landing and the Cuban government included Castro in the list of casualties. In February, 1957 a New York Times correspondent returned from Castro's hideout with photos and a detailed interview.

This reemergence from supposed "official" death gave the rebel leader a new level of importance in the revolutionary movement. After waging a guerilla war on the Batista regime with support from various sectors, Fidel Castro and his band of revolutionaries marched into Havana to claim victory on January 1, 1959. A *Symbol of Rebellion*, *Fidel Castro*, N.Y. TIMES, Jan. 2, 1959, at A7; see also Juan A. Blanco, *Cuba: Utopia and Reality Thirty Years Later*, in *THE CUBAN REVOLUTION INTO THE 1990S*, (Centro de Estudios Sobre America ed., 1992); see generally PHILLIP BRENNER, *FROM CONFRONTATION TO NEGOTIATION* (1988).

62. See, e.g., STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT* (1983) (concerning the 1954 CIA-sponsored coup in Guatemala); J. HANDY, *GIFT OF THE DEVIL: A HISTORY OF GUATEMALA* (1984); see also JENNY PEARCE, *UNDER THE EAGLE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE CARIBBEAN* (1982); *THE CONTINUING CRISIS: U.S. POLICY IN CENTRAL AMERICA AND THE CARIBBEAN* (Mark Falcoff & Robert Royal eds., 1987); *RIFT AND REVOLUTION: THE CENTRAL AMERICAN IMBROGLIO* (Howard J. Wiarda ed., 1984); *THE CENTRAL AMERICAN CRISIS: SOURCES OF CONFLICT AND THE FAILURE OF U.S. POLICY* (Kenneth M. Coleman & George C. Herring eds., 1985); *U.S. Neighbors, The Big Stick, Major Intervention in the Americas*, MIAMI HERALD, Sept. 27, 1994, at 28A.

63. The Cuban Embargo was imposed in 1962 after Fidel Castro's announcement that he had converted to Marxism. R. FONTAINE, *ON NEGOTIATING WITH CUBA* 37 (1975). There was a four-fold purpose to the United States trade embargo against Cuba. *Id.* at 50. Generally, the purposes were:

- 1) to limit the possible spread of subversion and violence from Cuba to the United States; 2) to demonstrate to Cubans that Castro's politics had undermined their economic well-being; 3) to show solidarity against com-

ensuing Cuban Missile Crisis,⁶⁴ widened an ideological chasm that belies the ninety-mile distance between the two countries.

Alleged assassination attempts,⁶⁵ support of exile overthrow efforts,⁶⁶ and stiff economic embargoes⁶⁷ are among the known U.S. efforts to eliminate the Castro regime. Currently, as a result of this interventionist policy, U.S. citizens generally regard Cuba with suspicion;⁶⁸ a vestige of the "evil empire"⁶⁹

munism; and 4) to force the Soviet Union to bear an increased financial burden due to its affiliation with Cuba.

Id.

64. During the October, 1962 Cuban Missile crisis, President Kennedy imposed a naval blockade around the island to prevent the Soviet Union from installing nuclear weapons targeting the U.S. See JAMES G. BLIGHT, BRUCE J. ALLYN & DAVID A. WELCH, *CUBA ON THE BRINK: CASTRO, THE MISSILE CRISIS, AND THE SOVIET COLLAPSE* (1993); DAVID DETZER, *THE BRINK: CUBAN MISSILE CRISIS, 1962*, (1979); History Staff, Central Intelligence Agency, *CIA Documents on the Cuban Missile Crisis* (Mary S. McAuliffe ed., 1962); see also Anthony Lewis, *U.S. Imposes Arms Blockade on Cuba on Finding Offensive-Missile Sites; Kennedy Ready for Soviet Showdown*, N.Y. TIMES, Oct. 23, 1962, at 1; *Kennedy Calls Crisis Talks; Cuba Blockade in Works?*, MIAMI NEWS, Oct. 22, 1962, at 1.

65. See W. MICHAEL REISMAN & JAMES BAKER, *REGULATING COVERT ACTIONS: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992); see also SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS*, S. Rep. No. 465, 94th Cong., 1st Sess. 225, 233-34 (1975).

66. For example, the Bay of Pigs invasion was an attempt to overthrow the government of Fidel Castro on April 17, 1961. The failed operation was sponsored by the U.S. Central Intelligence Agency. See OPERATION ZAPATA: THE "ULTRASENSITIVE" REPORT AND TESTIMONY OF THE BOARD OF INQUIRY ON THE BAY OF PIGS (1981).

67. See, e.g., the International Economic Emergency Powers Act (IEEPA) 50 U.S.C. §§ 1701-1706 (1991) (formerly known as the Trading with the Enemy Act (TWEA)). 50 U.S.C. app. 5 (1946).

On the issue of artwork and the TWEA, see Marielise Kelly, Note, *Artwork From "Enemy" Nations: Informational Material Under the Trading With the Enemy Act, A Relic of the Perceived Communist Threat*, Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fla. 1989), 14 SUFFOLK TRANSNAT'L L.J. 567, 570 n.19; see also The Cuban Democracy Act of 1992. 22 U.S.C. § 6001, Pub. L. 102-484, Div. A, Title XVII, § 1702, Oct. 23, 1992, 106 Stat. 2575. For an analysis of the Cuban Democracy Act, see Jason S. Bell, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77 (1993).

68. In a survey conducted by the Chicago Council on Foreign Relations, 1492 participants were asked:

Tell me whether you feel the U.S. does or does not have a vital interest in Cuba?	
Has interest	67%
Doesn't have interest	24%
Not sure	9%

American Public Opinion and U.S. Foreign Policy 1995, Gallup Organization, Feb. 15, 1995, available in LEXIS/NEXIS, Polls File.

enshrouded in mystery and hyperbole.

One result of the frozen relations between the U.S. and Cuba is a dramatic reduction in musical exchanges between the two countries.⁷⁰ Prior to this freeze, the Afro-Cuban musical influence of Perez Prado fueled the 1950's Mambo craze in the U.S.⁷¹ Cuban musicians such as Chano Pozo, Frank "Machito" Grillo and Mario Bauza sparked U.S. bebop jazz musicians like Charlie Parker and Dizzy Gillespie, igniting the fiery fusion known as "Cubop."⁷² Mongo Santamaria and Chico O'Farrill made substantial contributions to the Latin Jazz movement in the 1960s.⁷³ Since 1962, however, a whole generation of Cuban music dissipated⁷⁴ in a ninety-mile dogmatic fog over the Florida straits, depriving U.S. musicians and fans⁷⁵ of the piquant

The same poll found an even split on the questions of:

1) Whether you would favor or oppose the use of U.S. troops . . . if people in Cuba attempted to overthrow the Castro dictatorship?

Favor 44%

Oppose 44%

Note sure 12%

and

2) Do you think the U.S. should or should not establish normal diplomatic relations with Cuba?

Should 46%

Should not 45%

Not sure 9%

Id.

69. Terence Hunt, *Reagan Denounces Freeze as Fraud*, BOSTON GLOBE, Mar. 9, 1983, available on WL, PAPERSMJ Database; *Reagan Addresses Evangelical Group*, BOSTON GLOBE, Mar. 8, 1983, available on WL, PAPERSMJ Database. Coined by Ronald Reagan in a speech, the "evil empire" became his administration's moniker for the Soviet Union.

70. See *infra* note 87.

71. See VERNON BOGGS, *SALSIOLOGY* (1992).

72. See JOHN STORM ROBERTS, *THE LATIN TINGE: THE IMPACT OF LATIN AMERICAN MUSIC ON THE UNITED STATES* 113-19, 141, and 215 (1979).

73. *Id.* at 160-85. See also *supra* note 6.

74. "When the United States imposed its embargo on post-revolutionary Cuba in 1962, decades of mambo crazes, cha-cha-cha, Latin Jazz and Cubop seemed to come to an end. Almost overnight Cuban music and Cuban musicians were no longer readily available in this country." Fernando Gonzalez, *A Look at Today's Cuban Jazz*, BOSTON GLOBE, July 19, 1991, § Arts & Film, at 33.

75. While the First amendment of the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech," U.S. CONST. amend. I, the United States Supreme Court has also found that a U.S. citizen has a "right to know" and access to information is protected by the Constitution, see *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (*citing* *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

Arguendo, one may claim that music is mere recreation and should not be

musical treasures⁷⁶ of this Caribbean island.⁷⁷

Fidel Castro is a continual foreign policy embarrassment to the U.S. government, largely because his small island nation is so geographically close to U.S. shores. Castro's regime doggedly resists economic and military pressure from the U.S.,⁷⁸ sur-

considered "information." However, the U.S. Congress made clear that music is considered information when it promulgated the Berman Amendment. See 31 C.F.R. 515.332(a)(1) (1994) (defining "informational materials"); see also *infra* section IV.A. Additionally, music can be a central element of religious practice bringing to bear yet another prong of 1st Amendment protections. See *supra* note 6 (discussion of Santeria religious ceremonies in Church of Lukumi Babalu Aye v. Hialeah, 113 S.Ct. 2217 (1993)). But see *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990) where a New York federal district court decided that the President of the United States' foreign affairs powers supersede both congressional supremacy in commerce and the First Amendment claims of a U.S. broadcaster seeking to transmit the Pan American games from Cuba. ABC's claim was that the Berman Amendment, see *infra* text accompanying notes 152-156, which carves out an exception to the Trading with the Enemy Act with respect to informational materials, permitted broadcast of the games. In holding on the side of the government:

The court relied on four bases for denying the First Amendment claims: (1) the First Amendment has less weight when the federal government is dealing with foreign affairs, (2) even in the domestic context the Supreme Court has recognized that the First Amendment must be flexibly applied depending on the nature of the regulation imposed, the type of speech at issue, the context in which the regulation arises, and the purpose for which the regulation is imposed, (3) "substantial constitutional issues of separation of powers and the authority of the Executive to conduct foreign affairs would be raised by an overly expansive interpretation of the Berman Amendment . . .

Pamela S. Falk, *Broadcasting from Enemy Territory and the First Amendment: The Importation of Informational Materials from Cuba under the Trading With the Enemy Act*, 92 COLUM. L. REV. 165 (1992) (quoting *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1012-14 (S.D.N.Y. 1990)).

76. "Embargoes don't just prevent food and energy from reaching the citizens of a nation in the U.S. government's disfavor. They also obstruct such vital resources as music, literature and film from getting through and finding their rightful place in the international economy of culture." Richard Gehr, *Cuban Music: Good to Go*, N.Y. NEWSDAY, (Nassau and Suffolk Edition) § Fanfare, Oct. 31, 1993, at 17.

77. Although U.S. music fans have had the opportunity to hear Cuban music on record, especially in light of the Berman Amendment, see *infra* text accompanying notes 151-161, they have rarely heard Cuban music in live performance. While some may make reference to the popular television commercial from the 1970s featuring Ella Fitzgerald's voice breaking a glass for the slogan "Is it live or is it Memorex?," live performance, especially in an improvisational context like jazz, is different each time due to variable factors in each setting. Thus, there is a tangible deprivation to the music fan when the music cannot be experienced live.

78. Historians differ in their analyses of the rationale behind Castro's success. Some argue it is a tribute to the policies of the revolution and effective government both with and without Soviet economic support, THOMAS G. PATERSON, *CONTESTING CASTRO: THE UNITED STATES AND THE TRIUMPH OF THE CUBAN REVOLUTION* (1994); others say it results from the U.S.'s inability to effectively overthrow the Castro

living what is perhaps the longest and most arduously enforced trade embargo in U.S. history. There is no indication that this survival will be short-lived. A recent study commissioned by the Pentagon predicts that Castro will remain in power for at least the next four years.⁷⁹

B. U.S. Immigration Policy and Cuba

U.S. opposition to Castro's communist government, and against communism in general, led to the enactment of the Cuban Refugee Adjustment Act of 1966.⁸⁰ This special U.S. immigration law allows Cuban nationals to apply for permanent residency in the U.S. one year after they have been inspected, admitted, or paroled into the U.S.⁸¹ This is one example of several special legislative acts⁸² giving preferred treatment to Cubans fleeing political persecution.⁸³ Unlike other refugee acts, the

regime through covert methods like those employed in the U.S.-sponsored 1954 coup against the left-leaning government of Jacobo Arbenz in Guatemala, see SCHLESINGER & KINZER, *supra* note 62, and the overthrow of Salvador Allende's government in Chile in 1973. G. TREVERTON, *COVERT ACTION: THE LIMITS OF INTERVENTION IN THE POSTWAR WORLD* 124-43 (1987).

79. Christopher Marquis, *Pentagon: Castro Managing to Walk Economic Tightrope*, MIAMI HERALD, Mar. 31, 1995, at 1A. See also *infra* text accompanying notes 181-184.

80. Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended by § 88 of the Immigration and Nationality Amendments of 1976, Pub. L. No. 94-571 at 8 U.S.C. § 1255 (1982)) [hereinafter Cuban Refugee Adjustment Act]. See Malissia Lennox, *Note, Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 712 (1993).

81. See KURZBAN, *supra* note 29, at 264. Since 1966, over 525,000 Cubans have entered the U.S. and become legal permanent residents. Neil Weiner, *Red Tape Greets Cuban Refugees*, CHI. SUN-TIMES, Aug. 28, 1994, at 18.

82. Other acts include the Indochinese Refugee Adjustment Act of 1948, Pub. L. No. 95-145, Title 1; the Hungarian Refugee Act of 1956, Pub. L. No. 85-559, 72 Stat. 419; and the Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, 100 Stat. 3359. See generally Jerri Blaney Tawadros, *Note, A Comparative Overview of the Vietnamese and Cuban Refugee Crises: Did the Refugee Act of 1980 Change Anything*, 6 SUFFOLK TRANSNAT'L. L.J. 25 (1982); SEVENTH ANNUAL BARON DE HIRSH MEYER LECTURE SERIES: John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 893, 897 n.12 (1982).

83. The future of this policy, however, has been put into question by the U.S.'s recent failure to grant visas to 30,000 Cuban rafters.

American policy is beset by a cruel contradiction. Washington maintains a harsh trade ban on the island, on grounds that Castro is a despot. Yet the United States has also detained 30,000 Cuban refugees at the U.S.-leased naval base in Guantanamo Bay, Cuba, on grounds that they are not fleeing despotism, but rather economic hardship.

Cuban Refugee Adjustment Act does not contain a sunset provision,⁸⁴ thus affording a continual open door to Cuban nationals seeking residence in the U.S.⁸⁵

C. The Reagan Years, Mariel, Radio Martí, and Proclamation 5377

Proclamation 5377 resulted from a confluence of divergent factors, including the Reagan Administration's Cold War attitudes, the "Mariel Boatlift," and the launch of Radio Martí. The Reagan Administration (1981-1989) stressed a vociferous anti-communist Cold War policy. Consequently, relations with Cuba retreated from the diplomatic politeness⁸⁶ commenced by the Carter Administration (1977-1981).⁸⁷

Daniel Williams, *Time to Redraw the Line Around Cuba? White House Advisers Look to an Easing, but Jesse Helms Wants Even Tougher Sanctions*. WASH. POST NAT'L WKLY ED., Mar. 27-Apr. 2, 1995, at 19.

84. A Sunset Law is "A statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other governmental function. The legislature must take positive steps to allow the law, agency, or functions to continue in existence by a certain date or such will cease to exist." BLACK'S LAW DICTIONARY 1436 (6th ed. 1990).

85. See *supra* note 80. A recent mass exodus from Cuba where over 30,000 Cubans left the island by raft caused the U.S. to amend the open door policy. The U.S. set up refugee camps for many of the rafters in Panama and on the Guantanamo naval base adjacent to the island. Alfonso Chardy, *Chorus of Unity: Free the Detainees*, MIAMI HERALD, Oct. 7, 1994, at 1A.

Note, recent changes in U.S. immigration policy toward Cuba are closing the door on unfettered Cuban immigration. However, these changes have occurred after the publication closing date of the UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW and are not analyzed herein. See *supra* note 1.

86. For example, on March 21, 1977, the Treasury Department under Carter promulgated a general license permitting all economic transactions incident to travel to Cuba. 31 C.F.R. § 515.560 amounted to approval of U.S. tourist travel to Cuba. § 515.560, as amended on May 18, 1977, specifically approved transactions ordinarily incident to travel to and in Cuba.

On January 9, 1978 the Treasury regulations were amended to permit U.S. residents to provide support payments of up to \$2000 per year to close relatives in Cuba. 31 C.F.R. § 515.563.

On May 9, 1978, the Treasury regulations were amended to permit travel-related transactions by Cuban travelers in the U.S. on a visa issued by the State Department. 31 C.F.R. § 515.564. See MICHAEL KRINSKY & DAVID GOLOVE, UNITED STATES ECONOMIC MEASURES AGAINST CUBA 118-19 (1993).

87. During President Carter's administration, there were important musical cultural exchanges between the U.S. and Cuba, including a three day music festival sponsored by CBS Records at the Karl Marx Theater in Havana on March 2, 3 & 4, 1979. The festival was dubbed "Musica Cuba-U.S.A." by the Cubans; "Havana Jam"

In the spring of 1980, approximately 125,000 Cubans participated in a mass exodus to the U.S., commonly referred to as the "Mariel Boatlift."⁸⁸ Of the 125,000 refugees, INS eventually paroled the vast majority into the U.S. and gave them the opportunity to apply for resident status under the 1966 Cuban Refugee Adjustment Act.⁸⁹ A small percentage, however, was declared excludable under U.S. immigration law⁹⁰ and was detained in the U.S. after Cuba's refusal to permit repatriation.⁹¹ On December 14, 1984, Cuba finally agreed to the repatriation of 2746 Mariel Cubans in exchange for a U.S. commitment to

by CBS; and perhaps most appropriately, "The Bay of Gigs" by one of the musicians! Liner Notes, HAVANA JAM, Volumes I & II (Columbia Records 1979).

The festival featured a diverse lineup of U.S. and Cuban musicians including: Weather Report; Irakere; Stephen Stills; Sara Gonzalez; the CBS Jazz All-Stars with Dexter Gordon, Stan Getz, Jimmy Heath, Woody Shaw, Cedar Walton and Percy Heath among others; Orquesta Aragon; Kris Kristofferson and Rita Coolidge; the Fania All-Stars featuring former Panamanian presidential candidate, actor and singer Ruben Blades; and "The Trio of Doom" featuring John McLaughlin, Jaco Pastorius and Tony Williams. The festival was memorialized in Havana Jam I & II on CBS records. *Id.*

In addition, the Cuban group Irakere was featured as part of the 1978 Newport Jazz Festival in New York at Carnegie Hall. This performance was also recorded by CBS records. Liner Notes, IRAKERE (Columbia Records 1979).

Bruce Lundvall, president of CBS records in 1978-79 and current president of Blue Note records (distributor of Rubalcaba's records in the U.S.), is largely responsible for the above events as well as Rubalcaba's appearance in New York.

See also PHILIP BRENNER, CONFRONTATION TO NEGOTIATION: U.S. RELATIONS WITH CUBA 17 (1988); MORRIS H. MARLEY, IMPERIAL STATE AND REVOLUTION: THE UNITED STATES AND CUBA, 1952-1986 299 (1987).

88. John M. Crewdson, Abstract, N.Y. TIMES, Apr. 25, 1980, at A1, available on LEXIS, Nexis Library, MAJPAP File; John M. Goshko, *State Department Seeks to Halt Sealift*, WASH. POST, Apr. 24, 1980, at A1; Marlise Simons, *Cuba Suddenly Permits Mass Emigration to U.S.*; *Cuba Opens Door to U.S.*; *Mass Emigration Likely, Cuba Announcement Permits Mass Exodus*, WASH. POST, Apr. 24, 1980, at A1; Marlise Simons, *Cuba Approves Refugees' Departure In Florida-Chartered Flotilla of Boats*, WASH. POST, Apr. 21, 1980, at A14; see also J. CLARKE, J. LASAGA & R. REQUE, THE 1980 REFERRED EXODUS: AN ASSESSMENT AND PROSPECT, 1981 COUNCIL FOR INTER-AMERICAN SECURITY SPECIAL REPORT 5 (1981); Garcia-Mir v. Smith, 766 F.2d 1478, 1480 (11th Cir. 1985).

89. See Cuban Refugee Adjustment Act, *supra* note 80.

90. The majority of those excluded, i.e. not granted parole and not admitted by an immigration officer, were singled out due to:

- (A) mental disorder under INA § 212(a)(1)(A)(ii) (codified as amended at 8 U.S.C. § 1182(a)(1)(A)(ii) (1993)); 42 C.F.R. § 34.2(d)(2), (1)(2); (n); or
- (B) criminal grounds under Crimes of Moral Turpitude, INA § 212(a)(2)(A)(i)(I) (codified as amended at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1993)).

91. See Willard P. Rose, *Some Refugees Are Imprisoned Without Crimes*, MIAMI HERALD, Dec. 21, 1980, at 1A; Robert Ryan, *Graham: Fly 'Undesirable' Cubans Back*, MIAMI HERALD, Feb. 25, 1981, at 1A.

resume processing of immigrant visas for Cuban applicants.⁹² At 5:30 A.M. on May 21, 1985, when the U.S. launched Radio Martí,⁹³ only 201 Mariel Cubans had been returned to Cuba.⁹⁴ Radio Martí was the Reagan administration's radio broadcast for the Cuban people. The stated goal of the daily 14 1/2 hour transmission was to provide "accurate, balanced, and objective news reports,"⁹⁵ as well as a variety of news-related, feature, and entertainment programs.⁹⁶ When it went on the air,⁹⁷ it effec-

92. Press Statement by White House Press Secretary (Dec. 14, 1984) reprinted in 61 INTERPRETER RELEASES 1080 (1984); see also Editorial, *Halfway Free*, MIAMI HERALD, Sept. 11, 1986, at 22A.

93. Radio Martí went on the air pursuant to The Radio Broadcasting To Cuba Act, Pub. L. No. 98-111, approved Oct. 4, 1983, 97 Stat. 749, 22 U.S.C. § 1465. The Act contains the following statement of congressional findings and purposes, in § 2:

(1) that it is the policy of the U.S. to support the right of the people of Cuba to seek, receive, and impart information and ideas through any media and regardless of frontiers, in accordance with article 19 of [the] Universal Declaration of Human Rights;

(2) that, consonant with this policy, radio broadcasting to Cuba may be effective in furthering the open communication of accurate information and ideas to the people of Cuba, in particular information about Cuba;

(3) that such broadcasting to Cuba, operated in a manner not inconsistent with the broad foreign policy of the U.S. and in accordance with high professional standards, would be in the national interest;

(4) that the Voice of America already broadcasts to Cuba information that represents America, not any single segment of American society, and includes a balanced and comprehensive projection of significant American thought and institutions but that there is a need for broadcasts to Cuba which provide news, commentary and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba.

94. See 62 INTERPRETER RELEASES 483 (1985); see also Fred Grimm, *Cuba's Latest Move Puts Refugees in Legal Limbo*, MIAMI HERALD, May 21, 1985, at 12G.

95. In its first week, Radio Martí broadcasts featured music, a radio soap opera, and commentary by Los Angeles Dodgers manager Tommy Lasorda, who pontificated "that Havana would have a major league ball team but for the communist government of Fidel Castro." Bob Dart, *Radio Martí a Hit with Cuban Audience*, ATLANTA J., May 26, 1985, at 16A. (Given the difficulty that the city of Tampa, Florida has experienced in procuring its own major league team, particularly after constructing a state of the art sports complex, Ned Seaton, *Dome's Cost: \$200 Million*, TAMPA TODAY, Apr. 8, 1995, at 1A, it is hard to imagine the possibility of a small Caribbean island having a team as being an accurate, balanced and objective statement).

96. See DEPT. ST. BULL., No. 2100, July 1985, at 89.

97. The station originates from studios in Washington, D.C. and is beamed into Cuba from a 50,000 watt transmitter in Marathon in the Florida Keys on 1180 AM. See Fred Grimm, *Cuba's Latest Move Puts Refugees in Legal Limbo*, MIAMI HERALD, May 21, 1985, at 12G; R.A. Zaldivar, *Radio Martí on the Air; Cuba Angry*, PHIL. INQUIRER, May 21, 1985, at B7.

tively negated any progress in U.S.-Cuban diplomacy resulting from the December 14, 1984 agreement.⁹⁸

Cuba denounced Radio Martí as a violation of its sovereignty, radio airspace, and international law.⁹⁹ Forty minutes prior to the first broadcast, the Cuban government press service released a statement charging that the:

clear aim of the Radio Martí broadcasts was to respond coarsely to the solid and unanswerable denunciations and pronouncements by the Cuban Government about the critical economic situation of Latin America and the Third World, and about the immoral and unpayable foreign debt and the unmerciful economic sacking which the unjust system of international relations has imposed on these countries.¹⁰⁰

98. See *supra* note 92; see also Marian Nash Leich, *Cuban Suspension of Operation of 1984 Agreement for Return of Mariel Cubans*, 79 AM. J. INT'L L. 1044 (1985).

99. In March 1990, the U.S. began broadcasting into Cuba on TV Martí via a direct broadcasting satellite. The complex international broadcast and foreign sovereignty laws which came into play as a result of this broadcast are beyond the scope of this comment. See generally, Stephen D. Bayer, *The Legal Aspects of TV Martí in Relation to the Law of Direct Broadcasting Satellites*, 41 EMORY L.J. 541 (1992).

Cuba claimed these actions violated the U.N. CHARTER arts. 1, 13, & 55 (claiming interference with a sovereign states' policies and endangering international peace, security, and violated human rights); and violating the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Jan. 27, 1967, 18 U.S.T. 2410 (referring in the Preamble to U.N. General Assembly Resolution 110(II) "which condemns propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression . . ." *Id.*

Radio and TV Martí are still operating today. Effectively, these broadcasting entities are federally subsidized economic support for the pro-embargo Cuban exile community. The 1994 budget for these two stations was over \$28 million. See Lyda Longan & William E. Gibson, *TV Martí Still Searching for an Audience*, ORLANDO SENTINEL (Florida), Aug. 2, 1993, at A1 [hereinafter LONGAN & GIBSON]; Larry Rohter, *Miami's Cuban Exiles May Lose TV Station*, N.Y. TIMES, July 10, 1993, § 1, at 7. Compare this to the funding for the Corporation for Public Broadcasting, which is slated to receive \$285 million in 1995, although major congressional efforts threaten this funding. See Tim Jones, *Public Stations Get Clear Signal on Federal Cuts*, CHI. TRIB., Mar. 5, 1995, § C (Business), at 1. The federal government is targeting budget cuts for over 1000 radio and television broadcast stations that broadcast to tax-paying Americans. *Id.* The affected programs range from *Sesame Street* to *Masterpiece Theater* to the radio news program *All Things Considered*. Meanwhile, these budget cuts would leave untouched radio and television broadcasting to Cuba which reaches a mere fraction of the Cuban population. See LONGAN & GIBSON *supra*. In the budget cutting rampage of the Contract with America, should \$28 million U.S. tax dollars be used to fund what the Pentagon deems a *ludicrous policy*? See Christopher Marquis, *Pentagon: Castro Managing to Walk Economic Tightrope*, MIAMI HERALD, Mar. 31, 1995, at 1A.

100. Marian Nash Leich (Office of the Legal Adviser, Department of State), *Cu-*

Radio jamming stations in Cuba emitted high pitched tones to block the broadcast, and Havana announced a series of retaliatory measures, including:

- a) A suspension of the agreement to take back Mariel criminals and allow Cubans to emigrate to the U.S. (this would have brought the number of Cuban emigres to the U.S. to between 25,000 and 30,000 per year).
- b) A suspension of trips to Cuba by exiles wishing to visit their families, except for cases based on "strictly humanitarian reasons."
- c) A warning that Cuba could initiate counter-broadcasts against the U.S. which might interfere with American commercial radio.
- d) An announcement that Cuba would reconsider "collaboration" with the U.S. in preventing illegal emigration and in returning airplane hijackers.
- e) A warning that Cuba might limit phone lines to the U.S.¹⁰¹

The broadcasts continued, and the suspension of the December 1984 agreement became permanent. This resulted in the U.S. assuming responsibility for the care and supervision of over 2000 Cuban criminals and mentally ill patients.¹⁰² On October 4, 1985, President Reagan responded with Proclamation 5377,¹⁰³ stating:

ban Suspension of Operation of 1984 Agreement for Return of Mariel Cubans, 79 AM. J. INT'L L. 1044 (1985). The U.S. State Department regularly publishes its policy positions in the American Journal of International Law cited here.

101. *Id.*

102. Philip Taubman, *U.S.-Cuban Parley Said to be Narrow*, N.Y. TIMES, July 14, 1984, at 4; Morris S. Thompson, *Military "Advisers" Dispatched to Besieged Atlanta Prison; Official Pledges Restraint if Hostages Safe*, WASH. POST, Nov. 26, 1987, at A1.

103. Proclamation 5377, *supra* note 3. An executive proclamation is generally issued following the completion of an agreement negotiated by the President pursuant to authority granted by congressional legislation. The President may also have the power to take action on the international plane without congressional authorization or approval on the basis of his own inherent power over foreign affairs. In *U.S. v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), the Court upheld the constitutionality of a presidential proclamation restricting the export of arms and found that the President has the power to make policy regarding international affairs even absent a Congressional declaration (note however that the proclamation in *Curtiss-Wright* was

In light of the current state of relations between the United States and Cuba, including the May 20, 1985, statement that the Government of Cuba, had decided "to suspend all types of procedures regarding the execution" of the December 14, 1984 immigration agreement between the United States and Cuba, thereby disrupting normal migration procedures between the two countries, I have determined that it is in the interest of the United States to impose certain restrictions on entry into the United States of officers or employees of the Government of Cuba or the Communist Party of Cuba.¹⁰⁴

issued pursuant to a congressional joint resolution). The constitutionality of such action is frequently debated.

In the area of foreign commerce, for example, which is an enumerated Congressional power, U.S. CONST. art. I, cl. 3, an agreement entered into by the President without Congressional authorization may be held a violation of the constitutional separation of powers. See, e.g., *United States v. Guy Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson noted that the President's authority is at its maximum when he acts pursuant to the express or implied authority of Congress, and is at its lowest ebb when he takes measures contrary to the express or implied will of Congress. In between there is a "zone of twilight" in which the distribution of powers may be unclear. *Id.* at 637. Congressional inertia or indifference may work in favor of the President acting independently. *Id.*

For a general discussion of the executive power to exclude aliens from the U.S., see Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

104. See Proclamation 5377, *supra* note 3.

The State Department considers virtually all Cuban nationals to be employees of the State of Cuba for purposes of granting non-immigrant visas. The State Department's theory is that since Cuba has a socialist centralized economy whereby all revenues go to the state and then are distributed to its citizenry, in effect all the island's citizens are "state employees." However, the Treasury Department has designated some Cubans as unblocked nationals, exempting them from embargo restrictions. See *infra* notes 200 to 203 and accompanying text. Additionally, the State Department asserts that "the U.S. Interests Section in Havana grants thousands of non-immigrant visas to Cuban nationals applying to travel to the U.S. - I have been informed that 26,458 B-1 and B-2 category visas were issued in Fiscal Year 1993... State Department Declaration, *supra* note 13 at para. 3.

B-1 visas are for business visitors engaging in commercial transactions not involving gainful employment, e.g., negotiating contracts, litigation, consulting with clients or business associates. B-2 visas are for aliens who traditionally received H-1 visas (other than entertainment professionals) but receive no salary or remuneration other than an expense allowance or other reimbursement incidental to temporary stay. KURZBAN, *supra* note 29 at 289.

III. THE EFFECTS OF PROCLAMATION 5377 ON CUBAN MUSIC IN THE U.S.

A. U.S. State Department Policy in the Pre-1991 Context

Proclamation 5377 effectively bars Cuban musicians from obtaining nonimmigrant visas for entry into the U.S. Under § 1(a), the musicians are barred because they normally travel on official passports as "cultural workers."¹⁰⁵ Even if the musicians do not travel on official passports, they can be denied visas under § 1(b) because the U.S. Secretary of State considers all Cuban nationals to be employees of the Cuban government.¹⁰⁶ Thus, although many Cuban musicians would qualify for admission to the U.S. under the O-1 nonimmigrant visa structure for entertainers,¹⁰⁷ Proclamation 5377 overrides the INS standards.

The Secretary of State's characterization of Cuban musicians as employees of the government is rigidly technical and perhaps correct when viewed in the context of the pre-1991 Cuban economic structure. Cuba has a Socialist economic system¹⁰⁸ whereby foreign revenues earned by Cuban citizens are collected by the government, then distributed to the citizenry.¹⁰⁹ This essentially renders all Cuban citizens who work abroad "government employees" whether they are in the business of government or the business of making music.

105. The erstwhile Cuban policy of regarding musicians and other artists as "cultural workers" led many artists to defect from Cuba. See Larry Rohter, *Jazz and Politics Meet Over the Keyboard*, N.Y. TIMES, § 2, May 9, 1993, at 30. This policy is no longer in effect due to changes in the Cuban music industry. See discussion *infra* parts III.B-C.

106. See State Department Declaration, *supra* note 13 at para. 7; see also, Sheila Rule, *The Pop Life. A Cuban's Respects*, N.Y. TIMES, Jan. 20, 1993, at C19.

107. See *supra* text accompanying notes 29-34.

108. In the Republic of Cuba the socialist system of economy is based on the people's socialist ownership of the means of production and on the abolition of the exploitation of man by man. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, [CUBA CONST.] art. 14 (1976), translated in Jay A. Sigler et al., 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993).

109. CUBA CONST. arts. 14 & 16. Whether redistribution of foreign revenues occurs in practice is a separate matter. Analysis of the Cuban government's redistribution procedures, however, is beyond the scope of this article.

The Cuban music business prior to 1991 was overseen by the Ministry of Culture, which in turn supervised the State record company Egrem, and Cubartista.¹¹⁰ Under this system, all professional musicians became state employees. Each musician belonged to one of 20 regional *empresas* (companies) jointly regulated by the *Instituto Cubano de la Música* (Cuban Institute of Music) and the Ministry of Culture. The Institute graded both individual musicians (from A to F, with pay based on grade) and groups (A or B).¹¹¹ An Egrem selection committee decided which artists to record. Egrem also paid fixed-scale royalties to recording artists on record sales. Cubartista arranged all overseas tours.¹¹²

In 1989, while the above structure was in place, New York City arts presenter Joseph Papp invited Rubalcaba to perform with Dizzy Gillespie at Central Park as part of the annual *Festival Latino* (Latin Festival).¹¹³ Additionally, Rubalcaba was scheduled to give a free concert in New York at the World Financial Center Winter Garden Pavilion.¹¹⁴ *Festival Latino's* producer Joseph Papp, with support from Senator Daniel Patrick Moynihan and several other members of the New York congressional delegation, petitioned the State Department to waive Proclamation 5377 for Rubalcaba.¹¹⁵ The State Department turned down the visa request two days before the first scheduled performance.¹¹⁶

As stated in the Introduction, the State Department's cur-

110. Philip Sweeney, *A Bare-Bones Music Trade Feeling Its Way In Cuba* BILLBOARD, Mar. 20, 1993, at 1. Cubartista is the organization responsible for overseas performances and music publishing. *Id.*

111. *Id.* That is, the best musicians (either technically or most famous) received "A" level salaries with lower grade musicians (grades B-F) receiving less money. Groups were rated similarly. However, it was possible for a "B" level musician to perform as a sideman in an "A" level group.

112. *Id.*

113. Ethan Schwartz, *U.S. Bars Cuban Pianist*, WASH. POST, Aug. 19, 1989, at E12; Aileen Jacobson, *Give Us Your Huddled Masses, But Not Your Artists: Arts Groups Play the Visa Game*, N.Y. NEWSDAY, Sept. 28, 1989, at § 2, O3.

114. The World Financial Center, headquarters for Merrill Lynch and American Express among other financial giants, often hosts free concerts in the Wintergarden Pavilion. Query whether a "Communist" musician, performing in this bastion of "Capitalist" America, affects the way in which people enjoy the music. See text accompanying *supra* note 2.

115. See Schwartz, *supra* note 113; see also Proclamation 5377, *supra* note 3, at § 2(c).

116. See Schwartz, *supra* note 113.

rent official policy is to grant or deny waivers based on the *commercial* viability of the Cuban O-1 visa applicant. In previous years it granted waivers to Joseph Papp's organization¹¹⁷ and issued visas for Cuban filmmakers.¹¹⁸ In a letter to Bernard Aronson, Assistant Secretary of State for Inter-American Affairs, Papp said, "When you seem to have no problem granting visas to three Cuban filmmakers and deny eight musicians entry, the rationale seems strained. It is counterproductive and ends up as an attack against artists whose presence poses no threat to national security."¹¹⁹ Papp strikes at the heart of a U.S. policy that relegates artists to the status of pawns in the chess game of U.S. - Cuban relations.¹²⁰ Papp went on to say "[t]he denial will not cause [Fidel] Castro any sleepless nights but will deprive several thousand Americans of hearing the music of this distinguished group."¹²¹

In 1991, Rubalcaba again applied for a visa to record his album *Discovery* with American jazz artists Charlie Haden and Paul Motian. This application was denied and Rubalcaba recorded in Toronto instead.¹²² At that time, he also performed with Haden and Motian at Toronto's El Mocambo to packed houses and critical acclaim.¹²³

U.S. State Department policy not only continued to plague Rubalcaba's attempted performances in the U.S., but also his ability to perform in Canada. In July 1992, he was scheduled to perform at the Montreal International Jazz Festival. He was delayed when his connecting flight from Jamaica was cancelled due to engine trouble. Proclamation 5377 again reared its ugly head; Rubalcaba could not be rerouted on a flight that had a connection or refueling stop in the U.S., given that he had no U.S. visa. He had to wait while arrangements were made for a private jet capable of flying him directly from Jamaica to Mon-

117. Joseph Papp was the founder of the Shakespeare Festival in New York's Central Park. He passed away November 1, 1991. William A. Henry, *A Showman of the People*, TIME, Nov. 11, 1991, at 99.

118. See Schwartz, *supra* note 113.

119. *Id.* (quoting Joseph Papp). State Department officials declined comment on Papp's complaint. *Id.*

120. See *infra* notes 207 - 216 and accompanying text.

121. See Schwartz, *supra* note 113.

122. Gene Santoro, *Gonzalo Rubalcaba Mines Order from Chaos*, PULSE MAG., Dec. 1992, at 42.

123. *Id.*

treat.¹²⁴

Commenting on Proclamation 5377's effect on his career, Rubalcaba said:

I think we have better times, easier times ahead. We are living a very difficult moment historically. Even art is suffering. I think letting political dogma get in the way of artistic activities shows lack of vision and perspective. But we have something in our favor: Music is a universal language and moves about freely—even if one's presence is not there.¹²⁵

B. Cuba's Changing Economy

The 1989 fall of the Soviet Union profoundly affected the Cuban economy. Between 1989 and 1992, Cuba's foreign exchange receipts and imports decreased 75%, from U.S.\$8.8 billion to U.S.\$2.2 billion.¹²⁶ To bolster Cuba's foreign trade receipts and expand the influx of hard currency, the Castro regime adjusted its socialist economic policy by opening the door to foreign business operations.¹²⁷

Evidence of Cuba's changing attitude toward capitalist ventures is present in policy shifts concerning both foreign and

124. Fernando Gonzalez, *Gonzalo Rubalcaba: A Bud Powell for the 21st Century*, BOSTON GLOBE, July 19, 1992, at B2.

125. *Id.*

126. The current estimate for 1993 is U.S.\$1.8 billion with an increase anticipated in 1994. James D. Whisenand, *The Other Side of Cuba*, FLORIDA TREND MAG., Oct. 1993, at 44.

127. *Id.* Fidel Castro announced the opening of Cuba to foreign investors in his 1991 report to the Fourth Congress of the Communist Party. *Id.* See also, Kevin Fedarko & Cathy Booth, *Open for Business; Bereft of Patrons, Desperate to Rescue His Economy, Fidel Turns to an Unusual Solution: Capitalism*, TIME, Feb. 20, 1995, at 50.

The past three years have seen the formation of 190 joint ventures involving 28 countries and representing more than \$1.5 billion in foreign money. Most of the capital has flowed into tourism, mining, agriculture, construction and manufacturing. American companies, barred from investing in Cuba by Washington's trade embargo, can only watch enviously — for now.

Cuba has signed investment-guarantee agreements — which carry Havana's promise not to expropriate property — with Britain, Columbia, Germany, Italy, Russia and Spain.

Michael Z. Wise, *The New Cuban Invasion*, INSTITUTIONAL INVESTOR, February, 1995, at 71.

domestic enterprises.¹²⁸ On the foreign front, "Cuba has reshaped the policies of the Principles of the Revolution to accommodate foreign capital and the right of foreigners to own up to 100% of Cuban companies."¹²⁹ While foreigners cannot presently own land, fifty-year-plus land leases are available.¹³⁰ On the domestic side, "Castro has created autonomous state enterprises that continue to be state-owned but theoretically succeed or fail on their own without state support."¹³¹ Additional efforts to open up the economy include a new policy by the Castro government that allows Cubans to own foreign currencies (including the U.S. dollar) and to purchase foreign goods in the Cuban U.S.-dollar stores.¹³² The Cuban government anticipates that much of the foreign currency will come from Cuban exiles sending money to their families in Cuba.¹³³

C. *The Cuban Music Business Feels the Impact*

The post-1991 economic changes are impacting the Cuban music industry in ways that should affect U.S. immigration policy toward Cuban musicians. Due to these changes, the Cu-

128. Lizette Alvarez, *Castro Tries Using Capitalism to Save Socialism*, MIAMI HERALD, Mar. 28, 1995, at 1A. A Miami reporter states:

After a six-year crisis sparked by the downfall of the Soviet Union and its massive subsidies, Fidel Castro's government has launched a series of agrarian reforms with two goals in mind: Usher in capitalism, safeguard socialism. . . . [A] government that once relied on revolutionary exhortations and Marxist economics to control production is now offering farmers a time-honored reason to toil harder: profit.

Id. See also Lizette Alvarez, *Farmers' Markets Oasis of Food for the Hungry*, MIAMI HERALD, Mar. 28, 1995, at 4A.

129. *Id.* But see France: *Cuba May Let Foreigners Own Majority in Firms*, Reuter News Service, Mar. 14, 1995, available in LEXIS, Nexis Library, INTNEWS File (Fidel Castro reports that Cuba may consider 100% foreign ownership of business ventures if the specific project benefits the island).

130. See Whisenand, *supra* note 126.

131. *Id.*

132. *Id.* Prior to this change, Cubans were not allowed to own U.S. dollars. However, Cubans did obtain dollars through an illegal black market whereby goods were traded outside of the state economy. As a result of the black market, the benefits of that commerce did not inure to the Government. The effect of these changes are estimated to create between \$700 million and \$1 billion dollars per year in new currency for the Cuban economy. *Id.*

133. *Id.* The new policy creates a moral dilemma for the exile community, which is torn between honoring the U.S. embargo and not supporting their families in Cuba, or sending money to family members whose economic well-being and standard of living are jeopardized by the embargo.

ban music business is reacting and evolving. Many of the pre-1991 attributes persist. Currently there are five record labels, the state-run Egrem, Artex,¹³⁴ PM,¹³⁵ Artcolor¹³⁶ and *Inspector de la Salsa*.¹³⁷ The five labels use the pre-1991 structure of salary rates for the artists.¹³⁸ While prior to 1991, the State affiliated labels did not operate autonomously, the new influx of private investors has created more competition for artist affiliation.¹³⁹ Prior to these changes, the government sanctioned labels (Egrem, Artex and PM) mutually negotiated artist allocation under the supervision of the Ministry of Culture.¹⁴⁰

It appears that the Cuban music industry will become more competitive. P.M.'s Orlando Echevarria states, in a fashion similar to that of an independent record executive in the U.S., "[w]e can offer better opportunities to artists. We're smaller, quicker, and less bureaucratic, and we do much more recording outside

134. Philip Sweeney, *A Bare-Bones Music Trade Feeling Its Way In Cuba*, BILLBOARD, Mar. 20, 1993, at 1. Artex superseded Cubartista and in addition to controlling overseas performances and music publishing, it now runs its own record label. *Id.* Though the label was created to be "independent" by the State, a Cuban-government entity does not reflect an "independent" entity in the U.S. sense, i.e., the Cuban government can still step into the operations of Artex.

135. *Id.* The PM label was founded by Cuban *nueva trova* (new song) star Pablo Milanes. The label has released about twenty titles, and sold approximately 80,000 records and CDs. Half of the releases are digitized re-issues by Mr. Milanes. *Id.* The creation of PM was under the auspices of a foundation created by Mr. Milanes. It took over a year to create this foundation and Cuban government approval came about as a reaction to critics and in order to show that Cuba allows artists to create foundations. Telephone Interview with a Cuban recording artist (Apr. 14, 1995)[hereinafter Cuban Artist Telephone Interview]. This artist asked that his name not be printed since he is currently seeking permanent residency in the U.S.

136. Artcolor is a completely private, independent label funded by a Venezuelan company. Cuban Artist Telephone Interview. *Id.*

137. *Inspector de la Salsa* is a joint venture between Spanish investors and Artex. Given the Spanish investment, it has more independence than Artex. However, the most independent of all the five labels is the completely private enterprise, Artcolor. Cuban Artist Telephone Interview. *Id.*

138. See *supra* note 111 and accompanying text.

139. *Id.* The Cuban government has allowed foreign entrepreneurs to come to Cuba to transact music industry business, and Cuban musicians often travel overseas to perform and record. Sublette Telephone Interview, *supra* note 6. The London jazz club, Ronnie Scott's, often features Cuban bands and has recorded them. *Hear, e.g., Irakere, Live at Ronnie Scott's* (World Pacific 1993). Additionally, Ronnie Scott's has opened an office in Cuba, Skuba Promotions, to set up tours of Cuban artists abroad and generally position itself from a business perspective to most effectively exploit the great music being produced in Cuba. *Id.*

140. See Sweeney, *supra* note 134.

Cuba, mainly in Mexico and Venezuela."¹⁴¹ Moreover, there is an understanding within the music business that musicians communicate and work better with other musicians than with bureaucrats and business executives. PM, a company headed by a musician, will hold this advantage as the Cuban music industry becomes more accessible to the world.

D. Cuban Musicians Get Their Own Bank Account

Previously, the Cuban government collected the fees earned by Cuban artists abroad, paid them per diems while on the road, and then paid the artists in Cuba in both cash and perquisites.¹⁴² On June 1, 1993, the Cuban National Bank issued new rules specifically allowing artists, athletes and others who earn hard currency abroad to keep it.¹⁴³ This is not to say, however, that Cuba's government receives nothing from its citizens who earn incomes abroad. In the case of touring musicians, Artex is usually involved in the logistics for the tour and retains a commission from the artist salaries analogous to commissions kept by U.S. booking agents.

In addition to the ability to legally retain money earned abroad¹⁴⁴ or sent to them by family members overseas, Cubans are now permitted to keep half of inheritances acquired abroad. Further, workers in tourist hotels and restaurants generally keep gratuities earned.¹⁴⁵ These shifts in economic policy dilute

141. *Id.*

142. Cuban Artist Telephone Interview, *supra* note 135.

143. Linda Robinson, *Capitalism Comes on Little Cat Feet*, U.S. NEWS & WORLD RPT., July 29, 1993, at 42.

This makes economic policy more consistent with the Cuban constitution, which contains provisions amenable to private ownership. For example, Chapter One, Article 22 guarantees the "right to personal ownership of earnings and savings derived from one's own work." CUBA CONST. art. 22. This specific guarantee applies to musicians performing abroad, making the new Cuban National Bank rules constitutionally consistent. One should note, however, that Cuba does not yet have an open economic market and it would be folly to directly analogize between a Cuban musician's business operations and those of a U.S. musician.

144. This provision is significant for Cuban musicians such as Los Van Van, Irakere and NG La Banda who often perform in Japan and Europe.

145. See Berta Esperanza Hernández Truyol, *Out In Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 98 (1994) (remarking that although this is not a legally sanctioned practice, authorities generally look the other way and allow workers to retain gratuities); see also ANDRES OPPENHEIMER, *CASTRO'S FINAL HOUR* 293-94 (1992).

the contention —still maintained by the U.S. government— that all Cuban citizens are employees of the state.¹⁴⁶ This stubborn adherence is not really a surprise under the Clinton administration, where Democrats compete with Republicans to see who is more macho in anti-Castro rhetoric and action. Both parties are fighting hard to capture the hearts and dollars of the Cuban American National Foundation.¹⁴⁷

IV. TRADING WITH THE ENEMY ACT AND THE FUTURE EMPLOYMENT CATEGORIZATION OF CUBAN MUSICIANS

To fully appreciate the Cuban musician's status in the eyes of the U.S. State and Treasury Departments, this section examines the requirements for Cuban music to be recorded and legally distributed in the U.S. With an understanding of the live and recorded aspects of the music business in the context of the U.S. trade embargo on Cuba, one can begin to press the issue of whether a Cuban musician is a government employee, independent contractor, or a combination of both.

A. *Trading Music with the Enemy*

The origins of present-day U.S. policy toward Cuban recordings can be traced to the Trading with the Enemy Act ("TWEA")¹⁴⁸ passed by Congress in 1917. The intent of the

146. The CACR's goal is to prevent *any* U.S. dollars from flowing to Castro. State Department Declaration, *supra* note 13 at para. 5. This fact alone makes it impossible for the State Department to change its policy without a fundamental change in the U.S. laws.

147. See Ann Louise Bardach, *Our Man in Miami—Mas Canosa: Mobster and Megalomaniac*, NEW REPUBLIC, Oct. 3, 1994, at 20. "Scores of politicians have been enriched by hefty Mas-controlled contributions . . ." *Id.*; Editorial, *The Dread of Refugees; U.S. Policy vs. Cuba*, PROGRESSIVE, Oct. 1994, at 9.

To a disgraceful extent, U.S. policy toward Cuba has been dictated by Jorge Mas Canosa and his Cuban American National Foundation, which favors the most punitive measures against the island's communist regime. Mas Canosa has delusions about heading a new government in Cuba, and his Foundation has contributed money to politicians across the country. Mas Canosa, who had supported Ronald Reagan, raised over \$400,000 for Bill Clinton's 1992 Presidential race. And Clinton now bows before him.

Id.

148. The Trading with the Enemy Act is now incorporated into the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1991). For purposes of

TWEA was to prevent an enemy country or a national of an enemy country from using any property owned or controlled in the U.S., and to make that property available to the U.S. for its disposition.¹⁴⁹ When the U.S. imposed the trade embargo against Cuba in 1963, the Office of Foreign Assets Control ("OFAC"), the federal agency responsible for enforcing the TWEA, adopted the Cuban Assets Control Regulations ("CACR") to prohibit transactions in which Cuba had an interest.¹⁵⁰ The CACR prohibited all trade with Cuba including trade in "informational materials" (i.e. records and tapes).¹⁵¹

On August 23, 1988, Congress enacted the Berman Amendment¹⁵² to the TWEA. This amendment denies the President authority to regulate or prohibit the import or export, to or from Cuba, of informational materials, including phonograph records and tapes.¹⁵³ The Berman Amendment allows these products to

this commentary, any references to the Trading with the Enemy Act also include the International Emergency Economic Powers Act. Note that new U.S. governmental documents continue to refer to the Trading with the Enemy Act. See, e.g., WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO, *supra* note 13.

149. 40 Stat. 415 (1917), as amended, 50 U.S.C. § 5(b) (1946). See Joseph W. Bishop, Jr., *Judicial Construction of the Trading With The Enemy Act*, 62 HARV. L. REV. 721 (1949) (discussing Trading with the Enemy Act.); see also, Kathleen M. Donovan, Note, *Cuban Assets Control Regulations*, 14 SUFFOLK TRANSNAT'L L.J. 273 n.1.

150. 31 C.F.R. § 515 (1987); see also, Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POLY INT'L BUS. 319, 328 (1983). The President of the U.S., pursuant to the TWEA, was granted the authority to impose embargoes on all trade with foreign countries. See 40 Stat. 415 (1917) (Trading with the Enemy Act). The President delegated to the Secretary of the Treasury the authority granted to the President under the Trading with the Enemy Act to impose embargoes on financial and commercial transactions with enemy countries. Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1942). The Secretary of the Treasury delegated the authority it received from the President to the OFAC. *DeCuellar v. Brady*, 881 F.2d 1561, 1564 n.2 (11th Cir. 1989).

The CACR prohibit all transactions that involve property in which a foreign country, or any national thereof, has at any time on or since the effective date of the regulations, had any interest of any nature whatsoever. 31 C.F.R. § 515.201(a)(1) (1987). According to section 515.305 of the CACR, Cuba is a designated national. 31 C.F.R. § 515.305 (1987). The OFAC responded to Fidel Castro's developing relationship with the Soviet Union by issuing an embargo on U.S. trade with Cuba pursuant to the CACR. 31 C.F.R. § 515 (1964); see also Donovan, *supra* note 149, at 27 n.2.

151. 31 C.F.R. 515.332(a)(1) (1994)

152. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1371, 50 U.S.C.App. § 5(b)(4), 31 C.F.R. 515.206(a).

153. 31 C.F.R. 515.332(a)(1) (1994) (defining "informational materials").

be imported and exported into the U.S. for commercial¹⁵⁴ or educational purposes.¹⁵⁵ The Amendment, however, provides that "materials not fully created and in existence at the date of the transaction are not authorized."¹⁵⁶ In addition, the statute does not authorize advance payments for works in progress.¹⁵⁷

While allowing record companies to license pre-existing Cuban material, the Berman Amendment appears crafted to prevent U.S. record labels from signing Cuban artists to standard recording contracts. Typically, a recording contract is for future recorded works, with the record company advancing funds to cover the costs of recording, manufacturing, and distributing the recorded product.¹⁵⁸ Securing a musician to a record contract is a prerequisite to effectively and competitively marketing him.¹⁵⁹ The Berman Amendment, while helpful, does not allow U.S. record companies to effectively market Cuban musicians because it precludes contracting for future performances.

Nevertheless, where there is art there is creativity. In Rubalcaba's case, the parties crafted a creative solution to circumvent the Treasury Department's constriction of the Cuban *clave*.¹⁶⁰ Somethin' Else records, a Japanese company, executed a recording contract with Rubalcaba and licenses his work to

154. American rock artist David Byrne's record label Luaka Bop became the first U.S. company to directly license Cuban material under the new law. His first release, CUBA CLASSICS 1, CANCIONES URGENTES, (Luaka Bop/Warner Brothers 1991), featured the Cuban singer Silvio Rodriguez.

The second release, CUBA CLASSICS 2, INCREDIBLE DANCE HITS OF THE 60'S & 70'S, DANCING WITH THE ENEMY, (Luaka Bop/Warner Brothers 1991) featured a bevy of artists long lost to American audiences due to the embargo. The release features: *Celeste Mendoza, Orquesta Original de Manzanillo, Los Van Van, Maria Teresa Vera, Orquesta Riverside, Chapottin y Sus Estrellas, Conjunto Rumbavana, Orquesta Revé "Cahngui '68", Caridad Hierrezuelo y Conjunto Caney, Los Zafiros, Orquesta Pancho el Bravo, El Jilguero de Cienfuegos, Caridad Curvo y Conjunto Caney and Celeste Mendoza y Los Papines. DANCING WITH THE ENEMY supra.*

155. This is echoed in the International Emergency Economic Powers Act which states, "The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly the importation from any country, or the exportation to any country, whether commercial or otherwise of phonograph records, tapes, or other informational materials" 50 U.S.C. § 1702(b)(3) (1991).

156. 31 C.F.R. § 515.206(c) (1994).

157. *Id.*

158. *See generally*, DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, chs. 7-14 (1991) (describing record deals).

159. *Id.*

160. *See supra* note 6.

Blue Note, a U.S. record company.¹⁶¹ The license and subsequent royalty payments from Blue Note occur only after the master recording is complete. This transaction does not violate the CACR. The security of the Somethin' Else deal allows Blue Note to effectively market Rubalcaba in the U.S.

In 1992, Congress passed the Cuban Democracy Act, which tightened the U.S. embargo against Cuba as promulgated under the CACR¹⁶² and the International Emergency Economic Powers Act.¹⁶³ The main thrust of the bill was to amplify the effects of the TWEA by including subsidiaries of U.S. companies within the definition of U.S. corporations.¹⁶⁴ The Cuban Democracy Act, however, specifically exempts transactions and laws passed prior to its signing on October 23, 1992. Thus, the benefits of the Berman Amendment, passed in 1988, still allow U.S. companies to directly license completed master recordings¹⁶⁵ by Cuban musicians.

B. Cuban Assets Control Regulations and the Cuban Musician

The CACR prohibit U.S. citizens or companies from engaging in commercial transactions with Cuba or any of its nationals, except as specifically authorized by the Secretary of the Treasury or his designees.¹⁶⁶ This is why Gonzalo Rubalcaba and his musicians could not receive compensation for their performance at Lincoln Center.

The reasoning behind the CACR is threefold. First, the U.S. seeks to deny Cuban nationals hard currency, fearing the money might be used to promote activities adverse to U.S. interests.¹⁶⁷ Second, the CACR are designed to retain blocked funds for possible use or vesting to the U.S.¹⁶⁸ Third, the U.S. posits that *any*

161. Howard Mandel, *The Long and Winding Road*, VILLAGE VOICE, May 25, 1993.

162. 31 C.F.R. § 515 (1994).

163. 50 U.S.C. § 1701 (1991).

164. Bell, *supra* note 67, at 79.

165. A master recording is the completed tape of a recording session from which copies are manufactured.

166. 31 C.F.R. § 515.201(a)(2) (1994).

167. *See* Real v. Simon, 510 F.2d 557, 563 (5th Cir. 1975).

168. *Id.*

Cuban national's funds frozen in the U.S. will give the U.S. additional negotiating power in settling the outstanding expropriation claims against Cuba.¹⁶⁹ Thus, artists such as Rubalcaba are manipulated as pawns in a thirty-year-long ideological battle.

In the case of Cuban musicians, the U.S. policy in denying them nonimmigrant visas does not, however, further the U.S. goals stated above. Since these musicians now keep all their money earned abroad, these funds do not fill the Cuban government's coffers. Additionally, as a result of the Berman Amendment, the U.S. Government cannot block Cuban musicians and composers from receiving hard currency for their recording and publishing royalties.¹⁷⁰ On the other hand, what this policy does do is to prevent U.S. citizens from hearing great music. Organizations like Artex are involved in the booking of tours, and as such do receive a modest percentage from artists. While the State Department argues this percentage is enough to trigger the CACR, one should bear in mind that nearly every nation in the world has a tax policy whereby citizens contribute a portion of their income to the government. The U.S. government policy is extreme because it demands that another sovereign nation refrain from taxing its artists before it will allow those artists to perform in the U.S. This policy is patently unreasonable, however, not surprising in light of the Cuban Democracy Act and current efforts by Senator Jesse Helms to constrict not only U.S. economic relations with Cuba, but U.S. allies as well.¹⁷¹ In the end, this archaic policy only hurts U.S. citizens who are denied both the artistry emanating from Cuba, and the business opportunities that are instead going to the Japanese, Canadians, and Europeans.

169. *Id.*

170. In reality, the sales of Cuban music in the United States are relatively small, in part because commercial Spanish language radio stations have refused to play music from Cuba and because the groups can't come into the U.S. to tour. See Sublette Telephone Interview, *supra* note 6. As a direct consequence of the limited exposure of Cuban groups on U.S. radio stations and in U.S. concert halls, the publishing royalties are minimal as well.

For a thorough explanation of recording and publishing royalties, see generally PASSMAN, *supra* note 158, at 53-256; SIDNEY SHELME and M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC, A PRACTICAL GUIDE TO THE MUSIC INDUSTRY FOR PUBLISHERS, WRITERS, RECORD COMPANIES, PRODUCERS, ARTISTS, AGENTS 3-48, 133-247 (1990).

171. See *infra* note 186 and accompanying text.

C. *Rubalcaba Arrives*

The State Department granted Rubalcaba's first visa to the United States for "humanitarian" purposes, so that he could serve as an honorary pallbearer at trumpeter Dizzy Gillespie's funeral on January 12, 1993.¹⁷² Gillespie, an enthusiastic supporter of Afro-Cuban music,¹⁷³ once declared Rubalcaba "the greatest pianist he'd heard in 10 years."¹⁷⁴ Rubalcaba and Gillespie performed together in Cuba when Rubalcaba was eighteen years old. Thereafter, Gillespie continued to be a major musical and spiritual influence for the pianist.¹⁷⁵ Sadly, the State Department found that "humanitarian" reasons more clearly compelled Rubalcaba's presence at Gillespie's funeral than they would a U.S. performance with the trumpeter while he was still alive.¹⁷⁶

D. *Are Cuban Jazz Musicians Government Employees?*

Because of the changes in the Cuban economy since 1991,¹⁷⁷ the Secretary of State's determination that all Cuban musicians are government employees is no longer valid.¹⁷⁸ The

172. Mr. Gillespie died at the age of 75 on January 6, 1993 of pancreatic cancer. Sheila Rule, *A Cuban's Respects*, N.Y. TIMES, Jan. 20, 1993, at C19.

173. Mr. Gillespie's first encounter with Cuban sounds came in the 1930s when he befriended the great Cuban musician Mario Bauza. Bauza, trumpeter and music director with Cab Calloway at the time, got Gillespie his first gig by calling in sick for one week to Calloway and sending Dizzy as his substitute. Dizzy later was hired by Calloway as a result and he continued a close personal and musical relationship with Bauza — known as one of the pioneers of the Latin Jazz sound — until his death.

Gillespie brought the Cuban sound to Bebop when he featured the great Cuban percussionist Chano Pozo in his group in the 1940s. See AL FRASER & DIZZY GILLESPIE, *TO BE OR NOT TO BOP, MEMOIRS OF DIZZY GILLESPIE* 317-319 (1979).

174. Gene Seymour, *Pianist Makes His U.S. Debut: Gonzalo Rubalcaba's Cubano Bop*, N.Y. NEWSDAY, May 14, 1993, at 83.

175. See, e.g., Larry Rohter, *Jazz and Politics Meet Over the Keyboard*, N.Y. TIMES, May 9, 1993, at 30; Sheila Rule, *A Cuban's Respects*, N.Y. TIMES, Jan. 20, 1993, at C19.

176. See *supra* notes 113-116.

177. See *supra* part III.B.

178. The Cuban government is increasingly providing Cubans incentives for capitalist enterprise in Cuba. See generally Lizette Alvarez, *Castro Tries Using Capitalism to Save Socialism*, MIAMI HERALD, Mar. 28, 1995, at 1A; see also Lizette Alvarez, *Farmers' Markets Oasis of Food for the Hungry*, MIAMI HERALD, Mar. 28,

State Department's classification of all Cuban citizens as government employees depends on the existence of pure socialist economics in Cuba. While arguably a reasonable conclusion prior to 1991, the changes in the Cuban economy previously outlined¹⁷⁹ call for a reappraisal of this classification. Additionally, under the Berman Amendment and the Cuban National Bank's new rules, Cuban musicians may keep all royalties derived from U.S. record sales. Effectively, Cuban musicians with international acclaim now keep virtually all of their money earned abroad.¹⁸⁰ Given these changes, it is unrealistic automatically to classify all Cuban musicians as government employees.

Finally, it is apparent that the current foreign policy towards Cuba, whereby the U.S. hopes to compel Castro's submission by enforcing a tightened embargo, is a failure. A recent Pentagon-commissioned study entitled "The Military and Transition in Cuba"¹⁸¹ concluded:

1995, at 4A.

179. See *supra* part III.B.

180. Cuban Artist Telephone Interview, *supra* note 135.

Contemplate the reverse implications in the case of a U.S. musician who is awarded a scholarship to a state-funded university music school, or a composer's grant from the National Endowment for the Arts ("NEA"). NEA grants are funded by the federal government, and by removing many subsistence concerns they allow fledgling American composers to concentrate exclusively on composition. If the musician composes avant garde or jazz music and performs extensively in Europe, the analogy to Rubalcaba is complete.

Consider whether U.S. residents would deem the musician in receipt of a scholarship or NEA grant based on talent to be a "government employee" when all fees collected from performances abroad are retained by the musician. Does acceptance of a subsidized education signify the musician's support for all the policies of incumbent administrations during the term of the subsidy, including, for example, those relating to Haiti, Bosnia-Herzegovina, NAFTA, the constitutional right to abortion, or the Brady Bill? Consider further that a U.S. musician's actual support of any, all or none of these administration policies is irrelevant as to whether a foreign government will grant a performance visa, because the simple fact of U.S. citizenship will determine that musician's eligibility for a visa. It is difficult to imagine that his or her country's views on these issues could in any way affect extraordinary ability, achievement, or distinction in the arts. Adding to this is the notion that by withholding concert fees of a U.S. musician, foreign governments can gain leverage in negotiations with the U.S. These propositions remain official U.S. policy with respect to a musician from Cuba.

181. Christopher Marquis, *Pentagon: Castro Managing to Walk Economic Tightrope*, MIAMI HERALD, Mar. 31, 1995, at 1A. This study was conducted by former CIA agent Nestor Sánchez and his firm International Research 2000 which received \$200,000 from the Pentagon. The study consulted experts from Moscow as well as visits by Russians to Cuba. Commenting on the experts, Sánchez said, "What they brought . . . is the experience of 36 years in which we have not been in contact

There is no doubt that Fidel Castro has won the present round of the political struggle in Cuba, and he has done so in a very professional manner . . . He has understood that present circumstances leave him no option other than to lead the country toward economic reforms in a controlled market . . . while maintaining absolute control of the country. The only peaceful road toward economic and political plurality in Cuba is the gradual evolution of the existing regime.¹⁸²

This report was prepared by Nestor Sánchez, a former CIA official and Deputy Assistant Secretary of Defense during the Reagan administration, an individual long known as a hard-line conservative. Over ten years after the filing of Proclamation 5377, a Reagan administration Cuba expert contradicts the assertions of many Congressional Republicans and Cuban exiles that Castro's power is slipping:¹⁸³

I don't know what people need — for 36 years we've had an embargo on this guy and he's still there,' said Sánchez, a sometime business partner of Iran-contra figure Oliver North. 'I would say Richard Nixon was probably right, when he wrote before he died that it's a failed policy.'¹⁸⁴

with the Cubans. The Russians trained them; they speak their language; they served in Cuba during many tours. They know them." *Id.* at 32A.

182. *Id.*

183. *Id.* It appears that the tide is turning among Cuban exiles in their optimism that Castro will soon fall. A Florida International University poll found that only fourteen percent of Cuban Americans are anticipating change within a year. An additional twenty-seven percent see it within five years. Overall, the survey showed sixty-eight percent of Cuban Americans favor starting negotiations to facilitate democratic changes. However, considering negotiation does not mean Cuban-Americans have given up their support of the embargo. Eighty-four percent favor increasing international economic pressure and eighty-two percent favor the tightening of the U.S. trade embargo.

Reflecting on the pessimism in the Cuban exile community, one exile stated, "[w]e've been waiting thirty-five long years and I think he's going to last a lot longer. He has outlived everything and remains firm in his power." Frances Robles, *Waning Hope for a Quick Fix in Cuba; Poll: Exiles think Castro Will Hang On*, MIAMI HERALD, Apr. 16, 1995, at 1A.

184. *Id.*

V. CONCLUSION

The history of U.S. - Cuban relations is fraught with the pain and suffering of families separated by obstinate policies on the part of the U.S. and Cuban governments. For many, it is a difficult subject to discuss intellectually, for it deals with the foundation of one's spiritual center, *la patria* (the homeland). However, with the fall of the Soviet Union and the warming of relations with both China and North Korea, the sensibility of U.S. policy toward Cuba is questionable. In effect, the U.S.'s Cuban foreign policy is dictated by emotionalism, obsolete Cold War posturing, and the lobbying strength of Miami's Cuban American National Foundation.¹⁸⁵ The bottom line is that Cuban musicians are being used as pawns in this foreign policy battle.

Lamentably, U.S. policy is trying further to constrict the Cuban economy. Senator Jesse Helms recently introduced a bill in the U.S. Congress seeking to punish foreign corporations and governments for doing business with Cuba.¹⁸⁶ In effect, the bill attempts to extend U.S. measures against Cuba beyond U.S. jurisdiction. This constitutes an illegitimate intrusion into a third country's affairs. The European Union's representative sent a letter to U.S. lawmakers, saying:

[T]he European Union 'cannot accept that the U.S. unilaterally determines and restricts European Union economic and commercial relations with any foreign nation that has not been collectively determined by the U.N. Security Council as a threat to peace.'¹⁸⁷

185. See *supra* note 147.

186. Steven Greenhouse, *Allies of U.S. Seek to Block Bill on Cuba, Europeans Protest Over New Embargo*, N.Y. TIMES, Apr. 13, 1995, at A1.

187. *Id.* In the final analysis, the obsession with undermining Communist powers has dictated many an unproductive U.S. foreign policy. The Vietnam war, a war against a nationalist communist insurgency, took 58,000 American lives. Many justify the war against communism, as they do today, by advocating a tougher stance against Cuba. However, Robert McNamara, former Secretary of Defense in the Kennedy and Johnson Administrations, recently disclosed in his autobiography that the U.S. war against Vietnam was a mistake and he knew that as early as 1967. B. Drummond Ayres, Jr., *For Most, Regrets Over Vietnam Come Too Late*, N.Y. TIMES, Apr. 15, 1995, at 1.

In deciding what policy to pursue in regard to Cuba, President Clinton must consider divergent advice. Hard liners such as Senator Helms, insist that tightening the embargo¹⁸⁸ will prompt Castro's fall.¹⁸⁹ In light of the increased foreign investment,¹⁹⁰ the recent Pentagon Report,¹⁹¹ and the increase in European and Canadian tourism¹⁹² in Cuba, the likelihood that a tightened embargo will cause Castro to fall is questionable at best. On the other hand, Undersecretary of State Peter Tarnoff and national security official Morton Halperin recently advised the President to lift some sanctions on the island to signal a willingness to respond favorably to any progress in Cuba toward developing free markets and democracy.¹⁹³

The advisers theorize that making an overture to Cuba could stimulate a speedup in reforms that could lead to a liberalization of Cuban society and perhaps to democracy. At a

188. Thus far the embargo has not prevented \$1.5 billion dollars in investment from abroad. *The Miami Herald* placed Cuba at number twenty-nine on a list of one hundred nations worthy of investors' attention. Only three Latin American or Caribbean nations were more favorably placed. See Dalia Acosta, *Cuba-Economy: No Shortage of Foreign Investors*, March 20, 1995, available in WL/ALLNEWS database.

Additionally, the foreign investment has significantly helped Cuba's economy in recent years with analysts saying "last year, after four years of uninterrupted losses, Cuba registered 0.7 percent economic growth and a seventy-two percent drop in the budget deficit." *Id.*

189. Williams, *supra* note 83; see also, Christopher Marquis, *U.S. Allies Angered by Bill to Tighten Cuba Embargo*, MIAMI HERALD, April 8, 1995, at 16A.

190. See Acosta, *supra* note 188.

180 associations with capital from thirty-eight nations currently operate in twenty-six economic sectors of Cuba, representing more than \$1.5 billion. The leading actors are from Canada, China, France, Mexico and Spain, with investments in tourism, mining, communications, petroleum, light industry and other areas.

Id.

191. See *supra* notes 181 to 184 and accompanying text.

192. Cuba is aggressively marketing itself as a tourist destination to Canadians. It is estimated that Cuba is spending \$10,000,000 on Canadian marketing alone, about triple South Florida's annual marketing budget. "There is no question that Canada is Cuba's number one market and that they are pulling business away from us," said Merrett Stierheim, President, Greater Miami Convention and Visitors Bureau. Anne Moncreiff Arrarte, *Ad Blitz, New Hotels, Cheap Prices are Luring Canadians to Cuba*, MIAMI HERALD, Mar. 19, 1995, at 1A.

The marketing campaign is paying off for Cuba. It hosted 100,000 Canadians in 1994 and expects a twenty percent increase in 1995. By comparison, Canadian tourism in Dade County, Florida dropped thirty-two percent between 1993 and 1994 from 596,800 to 406,200. *Id.*

193. See Williams, *supra* note 83.

minimum, engagement would give the United States a wedge to influence possible succession to Fidel Castro, or lesser alterations in the government during a time of rapid change.¹⁹⁴

The arts have been categorized by Congress as "informational materials." It is a fundamental principle of the First Amendment that all voices be heard in order to preserve a free society. It is nothing short of hypocrisy for the U.S. to pursue a policy of *de facto* artistic censorship while criticizing Castro's government for the same. When the U.S. government prohibits the live performance of Cuban popular music because it will help Fidel Castro, how is that different, at a philosophical level, from the Cuban government telling Cuban jazz lovers they are pro-Yankee because of the music they enjoy?¹⁹⁵ In the end, can music really be our enemy?¹⁹⁶

If a foreign government were to deny a U.S. artist a visa to perform abroad based on U.S. domestic or foreign policy, there would arguably be an outcry in the U.S. that art and politics should remain separate. The media would probably latch onto the story and scoff at the absurdity of denying a musician a visa because of a U.S. president's position on *any* policy issue.

When viewed in this context, Proclamation 5377 conjures a strange paradox as presently applied to Cuban musicians. Given the changing landscape of the Cuban economy, U.S. policy should be changed to allow Cuban musicians to perform in the U.S. by complying with the INS O-1 visa requirements. There are three ways to accomplish this goal. First, President Clinton can repeal Proclamation 5377. Second, the State Department, at a minimum, can revise its interpretation of Proclamation 5377 and allow Cuban musicians to perform in the U.S. regardless of musical style.

Finally, the U.S. Congress can adopt an analysis consistent with the policy construct of the "Berman Amendment." Legislation can be drafted to carve out an exception for live performances currently within Proclamation 5377's ambit. The "Live v.

194. *Id.*

195. *See supra* note 24.

196. *See text at supra* note 2.

Memorex¹⁹⁷ extended analogue of "informational materials" should not be subject to political caprice.

The *de facto* effect of Proclamation 5377 is musical censorship. Rather than permit State Department officials to decide what musicians can enter the U.S., perhaps it would be more in line with American ideals to allow Cuban musicians to apply for O-1 visas and let ticket sales and the free market decide whether Cuban music should be performed in the U.S.

The current U.S. State Department policy infringes on capitalism and the free market.¹⁹⁸ Where the Japanese record label executive can go to a Cuban artist and say 'here's "X dollars" for an exclusive recording contract for your next record with an option for your next two records,' a U.S. record label executive would face felony charges. Additionally, by barring Cuban musicians from performing in the U.S., it limits my record label's ability to market the artist to radio and the record buying public.¹⁹⁹

VI. EPILOGUE

Since the initial writing of this article, Gonzalo Rubalcaba moved to the Dominican Republic and established his legal residence there. In June, 1994, the U.S. Treasury Department ruled that because Rubalcaba's legal residence was established in the Dominican Republic, he is no longer subject to the restraints of the U.S. trade embargo with Cuba.²⁰⁰ This decision means that Rubalcaba is now free to perform in the U.S. under the O-1 visa guidelines like other foreign national artists. It also means he can be paid for his performances.²⁰¹

Speaking about Rubalcaba's new immigration status, his attorney stated:

197. See *supra* note 77.

198. "A study by Johns Hopkins University states that the U.S. ban on relations with Cuba deprives businesses in the United States of \$750 million a year." See Acosta, *supra* note 188.

199. Sublette Telephone Interview, *supra* note 6.

200. Zan Stewart, *Jazz Notes: The Keys to lifting an Embargo; Pianist Gonzalo Rubalcaba's Move to the Dominican Republic has Opened Doors to the U.S., Thanks to a Ruling by the Treasury Department*, L.A. TIMES, June 24, 1994, at F1.

201. *Id.*

[that the] shift in his client's status was not the result of a major U.S. policy decision.²⁰² When a Cuban national establishes residence in a third country, it's standard Treasury Department procedure to license and unblock. The U.S. government could have continued to impose roadblocks if it had wanted to, I think it is significant that this further action by the Treasury Department [has been granted to a musician who] has not broken his ties with Cuba, who goes there, performs there, is welcomed there as a major cultural figure.²⁰³

Commenting on his new status, Rubalcaba said without hesitation that "Cuba is my home . . . I am an artist, linked to my traditions, my family, my country." He added with some vehemence, "I am not a person who works for the government of Cuba."²⁰⁴

Rubalcaba retains strong ties to the Cuban music scene. He

202. There are still many great Cuban artists who are denied nonimmigrant O-1 visas or waivers by the State Department. Groups like NG La Banda, Pablo Milanes, Los Van Van, Silvio Rodriguez and Irakere all perform frequently at European music festivals. Thus the analysis herein still applies until Proclamation 5377 is lifted or an exception is made for artists.

Professionals in the music industry who deal with jazz agree that the current policy is detrimental to music fans.

This policy is denying U.S. Jazz fans some of the greatest music in the world.

Telephone Interview with Roy Parkhurst, Executive Editor, Jazziz Magazine, April 14, 1995.

I presented Irakere in 1978 at the Newport Jazz Festival and they were some of the best jazz artists I have heard in forty years of presenting jazz festivals. Cuba has some of the most brilliant jazz musicians in the world, if I was able to bring them here to our festivals, I would do it in a second. It's a shame that politics have to get in the way of enjoying great artistry.

Telephone Interview with George Wein, Founder of the Newport Jazz Festival, April 16, 1995.

203. See Stewart, *supra* note 200.

204. *Id.*

Cuban group Los Muñequitos de Matanzas toured the U.S. in 1994. When interviewed, the groups artistic director, Armando Valladares, scoffs at the argument that his group is funneling American dollars back to a hostile power. "First of all, we're doing a cultural exchange. And secondly, we're not earning any money. We're given a per diem to cover food, and our air fare and hotels are paid for, but we're not allowed by the law of the embargo to receive a paycheck in this country. We put our hearts into our work, and that's all it's about. Jeff Kaliss, *Good Vibes from Cuba Rumba Masters Los Muñequitos de Matanzas*, S.F. Chron., Aug. 7, 1994, at § Sunday Datebook, 29.

is featured on a recent release by Isaac Delgado, former lead singer of the popular Cuban band NG La Banda. Serving as musical director on the recording, Rubalcaba's artistry helped it earn five number-one hits on Cuban radio. Additionally, he still employs Cuban musicians in his touring group.²⁰⁵

Perhaps most symbolic, however, is the assembly of Cuban musicians convened at the 1995 Grammy Awards in Los Angeles. In a tribute to Latin Jazz, Gonzalo Rubalcaba appeared with fellow Cubans Arturo Sandoval and Israel Cachao Lopez.²⁰⁶ These three musicians, from three different generations, merged the sounds of past and present Afro-Cuban musical traditions. For this musical moment, the passports held by these musicians were completely irrelevant. With Rubalcaba now receiving the State Department stamp of approval, the only thing preventing reunions between these three musicians in the U.S. and their musical siblings still in Cuba is the U.S. application of Proclamation 5377.

Other musicians too have been prevented from pursuing their craft as a result of Proclamation 5377. In 1993, the organizers of the San Francisco concert *Encuentro del Canto Popular* ("*Encuentro*"),²⁰⁷ attempted to bring Lazaro Ros, Cuba's greatest living Akpunon²⁰⁸ of Santeria to the U.S. along with the fusion band Mezcla.²⁰⁹ *Encuentro* set up a tour which included engagements at the Smithsonian Institution in Washington, D.C. and the Berklee School of Music in Boston.²¹⁰ While the INS designated both Ros and Mezcla as "culturally unique,"²¹¹

205. Sublette Telephone Interview, *supra* note 6.

206. Fernando Gonzalez, *It's the Boss, Bennett, Crow*, MIAMI HERALD, Mar. 2, 1995, at 1A. Both Arturo Sandoval and Israel Cachao Lopez were awarded grammys. *Id.*

207. Encounter of the new song.

208. Master singer.

209. Ros had recently recorded his traditional delivery of ancient Yoruban religious chants and bata drum melodies with the funky bass lines and electric guitar licks of jazz/rock/fusion band Mezcla. *Hear, e.g., LAZARO ROS Y MEZCLA, CANTOS* (Intuition Records 1993); *CUBA CLASSICS 3, NEW DIRECTIONS IN CUBAN MUSIC, DIABLO AL INFIERNO* (Luaka Bop/Warner Brothers 1992).

210. Other tour stops included Seattle, Philadelphia, Minneapolis, New York City, and San Antonio, Texas. Susan Ferriss, *Santana Decries Barring of Cuban Band from U.S.; State Department Withholds Visas, Saying Tour Might Help Communism*, S.F. EXAMINER, Nov. 10, 1993, at A6.

211. I.e., satisfying the threshold O-1 visa requirements, *see supra* part I.A.

the U.S. State Department denied waivers to the members of Mezcla while granting a waiver to Ros. The State Department justified the distinction stating that Mezcla was composed of professional musicians and their earnings would directly aid Cuba in violation of the trade embargo; this despite the fact that the musicians were not going to be paid.²¹²

Legendary San Francisco rock guitarist Carlos Santana described the State Department's denial of visas to Mezcla as ridiculous. Santana said Mezcla had been his favorite group since 1992 and described the music as:

a very refined fusion of African and Latin sounds with a dash of James Brown. To me, Mezcla is the cleanest, freshest water I have ever tasted. I was looking forward to meeting them, talking about touring with them, playing with them, and making videos with them. The whole concept of 'global exchange' is what turned me on.²¹³

Senator Barbara Boxer (D-Ca.), Representative Nancy Pelosi, (D-S.F.), and Rep. Charles Rangel (D-N.Y.), asked the State Department to reverse its decision on Mezcla. Representative Pelosi said in a statement: "Carlos Santana attests to the innovation of [the band's] musical style and has been working to expose American audiences to their unique contributions . . . We are a great and strong country here. How can such efforts be any threat to our way of life?"²¹⁴ Nonetheless, the visa decision on Mezcla remained.

The State Department logic is flawed in this case when taken to its natural conclusion. Given Lazaro Ros' renown as a

212. Chiori Santiago, *Encuentro del Canto Popular Show Goes on Despite Visa Snag*, S.F. CHRON., Dec. 5, 1993, § Sunday Datebook, at 42.

Commenting on the decision, a State Department official who screens Cuban visa requests said that Ros and two other Cubans who are also considered noncommercial folklore performers had been granted visas as "a compromise." He went on to say that the U.S. embargo usually prohibited visas for commercial artists because their success might benefit the communist Cuban regime. "Even though Grupo Mezcla would be playing for free, he said, the band would gain stature by appearances here. Every case is different, we concluded the older gentleman [Ros] could not be considered a professional musician the way Mezcla is." See Ferriss, *supra* note 210, at A6.

213. *Id.*

214. *Id.*

folkloric artist, as evidenced by the INS O-1 approval, his performance only elevates his popularity internationally. As a result, he will garner more press, more recognition, and ultimately more income from sales of records and bookings abroad. In the end, the goal of depriving Cuba of U.S. dollars is ill-achieved by *any* recognition of Cuban artists because U.S. performances enhance the popularity of all foreign musicians, folkloric or otherwise.

Therein lies the hypocrisy of U.S. policy. The State Department considers folkloric musicians to be less professional than popular musicians. Is one musician acceptable to the State Department while playing an acoustic guitar but immediately unacceptable when joined by musicians playing electric instruments? In effect, the State Department, in pursuing this policy, would give visas to groups performing on *MTV Unplugged*, but not to those appearing in standard MTV-style videos. Thus if Eric Clapton were Cuban, only those performances with acoustic guitar would be permitted in the U.S.; his use of a Fender Stratocaster electric guitar, however, would be illegal.

The U.S. federal courts may resolve the ban on Cuban musicians. As a result of the *Encuentro* situation, San Francisco non-profit groups *Encuentro del Canto Popular*, *Accion Latina*, *Global Exchange*, *Pastors for Peace* and two individuals (Sylvia Sherman and Barbara Dane) filed suit against the U.S. State Department²¹⁵ alleging they were denied the right to see the band play. The suit says the State Department improperly defines every Cuban professional performer seeking entrance to the U.S. as an employee of the Cuban Government. The suit also claims that the First Amendment rights of the tour organizers and two other American citizens were violated.²¹⁶

Regardless of how the U.S. addresses this policy issue, the music will continue to grow and flourish.²¹⁷ In speaking to a

215. *Encuentro Del Canto Popular, Accion Latina, Global Exchange, Pastors for Peace, Sylvia Sherman, and Barbara Dane v. Warren Christopher, Secretary of State, Office of Cuban Affairs, a division of the United States Department of State, Marc Susser, Desk Officer, Office of Cuban Affairs, Dennis Hayes, Coordinator, Office of Cuban Affairs, and Karl Wagner, Vice Consul, U.S. Interests Section of the Department of State, Havana Cuba.* (U.S.D.C. - N.D. Ca 1994) (No. C-93-4221 VRW).

216. Krysten Crawford, *Pro Bono Team Fights U.S. for Cuban Musicians*, *The Recorder*, May 25, 1994, at 2.

217. The Michel Camilo Trio shared the bill with the Gonzalo Rubalcaba Trio at

Cuban musician who recently arrived upon U.S. shores, I asked how it is that with the tremendous economic strains and political turmoil in Cuba that the island continues to produce such great music? The response:

It's in the blood, it's in the folklore. It doesn't matter how bad things are, Cubans have a rich culture that will always be there.²¹⁸ Music will always persevere.²¹⁹ Look at the slaves who were brought to the U.S. When they arrived, the slave owners took their drums away but African-Americans created gospel. It will come out somehow. You can't restrain the human spirit, culture will always win. As the Cubans say about their home, "la tierra es muy arregara."²²⁰

Thus the question remains: Does a music become capitalistic purely by virtue of the U.S. Treasury Department's stamp of approval?

LESLIE JOSÉ ZIGEL*

the Blue Note Jazz Club in New York the week of April 16, 1995. Camilo, a Dominican-born jazz pianist, commented on Rubalcaba and U.S. policy toward Cuban musicians,

Music should not be limited by politics. I decided to play the engagement with Rubalcaba because he's a great musician and performing in this setting will be rewarding both personally and to the public.

Telephone Interview with Michel Camilo. (Apr. 16, 1995).

218. See, e.g., Armando Correa, *Detainees Strive for Artistic Freedom; Creativity Flourishes at Guantanamo*, MIAMI HERALD, Apr. 16, 1995, at 41. Detailing the struggles of a group of Cuban artists being detained at Guantanamo Naval Base. See also *supra* note 85.

219. Commenting on the U.S. embargo's effect on the music, jazz impresario George Wein, see *supra* notes 87 and 202. stated:

When I think about the impact of the embargo on the music I think about how much the jazz world has lost musically. Both American and Cuban jazz musicians have been deprived of the interchange and growth that comes from the ability to hear each other in a live setting; to exchange musical ideas and concepts in a free environment. Cuban musicianship is so special and creative, having been able to develop only from jazz recordings when the totalitarian regime allowed it.

See *supra* note 24. Telephone Interview with George Wein, CEO, Festival Productions, Inc. (Apr. 16, 1995).

220. The land is very rich. Cuban Artist Telephone Interview, *supra* note 135.

* J.D. Candidate 1995, University of Miami School of Law. This article is dedicated to my parents and brother and sister for being beacons of integrity and intellectual curiosity, and to the memory of Mario Bauza, a seminal Cuban musician whose brilliant artistry transcended the mire of politics.