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Miami's Mambo: The "Cuba Affidavit" & Unconstitutional Cultural Censorship in an Embargo Regime

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COMMENTS

Miami's Mambo: The "Cuba Affidavit" & Unconstitutional Cultural Censorship in an Embargo Regime

Joshua Bosin*

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* Juris Doctor Candidate, May 2005, University of Miami School of Law. The great author Victor Hugo once said, "Music expresses that which cannot be said and on which it is impossible to be silent." This Comment is dedicated to my beloved grandparents, who nurtured and cherished my love of music and the arts throughout their lives. Special thanks to Laurie, Charlie, and Zach for reading and assisting with numerous drafts of this manuscript – I am eternally grateful for your unfaltering love and support.

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I. INTRODUCTION

Freedom of expression has long been hailed as the most fundamental constitutional guarantee of the American populace. In the global melting pot that is Miami, Florida, the free flow of ideas and cultural exchange is critical to the maintenance of social, political, and economic solidarity. In March 1996, Miami-Dade County ("County") passed a series of ordinances now collectively known as the "Cuba Affidavit" ("Affidavit"). These administrative resolutions created policies that banned the County from entering into contracts with firms doing business directly or indirectly with Cuba. While not expressly discriminating against Cuban cultural performances and Cuban modes of artistic expression, the Affidavit effectively facilitated an outright blockade against Miami cultural entities possessing any potential or existent ties to Cuba.

Miami-Dade County's regulatory approach, however, proved unworkable under the First Amendment. Although the County sought to further isolate and antagonize Fidel Castro's Cuban government, the manifestation of that opposition in the form of artistic and expressive restraint proved intolerable. In a rare exercise of "thought control," Miami-Dade County effectively co-opted its local government power "to set the [political and artistic] agenda."¹ Despite that United States citizens generally place a high priority on First Amendment ideals, Miami's marginalized Cuban community, as reflected by Miami-Dade County's actions, seemed to support the County's unconstitutional restrictions. Ironically, the Cuban Exile community championed the County's

1. NOAM CHOMSKY, NECESSARY ILLUSIONS: THOUGHT CONTROL IN DEMOCRATIC SOCIETIES 48 (1989). Chomsky also notes generally that the basic presupposition of political discourse in America as to foreign policy is that America's stance is guided by a "yearning for democracy" and a "general benevolent intent[.]" *Id.* at 59. In the case of Miami-Dade County, however, the materialization of that intent evidenced nothing more than the desire of local politicians to squelch constitutionally protected artistic and political expression associated with Cuba or Cubans.

restrictive maneuvers, which essentially echoed the censorial actions of Fidel Castro's Communist government that the Exile community so abhors. Thus, two general questions arise regarding the Affidavit: 1) What are the political and economic boundaries that justify restrictions such as those imposed under the Affidavit, and 2) What enables a democratic community's political ideologies to effectively supersede the First Amendment?

Therefore, given the overwhelming Cuban constituency in Miami, this Comment examines the socio-political institutions that facilitated the passage of the Cuba Affidavit and the subsequent litigation regarding its constitutionality. This Comment also evaluates the Affidavit against the backdrop of the First Amendment, particularly on the grounds of freedom of expression, censorship, and prior restraint. Finally, this Comment scrutinizes the Miami-Dade County ordinances as violative of federal foreign affairs policy, rendering the Affidavit unconstitutional under the Supremacy Clause and the doctrine of federal preemption.²

II. THE POLITICS OF EXILE

Miami, Florida, is the capital of the Cuban Exiles.³ Since Fidel Castro's dramatic rise to power in 1959, millions of Cubans have journeyed to South Florida, making the area the center of "*ex exilio*, the Cuban exodus[.]"⁴ By retaining a visible presence in both the financial and political arenas, Cuban immigrants have steadily secured an unprecedented stronghold within the community.⁵ At the close of the 1970s, for example, Cuban-Americans, as a collective population, constituted the wealthiest Hispanics in the United States, far surpassing the previous economic successes of other Latin American constituencies.⁶

Local Cuban power reached new heights in the 1980s, gaining support via the Cuban voting bloc and organizations like the Cuban American National Foundation, the Latin Builders Association, and the Latin Chamber of Commerce.⁷ Despite these powerful successes, however, Miami's Cubans are still largely viewed

2. U.S. CONST. art. VI, cl. 2. See generally *McCulloch v. Maryland*, 17 U.S. 316 (1819).

3. ROBERT M. LEVINE & MOISÉS ASÍS, CUBAN MIAMI 3, 5 (2000).

4. *Id.* at 5.

5. See generally ALEX STEPICK, ET AL., THIS LAND IS OUR LAND: IMMIGRANTS AND POWER IN MIAMI (2003).

6. LEVINE & ASÍS, *supra* note 3, at 5-6.

7. GUILLERMO J. GRENIER & ALEX STEPICK III, *Introduction* to MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE 10 (Guillermo Grenier & Alex Stepick

as immigrant newcomers.⁸ David Reiff, writing on Miami's cultural communities, has suggested that despite the lay conception of the Cuban community, "Cubans are probably the only people who really do feel comfortable in Dade County these days . . . Miami is their town now"⁹

Miami's Cuban Exile enclave is deeply rooted in "highly differentiated entrepreneurial activity."¹⁰ The number of Cuban-American owned businesses in Miami is staggering, and the notion of economic aggrandizement in the Cuban community provides great support for what has been deemed "institutional completeness."¹¹ The ability of Miami's Cubans to live in essential fiscal and social isolation has led to increased entrenchment of Cuban culture and ethnic solidarity, thereby drastically slowing acculturation and inter-ethnic relations.¹² In fact, this self-insulation from the prevailing culture has led to animosity both within the Cuban community and in the greater Miami population at large.¹³ As a result, despite decades of local and national pro-integrationist measures, at least two parallel, yet incredibly distinct communities subsist in Miami.¹⁴

Much of this divisiveness has been attributed to the Exile ideology,¹⁵ which is bound by four fundamental characteristics:

III, eds. 1992). Three factors have been identified as contributing to this rise in Cuban socio-political status:

- 1) Structural factors arising from the human capital Cubans brought with them and their geographical concentration in Miami;
- 2) The role of the United States government in providing aid to the arriving Cuban refugees; and
- 3) The creation of a collective Cuban-American identity arising from the interplay of the United States, State, and Cuban Exile counter-revolutionary organizations.

Id. at 10.

8. Lisandro Pérez, *Cuban Miami*, in *MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 86 (Guillermo Grenier & Alex Stepick III, eds., 1992).

9. *Id.* (citing DAVID REIFF, *GOING TO MIAMI: EXILES, TOURISTS, AND REFUGEES IN THE NEW AMERICA* (1987)).

10. *Id.* at 90-91.

11. *Id.* at 91.

12. *Id.* at 91 & 93.

13. *Id.* at 90-94.

14. *Id.*

15. *Id.* at 94. See also RICHARD R. FAGEN, ET AL., *CUBANS IN EXILE: DISAFFECTION AND THE REVOLUTION* 101 (1968) (stating that:

Self imposed political Exile arises from the confluence of four phenomena: First, an individual must come to perceive his conditions of life as intolerable or about to become so. Second, he must attribute the shift from tolerable to intolerable conditions to

- 1) The primacy of issues and concerns that deal with the political status of the homeland;
- 2) Uncompromising struggle against and hostility toward the current Cuban government;
- 3) Lack of debate allowed about the "Exile" ideology within the community; and
- 4) Overwhelming support for the Republican Party among Cubans in Miami.¹⁶

Even years after the mass exodus from Cuba, Miami's Cubans remain preoccupied with the political and social status of their homeland.¹⁷ Concerns with American policy toward Cuba, coupled with the desire to eventually return thereto as a free people, have led Miami's Cubans to preserve their political agenda through high levels of participation in Miami's democratic processes.¹⁸ It is this "central role" in Miami-Dade County politics that propels and encourages continual conflict and animosity along both party and community lines.¹⁹

III. THE EMBARGO

A. *Historical Perspective: Political Hostility & Trade Barriers*

The United States trade policy with Cuba is based largely on the Trading with the Enemy Act of 1917 ("TWEA").²⁰ TWEA delineates the powers granted to the United States President to initiate extraordinary embargo measures against "hostile" countries during times of war.²¹ Enacted upon the United States' entry

the incumbent regime. Third, he must be able to conceive of an alternative place of residence and a means for getting there. Fourth, such an alternative must actually exist).

Id. at 101.

16. Pérez, *supra* note 8, at 95-96.

17. *Id.* at 95.

18. *Id.* at 102-103.

19. THE CUBAN AMERICAN POLICY CENTER, *MIAMI MOSAIC: ETHNIC RELATIONS IN DADE COUNTY* 12 (1987).

20. Angela T. Puentes, Comment, *The Politics of Music and Film: The Validity of a Local Government's Cultural Embargo on Cuba*, 31 U. MIAMI INTER-AM. L. REV. 253, 257 (2000).

21. Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 311 (codified as amended at 50 U.S.C. app. § 5(b) (2003)). Section 5(b)(1)(B) of TWEA authorizes the President to:

[I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect

into World War I, TWEA was intended as a "permanent piece of legislation to meet both present and future wartime and peacetime conditions."²²

In August 1960, shortly after his controversial rise to power, Fidel Castro orchestrated a commercial coup in Cuba by nationalizing all large commercial industrial assets.²³ From 1959-1961, Cuba experienced "rapid economic transformation from a capitalist market economy to a centrally planned socialist economy."²⁴ Because Castro's regime targeted the redistribution of Cuban land then owned by several American super-industries, American hostility towards Cuba's new economic policy escalated, culminating in informal embargos in several industry sects.²⁵ Opposition towards Cuba and its economy was severely exacerbated by the Soviet-Cuban trade agreement of February 1960.²⁶ Through its arrangements with the Soviet Union, the Cuban government effectively circumvented American trade weapons by skirting United States threats of economic sanction.²⁷ The United States' aggression, combined with the escalating Cuban-Soviet relationship, proved detrimental under American Cold War policy, and as a result, United States-Cuban economic relations swiftly deteriorated.²⁸

America's relationship with Cuba exploded at the end of the Eisenhower administration, resulting not only in a more pronounced desire to destroy Cuba economically, but also an American movement to completely "destabilize and overthrow the Castro government."²⁹ On April 16, 1961, President John F. Kennedy executed the plan he inherited from the Eisenhower admin-

to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States

See also Laura A. Michalec, Note, *Trade with Cuba under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L.J. 808, 808 (1992).

22. See Michalec, *supra* note 21, at 814 (citing IREDELL MEARES, *THE TRADING WITH THE ENEMY ACT* 7 (1924)).

23. Muriel van den Berg, Comment, *The Cuban Liberty & Democracy Solidarity Act: Violations of Int'l Law & the Response of Key American Trade Partners*, 21 MD. J. INT'L L. & TRADE 279, 279-280 (1997).

24. DONNA R. KAPLOWITZ, *ANATOMY OF A FAILED EMBARGO: U.S. SANCTIONS AGAINST CUBA* 35 (1998).

25. See *id.* at 36.

26. *Id.* at 36-37.

27. *Id.*

28. See *id.* at 37.

29. *Id.* at 45 (citing MORRIS MORLEY, *IMPERIAL STATE & REVOLUTION: THE UNITED STATES AND CUBA, 1952-1986*, 72 (1987)).

istration to permanently eliminate the Castro regime.³⁰ As a result of that now famous military failure at the Bay of Pigs, the United States instituted policies of strategic isolationism, and in September 1961, Congress passed a measure "barring assistance to any country that aided Cuba, unless the president determined that such aid was in the U.S. national interest."³¹ Thereafter, on February 3, 1962, President Kennedy officially executed Proclamation 3447,³² declaring a national emergency and subsequently implementing a formal, national embargo against Cuba that was attributed to the threat of Castro's aggressive regime.³³

The preliminary impetus for the embargo was to wrestle away Castro's power by prohibiting all parties subject to the United States' jurisdiction from commercial transactions with Cuba, a move Castro countered by beefing up existing links with the Eastern Bloc.³⁴ Under TWEA, the United States Treasury Department, as administrative designee, delegated its authority to regulate embargo directives to the Office of Foreign Assets Control ("OFAC"),³⁵ which promulgated the Cuban Assets Control Regulations ("Regulations") and indefinitely barred the flow of money from the United States to Cuba.³⁶ Under the current Regulations, the only permissible United States-Cuban economic activities are transactions executed pursuant to either a general or specific licensing agreement granted exclusively by the Secretary of the United States Treasury.³⁷ The general licensing provision allows individuals to engage in transactions without explicit OFAC approval, but where controversial financial benefit may inure to Cuba, specific licensing is required and only granted on a strict case-by-case basis.³⁸

Additionally, the Regulations require the rejection of licens-

30. *Id.* at 45.

31. *Id.* at 47.

32. Proclamation 3447, 27 Fed. Reg. 1085 (1962).

33. See Puentes, *supra* note 20, at 260. See also van den Berg, *supra* note 23, at 281; Michalec, *supra* note 21, at 814-815.

34. See van den Berg, *supra* note 23, at 281.

35. See Michalec, *supra* note 21, at 815. See also Puentes, *supra* note 20, at 260.

36. See 31 C.F.R. § 515.201 (2003). The statute notes that, "[f]or the purposes of this part, the term, 'foreign country designated under this part' and the term 'designated foreign country' mean Cuba and the term 'effective date' and the term 'effective date of this section' mean with respect to Cuba, or any national thereof, 12:01 a.m., e.s.t., July 8, 1963." *Id.*

37. See 31 C.F.R. § 515.201(b) (2003).

38. See, e.g., 31 C.F.R. §§ 515.542(c), 515.560(b), 515.565(b) (2003). See also Eric M. Bland, Comment, *Constitutionality of Regulating International Sports Broadcasting: Capital Cities/ABC, Inc. v. Brady*, 44 FED. COMM. L.J. 363, 366-367

ing requests for "payment of television rights, appearance fees, royalties, pre-performance expenses, or other similar payments resulting from any public exhibition or performance in Cuba or the United States."³⁹ Functionally, this protectionist limitation prevents Cuban-based artists and entertainers from receiving any United States based remuneration,⁴⁰ and stems from the concern that money paid to Cuban artists will eventually siphon into Castro's government.⁴¹

When considered in conjunction with the Mutual Educational and Cultural Exchange Act of 1961 ("MECA"), however, the payment restriction portion of the Regulations inevitably elicits conflicting application of the law.⁴² Under the MECA, a federal "cultural exchange" exception was created to grant protection to items of educational and artistic interest.⁴³ The Congressional

(1992) (discussing *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990)). It was explained therein that:

In 1988, Congress amended Section 5 of the TWEA, exempting certain agreements from the reach of the statute. The Berman Amendment limits Section 5 so it does not grant or "include the authority to regulate or *prohibit*, directly or indirectly, the importation . . . whether *commercial* or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or *other informational materials*, which are not otherwise controlled for export."

In an attempt to comply with the Berman Amendment, the Regulations were amended to authorize by a general license all transactions relating to "informational materials." The definition of "informational materials" excluded "intangible items such as telecommunications transmissions;" the Regulations also prohibited "transactions related to informational materials *not fully created* and in existence at the date of the transaction." This exception is critical. The Regulations still preclude the "remittance of royalties or other payments relating to works not yet in being." (emphases added) (internal citations omitted)).

39. See Michalec, *supra* note 21, at 816. See also 31 C.F.R. § 515.565(c) (2003).

40. See Puentes, *supra* note 20, at 260.

41. Some delineated rationales for TWEA and the Regulations are:

- 1) to deny Cuba or its nationals hard currency which might be used to promote activities inimical to the interests of the United States;
- 2) to retain blocked funds for possible use or vesting to the United States should such a decision be made; and
- 3) to use blocked funds for negotiation purposes in discussion with the Cuban government.

See Michalec, *supra* note 21, at 815 n.40 (citing *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975) (footnotes omitted)).

42. See Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §§ 2451-2461 (2003).

43. 22 U.S.C. § 2451 (2003).

Statement of Purpose identifies that the Act “enable[s] the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange”⁴⁴ Theoretically, the legislation grants the President authority, “when he considers that it would strengthen international cooperative relations,” to provide for educational and cultural exchanges.⁴⁵ Thus, while the Regulations financially restrict some aspects of public performance and exhibition, the MECA sanctions both the creation and reception of worldly cultural and artistic enterprises. This confusing dichotomy underscores why the Affidavit, as discussed *infra*, eventually failed under judicial scrutiny.

B. Interpreting the Berman Amendment

Additional significant legislation, the Berman Amendment (“Amendment”),⁴⁶ provides further grants and limitations regarding cultural exchange between United States and Cuban parties. The Berman Amendment explicitly denies the American President any authority to ban the importation of foreign artistic work,

44. *Id.* The Statement continues that the purpose of the Act is:

[T]o strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people through the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.

45. 22 U.S.C. § 2452(a)(1)-(2) (2003).

46. 50 U.S.C. app. § 5(b)(4) (2003), which reads in pertinent part:

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, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 5 of the Export Administration Act of 1979 [50 U.S.C. app. § 2404], or under section 6 of that Act [50 U.S.C. app. § 2405] to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18, United States Code [18 U.S.C. §§ 791-799].

instead guarantying the dissemination of tangible materials of artistic merit from other countries, including Cuba. The Amendment defines importable items as: films, phonograph records, photographs, microfilms, microfiche, tapes, CDs, CD ROMs, artworks, and other information and informational materials.⁴⁷

On February 2, 1989, the Regulations were amended to comply with the Berman Amendment,⁴⁸ and all transactions relating to "informational materials" became authorized under the aforementioned general licensing provisions.⁴⁹ The definition of "informational materials" was defined to exclude "intangible items such as telecommunications transmissions."⁵⁰ Beyond that delineation, however, there was no other interpretive guidance provided regarding the definition of "intangible."⁵¹ If protection exists at all for "intangibles," then, it emanates from existing or future legislative or judicial construction of the statutory phrase "other information and informational materials."

The United States District Court for the Southern District of New York attempted to define TWEA's broad language in *Capital Cities/ABC, Inc. v. Brady*,⁵² and reaffirmed that OFAC could authorize transactions by the issuance of specific licenses.⁵³ In *Capital Cities*, the court examined the validity of an agreement between Capital Cities/ABC ("ABC"), then-owner of the ABC Television Network, and the Pan American Sports Organization ("PASO"), the chief organizer of the Pan American Games.⁵⁴ In 1998, ABC placed a bid to televise the 1991 Pan American Games to be held in Havana, Cuba, for 8.7 million dollars.⁵⁵ The bid agreement stipulated that seventy-five percent of ABC's payment would remit to Cimesports, S.A., the Cuban entity responsible for organizing the games.⁵⁶ The nature of the agreement required

47. See generally Bland, *supra* note 38.

48. *Id.* See 54 Fed. Reg. 5229, 5231 (1989).

49. *Id.* See 31 C.F.R. §§ 515.206(a), 515.545(b) (2003).

50. *Id.* See 31 C.F.R. § 515.332(b)(2) (2003).

51. The Regulations as amended also prohibit "transactions related to informational materials not fully created and in existence at the date of the transaction." See 31 C.F.R. § 515.206(a)(2) (2003).

52. 740 F. Supp. 1007 (S.D.N.Y. 1990). See generally Pamela S. Falk, Note, *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).

53. *Capital Cities/ABC, Inc.*, 740 F. Supp. at 1009. See, e.g., 31 C.F.R. §§ 515.542(c), 515.560(b), 515.565(b) (2003).

54. *Id.*

55. *Id.*

56. *Id.* See also Puentes, *supra* note 20, at 258.

ABC to notify OFAC of its proposed broadcast, to which OFAC informed the television company that a specific licensing agreement was statutorily required.⁵⁷ Despite its initial acquiescence, ABC subsequently withdrew its specific license application, arguing that OFAC's position was contrary to the Amendment's delineated proscriptions.⁵⁸ Instead, ABC submitted its application in compliance with the general licensing scheme, but OFAC refused to sanction ABC's broadcast on those grounds; the overwhelming probability of a transfer of United States assets to Cuba proved too likely.⁵⁹

Under a *Chevron*⁶⁰ deference analysis the New York District Court noted that:

Where Congress has specifically addressed the precise question presented in either the plain language of the statute or its clear legislative history, deference to a contrary agency interpretation is neither required nor permitted . . . [and the phrase at issue] 'other informational materials,' [was] clearly susceptible to more than one reasonable interpretation.⁶¹

Neither the Amendment nor its legislative history necessitated Congressional deference, but the Court held that compliance with OFAC's interpretation was required, unless, as ABC argued, "deference [wa]s precluded by the First Amendment, or . . . [the] Regulations as construed by the agency [we]re so arbitrary and irrational as to violate substantive due process."⁶² The court opined on Congress' failure to elucidate a distinction between tangible and intangible "information" and noted additionally that the Amendment and its correlative history "foster the exchange of ideas across national borders, [of which] there is no discussion of

57. *Capital Cities/ABC Inc.*, 740 F. Supp. at 1010.

58. *Id.*

59. *Id.* See also Bland, *supra* note 38, at 367 (explaining that:

In other words, under the Regulations, [the American Broadcasting Company (ABC)] could not remit royalty payments for a "live" transmission, even though it could import videotapes of the [Pan American] Games and make royalty payments to Cuba for the videotapes without violating the embargo. Under a generous interpretation of the congressional language, neither type of transmission would be barred. According to the new Regulations, the general licensing provisions only applied to news and "fixed" works; for a live non-news broadcast, the network had to obtain a specific license).

60. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

61. *Capital Cities/ABC Inc.*, 740 F. Supp. at 1011.

62. *Id.* at 1012.

the limits"⁶³

The United States District Court for the Southern District of Florida, in *Cernuda v. Heavey*,⁶⁴ however, proffered an alternative Berman Amendment interpretation. In that case, two hundred paintings of Cuban origin were seized from the personal residence and offices of Ramon Cernuda, an executive at Miami's Cuban Museum of Arts and Culture.⁶⁵ Prior to the seizure of Cernuda's works, a dispute arose regarding an auction of similar art, as dissenters suggested that the sale of such work would violate TWEA.⁶⁶ The controversial works were reluctantly withdrawn from that auction, but Cernuda and other museum directors became the subject of death threats, incumbent museum board members resigned in opposition to the Cuban art, and the Cuban Museum was arbitrarily subjected to city and state audits for financial impropriety.⁶⁷ When Cernuda attempted to comply with the federal licensing scheme by petitioning OFAC for permission to exhibit the works of dissident artists, OFAC failed to respond.⁶⁸

The district court's analysis recognized Cernuda's argument that the phrase "informational materials" was premised on First Amendment principles, and "encompass[ed] original works of art, thus exempting the acquisition of Cuban paintings from TWEA prohibition or regulation."⁶⁹ In holding that Cernuda's paintings had to be returned, the court used "common sense" to renounce the government's argument that art is limited to an aesthetic dimension, and instead held that art is plainly a form of "information."⁷⁰ Thus, the district court reaffirmed that prohibitions on ideas and information could not exist if, at base, they were afforded First Amendment guarantees.⁷¹ Artwork, reasoned the court, was like other forms of protected expression and shielded by

63. *Id.* at 1011.

64. 720 F. Supp. 1544 (S.D. Fla. 1989).

65. *Id.* at 1545-1546.

66. *Id.* at 1545.

67. *Id.* See also *Cuban Museum of Arts & Culture v. City of Miami*, 766 F. Supp. 1121 (S.D. Fla. 1991).

68. *Cernuda*, 720 F. Supp. at 1546. See *id.* at 1546 n.4 (noting that Cernuda was the only art dealer subjected to government seizure of his collection, and that the directors of Latin American art for Sotheby's and Christie's in New York never acquired licenses to auction works by Cuban artists prior to the controversy).

69. *Id.* at 1549.

70. *Id.* at 1550. The court held further that the paintings conveyed information because of the very nature of the very persons who opposed their exhibition at the Cuban Museum. *Id.* at 1551.

71. *Id.* See also H.R. REP. NO. 100-40, 40, pt. 3, at 113 (1987).

the First Amendment,⁷² thus reaffirming the Supreme Court's notion that, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁷³

C. LIBERTAD

Perhaps the most controversial United States regulation promulgated against Cuba is the Cuban Liberty and Democratic Solidarity Act of 1996 ("LIBERTAD") or the Helms-Burton Act.⁷⁴ Passed in response to "international annoyance"⁷⁵ with the Cuban Democracy Act of 1992,⁷⁶ LIBERTAD implemented increased extraterritorial political and economic restrictions, decreased the power of the President to unilaterally sanction Cuba, and punished foreign businesses that engage in business with Cuba.⁷⁷ While strengthening the breadth of the Cuban embargo, however, the Helms-Burton Act also purportedly relaxed sanctions on cultural exchanges.⁷⁸ LIBERTAD's passage assisted "the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that . . . flourish[] in the Western Hemisphere[.]" The Act has reinvigorated the movement to liberate Cuba from Communist oppression.⁷⁹

72. *Cernuda*, 720 F. Supp. at 1550. See *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988). See also *Piarowski v. Illinois Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied* 474 U.S. 1007 (1985) (holding that "the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression [] and entertainment that falls far short of anyone's ideas of 'art,' . . . unless the artistic expression is obscene in the legal sense.")

73. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (protecting the burning of an American flag when done for purposes of political expression).

74. 22 U.S.C. §§ 6021-6091 (2003). See generally *Kaplowitz*, *supra* note 24, at 150-162.

75. See *van den Berg*, *supra* note 23, at 282.

76. 22 U.S.C. §§ 6001-6010 (2003).

77. *Kaplowitz*, *supra* note 24, at 180.

78. See Michael Grunwald, *Sounds of Political Discord: In Miami, Some Exiles Hear a Different Beat out of Cuba*, BOSTON GLOBE, Feb. 28, 1998, at A1 (stating that, "the Helms-Burton Act of 1994, which tightened most of the Cuban embargo, actually loosened restrictions on cultural exchanges, and visits by Cuban musicians to the United States have increased more than 500 percent.") (*cited in* Puentes, *supra* note 20, at 262).

79. 22 U.S.C. § 6022(1) (2003). The Purpose Statement continues:

The purposes of this chapter are . . .

(2) to strengthen international sanctions against the Castro government;

(3) to provide for the continued national security of the United

IV. CONFLICTING APPLICATION OF THE "CUBA AFFIDAVIT" – THE "RHYTHM IS GONNA GET YOU"⁸⁰

In March 1996, the Miami-Dade County Board of County Commissioners ("Commissioners") was presented with a proposed administrative order, which, together with two subsequent resolutions, became known collectively as the "Cuba Affidavit."⁸¹ Robert A. Ginsburg, County Attorney for Miami-Dade County, proposed Administrative Order No. 3-12 to implement Miami-Dade County Resolution No. R-202-96, which charged the County Manager with reviewing local initiatives regarding Cuban trade policies.⁸² Additionally, the proposal called for an eventual amendment of Administrative Order No. 3-12 to "provide that, to the extent allowable by law, Dade County shall not knowingly enter into a contract with any firm . . . deemed to be doing business with Cuba"⁸³

The decision to implement additional trade barriers was surprising, as the State of Florida had previously adopted similar legislation prohibiting financial investment and cooperation with any company doing business with Cuba.⁸⁴ On its face, the Affidavit

States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;

- (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
- (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
- (6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

Id. at §§ 6022(2)-(6).

80. GLORIA ESTEFAN & MIAMI SOUND MACHINE, *Rhythm is Gonna Get You*, on LET IT LOOSE (Sony Records 1988).

81. *Miami Light Project v. Miami-Dade County*, No. 00-1281-CIV-MORENO, 2000 U.S. Dist LEXIS 8761 (S.D. Fla. May 16, 2000).

82. *See* Puentes, *supra* note 20, at 262 & 262 n.57 (citing Memorandum from Robert A. Ginsburg, County Attorney, Miami-Dade County, Fla. to Board of County Commissioners, Miami-Dade County, Fla. (Mar. 5, 1996)).

83. *Miami-Dade County, Fla.*, Resolution R-202-96 (Mar. 5, 1996).

84. *See* FLA. STAT. § 215.471 (2003). The statute reads:

The State Board of Administration shall divest any investment under § 121.151 and §§ 215.44-215.53, and is prohibited from investment in stocks, securities, or other obligations of:

- (1) Any institution or company domiciled in the United States, or foreign subsidiary of a company domiciled in the United States,

seemed to implicate questions of federal preemption and generalized First Amendment issues. Indeed, under the Affidavit, Miami-Dade County was the only local United States jurisdiction barring contractual relationships with groups conducting business with Cuban entities.⁸⁵

A. *Cuban Music in Miami*

In addition to the political issues facing the Exile community, Cuban musical expression headlined as a critical issue under the Affidavit.⁸⁶ Originally, Miami's Cuban music was largely reflective of the 1960s Exile ideology, consisting of "old standbys" from the Cuban homeland.⁸⁷ Throughout the early waves of immigration, musical expression "allowed [native Cubans] to vent the affect of Exile – the nostalgia and the disorientation and the sorrow – without directly confronting its specific circumstances."⁸⁸ The 1970s, however, brought a new era in Cuban music; first-generation Cuban-Americans began to prosper in their own right, and musical expression celebrated a new heritage rather than lamenting the bygone Exile era.⁸⁹

Today, Cuban and Latin music have propelled Miami's music scene to the international forefront. All major record labels and distributors now have outposts in Miami, including Sony, WEA, Universal, BMG, and EMI.⁹⁰ Although the local Miami music scene has yet to rival that of New York or Los Angeles in size and scope, popular appreciation of Latin music continues to swell. In

doing business in or with Cuba, or with agencies or instrumentalities thereof in violation of federal law.

(2) Any institution or company domiciled outside of the United States if the President of the United States has applied sanctions against the foreign country in which the institution or company is domiciled pursuant to § 4 of the Cuban Democracy Act of 1992.

Id.

85. See Puentes, *supra* note 20, at 263 (citing Alisa Valdes-Rodriguez, *Latin Grammy's Need a Venue: Miami Waits*, L.A. TIMES, Oct. 30, 1999, at F1) (internal quotes omitted)).

86. LEVINE & ASÍS, *supra* note 3, at 123.

87. *Id.* at 124.

88. *Id.* (citing GUSTAVO PÉREZ-FIRMAN, LIFE ON THE HYPHEN 104 (1994)).

89. *Id.* at 127. Among these new artists were Willy Chirino and Gloria Estefan. This new brand of Cuban music was popularized with the aid of Super Q (WQBA), a radio station launched to appeal to the younger Cuban American market. Despite a shift in the younger demographic in the 1980s, elder Cuban Exiles maintained allegiance to AM radio programming, music from the homeland, and radio soap operas. *Id.* at 127-128.

90. Jordan Levin, *Taking Tune Scene Seriously; Top Distribs, NARAS Pave the Way*, WEEKLY VARIETY (June 10 – June 16, 1996).

1996, the opening of the National Academy of Recording Arts and Sciences ("NARAS") branch in South Beach further connected Miami's music giants to the national industry community;⁹¹ South Beach is "Miami's Music Row."⁹²

B. *MIDEM Miami*

MIDEM Latin America and Caribbean, subsequently renamed MIDEM Americas, was an international music trade show organized by the Reed MIDEM Organisation. MIDEM Organisation was founded in 1965 and acquired in 1989 by Reed International, a London-based multi-national publishing company and the world's leading organizer of exhibitions and shows.⁹³ The Reed MIDEM Organisation is most famous for its MIDEM Cannes conference, and the group currently coordinates nearly a dozen other music exhibitions from its offices in New York, London, Tokyo, Cannes, and Hong Kong.⁹⁴ Like MIDEM Cannes, the Miami show marketed Latin American, Caribbean, and other international music, but provided the resources of the Cannes festival on a regional level to accommodate smaller music labels, companies, and distributors.⁹⁵

David Bercuson, chairman of the local MIDEM Host Commit-

91. *Id.*

92. *Id.* According to the Recording Industry Association of America (RIAA), sales of Spanish-only recordings jumped eleven percent in the first half 1999, while sales of English works were and continue to be flat. Mary Sutter, *Where is Spanish Recording Capital?*, WEEKLY VARIETY (Nov. 1 – Nov. 7, 1999). Cf. Press Release, Recording Industry Association of America, RIAA Releases 2003 Latin Music Shipment Information (Mar. 31, 2004), available at http://www.riaa.com/news/newsletter/033104_2.asp (last visited Nov. 17, 2004) (noting that:

Net U.S. shipments of Latin music CDs from record companies to retail outlets decreased 2.5 percent in 2003 while the dollar value of those shipments decreased one percent, according to statistics released today by the Recording Industry Association of America (RIAA). Due in part to the music industry's increased focus on addressing Latin music piracy around the country, the decline in shipments of Latin music CDs was less than in previous years. In 2002, shipments of Latin music CDs decreased eight percent and the dollar value of those shipments decreased 9.6 percent compared to the previous year.).

93. Press Kit, The Second Latin America & Caribbean Music Market 1998 - Fact Sheet: Reed MIDEM Organisation (August 1998) (on file with author).

94. Puentes, *supra* note 20, at 264. See also Jordan Levin, *Latin Music Wave Rolls Over Miami; Pop Music: The MIDEM Trade Show Turns the South Beach Area into a Pulsating Sounding Board*, L.A. TIMES, Aug. 28, 1998, at F2.

95. Interview with David Bercuson, Former Host Committee Chairman, MIDEM Latin America and Caribbean, in Miami, Fla. (Sept. 22, 2004). See also Judy Cantor, *Cuba's Finest Banned*, MIAMI NEW TIMES, Aug. 21, 1997.

tee, rallied support for the 1997 MIDEM Latin America and Caribbean conference by encouraging Latin music publishers, labels, and music television stations located in Miami to participate in MIDEM's event.⁹⁶ Bercuson contacted Miami-Dade County's Greater Miami Convention and Visitors Bureau ("Bureau") to garner support to bring MIDEM to Miami. After all, MIDEM was known worldwide for its importance in the global music industry, as well as the glamour of its events.⁹⁷

On account of the Affidavit, however, the Bureau requested that MIDEM bar all Cuban-based artists and organizations from the 1997 exhibition.⁹⁸ The Bureau's insistence on the Cuban ban was nothing more than an attempt to sully the international flare of the event.⁹⁹ Resultant discord was further heightened by the removal of Miami-Dade Film and Print Advisory Board member Peggy McKinley from her post for suggesting that the County exempt the festival from the Affidavit's proscriptions.¹⁰⁰ Eventually, officials from the Bureau stipulated that its pledge of one-hundred and twenty-five thousand dollars in County grants and corporate support would remain available only if MIDEM fulfilled the Bureau's request to forbid Cuban entities from participation.¹⁰¹

MIDEM's reluctant acquiescence to the demands of the Affidavit incensed the record labels, executives, and artists who had been regular MIDEM participants for many years, for although MIDEM agreed to ban Cuban music and executives from the conference, international labels with access to Cuban repertoire freely sold licenses to Cuban music; they were not engaged in Miami-Dade County business, nor were they subject to its Affidavit.¹⁰² In response to local and international dissent, Mayco Villanfana, the Bureau's then-vice president for corporate communications, argued that the County was well within its rights to determine with whom it would and would not do business.¹⁰³ MIDEM, however, had sustained significant damage to its reputation as an international entertainment business organiza-

96. See Interview with David Bercuson, *supra* note 95.

97. *Id.*

98. *Id.*

99. *Id.*

100. See Grunwald, *supra* note 78.

101. See Cantor, *supra* note 95. The Bureau estimated that MIDEM Miami would feed seventeen and a half million dollars into the local community in the 1996-1997 fiscal years alone. *Id.* See also Interview with David Bercuson, *supra* note 95.

102. See Interview with David Bercuson, *supra* note 95.

103. *Id.*

tion and trade show, and following that year's Miami conference, the company felt compelled to rehabilitate its global image.¹⁰⁴ Although the County and its Affidavit were responsible for the ban on Cuban performers at MIDEM, it was the organization that sustained the most serious criticism.

In 1998, when MIDEM returned to Miami as MIDEM Americas, the organization sought no funding from the Bureau, instead focusing on the importance of including Cubans in that year's musical showcase and exhibition.¹⁰⁵ When it was announced that Cuban performers would attend MIDEM Americas, local Cuban radio lashed out at host chairman David Bercuson, calling him an "Israeli Communist," and promising to demonstrate against the inclusion of Cuban musicians in that year's conference.¹⁰⁶ On the night of a Cuban musical performance during MIDEM Americas 1998, a full audience was forced to evacuate the Miami Beach Convention Center concert venue merely twenty minutes into a Cuban musician's performance due to a bomb threat.¹⁰⁷ In spite of all odds, however, Bercuson and his host team quickly reorganized, and with just hours notice to the MIDEM delegates, a second performance the next night went off without a hitch; Cuban dissidents had no time to mobilize their guerilla force to protest.¹⁰⁸

MIDEM Americas 2000 also included Cuban performances and musical organizations, but prior to the 2001 conference, MIDEM decided to retire its regional Miami event. The company recognized that many of MIDEM Americas' attendees were simply without the resources to attend the conference.¹⁰⁹ In addition, sev-

104. *Id.*

105. See Jay Weaver, *Cuban Musician to Play at Conference; Exiles Express Anger at Trade Show Organizer for Getting Around Miami-Dade Ban*, SUN-SENTINEL (Ft. Lauderdale), Jan. 25, 1998, at B4. See also Interview with David Bercuson, *supra* note 95.

106. See Interview with David Bercuson, *supra* note 95. See also Puentes, *supra* note 20, at 264. The exclusion of Cuban music and musicians put a dark cloud over the entire event. Bill Nowlin, head of Cambridge-based Rounder Records stated that:

While [he] underst[ood] that there [were] strong feelings among the anti-Castro community in Miami, [MIDEM Miami was] an international music conference hosted by a European organization, and it [was] intended to be inclusive rather than to exclude. United States government policy is that there should be free exchange of recordings and publications between Cuba and the United States. So this vocal minority is not only contradicting the wishes of the attendees from around the world but also U.S. policy.

See Cantor, *supra* note 95.

107. See Interview with David Bercuson, *supra* note 95.

108. *Id.*

109. *Id.*

eral European and Asian companies felt the conference had become too focused on Spanish music, and therefore not a valuable venue for the sale of their musical genres.¹¹⁰ The Affidavit's force had taken its toll on the MIDEM Organisation.

C. *Los Van Van*

In 1999, Debra Ohanian, a Miami concert and event promoter who became known as "Havana Debbie" in the Cuban community, was determined to bring the Grammy award winning Cuban dance/salsa band, Los Van Van, to Miami on the group's American tour. Prior to Los Van Van's performance in October 1999, a national NBC Nightly News report confirmed that many of Miami's Cuban-American citizens, including local government leaders, had attempted to cancel the band's concert.¹¹¹ Although it had previously banned the performance altogether, the County, at the last minute, advised the group and its promoter that the performance could proceed if the group obtained a five million dollar insurance bond.¹¹² Even though Ohanian quickly obtained the policy, she was informed that in the interim, the initial concert venue had been rented by Cuban Exiles opposing the performance.¹¹³

Ohanian, despite protests from the Cuban Exiles, ensured that Los Van Van played its concert at the Miami Arena. What resulted was a culture war, later described as a scene from "an abortion clinic."¹¹⁴ All out hell ensued a day and a half before the event when militant Exiles mounted an attack on concert-goers that eventually included the throwing of "bottles, cans, rocks, and baggies full of excrement."¹¹⁵ Then-Miami Mayor Joe Carollo fueled dissent by lashing out on local radio, saying, "Havana Deb-

110. *Id.*

111. See Puentes, *supra* note 20, at 263 (citing *NBC Nightly News: Miami Trying to Ban Performance by Cuban Musicians*, NBC television broadcast, Oct. 9, 1999).

112. *Id.*

113. *Id.* It was stated that the Exile's plan was to oppose the concert by sponsoring a showing of the anti-Castro film, "Liberty." *Id.*

114. Julia Reynolds, *Miami's Music War: Cuban Americans Terrorize Cubans to Keep Their Music Out of Miami*, EL ANDAR, Summer 2000.

115. *Id.* Ohanian had every right to be angry about the Los Van Van situation, and stated:

People keep saying all this money goes back to Castro. What they don't realize is these musicians don't take one penny back. They spend everything they have at Target, Toys R Us, and Sears. And God forbid there's a special on VCRs at Wal-Mart; they clean the whole place out. It's really a big boost for the local economy.

See Celeste F. Delgado & Jose L. Jimenez, *Cuba Affidavit*, MIAMI NEW TIMES, Mar. 16, 2000.

bie knows this isn't about bringing Los Van Van to Miami. This is about trying to cause problems in Miami and making Uncle Fidel happy."¹¹⁶

In March 2000, in response to the excessive security fees that Ohanian was forced to shell out to secure performance rights at Miami Arena, the ACLU filed suit on her behalf in federal court.¹¹⁷ At issue was whether the Miami Police Department illegally charged nearly thirty-five thousand dollars in excessive fees for exterior security, all of which, argued Ohanian, should have been charged to the City of Miami.¹¹⁸ Howard Simon, ACLU of Florida Executive Director, explained that, "[t]he Miami Police Department responded to . . . protestors by providing . . . SWAT-team paramilitary presence to protect the band members and the approximately two-thousand people who attended the festive, otherwise peaceful concert."¹¹⁹

Judge Lenard's order granting summary judgment in favor of Ohanian noted that Ohanian was charged excessively for police security, while the Cuban Exiles protesting the concert were not, and according to Lenard, that alone was evidence of unfair fiscal administration for event security.¹²⁰ At oral argument, the City of Miami conceded that the fees "were calculated and charged . . . in an unconstitutional manner."¹²¹ In a First Amendment victory, Judge Lenard required reimbursement to Ohanian, and held that, "the security fees charged to [Ohanian] by authorized and empowered public officials resulted in a chilling effect on [Ohanian's] First Amendment activity."¹²² Judge Lenard went on to condemn the inherent discrimination embedded in the Miami's fiscal maneuver against Ohanian, making it clear that, "the First

116. See Reynolds, *supra* note 114.

117. Debra Ohanian v. City of Miami, No. 00-1114-CIV-LENARD/SIMONTON (S.D. Fla. Nov. 25, 2003) (Order Granting Sum. J. for Pls.), available at http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/losvanvanorder112503.cfm (last visited Oct. 20, 2004).

118. Press Release, American Civil Liberties Union of Florida, Federal Court Arguments Set for Monday in ACLU Challenge to City-Imposed Security Fees at 1999 Los Van Van Concert (Dec. 12, 2002), available at http://www.aclufl.org/news_events/archive/2002/losvanvan121202.cfm (last visited Oct. 20, 2004).

119. *Id.* Simon continued that, "[Miami didn't] have a right to impose a fee on freedom of speech and increase the price tag for any speech that attracts demonstrators." *Id.* See also Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 134-135 (1992) (holding that speech cannot be financially burdened any more than it can be punished or banned simply because it might offend a hostile mob).

120. Debra Ohanian, No. 00-1114-CIV-LENARD/SIMONTON at 7.

121. *Id.* at 11.

122. *Id.* at 22-23.

Amendment [wa]s alive and well – especially in the City of Miami.”¹²³

D. The Latin Recording Academy's Latin Grammy Awards

Established in 1997, the Latin Academy of Recording Arts and Sciences (“Latin Recording Academy”) was the first NARAS international venture.¹²⁴ Headquartered in Miami, the Latin Recording Academy is a multi-national association of musicians, producers, engineers, and other recording professionals who are dedicated to improving the cultural conditions for Latin music and its makers.¹²⁵ In 1999, NARAS announced its organization of the Latin Grammy’s award show to celebrate the international expansion of the Latin music industry.¹²⁶ The natural choice for the premiere event was Miami, but NARAS quickly faced County opposition.¹²⁷ It was reported that just days before the award show, Miami lost the Latin Grammy’s because the County feared the threat of violence.¹²⁸ Presumably, if the premiere Latin Grammy’s event had taken place under the Affidavit regime, the County would have responded with a hard line policy similar to that exercised against the 1997 MIDEEM event; Cuban musicians would be barred from an event in a Miami-Dade public venue.¹²⁹ Despite Miami’s prominence in the Latin music world, the Commissioners’ interpretation of the Affidavit proved problematic, and despite NARAS’ assertion that Miami’s then-new American Airlines Arena was its first choice for the show, the threat of the Affidavit’s enforcement preempted NARAS from awarding the first

123. *Id.* at 23. See also *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that music, as a form of expression and communication, is protected under the First Amendment).

124. *Latin Recording Academy*, at http://www.grammy.com/latin_academy/ (last visited Feb. 4, 2004).

125. *Id.*

126. *Id.*

127. See Interview with David Bercuson, *supra* note 95.

128. See *id.*

129. See Puentes, *supra* note 20, at 265 (noting that:

The County administrators’ historical application of Resolution 202-96 would effectively ban the Grammy’s and NARAS if any Cuban artists were asked to appear at the event . . . , [and that] this resolution ‘would block Miami from providing police, fire, and other key city services if the internationally televised awards show were held at a venue that has received public money, which most major arenas have.’).

Latin Grammy's in Miami.¹³⁰

As a result, it was estimated that Miami lost at least forty million dollars in potential revenue.¹³¹ In a meeting of Latin music executives regarding the location of the first award presentation, music mogul Emilio Estefan stated, "It's about music. As an American, it's nice to have the freedom of speech, to welcome everybody to this country. As a Cuban, my heart is sad with what's happening in that country."¹³² Bill Martinez, an immigration attorney who helps Cuban musicians set up United States tours, reported that Estefan went on to say, "[but I cannot] support a dictator, or music that comes from the dictator's house . . . if Cuban musicians were going to be a part of [the Latin Grammy's], I would not do anything to stop it from happening in Miami, but [I] certainly [am] not going to support it because [I] do[n't] support dictators"¹³³

On September 3, 2003, the Latin Grammy's finally arrived home in Miami for the show's third consecutive "prime-time, English-, Spanish- and Portuguese-language telecast on U.S. television."¹³⁴

E. Florida International University-Miami Film Festival

The 1997 Florida International University-Miami Film Festival ("Festival") stirred unprecedented controversy when Festival presenters organized a showing of *La Vida Es Silbar* ("Life is to Whistle"), a movie created and sanctioned by the Cuban government film agency.¹³⁵ The Miami Herald explained that the film, "[was] widely interpreted to be subtly critical of Cuban society and government."¹³⁶ As a result, two days before the sold-out screening, County officials threatened, on the basis of the Affidavit, to withdraw almost fifty thousand dollars in funding if the Festival screening went forward.¹³⁷

130. *Id.*

131. See Reynolds, *supra* note 114.

132. *Id.*

133. *Id.*

134. See Latin Recording Academy, *supra* note 124.

135. See Puentes, *supra* note 20, at 266-267.

136. Jordan Levin, *Miami-Dade Threatens to Cancel Film Fest Grant*, MIAMI HERALD, Feb. 25, 2000, at A1. See also Puentes, *supra* note 20, at 266 n.87 (explaining that the film's three main players "explore the restriction of Cuban society in their search for happiness in post-revolution Cuba, a highly restrictive and oppressive government.").

137. See Puentes, *supra* note 20, at 267.

Despite that Festival officials insisted no financial benefit would inure to Cuba, the County's threat stood firm. Under the Berman Amendment, showing the film was compliant with federal standards for film distribution and exhibition, as "the festival receive[d] [the movie] for free from its U.S. distributor, New Yorker Films, which in turn [paid] WANDA, a Spanish company that . . . co-produced the film in Cuba."¹³⁸ Despite the promises of grant withdrawal, the film eventually played to a sold-out crowd.¹³⁹ In fact, County inquiries would never have occurred but for The Miami Herald's investigation into why the presentation failed to receive more intense scrutiny under the Affidavit.¹⁴⁰

F. Visual Artistic Expression

Paintings and other visual forms of expression, like music of Cuban origin, also drew hostility from Miami's Exile community during the County's Affidavit regime.¹⁴¹ In a 1998 incident at an auction at Miami's Cuban Museum of Art and Culture, José Juara, a member of Brigade 2506,¹⁴² obtained Manuel Mendive's *El Pavo Real*. Reportedly, in the presence of five-hundred onlookers, Juara took the painting outside the museum and set it ablaze.¹⁴³ Eleven years after the event, Juara was quoted as saying his actions were a political statement, and that "[he] burned th[e] painting because [he] foresaw the ideological penetration from communist Cuba that was beginning to take place in the Cuban Exile community."¹⁴⁴

A similarly offensive incident occurred in 1999, when artist George Sánchez opened a gallery exhibit in the Coconut Grove hangar where Bay of Pigs veterans were once welcomed home to Miami.¹⁴⁵ Despite Sánchez's intention to "raise the consciousness of Cuban Americans of his generation," he obtained several anonymous threats regarding his artistic depictions of the Bay of Pigs

138. See Levin, *supra* note 136, at A1.

139. See Puentes, *supra* note 20, at 267 (citing Rene Rodriguez & Charles Rabin, *Ban or No, 'La Vida' Film Fills Gusman*, MIAMI HERALD, Feb. 27, 2000, at B1).

140. See Puentes, *supra* note 20, at 267 (citing Levin, *supra* note 136, at A1; Rodriguez & Rabin, *supra* note 139, at B1).

141. LEVINE & ASÍS, *supra* note 3, at 129.

142. During the Bay of Pigs invasion, "Brigade 2506 was the self designation of the Cuban Exiles who named their invasion force after the [identification] number of the first training casualty." *Bay of Pigs and Brigade 2506*, at <http://cuban-Exile.com/menu2/22506.html> (last visited Sept. 12, 2004).

143. See LEVINE & ASÍS, *supra* note 3, at 129.

144. *Id.* (citing Lissette Corsa, *Art to Burn*, MIAMI NEW TIMES 7-8 (Apr. 8-14, 1999)).

145. *Id.*

maneuver.¹⁴⁶ A mere five days after the exhibit opened, Sánchez was forced to close the hangar due to extreme vandalism.¹⁴⁷ Thus, despite attempts to eradicate hostility within the Exile community, heavy animosity exists, and the emblematic slogan "No Castro, No Problem" still prevails.

V. THE FIRST AMENDMENT ARGUMENT: UNCONSTITUTIONAL CENSORSHIP OF CUBAN CULTURE

A. *The First Amendment & Freedom of Expression*

The Affidavit proves most problematic when examined under the microscope of the First Amendment. Because the County routinely construed and invoked the Affidavit against artistic and expressive media, the legislative policy operated as an unconstitutional form of prior restraint, violating deep-rooted First Amendment norms. The examples provided in Section IV, *infra*, highlight the Affidavit's inconsistent application and its function as a vehicle to preemptively stifle expressive ideology, a practice characterized as the exercise of "censorial community values."¹⁴⁸

The Supreme Court stated in *United States v. O'Brien*¹⁴⁹ that:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁵⁰

Under an *O'Brien* analysis, the Affidavit violated safely guarded First Amendment values, and instead of operating as a fiscal blockade, the Affidavit served to eviscerate constitutionally guaranteed expression. The Court's language in *O'Brien* underscores that government regulations are unconstitutional if their purpose is explicitly related to the suppression of free expression. Not surprisingly, then, the Affidavit fails under this rubric.¹⁵¹

146. *Id.*

147. *Id.* at 129-130.

148. See generally Amy Ruth Ita, Note, *Censorial Community Values: An Unconstitutional Trend in Arts Funding & Access*, 61 OHIO ST. L. J. 1725 (2000).

149. 391 U.S. 367, 377 (1968).

150. *Id.*

151. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). In that case, the Court reaffirmed that, "[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity" (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) and that

While the Supreme Court has arguably ignored the Federalist origins of the First Amendment, i.e., that the First Amendment was intended to shield the federal government from state intrusion into matters protected thereby, the Court has acknowledged the broad role of free speech and expression in the preservation of democracy.¹⁵² As advanced by constitutional scholar Alexander Meiklejohn, this view of the First Amendment is bound up in the notion that the free flow of information is essential to our system of self-governance.¹⁵³ Thus, when political speech is implicated or somehow affected by local government action, the courts generally recognize the free speech rights of entities, for "the central function of the First Amendment is not to preserve individual rights, but to protect our democratic society by permitting the free discussion and debate of issues of public concern."¹⁵⁴ As a result, attempts by Congress and local governments to limit speech based on content are subject to the strictest scrutiny, meaning that any restrictive measure must be narrowly tailored to achieve a compelling governmental interest;¹⁵⁵ the hurdle is "well-nigh insurmountable."¹⁵⁶

B. The First Amendment, United States Foreign Policy & State Encroachment on Federal Powers: The Case of South Africa

Using a comparative analysis, it is helpful to explore the commonalities between the Affidavit regime and the South African government's now-defunct apartheid policy. Apartheid

"[t]he Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). The Affidavit fails under this analysis, for again, even though the Commissioners' policy may have been well-intentioned, it operated to preempt the valid expression of ideas.

152. See Matthew C. Porterfield, Article, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 31 (1999).

153. *Id.* See also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 77 (1965) (noting that, "the unabridged freedom of public discussion is the rock on which our government stands.")

154. See Porterfield, *supra* note 152, at 156. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (pronouncing that, "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations — religious, charitable, or civic — to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.").

155. See *Boos v. Barry*, 485 U.S. 312, 324 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983)).

156. *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

encouraged a system of "separate development," by which the South African government denied black citizens the rights enjoyed by white citizens in nearly every aspect of life.¹⁵⁷ The South African political machine supported and encouraged depriving blacks of equal treatment in government representation, voting, housing, employment, and education, in addition to denying the black population any guarantees of freedom of speech, assembly, and personal mobility.¹⁵⁸

To undermine South Africa's apartheid policy, American national and local legislative policy was restructured, and attempts were made to ban private and public actors from engaging in activities which would further South Africa's segregationist, anti-black stance.¹⁵⁹ At issue, however, was the constitutionality of several resolutions enacted by local governments; some of the measures were perceived as violative of First Amendment freedoms. Although many local anti-apartheid directives were constitutional, discriminatory measures which suppressed political speech and expression regarding South Africa and its policies did not withstand judicial treatment.¹⁶⁰

In *Springfield Rare Coin Galleries, Inc. v. Johnson*,¹⁶¹ the Illinois Supreme Court examined Illinois' imposition of a discriminatory tax on the sale of South African products as an expression of disapproval of that nation's policies and a disincentive to invest in

157. See also Anne R. Bowden, Note, *North Carolina's South African Divestment Statute*, 67 N.C. L. REV. 949, 950 n.5 (1989).

158. *Id.*

159. *Id.* at 955-56 (discussing divestiture in the context of North Carolina legislative policy).

160. South Africa's apartheid regime was the target of incredible divestment campaigns within the United States. Divestment laws required that state and local entities sell financial interests in companies with South African operations. See Jennifer Anderson, Article, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 379 (1999). Despite extensive local and state legislation, the South African divestment era did not produce growth in constitutional doctrine. It has been noted that few, if any, of the municipal ordinances or state laws ordering divestment were struck down as unconstitutional. See *id.*

As to the Cuba Affidavit, it is crucial to consider that:

In a time when most Americans feel increasingly alienated and unable to effectively voice their concerns about federal policies, [local] laws provide a means for citizens to take concrete action at the local level. If the action is clearly incompatible with federal policy, [as in the case of the Affidavit,] Congress should preempt the state law.

Id. at 408.

161. 503 N.E. 2d 300 (Ill. 1986).

South African products.¹⁶² The Illinois high court rejected the law, explicating that the legislation was motivated by disapproval of South Africa's apartheid policy and that by focusing on a single nation, the ability of the United States to choose between a range of policy options in developing its foreign relations was compromised; the effect of the statute was to create an embargo or boycott "outside the realm of permissible state activity."¹⁶³ The Illinois court strongly noted that condemnation of the political and social policies of a foreign nation would never justify antagonistic and unconstitutional suppression of a particular nation's ideologies, and that, "[n]o single state should put the nation as a whole to such a risk."¹⁶⁴

Using reasoning similar to that of the Illinois court in *Springfield*, a California appellate court held in *Bethlehem Steel Corp. v. Board of Commissioners*¹⁶⁵ that California's Buy American Act ("Act") was unconstitutional.¹⁶⁶ The Buy American Act required that all contracts for public works be awarded only to contractors who agreed to use or supply materials manufactured in the United States.¹⁶⁷ A xenophobic maneuver, the California Buy American Act masked negative sentiment towards extra-territorial cultures under the guise of economic sanction.¹⁶⁸ As to the constitutionality of the Act, the California court held that, "state encroachments upon . . . exclusive and plenary federal power whether in the guise of a licensing requirement, a grant of exclusive privileges or a franchise, or of inspection and fees therefore have been stricken down."¹⁶⁹ Although the Act was dismantled under a foreign affairs analysis,¹⁷⁰ First Amendment implications

162. See generally *id.*

163. *Id.* at 307. See also Bowden, *supra* note 157, at 969-71. In *Springfield*, the Illinois high court noted the Supreme Court's holding in *United States v. Pink*, wherein the Court held, "[T]here are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *Springfield*, 503 N.E.2d at 305 (citing *United States v. Pink*, 315 U.S. 203, 233 (1942)).

164. *Springfield*, 503 N.E.2d at 307.

165. 276 Cal. App. 2d 221 (Cal. Dist. Ct. App. 1969).

166. See generally *id.*

167. *Id.* at 223-24.

168. *Id.* at 225.

169. *Id.* at 231 (noting generally *Welton v. Missouri*, 91 U.S. 275 (1875); *Brown v. Maryland*, 25 U.S. 419 (1827) *Gibbons v. Ogden*, 22 U.S. 1 (1824), and *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938)).

170. See Bowden, *supra* note 157, at 971 (explicating that the court's decision was based largely on a review of the federal foreign affairs power, thus leading the court to find the statute unconstitutional on the grounds that it effectively placed an embargo

permeate the California court's opinion. The California court's renunciation of the state's proprietary maneuver indicates an unwillingness to allow economic embargoes to stifle trade with countries that share divergent, even troubling, ideologies.¹⁷¹

A third case regarding local action directed against South African apartheid, *New York Times Co. v. City of New York Commission on Human Rights*,¹⁷² examined the placement of newspaper advertisements as a direct violation of New York's powerful anti-discrimination laws. The New York Commission on Human Rights claimed that newspaper advertisements for employment in South Africa were racially and politically discriminatory.¹⁷³ Following an inquiry into South Africa's employment practices and processes, the Commission on Human Relations established that the use of "South Africa" in employment advertisements was substitute code for the "principle of white supremacy."¹⁷⁴ Contrarily, the New York Court of Appeals held that:

[I]t [was] plain enough that the ordinance at issue . . . prohibit[ed] the [e]xpression, directly or indirectly, of discrimination in employment advertising. The [New York] Times may be held as an aider and abettor of discrimination only if it published advertisements that expressed discrimination. None of the advertisements do so.¹⁷⁵

The New York court noted that the use of the phrase "South Africa" as a disguise for discrimination, however, was not at the heart of the case, and instead, the court focused on the advertising prohibition as a veritable economic boycott aimed at South Africa.¹⁷⁶ By ruling on those other grounds, the court avoided the First Amendment issues advanced by the New York Times.¹⁷⁷

on foreign products that amounted to state usurpation of the federal power to conduct foreign trade policy). See also *Bethlehem Steel*, 276 Cal. App. 2d at 225.

171. See Bowden, *supra* note 157, at 971.

172. 361 N.E.2d 963 (N.Y. 1977).

173. *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986).

174. *New York Times Co.*, 361 N.E.2d at 965.

175. *Id.* at 967-68 (emphasis added).

176. *Id.* at 968. The New York court continued further that, "[w]ithout expressing disapproval of the goal of the complainants and without expressing approval of the invidious practices of the government of the Republic of South Africa, [the court] would conclude that a city agency was without jurisdiction to make and enforce its own foreign policy. *Id.*

177. *Id.* at 969. The dissent, finding that the advertisements were impermissibly discriminatory, also held the First Amendment arguments inapposite, noting that, "Even the most broadly defined concept of First Amendment rights, one which makes no distinction whatever between commercial and noncommercial speech, cannot serve

These aforementioned cases relating to local action against South African apartheid in the 1980s indicate a judicial unwillingness to allow economic sanction and foreign policy maneuvers to effectuate barriers to constitutionally protected expression and ideological exchange regarding extra-territorial governments. Indeed, the opinions expressed in *Bethlehem Steel* and *New York Times Co.* confirm that regulations which amount to unconstitutional embargoes or boycotts are outside the realm of permissible state activity.¹⁷⁸ Judicial uniformity in this area follows from the notion that although Congress has the power to override the First Amendment in very limited circumstances, "neither the Commerce Clause nor the federal power to regulate foreign affairs can plausibly be understood to constitute self-executing limitations on free speech."¹⁷⁹

Alternatively, it has been advanced, albeit unsuccessfully, that if the First Amendment protects local expression in the field of foreign affairs, then local legislators should be able to express collective sentiment through resolutions similar to the Cuba Affidavit and the anti-apartheid legislation discussed herein.¹⁸⁰ Consistent with the notion that the United States speaks with "one voice"¹⁸¹ in its foreign affairs, statutes enacted as a collective expression of policy would support that objective.¹⁸² However, regulations implicating the First Amendment as a part of such pronouncements would be held unquestionably unconstitutional in application.¹⁸³ Thus, while some declarations by state and local governments may be permissible under a foreign affairs analysis, the discriminatory policies set in place by the Cuba Affidavit, in addition to those in some of the anti-apartheid cases, fail under the rubric of the First Amendment. Constitutionally guaranteed artistic and expressive rights cannot be displaced by "one voice" reasoning.

to protect the publication of discriminatory material such as that before [the court] *Id.* at 970, 973 (Fuchsberg and Cooke, JJ., dissenting).

178. See *Springfield*, 503 N.E.2d at 307.

179. See *Porterfield*, *supra* note 152, at 36. See also *id.* at 36 n.234 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)) (noting that the First Amendment itself does not limit the ability of a government to promote particular ideas or points of view that may not be universally held).

180. See *Porterfield*, *supra* note 152, at 38.

181. The "one voice" concept dates as far back as the beginning of the American democratic process. See THE FEDERALIST NO. 42 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations").

182. See *Porterfield*, *supra* note 152, at 38.

183. *Id.* See also *Bond v. Floyd*, 385 U.S. 116, 135-137 (1966) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

C. Political Discourse and Prior Restraint

In the context of politicized speech, the Supreme Court has routinely invoked the First Amendment to promote the free exploration of ideas. After all, the inherent value of political discourse is only realized when divergent viewpoints are critically and openly aired. In *Dennis v. United States*,¹⁸⁴ the Court reaffirmed its *American Communications Association v. Douds*¹⁸⁵ holding that, "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and the] free debate of ideas will result in the wisest governmental policies. It is for this reason that [the] Court has recognized the inherent value of free discourse."¹⁸⁶ The Court's analysis in *Dennis* highlights the palpable benefit of ideological exchange. If the Cuba Affidavit were allowed to stand as constructed, then the only Cuban artistic expression accessible to the public would be that sanctioned by the Commissioners, a stinging censorial maneuver.

Furthermore, the Supreme Court's First Amendment jurisprudence indicates that where First Amendment claims are brought challenging the constitutionality of legislative acts, courts must closely examine "the purpose" of the objectionable regulation.¹⁸⁷ If a restriction on First Amendment freedoms is incidental to the proper purpose of a regulation and not unnecessarily broad, then the regulation will withstand a constitutional challenge.¹⁸⁸ Such was not the case with the Cuba Affidavit. The government interest embodied therein was clearly related to the suppression of free expression. The purpose of the Cuba Affidavit, while perhaps not facially, was to serve as an outright ban on Cuban artistic and political expression under the guise of economic sanction and regulation. The "incidental" intrusions on First Amendment freedoms were not "incidental," but severely limiting. Although it could be argued that the Affidavit's purpose was a reasonable and necessary political maneuver against Communist Cuba, the unconstitutional suppression of ideas far outweighed the legislation's stated goals.¹⁸⁹

184. 341 U.S. 494 (1951).

185. 339 U.S. 382 (1950).

186. *Dennis*, 341 U.S. at 503.

187. *Am. Documentary Films, Inc. v. Sec'y of the Treasury of the United States*, 344 F. Supp. 703, 710 (S.D.N.Y. 1972).

188. *Id.* (citing *Teague v. Reg'l Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) *cert. denied* 394 U.S. 977 (1969)).

189. See generally Brad R. Roth, *The First Amendment in the Foreign Affairs*

Alternatively, some constitutional scholars have argued that since the Commissioners were elected by "the people," they performed a collectively sanctioned censorial function by enacting Affidavit policy.¹⁹⁰ Running counter to that notion, though, is that those members of the community who did desire exposure to Cuban artistic expression were subject to unconstitutional restraint under the Affidavit. Thus, a justification of "censorial community values"¹⁹¹ under the theory that the community, as a whole, deemed Cuban artistic ventures as offensive is misplaced. Validating such an assertion would unconstitutionally sanction a form of blatant viewpoint discrimination.¹⁹²

As the Supreme Court held in *Rosenberger v. Rector of the University of Virginia*,¹⁹³ "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."¹⁹⁴ In the case of the Affidavit, the withholding of County funds for failure to renounce Cuban ties represents the unconstitutional disapproval of particular viewpoints. Although administered as an economic and political tactic, the Affidavit, in practice, prevented access to constitutionally protected, although sometimes controversial, ideology.¹⁹⁵

Realm: "Domesticating" the Restrictions on Citizen Participation, 2 TEMP. POL. & CIL. RTS. L. REV 255, 255 (1993) (introducing the concept that:

Courts, constitutional scholars, and ordinary citizens of the United States have long recognized the crucial role of free speech and free access to information in a democratic polity. Without an airing of the widest range of views and information, governmental actions are shielded from proper review and evaluation, resulting in the concentration of political power in the hands of dictatorial authorities. A democracy requires that decision-making power be widely dispersed, with citizens free to evaluate independently the issues of the day, to associate with like-minded persons, and to take appropriate action. Such action may involve organizing to defeat elected officials whose decisions do not embody the citizens' values or ideas . . .).

190. See generally *Ita*, *supra* note 148, at 1731-33.

191. See *Ita*, *supra* note 148, at 1729. As defined in that article, censorial community values are those beliefs, standards, or morals valued by a group of people with common interests used to ban art though the withdrawing of funding or access to art after a government actor previously granted such funding or access. *Id.*

192. *Id.*

193. 515 U.S. 819 (1995).

194. *Id.* at 829 (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992)).

195. See generally *Ita*, *supra* note 148. See generally *Cuban Museum of Arts & Culture v. City of Miami*, 766 F. Supp 1121 (S.D. Fla. 1991). The Supreme Court has held that:

D. Where is the Clear and Present Danger?

It has been otherwise advanced that the Affidavit also withstood First Amendment scrutiny on the basis of a "clear and present danger" challenge.¹⁹⁶ In his now-famous *Schenk* opinion, Justice Holmes held that, "[t]he question . . . is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."¹⁹⁷ The argument that allowing Cuban cultural and artistic undertakings to penetrate the community would somehow result in a threatening spread of Communist political theory is nonsensical.¹⁹⁸ That theory hinges on an "undifferentiated fear . . . of disturbance, [which is constitutionally] not enough to overcome the right to freedom of expression."¹⁹⁹ The guiding principles in First Amendment jurisprudence are derived from the very essence of free political and artistic expression. In the case of the Affidavit, the actions of local Miami politicians offended the fundamental responsibility of our governors to ensure the unbridled exchange of ideas. For, as the Supreme Court has pronounced:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

196. See generally *Schenk v. United States*, 249 U.S. 47 (1919).

197. *Id.* at 52.

198. In his dissent in *Abrams v. United States*, Justice Holmes explicated that:

The principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are concerned. Congress certainly cannot forbid all effort to change the mind of the country.

250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

199. *Cohen v. California*, 403 U.S. 15, 23 (1971) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.²⁰⁰

By implementing the Affidavit policy, the Commissioners sought to exenterate these fundamental guarantees.

VI. A CONSTITUTIONAL CHALLENGE: THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA RESPONDS

A. *Initial Application for Relief*

On April 5, 2000, the American Civil Liberties Union of Florida ("ACLU") resolved to challenge the Affidavit by suing the County on behalf of a plaintiff class consisting of:

[A]ll persons, organizations, and entities, including non-profit and for-profit corporations, who wish to invite, present, exhibit, promote, produce or otherwise offer educational, cultural, artistic, musical, balletic, dramatic, symphonic, operatic, cinematic, or other cultural events involving, directly or indirectly, Cuban nationals, but are prohibited from doing so, or are penalized by the County for doing so²⁰¹

The class sued under 42 U.S.C. § 1983, 28 U.S.C. §§ 2201-2202, and 42 U.S.C. § 1988, in addition to asserting claims under the First and Fourteenth Amendments and the Foreign Commerce

200. *Id.* at 24. The Cohen v. California Court continued that:

To many, the immediate consequence of . . . freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness, but of strength.

Id. at 25. See *Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring). See also Puentes, *supra* note 20, at 278 (recognizing that a state or local foreign policy maneuver will not likely express the opinions of the entire community, and that an official statement by local government may deter the expression of divergent views so as to threaten First Amendment interested of community members) (citing Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMPLE L. REV. 813, 837 (1989))).

201. See Verified Class Action Compl. for Decl. & Inj. Relief, *Miami Light Project*, 2000 U.S. Dist. LEXIS 8761 (S.D. Fla. May 16, 2000), available at http://www.aclufl.org/issues/free_speech/government_censorship.cfm#legalDocuments (last visited Sept. 8, 2004).

and Supremacy Clauses of the Constitution.²⁰² The plaintiff's complaint asserted that since the Affidavit was the *sine qua non* for obtaining any monetary assistance from the County, including the County's Department of Cultural Affairs International Exchange Grants, the plaintiffs' grant applications were preemptively and unconstitutionally foreclosed from consideration.²⁰³ As a result, five claims for relief were brought forward, consisting of foreign powers arguments, notions of federal supremacy, and assertions of individual liberties.²⁰⁴

202. *Id.* at 2.

203. *Id.* at 6. The complaint further recognized that the County restrictions specifically exempted contracts with air carriers that required use of Miami International Airport and that the restrictions could be waived by the County Commissioners only upon the request of a County agency (i.e., for purposes of health, safety, welfare, economic benefit, or well being of the public.) *Id.* at 6-7.

204. The enumerated claims were as follows:

- 1) The [Miami-Dade County] Cuba Restrictions violate the foreign affairs powers of the federal government by interfering with and imposing additional restrictions upon the foreign affairs powers exercised by the legislative and executive branches of the government of the United States.
- 2) The [Miami-Dade County] Cuba Restrictions interfere with foreign commerce by imposing restrictions on cultural commerce with Cuban nationals that exceed the requirements imposed by federal law; by restricting the flow of foreign cultural commerce; by limiting cultural transactions with Cuban nationals that are specifically protected by federal law; by discriminating against foreign commerce contrary to federal laws regulating that commerce; by interfering with "the federal government's ability to 'speak with one voice' in foreign affairs, because [the Cuba Affidavit] harms 'federal uniformity in an area where federal uniformity is essential.'" (citing *Nat'l Foreign Trade Council v. Natsios*, 181 F. 3d 38, 68 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000)).
- 3) The [Miami-Dade County] Cuba Restrictions, by exceeding and interfering with the federal laws regulating foreign commerce with Cuban nationals, and the federal laws regulating foreign affairs powers, violates the Supremacy Clause of the Constitution of the United States.
- 4) The [Miami-Dade County] Cuba Restrictions, by denying access to facilities and to grants, violate the First Amendment because the Restrictions are not content neutral; they constitute a prior restraint upon the right of free association and speech; they give unbridled discretion to public officials to decide whether or not expressive activity will be permitted; and they permit County officials to discriminate by suppressing disfavored speech, film, music, art, theater, dance, educational and cultural events based on content and on the nationality of the persons whose speech, film, music, art, theater, dance or educational and cultural performances are offered by Plaintiffs and the members of their class.

B. *A Motion to Dismiss*

The County filed a motion to dismiss in *Miami Light Project* on April 28, 2000, asserting that the plaintiff class lacked standing. Judge Moreno noted that, “[t]he doctrine of standing serves to ‘identify those disputes which are appropriately resolved through the judicial process.’”²⁰⁵ Although the County argued that no standing existed for lack of a specifically named Cuban artist in any grant application or venue reservation, Judge Moreno rejected the County’s assertions.²⁰⁶ Instead, the district court held that, “but for the submission of the [Affidavit, the plaintiff class was] ready, willing, and able to apply for . . . grant[s], [but that [t]o require the submission [given the] certain denial of a grant application would . . . be an exercise in futility.”²⁰⁷ In denying the County’s motion to dismiss, Moreno noted the plaintiff’s challenge was “in no way hypothetical,” and that a discriminatory policy for County fund disbursement appeared to exist.²⁰⁸

C. *Moreno’s Magic: Poof! The Disappearance of the “Cuba Affidavit”*

1. Preliminary Injunction

On May 16, 2000, Judge Moreno issued a preliminary injunc-

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- 5) The [Miami-Dade County] Cuba Restrictions, by exempting contracts with air carriers that pertain to access to and from Miami International Airport from the Cuba Affidavit requirement, violates the Equal Protection Clause of the Fourteenth Amendment because the Restrictions create two classes of persons, organizations and entities that are similarly situated but are treated differently: those persons contracting with the County who need not sign the Cuba Affidavit solely because they are air carriers utilizing the Miami International Airport and those, like the Plaintiffs and their class, who are not air carriers utilizing the Miami International Airport and therefore must sign the Cuba Affidavit as a condition of contracting with the County in any way, including seeking grants from the County or utilizing venues in the County that require compliance with the Cuba Affidavit.

205. *Miami Light Project*, 2000 U.S. Dist. LEXIS 8761, at *4 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). *Lujan* held that a party has standing to sue in federal court when: 1) the plaintiff suffered “injury in fact” that constitutes an invasion of a legally protected interest that is concrete, particularized, and “actual or imminent, not ‘conjectural or hypothetical,’” 2) there is a causal connection between the injury and the conduct complained of, and 3) plaintiff’s injury can be “redressed by a favorable decision.” *Id.* at *4-5.

206. *Id.* at *9.

207. *Id.* at *6-7.

208. *Id.* at *6, *9.

tion in *Miami Light Project*, noting the likelihood that certain portions of the Affidavit were violative of the Foreign Affairs, Foreign Commerce, and Supremacy Clauses of the United States Constitution.²⁰⁹ The district court opinion held that, "the County [had to] accept applications for grants submitted without those portions of the [Affidavit] relating to lawful conduct with Cuba, [but that] the County [could] enforce those provisions of the [Affidavit] relating to unlawful travel to Cuba."²¹⁰ Although the court recognized the potential First Amendment and Equal Protection issues inherent in the case, it refrained from opining on those claims in granting the preliminary injunction.²¹¹

Instead, Judge Moreno outlined the underlying, problematic foreign policy concerns presented by the Affidavit. Under the federal law which regulates commercial relations with foreign governments, "[a] state law regulating foreign affairs which has no more than an 'incidental or indirect effect in foreign countries' will be [deemed] valid."²¹² The major inquiry for the district court, then, was whether the requirements of the Affidavit directly and seriously infringed upon the foreign affairs powers of the federal government.

National Foreign Trade Council v. Natsios,²¹³ a First Circuit case finding the Massachusetts Burma Law²¹⁴ unconstitutional, was directly on point at the issuance of the preliminary injunction. Under that law, firms who engaged in business with Myanmar, formerly known as the Nation of Burma, were designated as "restricted,"²¹⁵ thereby prohibiting Massachusetts firms from doing business with any of the country's agencies or authorities.²¹⁶ The First Circuit, however, held that the Massachusetts restriction unlawfully encroached on the federal government's foreign affairs power, and swiftly invalidated the law.²¹⁷

209. *Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1176, 1178 (2000).

210. *Id.* at 1176. The injunctive order in no way required the County to fund Cuban artists or sponsor Cuban cultural programs, but provided a mechanism to maintain the status quo until the issues could be fully adjudicated on the merits. *See id.*

211. *Id.*

212. *Id.* at 1179 (citing *Zschoernig v. Miller*, 389 U.S. 429, 434-35 (1968)).

213. 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

214. Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) ch. 130, Mass. Acts 239 (1996) (codified at Mass. Gen. Laws ch. 7, §§ 22G-22M).

215. *Miami Light Project*, 97 F. Supp. 2d at 1179.

216. *Id.*

217. *See id.* The First Circuit determined that the law invaded federal authority

Recognizing similarities between the Massachusetts law and the Affidavit, Judge Moreno used the reasoning of *National Foreign Trade Council* to hold that, "the Cuba Affidavit significantly exceed[ed] the scope of the United States embargo on Cuba, [thereby] 'upsetting Congress' careful choice of tools and strategy.'"²¹⁸ Thus, noted Moreno, the Affidavit would likely fail as a matter of federal preemption, for "when Congress legislates in an area of foreign relations, there [exists] a strong presumption that it intended to preempt the field."²¹⁹

2. Final Order

The Supreme Court heard oral argument in *Crosby v. National Foreign Trade Council*²²⁰ on March 22, 2000, and handed down its opinion on June 19, 2000.²²¹ Under the doctrine of federal preemption, the Court affirmed the First Circuit's ruling, holding that, "[the Court] will find preemption where it is impossible for a private party to comply with both state and federal law,"²²² and where "[the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives

because: 1) the law was designed to affect the affairs of a foreign country, 2) Massachusetts was in the position to have an effect on foreign policy, 3) Massachusetts may have been a bellwether for other states, 4) other countries and international organizations protested the law, and 5) the Burma law was different from existing federal economic sanctions. *Id.*

218. *Id.* at 1180 (citing *Nat'l Foreign Trade Council*, 181 F.3d at 76). Primarily, the district court held:

The impingement of the "Cuba Affidavit" on foreign affairs goes beyond that of . . . the Massachusetts Burma Law . . . First, the law was designed to specifically impact and affect the affairs of a foreign country. Second, Miami-Dade County by its geographic proximity to Cuba is in the position to have an independent impact on foreign policy. Third, Miami-Dade County, like Massachusetts, may be a bellwether for other states. Fourth, the "Cuba Affidavit" is significantly more restrictive than the existing United States embargo on Cuba. Finally . . . the "Cuba Affidavit" affects any entity that ever interacted with Cuba or a Cuban national in the second or third degree. As such the "Cuba Affidavit" is an independent foreign policy that has more than an "incidental or indirect effect" on Cuba.

Id.

219. *Hines v. Davidowitz*, 312 U.S. 52, 76 (1941).

220. 530 U.S. 363 (2000) *aff'g* *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1999).

221. *See Miami Light Project*, 97 F. Supp. 2d at 1179 n.7.

222. *See, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

of Congress.’”²²³ Under the Supremacy Clause, the Court found that the Massachusetts Burma Law provisions conflicted with Congress’ specific delegation to the President over Myanmar sanctions and the development of a more comprehensive and multilateral fiscal strategy.²²⁴ As a result, the law failed.

The decision of the Supreme Court in *Crosby*, however, was not a bar to all future state and local boycotts affecting foreign affairs. Because the Court chose preemption as its ground for overturning the Massachusetts Burma law, the Court left states free to legislate where Congress has not previously done so.²²⁵ As such, the narrow holding of the Court gave state and local governments some freedom to address the “denial of human rights in other countries through boycotts and similar means.”²²⁶ Where that legislation impinges on the fundamental rights guaranteed by the First Amendment, however, it will fail as an unconstitutional exercise of restraint.

VII. CONCLUSION

As was indicated in *Miami Light Project*, the decision in *Crosby* played a large role in Judge Moreno’s final ruling on the constitutionality of the Affidavit. A statement by the ACLU noted that the plaintiffs in *Miami Light Project* were subject to similar unconstitutional limitations.²²⁷ The *Crosby* standard was consistent with the plaintiff class’ interpretation of the Affidavit as an intrusion upon fundamentally guaranteed rights.²²⁸ Following the Court’s *Crosby* ruling, Howard Simon, Executive Director of the ACLU of Florida, stated that, “it [was] . . . time to formalize the removal of Miami-Dade County from the business of foreign policy and end the persistent censorship of the arts in South Florida.”²²⁹

223. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (citing *Hines*, 312 U.S. at 67).

224. *Id.* at 374-78.

225. See Thomas A. Barnico, Article, *The Road From Burma: State Boycotts After Crosby v. National Foreign Trade Council*, 19 B.U. INT’L L. J. 89, 108 (2001). See also Patrick J. Thurston, Note and Comment, *National Foreign Trade Council v. Natsios and the Foreign Relations Effects Test: Searching for a Viable Approach*, 2000 B. Y. U. L. REV. 749 (2000).

226. *Id.* at 110.

227. Press Release, American Civil Liberties Union of Florida, Statement by ACLU Attorneys Bruce Rogow & Beverly Pohl (June 19, 2000), available at http://www.aclufl.org/news_events/archive/2000/index.cfm (last visited Oct. 20, 2004).

228. The Court in *Crosby* held that, “the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach.” *Crosby*, 530 U.S. at 363.

229. Press Release, American Civil Liberties Union of Florida, Judge Schedules

On July 11, 2000, Judge Moreno announced that he would issue a permanent injunction barring Miami-Dade County from further enforcing the Cuba Affidavit.²³⁰ The permanent injunction noted that both parties agreed the *Crosby* decision was dispositive of the issues surrounding the Cuba Affidavit, and that the Affidavit's requirements clearly violated the Supremacy Clause.²³¹ The final order held that, forthwith, Miami-Dade County was barred, in perpetuity, from requiring submission of the Affidavit and declining to enter into contracts based thereon.²³² The permanent removal of the Affidavit requirement was a triumph for the First Amendment and for free expression in Miami-Dade County. Without the Affidavit, the County and its Commissioners could no longer sanction unconstitutional discrimination against Cuban outlets of artistic and ideological freedom.

Emanating from the conflicts discussed herein is that the First Amendment seeks to protect freedom of expression regardless of whether those expressing ideas are members of a popular majority or an unpopular minority.²³³ The irony of the Cuba Affidavit case is that the County's preemptive stifling of artistic and cultural expression is precisely the kind of anti-democratic behavior the Cuban Exile community so rightly opposes in the first instance.²³⁴ The questions raised in the Introduction to this Comment may remain unanswerable, for the cultural traditions of Miami's communities are deeply embedded and in many ways unwavering. Indeed, the Affidavit controversy raised individual consciousness within both the Cuban Exile and greater Miami communities at large, hopefully prompting a surge of tolerance rather than sustained animosity. While the significant results of these controversial events may still remain unseen, one certainty remains — the Miami Mambo rumbles on

Status Conference in ACLU's Miami Artistic Censorship/Cuba Ordinance Case (July 10, 2000), *available at* http://www.aclufi.org/news_events/archive/2000/cubaordinance/status0700.cfm (last visited Oct. 20, 2004).

230. See Permanent Inj. Barring Enforcement of the "Cuba Affidavit Requirement, *Miami Light Project*, 2000 U.S. Dist. LEXIS 8761 (S.D. Fla. May 16, 2000), *available at* http://www.aclufi.org/legislature_courts/legal_department/briefs_complaints/cubaordinanceruling0700.cfm (last visited Oct. 20, 2004). See also Press Release, American Civil Liberties Union of Florida, Judge to Bar Miami-Dade County from Enforcing the Cuba Ordinance (July 11, 2000), *available at* http://www.aclufi.org/news_events/archive/2000/cubaruling0700.cfm (last visited Oct. 20, 2004).

231. See Permanent Inj. Barring Enforcement of the "Cuba Affidavit" Requirement, *Miami Light Project*, 2000 U.S. Dist. LEXIS 8761.

232. *Id.*

233. See *Cuban Museum of Arts & Culture*, 766 F. Supp. at 1130.

234. *Id.*