

# Another Inning in Cuban-United States Relations: Capital Cities/ABC Inc. v. Brady

## I. INTRODUCTION

When baseball teams from the United States and Cuba met in the finals of the 1987 Pan American Games (Games), the heavily-favored Cubans won their fifth straight gold medal in a 13-9 victory over the United States.<sup>1</sup> Although the 1991 Games were scheduled to be held in Cuba, a dispute in the negotiation for television broadcast rights between Capital Cities, Inc./ABC (ABC) and the Treasury Department raised doubts that American fans would be able to witness the next baseball game between the two countries or any other events of the 1991 Games. The result was a suit filed by ABC against the Treasury Department for denial of the specific license necessary to broadcast the Games.<sup>2</sup>

The case illustrates the interaction between the courts and the Executive in foreign policy areas. The executive branch was willing to litigate for policy reasons to preserve its control over contacts with Cuba as an enemy of the United States. Courts tend to defer to the executive branch in foreign policy areas. After winning in court, the Treasury Department was then willing to settle with ABC to promote other executive branch policy goals. As a result, parties desiring contact with Cuba may be best guided by an awareness of overall foreign policy goals.

After explaining the facts of the case in more detail, this Note will set out the history of the Games, Cuban internal affairs, and United States foreign policy toward Cuba, and will describe the relevant law, the Trading With The Enemy Act (TWEA),<sup>3</sup> by which the United States has applied an embargo against Cuba. The embargo affects informational material such as television sports broadcasts. In addition, this Note will review the constitutional implications for free speech and separation of powers which were raised by the TWEA. An analysis of the court's reasoning in *Capital Cities/ABC* will show why judicial def-

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1. Dave Garlick, *Cuba Wins Baseball Gold*, INDIANAPOLIS STAR, Aug. 23, 1987, microformed on Int'l, 1987, Fiche 150, A-2 (NewsBank).

2. *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990).

3. 50 U. S. C. § 5 (Supp. 1990).

erence to the Office of Foreign Assets Control (OFAC) is appropriate in the situation of live coverage of the Games and does not offend First Amendment rights or due process rights. Nevertheless, ABC did televise portions of the 1991 Games, illustrating the subtle interplay between the judicial and executive branches of government in the foreign policy arena.

The case arises as a result of a bid by ABC television to the Pan American Sports Organization (PASO) for live broadcasting rights for the 1991 Games to be held in Cuba.<sup>4</sup> PASO granted the rights to ABC for \$8.7 million with the express understanding that approximately seventy-five percent of this sum, \$6.5 million, would be passed through to Cimesports, S.A., the Cuban host organizer of the Games.<sup>5</sup> Because an embargo under the TWEA is in effect against Cuba, the Treasury Department requires a specific license for such a transaction.<sup>6</sup> In a letter dated June 12, 1989 to OFAC, ABC applied for "a license covering all necessary transactions involving Cuba in connection with the television coverage and transmission of the 1991 Pan American Games."<sup>7</sup> OFAC responded that a specific license was necessary. ABC believed the transaction did not require a specific license and furthermore thought the requirement was contrary to the intent of the Berman Amendment to TWEA.<sup>8</sup> ABC thought that a general license for travel connected with news gathering should be granted.<sup>9</sup> OFAC agreed to grant ABC a license if royalty payments were made into a blocked account,<sup>10</sup> and if travel expenses were kept to a minimum. In addition, OFAC defined sports broadcasts as entertainment and not news, but agreed to extend ABC a news gathering general license if no royalty payment were made. The only other choice for ABC, according to OFAC, was to import videotapes of the Games, providing that ABC did not pay for services in connection with the production of such

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4. *Capital Cities/ABC*, 740 F. Supp. at 1009.

5. *Id.* at 1009, 1010.

6. *See infra* notes 84-92 and accompanying text.

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

8. *Id.*; *see infra* notes 93-99 and accompanying text.

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

10. 31 C. F. R. § 515.508 (a) (1989). *See De Cuellar v. Brady*, 881 F. 2d 1561 (11th Cir. 1989). Blocked funds are retained by the United States for possible vesting to the United States and for use in negotiation discussions with the Cuban government. The United States has a long history of compensating our own citizens out of foreign assets in this country for wrongs done to them by foreign governments abroad. Such action against Iran was upheld in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

tapes. The effective result was that OFAC denied the request because the transaction would result in a very substantial payment to Cuba, contrary to the current foreign policy of the United States.<sup>11</sup> ABC decided that none of those alternatives was satisfactory and instituted suit.

## II. THE PLAYERS: HISTORICAL BACKGROUND OF THIS CASE

A brief explanation of the history of the Pan Am Games, the recent history of Cuba, and the United States' foreign policy regarding Cuba will establish the context for *Capital Cities/ABC v. Brady*.<sup>12</sup>

### A. *The Pan American Games*

The idea of Pan American Games was conceived in 1932 during the Los Angeles Olympic Games, but the first officially sanctioned Pan Am Games did not take place until 1951.<sup>13</sup> World politics interfered from the start.<sup>14</sup> As a prelude to the Games originally planned for 1942, a festival called the 1937 Pan American Games was held in Dallas, Texas. At least 21 nations of South, Central and North America were invited, but only about a half dozen actually attended.<sup>15</sup> Then in 1940 the Olympic Games to be hosted by Finland were cancelled because of the war in Europe. As a result, plans were made to organize another Pan Am Games as a substitute "to reward American athletes who had trained for the Olympics"<sup>16</sup> and to "solidify relations of the Americas."<sup>17</sup> Cuba indicated an interest in staging the games. The games did not occur, however, and American athletes participated in a national week of sports instead. Organization was attempted again in 1942, but the United States withdrew because of war involvement. Avery Brundage expressed the goals of the Pan Am Games when he wrote in 1942:

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

12. *Id.* at 1007.

13. James G. Newland, Jr., *Games Have Survived, Flourished Despite Turmoil*, INDIANAPOLIS STAR, Aug. 4, 1987, microformed on Int'l. 1987, Fiche 132, G7 (NewsBank).

14. See Jeffrey M. Marks, Comment *Political Abuse of Olympic Sport—DeFrantz v. United States Olympic Committee*, 14 N. Y. U. J. INT'L. LAW & POLITICS 155, 156 (1981) (intertwining of sports and politics also has been apparent in Olympic Games history).

15. Newland, *supra* note 13, at 7. This event was sponsored by the Amateur Athletic Union and billed in A.A.U. documents as the 1937 Pan American games. *Id.*

16. *Id.*

17. *Id.*

After the last great war, revulsion from the horrors of conflict and the chicanery of politics, and the desire for something clean and honest, something idealistic and inspiring, led to a tremendous worldwide sport development. The same thing will occur after the present conflict ceases, and those who have worked to keep the fine spirit of amateur sport alive will be hailed as patriots of the highest rank.<sup>18</sup>

In 1951, the first Pan Am Games took place in Buenos Aires. They have been held every four years since with the most recent Games in 1991.<sup>19</sup> In that event a United States team competed with teams from 39 other countries in North, Central, and South America.<sup>20</sup>

Although the host country of the Games may benefit politically from the interaction with other countries, economists hold differing views regarding the financial impact on host locations of sports events.<sup>21</sup> Indianapolis, host city of the 1987 Games estimated the economic impact to be \$175 million for the 21-day event.<sup>22</sup> It has been recently reported, however, that the 1987 Pan Am Games were able to break even only because creditors forgave \$736,000 in debts.<sup>23</sup> Nevertheless, some Indianapolis officials believe there have been big benefits in public relations and image making "that go beyond bottom line numbers."<sup>24</sup> Fidel Castro believes the Games can have positive benefits for Cuba "from the social point of view."<sup>25</sup>

18. *Id.* at 8. (Brundage served amateur athletics and the international Olympic movement in a variety of positions and was one of the main backers of the Pan American Games idea).

19. *Id.*

20. Bill Benner, *Pan Am Race*, INDIANAPOLIS STAR, July 28, 1991, at B-2.

21. Bill Koenig, *Economists Question Impact of Events*, INDIANAPOLIS STAR, Oct. 16, 1990, at D-1. *See also* Susan Hanafec, *Pan Am Games' Impact Significant, Survey Says*, INDIANAPOLIS STAR, Oct. 2, 1987, *microformed on Int'l.*, 1987, Fiche 162, D-1 (NewsBank); Scott L. Miley, *Pan Am*, INDIANAPOLIS STAR, July 13, 1986, *microformed on Int'l.* 1986, Fiche 66, E-12 (NewsBank); Rob Schneider, *Pan Am Games Spur Aid to Blighted Areas*, INDIANAPOLIS STAR, Feb. 3, 1985, *microformed on Int'l.* 1985, Fiche 12, F-8 (NewsBank).

22. Koenig, *supra* note 21, at D-1 (stating the annual impact by the Indianapolis Colts professional football team to be \$25 million).

23. Robert Rice, *Olympic Group Wants Facilities for Pan Am Games*, DESERT NEWS (Salt Lake City, Utah), Jan. 16, 1990, *microformed on Int'l.* 1990, Fiche 16, B-6, 7 (NewsBank).

24. Koenig, *supra* note 21, at D-1. Sports economists acknowledge the intangible benefits but believe sports are not an economic panacea. *Id.*

25. *Castro: Cuba Came Close to Not Playing Pan Am Host*, INDIANAPOLIS STAR, July 29, 1991, at B-1 (Castro himself had a brief career as a pitcher in the Cuban baseball leagues and once declined a major league contract from the Giants).

Cuban participation in the Games has been frequently interrupted by political expressions. At the 1971 Games a scuffle between Canadian, American, and Cuban athletes developed into a melee in which several were injured. Later at that event chaos broke out again when several Cubans attempted to defect into the "no man's land" in the center of the track and field stadium. Four Cubans managed to defect, and two who were prevented from doing so committed suicide. At the 1975 Games the water polo match between Cuba and the United States erupted into a brawl.<sup>26</sup> When the 1987 Pan Am Games were held in Indianapolis, relations with Cuban organizers and athletes were sometimes strained. "A small plane flew over the opening ceremonies, trailing a banner that urged Cuban athletes to defect and gave a phone number for assistance."<sup>27</sup> Leaflets were circulated that said, "Cuban brothers, welcome to the land of freedom."<sup>28</sup> Demonstrators burning a Cuban flag incited the Cuban boxing team to charge into the stands after them.<sup>29</sup>

Cuba's participation in recent international sports activities has been unpredictable.<sup>30</sup> In 1987 there was speculation that Castro might boycott the Pan Am Games in Indiana unless his nation was named to host the 1991 Games.<sup>31</sup> Indeed that award was made to Cuba by

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26. Nafziger & Strenk, *The Political Uses and Abuses of Sports*, 10 CONN. L. REV. 259, 278-79 (1978).

27. *Games Countries Play*, Newsweek, Aug. 24, 1987 at 25 [hereinafter *Games*]. See *Pan Am Start Disrupted by Anti-Castro Political Ploys*, INDIANAPOLIS STAR, Aug. 10, 1987, microformed on Int'l. 1987, Fiche 132, B-9 (NewsBank). One Spanish-language leaflet that was circulated offered \$25,000 reward to the first intelligence agent to defect from Cuba or Nicaragua. Indianapolis Games planner, Theodore Boehm, declined to control the exercise of free speech, saying, "That's life in the United States, thank God." *Id.*

28. *Pan Am Start Disrupted by Anti-Castro Political Ploys*, INDIANAPOLIS STAR, Aug. 10, 1987, microformed on Int'l. 1987, Fiche 132, B-9 (NewsBank).

29. *Games*, *supra* note 27, at 25.

30. Christine Brennan, *U.S. Government Plays Hardball With Cuba, Pan American Games*, WASH. POST, Feb. 6, 1990, microformed on Int'l. 1990, Fiche 16, B-4 (NewsBank). "Castro has angered the Olympic community by boycotting the last two Olympic Games. Cuba joined the Soviet boycott of the 1984 Los Angeles Olympics and skipped the 1988 Games for political reasons." *Id.*

31. Linda G. Caleca, *'Healing' Will Mean Fewer Boycotts, PAX-I Officials Say*, INDIANAPOLIS STAR, Nov. 18, 1986, microformed on Int'l. 1986, Fiche 134, D-5 (NewsBank). See George Stuteville & Linda G. Caleca, *Cuba Joyous About Coming to Games*, INDIANAPOLIS STAR, Aug. 15, 1986, microformed on Int'l. 1986, Fiche 75, E-2 (NewsBank). Robert H. Helmick, President of the United States Olympic Committee wrote a letter to PASO saying that if Cuba intended to bid for the 1991 Games, he would not place a bid for the United States.

PASO, giving Fidel Castro the opportunity he had wanted for years.<sup>32</sup> "For the now-shrinking Communist world, the Games became a symbol. For Castro and his people, the Games became a cause. And for the United States government, they became a problem."<sup>33</sup> Because of the restrictions under TWEA, officials and athletes who traveled to Havana for the Games had to report how much cash they took in and brought out. They were not allowed to use credit cards. Few families and friends of athletes were able to attend.<sup>34</sup>

Policies that had been in place for decades in the United States with regard to Cuba were under attack because of the Pan Am Games. The State Department declared, "We support U.S. participation in a sporting event, but we are not going to turn our foreign policy upside down for it."<sup>35</sup>

### B. Cuba

A brief look at Cuba's recent history will trace the development of Cuba's present relationship with the United States. Soon after coming to power in 1959, Castro expropriated land and other properties, including United States' holdings, and set about establishing ties with the Soviet Union and the Eastern bloc countries. By 1961 the United States had broken off relations with Cuba and in April of that year thirteen hundred Cuban exiles, trained and armed by the CIA, attempted to invade Cuba at the Bay of Pigs. They were defeated after the United States failed to provide the promised air support. In October of 1962 President Kennedy confronted Soviet President Khrushchev over nuclear missiles in Cuba. Khrushchev backed down, but not until Kennedy promised not to invade Cuba.<sup>36</sup>

Cuba has received much aid in the form of trade subsidies.<sup>37</sup> Until recently "Fully 70 percent of Cuba's foreign trade [was] conducted

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32. Caleca, *supra* note 31, at D-5. PASO assured the other contender, Mar del Plata, Argentina, that it would be a leading contender to host the 1995 Games and would be the alternate site for the 1991 Games. See Stuteville & Caleca, *supra* note 30, at E-1 (Cuba's sports training facilities are excellent. Cuba makes athletic training an educational component and eighty percent of her athletes are at the university level).

33. Brennan, *supra* note 30, at B-4.

34. *Id.* at B-5.

35. *Id.* at B-4.

36. LOUIS A. PEREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION, 315-81 (1988).

37. Susan K. Purcell, *Cuba's Cloudy Future*, 69 FOREIGN AFFAIRS 113, 114 (1990).

with the Soviet Union; estimates of Soviet economic aid range from 16 percent to 29 percent of Cuba's gross national product . . . ."<sup>38</sup> Cuba has been useful to the Soviets as an "important outpost and ideological ally in the U.S. sphere of influence."<sup>39</sup> Cuba has served as a Soviet military base and advanced Soviet causes that would be unacceptable if done by the Soviets directly.<sup>40</sup> However, "as the Cold War winds down, Havana's value to Moscow has declined."<sup>41</sup> Soviet President Gorbachev has announced a planned withdrawal of troops from Cuba in a move to improve Soviet relations with the United States.<sup>42</sup> The Soviet Union's internal politics contribute to reduced enthusiasm for Soviet-Cuban ties.<sup>43</sup> The Soviet press is questioning the wisdom of sustaining Cuba at the expense of the Soviet domestic economy.<sup>44</sup> Reductions in Soviet aid are beginning to be felt in Cuba.<sup>45</sup>

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Since the late 1970's, Moscow has allowed Havana to import more oil than it consumes and to sell the excess on the world market at commercial rates. As a result petroleum sales have become the single most important source of foreign exchange for Cuba. The Soviet Union also buys sugar from Cuba at prices that have averaged between three and five times the world market price. Cuba's dependence on subsidized trade with the Soviet Union has grown since 1981, when 60 percent of its trade was with Moscow; today that share is nearly 75 percent. Almost 90 percent of Cuba's trade is with socialist countries, an increase from 74 percent nine years ago.

*Id.* at 114.

38. *The Revolution at 30*, NEWSWEEK, Jan. 9, 1989 at 37 [hereinafter *Revolution at 30*].

39. Purcell, *supra* note 37, at 115.

40. *Id.* Cuba has engaged in the training and arming of guerrillas and the deploying of tens of thousands of troops to prop up third world regimes friendly to the Soviet Union. *Id.*

41. *Id.*

42. Elizabeth Shogren & Carey Goldberg, *Gorbachev Wins Nobel, But Falters at Home*, INDIANAPOLIS STAR, Sept. 12, 1991, A-3.

43. Purcell, *supra* note 37, at 116.

44. *Id.* The Soviet press reported in early 1990 on debts owed to Moscow by foreign borrowers. "Cuba was at the top of the list, with a cumulative debt of 15 billion rubles, or more than \$24 billion at the official exchange rate of one ruble for \$1.60. Cuba's debt was more than double that of the second-place debtor, Vietnam." *Id.* See Mimi Whitefield, *Soviet Journalists Open Fire on Lack of Reforms in Cuba*, MIAMI HERALD, Mar. 8, 1990, *microformed on Int'l.* 1990, Fiche 21, D-12 (NewsBank) (reporting criticism by a Soviet deputy of Soviet foreign aid spending commitments when Soviet citizens experience rations in soap and sugar and Izvestia's account that Cuba was the largest socialist debtor with a debt of about \$24.78 billion).

45. Purcell, *supra* note 37, at 117. In April 1990 in a new annual trade agreement, trade and technical assistance was increased by 8.7 percent over 1989. Military aid was decreased from \$1.5 billion to \$1.2 billion. In 1989 the Soviets delivered six new

Eastern European socialist countries have accounted for about 15% of Cuba's trade in the past, but the collapse of communism in Eastern Europe is proving destabilizing economically to Cuba as well.<sup>46</sup> "Eastern Europe is racing to recapture its capitalistic past . . . [and] feel[s] no gratitude or responsibility toward Cuba."<sup>47</sup> As a result, Cuba is being left alone defending a system that her former allies are repudiating.<sup>48</sup> Nevertheless, Castro still has some strengths which protect him from the sorts of recent revolution in Eastern Europe. Castro notes, "Cuba is not a country where socialism arrived behind victorious divisions of the Red Army."<sup>49</sup>

In the 1970's Cuba extended its influence into Africa and the Middle East. These involvements received general support among Third World nations; but when Cuba failed to support Afghanistan in a United Nations resolution condemning the Soviet invasion, Cuba's prestige in the Third World suffered great harm.<sup>50</sup> Castro's assertion that he enjoys strong popular support in the Western Hemisphere was undermined by elections in Nicaragua in which the Sandinistas lost to

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MiG-29s to Havana to replace Cuba's aging jets. *Id.* See Lee Hockstader, *Preparing for Harder Times, Cuba Tries to Become More Self-Sufficient*, WASH. POST, July 29, 1990, microformed on Int'l. 1990, Fiche 71, B-11 (NewsBank). The real pinch is expected to be felt in January of 1991. "Moscow's new posture may cost Cuba as much as \$150 million in lost subsidies in 1991, according to foreign diplomats in Havana." *Id.*

46. Purcell, *supra* note 37, at 117.

47. *Id.* at 118. In March of 1990 Czechoslovakia, Poland, Bulgaria, and Hungary all joined the United States in voting against Cuba at the U.N. Commission on Human Rights. The resolution, co-sponsored by Czechoslovakia and Poland and vigorously opposed by Cuba, asked the Cuban government to comply with its pledge not to detain, repress or otherwise mistreat Cuban human rights activists. It asked for answers to questions raised by a 1988 delegation that visited Cuba. Prior to 1989, Eastern Europe had always voted as a bloc with Cuba on the Human Rights Commission. *Id.*

48. *Id.* See Lee Hockstader, *Preparing for Harder Times, Cuba Tries to Become More Self-Sufficient*, WASH. POST, July 29, 1990, microformed on Int'l. 1990, Fiche 71, B-11 (NewsBank) (Eliot Abrams, former State Department Assistant Secretary for Inter-American Affairs commented, "It's very striking, in this moment of mass democratization around the world, that the Games will be held in one of the very few dictatorships in the hemisphere." *Id.*).

49. Julia Preston, *East Bloc Turmoil Bodes Ill For Trade and Aid in Cuba*, WASH. POST, Jan. 22, 1990, microformed on Int'l. 1990, Fiche 8, A-5 (NewsBank). See Susan Benesch, *Castro May Be Slipping, But His Fall Remains in Doubt*, ST. PETERSBURG (Fla.) TIMES, June 7, 1990, microformed on Int'l. 1990, Fiche 58, A-4 (NewsBank).

50. PEREZ, *supra* note 36, at 379-80. For example, Cuban troops were sent to assist Syria in the Yom Kippur War of 1973 and an estimated 36,000 Cuban troops assisted the liberation forces in Angola in 1975-76. *Id.* at 378.



a candidate promising democracy and a market economy. Costa Rica, El Salvador and Honduras also elected conservative presidents, lessening Castro's influence in Central America.<sup>51</sup>

In 1980 the Mariel Boatlift brought 125,000 Cubans to the United States. At the present time the United States allows the immigration of only political prisoners and their families and as many as 20,000 other Cubans a year. In 1990, after 30,000 Cubans had completed the paperwork to emigrate to the United States, Castro urged the United States and other European countries to send visas and boats to pick up the emigrants. In addition, Cuba has lowered the age limit for citizens permitted to travel outside Cuba to men over age 55 and women over age 50.<sup>52</sup> The State Department has indicated there are no plans to change immigration policy to allow a new mass exodus of Cubans.<sup>53</sup>

Cuba has suffered economic decline and serious internal political problems.<sup>54</sup> Many food items are rationed and there are severe restrictions on the sale of household items, clothing, and electrical appliances. Castro has warned his country of hard times to come when the Cuban economy would be very bleak.<sup>55</sup> Castro fans the flames of Cuban nationalism in order to divert attention from Cuba's internal diffi-

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51. Purcell, *supra* note 37, at 119.

52. Gladys Nieves, *Cuba Lowers Its Age Limit on Travelers*, MIAMI HERALD, March 6, 1990, *microformed on Int'l.* 1990, Fiche 21, D-8 (NewsBank). See Mimi Whitefield, Sandra Dibble, & Elinor Burkett, *Castro May Ease Migration*, MIAMI HERALD, May 6, 1990, *microformed on Int'l.* 1990, Fiche 44, F-12 (NewsBank). A Cuban who comes to the United States with a temporary travel visa may become a permanent resident after remaining in the country for a year. More liberal travel would permit more Cubans to settle in the United States. Some analysts believe Cuba is seeking a way to allow dissidents to leave, having the effect of a legal Mariel. *Id.* at F-13.

53. Mimi Whitefield, *Castro's 'Send Boats' Is No Mariel*, MIAMI HERALD, July 28, 1990, *microformed on Int'l.* 1990, Fiche 85, E-1 (NewsBank).

54. Purcell, *supra* note 37, at 121. In 1986 Castro launched a rectification campaign aimed at reversing an experiment with market mechanisms. The campaign, still in effect, recentralizes the economy and substitutes moral incentives for material incentives. *Id.*

55. Mimi Whitefield, *Shortages in Cuba Force Stringent Rationing Plan*, MIAMI HERALD, Sept. 27, 1990, *microformed on Int'l.* 1990, Fiche 100, F-7 (NewsBank). See Ron Casey, *Castro's Cuba: An Island in Pain*, BIRMINGHAM (Ala.) NEWS, Oct. 31, 1990, *microformed on Int'l.* 1990, Fiche 112, B-6 (NewsBank); Andres Oppenheimer, *Visit to Cuba: Anxiety But No Hint of Rebellion*, MIAMI HERALD, Oct. 21, 1990, *microformed on Int'l.* 1990, Fiche 112, B-8 (NewsBank) (detailing recent visits by journalists to Cuba and telling of the evident hard times the people suffer there).

culties.<sup>56</sup> When the United Nations Security Council voted to impose sanctions on Iraq in August, 1990, Cuba remained an implacable foe of the United States. Cuba preferred to abstain rather than vote with the Soviet Union and the United States.<sup>57</sup> Later Cuba voted against military action against Iraq<sup>58</sup> and supplied Iraq with air shipments of military-related equipment.<sup>59</sup>

### C. *The United States: Foreign Policy Toward Cuba*

Against this background, attention focuses on United States policy toward Cuba. In 1963 the United States imposed an economic embargo on trade with Cuba.<sup>60</sup> Economic pressure is a major tool in general United States foreign policy.<sup>61</sup> Use of economic sanctions, which dates back to the ancients, has been used throughout United States history, and with increasing frequency since World War II.<sup>62</sup> "Sanctions do not involve the violence and destruction of armed force, yet they provide a nation's leader with the appearance, and often the reality, of taking decisive steps. They are also more acceptable in the international community. . . [and] more concrete than diplomatic protests or other diplomatic moves."<sup>63</sup> The general rationales for imposing sanctions

56. Purcell, *supra* note 37, at 124. In a 1989 speech Castro said: Destiny assigns the role of one day being among the last defenders of socialism. . . . In a world in which the Yankee empire was able to make a reality of Hitler's dreams of dominating the world, we would know how to defend this bastion until the last days of blood. . . . Socialism or death! Fatherland or death! We will win!

57. John M. Goshko, *Security Council Approves Package With a 13-0 Vote*, WASH. POST, Aug. 7, 1990, *microformed on Int'l.* 1990, Fiche 89, G-2 (NewsBank).

58. Warren Strobel, *U. N. Approves Use of Force, Gives Iraq Jan. 15 Deadline*, WASH. TIMES, Nov. 30, 1990, *microformed on Int'l.* 1990, Fiche 129, F-12 (NewsBank).

59. Bill Gertz, *Cuba, Libya Ignore Sanction*, WASH. TIMES, Aug. 30, 1990, *microformed on Int'l.* 1990, Fiche 89, E-6 (NewsBank).

60. *See infra* notes 77-84 and accompanying text.

61. Barry Carter, *International Economic Sanctions: Improving the Haphazard U. S. Legal Regime*, 75 CALIF. L. REV. 1162, 1163 (1987). Recent examples include trade and investment sanctions against South Africa, financial and other sanctions against Panama, measures against Libya, a trade embargo against Nicaragua, controls on high-technology exports, sanctions against Poland and Soviet Union (including the grain embargo and attempt to stop exports of pipeline equipment), and a ban on trade and freezing assets of Iran during hostage crisis. *Id.* *See* John Goshko, *U. N. Tightens Sanctions, Bans Air Traffic to Iraq*, WASH. POST, Sept. 26, 1990, *microformed on Int'l.*, 1990, Fiche 106, C-1 (NewsBank) (noting the United States also used sanctions against Iraq in an attempt to force Iraq out of Kuwait).

62. Carter, *supra* note 61, at 1168-70.

63. *Id.* at 1163.

include: to influence a country's policies or government; to punish a country for its policies; or to indicate a symbolic protest of a country's policies.<sup>64</sup> Debate centers around embargo effectiveness.<sup>65</sup> The actual rationale for the particular embargo is often difficult to discern and the extent to which the embargo contributes to change is difficult to measure.<sup>66</sup>

In the past it has been argued that the United States should lift the economic embargo against Cuba and take steps to normalize relations.<sup>67</sup> Different viewpoints on the matter have existed within the State Department.<sup>68</sup> "[T]he U.S. embargo on trade with Cuba has

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64. *Id.* at 1170. See Nafziger & Strenk, *supra* note 26, at 261. This article examines six political uses of international athletic contests, including "diplomatic recognition and nonrecognition, protest, ideology and propaganda, official prestige, international cooperation, and conflict." *Id.* at 261 (footnote omitted).

65. Carter, *supra* note 60, at 1163.

Despite significant failures, . . . detailed studies suggest that sanctions have been successful in some situations. For example, U.S. economic sanctions helped to topple Haiti's Duvalier in 1986, Uganda's Idi Amin in 1979, Chile's Allende in 1973, and the Dominican Republic's Trujillo in 1961. . . .

While the evidence is still unclear, comprehensive U.S. sanctions probably helped free the hostages from Iran in 1981. Similarly, sanctions against South Africa . . . appear to be having an impact on the economy and on the political climate.

*Id.* (footnotes omitted).

66. *Id.* at 1171-2. A comprehensive study by Hufbauer and Schott which evaluated the effectiveness of sanctions against specific foreign policy objectives. To measure success the study considered "the extent to which the policy outcome sought . . . was in fact achieved" and "the contribution made by sanctions to a positive outcome." *Id.* at 1172. The result was that in the sixty-two cases since 1945 in which the United States was the sanctioning country, the success rate was about 40%. The success rate declined somewhat in recent years in the areas where the United States was seeking modest policy results. This is due to two factors: recent targets are less dependent on trade with the United States and other countries, such as the Soviet Union, have stepped forward to assist the target countries. *Id.* (footnotes omitted).

67. Alfonso Chardy, *Havana: U.S. Cool to Improving Ties*, MIAMI HERALD, April 3, 1989, *microformed on Int'l*, 1989, Fiche 33, D-8 (NewsBank). See Carla Ann Robbins, *The Graying of a Revolution*, U. S. NEWS & WORLD REPORT, Jan. 9, 1989 at 41 (reporting on a poll of Cuban Americans which found that 73 percent favor negotiations between the United States and Cuba); cf. *Revolution*, *supra* note 38, at 37 (calling Cuba the rallying cry for the United States political right, making it unlikely Bush will risk loss of that political support by normalizing relations with Cuba).

68. WAYNE SMITH, *THE CLOSEST OF ENEMIES: A PERSONAL AND DIPLOMATIC ACCOUNT OF U.S. - CUBAN RELATIONS SINCE 1957* (1987). Wayne Smith, a diplomat, served in Cuba until 1982. He indicates that the Cubans made preliminary gestures in 1981 that could have led to talks between the United States and Cuba, but those low-level openings were rebuffed by the State Department.

inflicted economic damage, but only in discrete areas such as technology and Western consumer products. In short, Cuba has paid a price for being a Soviet ally, but U.S. interests have not advanced accordingly."<sup>69</sup> Nevertheless, in March of 1989, Secretary of State James Baker dispatched a confidential memo to all United States embassies saying that the Bush administration planned no change in relations with Cuba because "Cuban behavior has not changed sufficiently to warrant a change in U.S. attitudes."<sup>70</sup> President Bush has said, "I am not about to shift our policy towards Fidel Castro."<sup>71</sup> Specifically Bush has challenged Castro to:

Free all political prisoners; Conform to accepted international standards regarding human rights and allow the United Nations and other organizations unrestricted access to monitor compliance. Stop intervening in the internal affairs of other nations; Hold free and fair elections. . . . Allow Cubans who wish to leave the country to do so; Show Cuba is truly independent by sharply reducing the Soviet military presence.<sup>72</sup>

The mood of Congress does not appear to be particularly sympathetic either. In 1989 Congress moved to tighten the embargo against Cuba with the passage of a bill that would bar foreign subsidiaries of United States companies from trading with Cuba. This action "closes a loophole" and brings additional economic pressure to force reform in Havana.<sup>73</sup>

### III. THE GAME RULES: UNITED STATES LAW DEALING WITH EMBARGOES AGAINST HOSTILE NATIONS

The relevant law regarding ABC's broadcast of the Games from Cuba is the Trading With the Enemy Act as amended. Because this

69. PAMELA S. FALK, *CUBAN FOREIGN POLICY*, 164 (1986).

70. Chardy, *supra* note 67, at D-8.

71. Andres Oppenheimer, *President Sees No Improvement in Havana Ties*, MIAMI HERALD, June 29, 1989, microformed on Int'l. 1989, Fiche 61, G-14 (NewsBank).

72. Frank J. Murray, *Bush Scorns Soft Line Toward Cuba*, WASH. TIMES, May 23, 1989, microformed on Int'l. 1989, Fiche 50, C-6 (NewsBank). Bush said, "As president, I am unalterably committed to a free, united, democratic Cuba, and I'm not going to ever falter in that support. . . . This I pledge: Unless Fidel Castro is willing to change his policies and behavior, we will maintain our present policy toward Cuba." *Id.*

73. Karen Riley, *Loophole Closing in Trade With Havana*, WASH. TIMES, July 27, 1989, microformed on Int'l. 1989, Fiche 76, G-13 (NewsBank) (describing how the amendment to a 1975 trade law bars subsidiaries of United States companies from circumventing the United States embargo against Cuba).

law restricts speech, questions are raised with regard to both First Amendment rights and executive powers under the separation of powers doctrine.

#### A. *Trading With the Enemy Act*

The Trading With the Enemy Act<sup>74</sup> was passed on October 6, 1917, exactly six months after the United States declared war on Germany. Congress invested the President with the power "to determine what disposition should be made of enemy properties in order effectively to carry on the war."<sup>75</sup> The Act was passed by Congress "to prevent the enemy from using any property it owns or controls in the United States, to make that property available for use by the United States, and to weaken enemy countries by depriving their supporters of the ability to aid them through trading."<sup>76</sup>

TWEA originally applied to both wartime and peacetime emergencies. President Kennedy declared Cuba a hostile nation in 1963 during peacetime and instituted an embargo.<sup>77</sup> A 1977 amendment to TWEA narrowed its scope so that only "[d]uring the time of war, the President may . . . prohibit or regulate any transaction in which any foreign country or a national thereof has any interest."<sup>78</sup> "[T]he amendment limited the power of the President to regulate domestic and international economic transactions via the national emergencies pro-

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74. 50 U. S. C. at § 5.

75. *Richardson v. Simon*, 560 F. 2d 500, 503 (2d. Cir. 1977) (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 10-12 (1926)).

76. Note, *Licensing of Journalists Under the Trading With the Enemy Act: An Impermissible Form of Censorship*, 3 B. U. INT'L. L.J. 457, 459-60 (footnotes omitted) (1985).

77. *De Cuellar*, 881 F.2d at 1563.

78. 50 U. S. C. at § 5 (b) (1) provides in pertinent part:

During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise— (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and (B) investigate, 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 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. . . .

vision of the act and provided safeguards giving Congress a role in declaring and terminating national emergencies."<sup>79</sup> Nevertheless, Congress still intended to give the President broad discretion in administering the Act.<sup>80</sup> The amendment acted prospectively. If a national emergency, such as the one with Cuba, had been declared by the President before 1977, it could be extended one year at a time if the President thought it in the national interest.<sup>81</sup> Congress recognized that it might be embarrassing for the President to have to declare new national emergencies in the case of Cuba and Vietnam.<sup>82</sup> Thus, the Cuban economic embargo was grandfathered, and every year since that time Presidents Carter, Reagan, and Bush have determined that such an extension is in the national interest.<sup>83</sup> "Emergencies, by definition, require a quick, decisive response. Of the three branches of government, only the Executive has a continuing, spontaneous capability for mounting such a response."<sup>84</sup>

*B. Implementation by the Treasury Department Through the Office of Foreign Assets Control*

The authority given the President in TWEA to administer the Cuban embargo is delegated to the Treasury Department's Office of Foreign Assets Control. In turn, OFAC created and administers the Cuban Assets Control Regulations (Regulations).<sup>85</sup> The Regulations prohibit transactions with Cuba or Cubans unless the transactions fall within the scope of either a general or specific licensing provision. General licenses allow transfers that are needed by "common carriers incident to the receipt and transmission of mail,"<sup>86</sup> that are incident to the "use of satellite channels for the transmission of television news

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79. Note, *Regulation Prohibiting Transactions Incident to Travel To, From, or Within Cuba Held Constitutional*, 17 TEX. INT'L. L. J. 529, 532 (1982).

80. Richardson, 560 F. 2d at 503.

81. *Tagle v. Regan*, 643 F. 2d 1058, 1059 (5th Cir. 1981).

82. *Id.* at 1060. Sponsors of the bill wished to pass it without the controversy which they believed would arise if the President were required to declare a new national emergency.

83. \_\_\_\_ Fed. Reg. \_\_\_\_ (1990); \_\_\_\_ Fed. Reg. \_\_\_\_ (1989); 53 Fed. Reg. 35,289 (1988); 52 Fed. Reg. 33,397 (1987); 51 Fed. Reg. 30,201 (1986); 50 Fed. Reg. 36,563 (1985); 49 Fed. Reg. 35,927 (1984); 48 Fed. Reg. 40,695 (1983); 47 Fed. Reg. 39,797 (1982); 46 Fed. Reg. 45,321 (1981); 45 Fed. Reg. 59,549 (1980); 44 Fed. Reg. 53,153 (1979); 43 Fed. Reg. 40,449 (1978).

84. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 582 (C. C. P. A. 1975).

85. 31 C. F. R. § 515 (1989). *See Regan v. Wald*, 468 U.S. 222 (1984).

86. 31 C. F. R. § 515.542 (a) (1989).

and news programs originating in Cuba by the United States news organizations,"<sup>87</sup> that are related to "travel to Cuba for the purpose of gathering news, making news or documentary films, or professional research and similar activities."<sup>88</sup>

Transactions which do not fall within the general licensing categories are approved or disapproved on a case by case basis upon application for specific licenses.<sup>89</sup> The Regulations explicitly prohibit the issuance of specific licenses for transactions involving the payment to Cuba for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in Cuba.<sup>90</sup>

Courts have described the purposes of the Regulations as:

(1) To deny to 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 discussions with the Cuban government.<sup>91</sup>

Such action provides an important bargaining tool for negotiations with the Cuban government. Not infrequently, outstanding claims of nationals of one country against the government of another country have been a source of friction sufficient to prompt agreements to settle such claims.<sup>92</sup> It has been a consistent policy of OFAC to keep all Cuban assets blocked, pending a decision regarding all claims. Eventually, all

87. *Id.* at (b).

88. *Id.* at 515.560 (a)(i-ii).

89. *See, e.g., Id.* at § 515.542 (c) (requiring specific licenses for transactions entering into traffic agreements to provide and charge for telephone and telegraph services); *Id.* at § 515.560 (b) (requiring specific licenses for persons wanting to travel to Cuba for humanitarian purposes, public performances, or public exhibitions, etc.); *Id.* at § 515.565 (b) (requiring specific license for transactions incident to participation by a U. S. national in a public exhibition or performance in Cuba).

90. *Id.* at § 515.565 (c) (1). In pertinent part:

Specific licenses will not be issued authorizing any: (1) Payment to Cuba or any national thereof for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in the United States or in Cuba.

91. *De Cuellar*, 881 F. 2d at 1569 (quoting *Real v. Simon*, 510 F. 2d 557, 563 (5th Cir. 1975)).

92. *Id.* (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981)).

blocked assets will be disposed of according to an overall plan.<sup>93</sup>

### C. *Berman Amendment*

In 1988 Congress amended TWEA, narrowing the President's authority to regulate or prohibit importation of "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials. . . ."<sup>94</sup> The purpose was to promote the free exchange of ideas across national borders.<sup>95</sup> Before the amendment, according to amendment sponsors, TWEA had "been used by the Government to restrict the importation of information. Under this authority, the executive branch . . . embargoed informational materials such as films, posters, and phonograph records. These restrictions are inconsistent with the philosophy underlying the first amendment [sic]."<sup>96</sup>

As a result of the Berman Amendment, the OFAC Regulations were also changed. "[I]nformational materials" are currently authorized under a general license,<sup>97</sup> but specifically exclude "intangible items such as telecommunication transmissions,"<sup>98</sup> and prohibit "transactions related to informational materials not fully created and in existence at the date of the transaction."<sup>99</sup> The "remittance of royalties or other payments relating to works not yet in being" is proscribed.<sup>100</sup>

### D. *Constitutional Implications*

The restrictions set out in the Regulations raise free speech questions. Because the context in which these Regulations operate is that

93. *Id.*

94. 50 U.S.C. § 5 (b) (4) (Supp. 1990), known as the Berman Amendment.

95. 132 CONG. REC. 6,550, 6,551 (1986).

96. *Id.*

97. 31 C. F. R. at § 515.206 (a), "The importation from any country, and the exportation to any country, whether commercial or otherwise, of informational materials, as defined in § 515.332, are exempt from the prohibitions and regulations of this part"; and § 515.545 (b),

Transactions relating to the dissemination of informational materials are authorized, including remittance of royalties paid for informational materials that are reproduced, translated, subtitled, or dubbed. This section does not authorize the remittance of royalties or other payments relating to works not yet in being, or for marketing and business consulting services, or artistic or other substantive alteration or enhancements to informational materials . . . .

98. *Id.* at § 515.332 (b) (2). "The term 'informational materials' does not include: . . . (2) Intangible items such as telecommunications transmissions." *Id.*

99. *Id.* at § 515.206 (c).

100. *Id.* at § 515.545 (b).



of foreign affairs, questions relating to separation of powers are also raised. "The mere incantation of 'national emergency' cannot . . . sound the death-knell of the Constitution."<sup>101</sup> Therefore, these restrictions must be carefully measured by Constitutional standards.

### 1. *First Amendment Free Speech*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."<sup>102</sup> When government abridges free speech, its reasons for doing so may be in one of two broad classes: because of its content or because the government wants to avoid some evil unrelated to the speech content that is merely an incidental byproduct.<sup>103</sup> The focus in *Capital Cities/ABC* is the latter in which the government's regulation of speech does not relate to the communication itself, but rather to the time, place, or manner of the speech.<sup>104</sup> The closing of a channel of free speech must be narrowly tailored to serve a significant governmental interest. The government's restriction of speech must be "no greater than is essential to the furtherance of that interest."<sup>105</sup> This test was recently clarified and applied in *Ward v. Rock Against Racism*.<sup>106</sup> The Court reaffirmed that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but . . . need not be the least-restrictive or least intrusive means of doing so."<sup>107</sup> A regulation is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation."<sup>108</sup> A balance "between the values of freedom of expression and the government's regulatory interests is struck on a case-by-case basis, guided by whatever unifying principles may be found in past decisions."<sup>109</sup> Issues of speech restriction were addressed by the District Court in *Capital Cities/ABC* as it examined the regulation of television broadcast rights.

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101. Yoshida, 526 F. 2d at 583.

102. U. S. CONST. Amend I.

103. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 580 (1978).

104. *Capital Cities/ABC*, 740 F. Supp. at 1007.

105. TRIBE, *supra* note 103, at 580.

106. 491 U. S. 798, 781 (1989).

107. *Id.* at 798.

108. *Id.* at 799.

109. TRIBE, *supra* note 103, at 582.

## 2. *Separation of Powers*

In *Capital Cities/ABC* the court's treatment of executive authority considers potential problems of separation of powers. While the Constitution allocates powers to the three branches of government,<sup>110</sup> the actual relationship of the branches may be determined more by practical realities and custom than by formal constitutional language.<sup>111</sup> A brief examination of the doctrine shows how it is still effective in sorting out the decision-making relationships such as those which will be discussed later in *Capital Cities/ABC*.

In 1952 Justice Jackson provided a helpful formula for distinguishing situations involving Presidential action and authority:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.<sup>112</sup>

More recently, in *Dames & Moore v. Regan*<sup>113</sup> the Court drew on implicit approval by Congress of an executive practice, long in place and not before questioned. The past practice itself could not give rise to the executive power, but the fact that it was known to and acquiesced in by Congress would give rise to a presumption of consent.

In *United States v. Curtiss-Wright*<sup>114</sup> the Supreme Court described the Executive's power in foreign affairs: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of

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110. U. S. CONST. arts. I, II, III.

111. ROSCOE POUND, *SPIRIT OF THE COMMON LAW*, 173-4 (1921).

112. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952).

113. 453 U. S. 654, 688 (1981).

114. 299 U. S. 304 (1936).

the nation.”<sup>115</sup> In *Regan v. Wald*,<sup>116</sup> the Court held that American citizens desiring to travel could be restricted under TWEA. The Court held that TWEA gave the President broad authority to impose comprehensive embargoes. The Court pointed to deteriorated relations between Cuba and the United States, Cuban efforts to destabilize governments throughout the Western Hemisphere, and Cuban deployment of 40,000 troops in various African and Middle Eastern countries. With a nod to *Curtiss-Wright*, the Court concluded:

Given the traditional deference to executive judgment ‘[i]n this vast external realm,’ we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President’s decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism. . . .<sup>117</sup>

The same deference to the executive branch was expressed in *Haig v. Agee*.<sup>118</sup> Especially in the areas of foreign policy and national security, a “consistent administrative construction of [a] statute must be followed by the courts ‘unless there are compelling indications that it is wrong.’”<sup>119</sup>

The Supreme Court has regarded as nonjusticiable any issue clearly committed by the Constitution to another branch of government.<sup>120</sup> The court announced a series of factors related to the separation of powers which may make an issue nonjusticiable, including a “lack of respect due co-ordinate branches of government” and the potential for “embarrassment from multifarious pronouncements by various departments on one question.”<sup>121</sup> The federal government needs to speak with a single, unified voice in foreign affairs.<sup>122</sup> This does not mean, however, that certain provisions are out of bounds for judicial interpretation, but rather they call for a mixture of constitutional interpretation and judicial discretion.<sup>123</sup>

The courts often decline to decide matters which affect foreign policy, particularly those which might involve separation of powers

115. *Id.* at 319.

116. 468 U. S. 222, 242 (1984).

117. *Id.* at 243.

118. 453 U. S. 280 (1981).

119. *Id.* at 291 (quoting *E. I. du Pont de Nemours & Co. v. Collins*, 432 U. S. 46, 55 (1977)).

120. *Baker v. Carr*, 369 U. S. 186, 209 (1961).

121. *Id.* at 217.

122. *Goldwater v. Carter*, 444 U. S. 996 (1979).

123. *TRIBE*, *supra* note 103, at 79.

issues between the President and Congress. Courts will avoid the substantive issues by ruling that the case is not justiciable or raises a political question better addressed by the Congress.<sup>124</sup> References to Presidential foreign affairs power may derive from John Marshall's early characterization of the President as the "sole organ" of foreign policy.<sup>125</sup> "From the beginning, the founders realized that the division of power would operate very differently in two distinctive areas of policy-making—domestic and foreign policy."<sup>126</sup> The "chief executive would have to assume more or less a leading role . . . and by virtue of such a role, possess much more power and influence than the other two branches in [foreign policy]."<sup>127</sup>

The historic tension between the branches has resulted in few landmark Supreme Court decisions regarding separation of powers in foreign policy areas.<sup>128</sup> When Congress delegates power to the Executive branch and the Executive branch exercises that power for a bona fide reason, the courts do not look behind the exercise of discretion nor apply a balancing test, even when First Amendment interests are at stake.<sup>129</sup> In such cases, the administrative interpretation controls unless it is plainly erroneous or inconsistent with the regulation.<sup>130</sup> Courts should not make foreign policy any more than they should make domestic policy, but should not decline to review merely because a case involves foreign relations.<sup>131</sup>

#### IV. THE GAME: THE PLAYERS COME TO COURT

ABC requested a judgment declaring that 1) the Berman Amendment and/or the Constitution authorized its transaction with PASO; 2) the Regulations were null and void to the extent that they regulate

124. Carter, *supra* note 61, at 1247. Cf. Baker, 369 U. S. at 211 (noting that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

125. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 45. It has sometimes been said that the President has power to conduct foreign relations but not to make foreign policy. That was Madison's view, but President Truman is reported to have said, "I make American Foreign Policy." *Id.* at 302, n. 24.

126. MOORE & TURNER, *CONGRESS, THE PRESIDENT, AND FOREIGN POLICY* A. B. A. Sec. Int'l. Law & Practice, 7 (1984).

127. *Id.*

128. *Id.* at 17.

129. *Kleindienst v. Mandel*, 408 U. S. 753, 770 (1972).

130. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945).

131. *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY*, American Society of Int'l. Law, 70 (1976).

the importation of television signals and related informational materials; and 3) the Berman Amendment, the Administrative Procedures Act and/or the Constitution bar the government from initiating any proceeding to prohibit ABC from televising the 1991 Games.<sup>132</sup> In addition, ABC sought an injunction barring the Treasury Department from regulating ABC's televising of the 1991 Games.<sup>133</sup>

The United States District Court for the Southern District of New York reviewed the Berman Amendment and examined the President's authority to regulate or prohibit the importation or exportation (commercial or otherwise) of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes or other informational materials. The court held that the refusal of the Treasury Department to license an agreement for the exclusive live broadcasting rights of the 1991 Pan Am Games is consistent with the Trading with the Enemy Act and does not offend the First Amendment or due process.<sup>134</sup>

The main issues were whether the Regulations were so ambiguous as to make judicial deference to the Executive inappropriate; whether the Executive power to regulate speech when dealing with foreign affairs is subject to scrutiny under the First Amendment; and whether certain due process rights were violated.

#### A. *Ambiguity*

First, the court considered whether the Regulations were so ambiguous that judicial deference to the executive branch would be inappropriate. The Berman Amendment provides that the President has no authority under the TWEA to regulate or prohibit transactions involving several types of publications, films, photos, "or other informational materials."<sup>135</sup> OFAC interpreted the term, "or other informational materials," to exclude live coverage of the Games. ABC argued that judicial deference to OFAC is not appropriate because the term is ambiguous. The court relied on *Chevron v. Natural Resources Defense*

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

133. *Id.*

134. *Capital Cities/ABC*, 740 F. Supp. at 1015.

135. 31 U. S. C. § 5 (b) (4), providing in pertinent part:

(4) The authority granted to the President in this subsection does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials, which are not otherwise controlled for export . . . [emphasis added].

*Council, Inc.*<sup>136</sup> for a standard of review of an agency's construction of its own regulations.

*Chevron* involved the Environmental Protection Agency's construction of a term used in the Clean Air Act Amendments.<sup>137</sup> In that case the Supreme Court considered whether Congress had spoken directly on the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>138</sup> If the court determines that Congressional intent is not clear, "the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation."<sup>139</sup> Instead, if the statute is either silent or ambiguous on the specific issue, the court must decide "whether the agency's answer is based on a permissible construction of the statute."<sup>140</sup> The power of an administrative agency includes the formulation of policy and the making of rules to fill any gaps left by Congress. If Congress explicitly allows the agency to fill the gaps by regulation, then those regulations are to be given controlling weight, "unless they are arbitrary, capricious, or manifestly contrary to the statute."<sup>141</sup> If Congress implicitly allows for such regulation, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation"<sup>142</sup> made by the administrative agency. The Court emphasized that considerable weight should be given to the executive department's administrative scheme and interpretations, especially when the meaning involves reconciling conflicting policies.<sup>143</sup>

Legislative intent proved meager assistance in determining the meaning of "or informational materials." At the time of the bill's passage, the sponsors recognized an inconsistency with the philosophy underlying the First Amendment and the use of executive authority under the TWEA to restrict films, posters, and phonograph records. The sponsors sought a "free trade in ideas legislation [which] applies the ideal embodied in the first amendment of the Constitution to the

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136. 467 U. S. 837 (1984), *reh'g denied*, 468 U. S. 1227 (1984).

137. *Id.* at 840.

138. *Id.* at 842.

139. *Id.* at 843.

140. *Id.*

141. *Id.* at 844.

142. *Id.*

143. *Id.*

laws governing . . . the movement of information.”<sup>144</sup> In *Walsh v. Brady*<sup>145</sup> the court noted that the amendment was intended generally to liberalize a perceived need for information exchange, but found no intent to alter the existing hard currency controls that had been developed in national policy regarding a particular country. “Such an intrusion on presidential authority in the field of foreign policy cannot be inferred, particularly where the policy was fully known and well established when the amendment was enacted.”<sup>146</sup> The result in *Capital Cities/ABC* was that the district court found no insight in legislative history as to the precise meaning intended for “or informational materials.”<sup>147</sup>

Parsing the terms of the regulation, the court considered the dictionary meaning of “materials” and “material” and concluded the term was susceptible to more than one reasonable interpretation.<sup>148</sup> Since the phrase was part of a list, the court applied the traditional rule that words in a list should be given a similar or related meaning.<sup>149</sup> However, this phrase was set apart from the other words in the phrase by the disjunctive “or” which “indicates a congressional intent to broaden, not limit, the preceding class.”<sup>150</sup> The court found that OFAC could reasonably have interpreted the phrase to include a television broadcast.

Finally, the court concluded that there was no reason to render judicial deference inappropriate, “unless such deference is precluded by the First Amendment or unless those Regulations as construed by the agency are so arbitrary and irrational as to violate substantive due process.”<sup>151</sup>

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144. 132 U. S. CODE CONG. & ADMIN. NEWS at 6,551. The bill’s sponsor quoted Justice Oliver Wendell Holmes, “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .” *Abrams v. United States*, 250 U. S. 616, 630 (1919).

145. 729 F. Supp. 118 (D. D. C. 1989) (involving a suit brought by an importer of political posters challenging a decision by OFAC that denied him a specific license to enter Cuba to arrange for importing such posters).

146. *Id.* at 120.

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

148. *Id.*

149. *Id.* See *Dole v. United Steelworkers*, 110 S. Ct. 929, 935 (1990).

150. *Capital Cities/ABC*, 740 F. Supp. at 1011. See *F. C. C. v. Pacifica Found.*, 438 U. S. 726, 739-40 (1978) (holding that the plain language of a statute determines that words written in the disjunctive imply that each has a separate meaning. *Cf. United States v. Powell*, 423 U. S. 87, 90 (1975)).

151. *Capital Cities/ABC*, 740 F. Supp. at 1012.

### B. *First Amendment Arguments*

ABC argued that the executive power to regulate speech when dealing with foreign affairs is subject to the same scrutiny and limitations as the First Amendment would impose in the domestic context. Relying on *Teague v. Regional Commissioner of Customs*,<sup>152</sup> the court disagreed. In that case, the addressees of publications originating in North Vietnam and mainland China were required to obtain licenses before being allowed to receive such publications. Instead of applying for licenses, they brought an action claiming their First Amendment rights had been abridged. The court balanced the vital interest of the government in limiting the flow of hard currency, a "weapon in the struggle between the free and communist worlds,"<sup>153</sup> with the limited availability of some publications originating in China, North Korea, and North Vietnam. All publications from those nations were excluded from importation. The court acknowledged that regulation impinges on First Amendment freedom, but that restriction "is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations."<sup>154</sup> The court concluded "that the infringement of first amendment freedoms is permissible as incidental to the proper, important and substantial general purpose of the regulations."<sup>155</sup>

In *Capital Cities/ABC* the court noted that in *Teague* the Second Circuit "upheld the constitutionality of the Cuban embargo although it entirely prohibited the importation of all 'informational materials,' which is now permitted by the Berman Amendment."<sup>156</sup> Since such restrictions would have been clearly invalid in a domestic context, ABC argued that when dealing with foreign affairs, the same scrutiny should be applied as in domestic contexts. In response, the court relied on *Ward v. Rock Against Racism*,<sup>157</sup> in which a flexible standard of restriction on First Amendment rights is permitted even in a domestic context.

In *Ward* the sponsor of a rock concert brought suit against New York City for use guidelines regarding sound equipment and technicians at the bandshell in Central Park. The Court reaffirmed that the regulation of free speech must be narrowly tailored to serve the govern-

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152. 404 F. 2d 441 (1968), cert. denied 89 S. Ct. 1457 (1969).

153. *Id.* at 445. The United States was at the time engaged in armed conflict with North Vietnam and not in a friendly relationship with either mainland China or North Korea.

154. *Id.*

155. *Id.* at 446.

156. *Capital Cities/ABC*, 740 F. Supp. at 1013.

157. 109 S. Ct. at 2746.



ment's interests, and that the required tailoring is satisfied if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>158</sup> The regulation may not burden more speech than is necessary or regulate in a way in which the burden to the speech does not advance the government's goals.<sup>159</sup> As long as the means chosen are not more broad than necessary, the regulation will not be invalid just because some less-restrictive alternative was not chosen.<sup>160</sup> The Court held that the guidelines were narrowly tailored to serve the city's interest in avoiding excessive sound and yet left open channels for ample communication.<sup>161</sup>

In *Capital Cities/ABC* the district court avoided an overly expansive interpretation of the Berman Amendment with regard to issues of separation of powers and the authority of the Executive to conduct foreign affairs. When the court considered the choice between restriction on First Amendment freedoms or latitude for the Executive in the conduct of foreign affairs, it decided in favor of the Executive.<sup>162</sup>

### C. *Due Process*

ABC claimed due process violations in the OFAC restrictions in three areas: (1.) discrimination between print and broadcast media; (2.) discrimination between works in existence and works not yet in being; (3.) misapplication of OFAC's own rulings. The applicability of concepts of due process to the exercise of the Executive's power in foreign affairs is not entirely clear.

First, ABC alleged that the Regulations impermissibly discriminated between print and broadcast media. *Richardson v. Simon*<sup>163</sup> was a due process challenge to OFAC Regulations applied to prevent a United States citizen from inheriting from a Cuban relative whose assets were in a blocked account.<sup>164</sup> The court declared due process was not violated "when the statutory classification, as implemented by the Regulations, is 'the product of a deliberate and rational choice' by Congress."<sup>165</sup>

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158. *Id.* at 2758 (quoting *United States v. Albertini*, 472 U. S. 675, 689 (1985)).

159. *Id.*

160. *Id.*

161. *Id.* at 2760.

162. *Capital Cities/ABC*, 740 F. Supp. at 1013.

163. 560 F. 2d. at 500.

164. *Id.* at 502. Before 1963 Cuban citizens had placed cash and stock certificates in a New York City bank. In 1963 when President Kennedy declared Cuba a hostile nation, these funds were blocked. *Id.*

165. *Id.* at 505 (quoting *Alexander v. Fioto*, 430 U.S. 634, 640 (1977)).

The court refused to be limited by the purposes of the Act which Congress articulated, but also included purposes Congress could reasonably have held. The final disposition of the interests depended on the outcome of the relationship between the United States and Cuba as determined by the Congress and the President.<sup>166</sup>

In *Capital Cities/ABC* the court pointed out that OFAC had not permitted either print or broadcast media to pay the Cuban government for exclusive coverage of the 1991 Games. In fact, both media could obtain videotapes by paying appropriate royalties after the tapes were produced, but no royalty payments could be made by either entity to the Cuban government.<sup>167</sup> Therefore, there was no showing of impermissible discrimination between print and broadcast media because ABC was not denied a benefit that was enjoyed by other media. ABC relied on cases in which content-based restrictions outweighed compelling state interest.<sup>168</sup> The court found the content-neutral position in *Teague* to be more analogous; as well as the result because "there is no censorship of selected materials; all publications from the specified nations are treated alike."<sup>169</sup> OFAC was restricting the time, place, and manner of the Games broadcasts, not the content of the broadcasts, and in *Teague* such regulation was permitted.

Next, ABC argued that OFAC discriminated against works not yet in being. ABC was denied a license to import live broadcast of the Games, but would have been allowed to import a completed version of the Games after the fact.<sup>170</sup> The court relied on a line of cases which held that "matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference."<sup>171</sup>

The Supreme Court has articulated a very low standard for upholding the exercise of executive power, that is, a basis that is facially

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166. *Id.*

167. *ABC/Capital Cities*, 740 F. Supp. at 1013.

168. *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97 (1979) (protecting the publication of an alleged juvenile offender's name did not justify the imposition of criminal sanctions on a newspaper). See *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2613 (1989) (only state interest of the highest order may overcome the right of newspaper to publish truthful information which it has lawfully obtained).

169. *Teague*, 404 F. 2d at 445.

170. *Capital Cities/ABC*, 740 F. Supp. at 1014.

171. *Wald*, 468 U. S. at 242 (quoting *Harisiades v. Shaughnessy*, 342 U. S. 580, 589 (1952)). See *Agee*, 453 U.S. at 292; *Curtiss Wright Export Corp.*, 299 U.S. at 319-20.

legitimate, a bona fide reason.<sup>172</sup> In *Kleindienst v. Mandel* the Court held that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against . . . First Amendment interests . . ." <sup>173</sup> Applying this standard in *Capital Cities/ABC*, the court could not say that it was irrational for OFAC to conclude that payments for a live work represented more potential for assisting a hostile nation than payments for a completed work.<sup>174</sup>

Lastly, ABC charged that OFAC had misinterpreted its own regulations in determining that ABC's agreement to broadcast the Games did not fall within the general licensing provision for travel related to news gathering. The court found that, unless contrary to the plain language of the regulation, the agency's interpretation was entitled to controlling weight.<sup>175</sup> The regulation on its face did not deal with agreements such as ABC's agreement with PASO. The court noted that the regulation was internally consistent with other regulations that expressly exclude telecommunication transmissions from the scope of informational materials,<sup>176</sup> prohibit payment of royalties not yet in being,<sup>177</sup> and prohibit payment for television rights.<sup>178</sup> Therefore, OFAC had not misinterpreted its own regulations.

#### D. Judgment and Settlement

The district court decided in favor of the Treasury Department. The court held that the refusal of OFAC to license the broadcast agreement between ABC and PASO was consistent with TWEA and the First Amendment. That decision could have been a significant setback for the 1991 Games. However, in December of 1990, following the decision of the District Court, a settlement was reached between ABC and the Treasury Department which will allow ABC to compensate Cuba for goods and services involved in the live broadcast.<sup>179</sup> The settlement details are not available to the public. However, ABC was

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172. *Kleindienst*, 408 U. S. at 770.

173. *Id.*

174. *Capital Cities/ABC*, 740 F. Supp. at 1014.

175. *Id.*

176. 31 C. F. R. at § 525.332 (b) (2).

177. *Id.* at § 515.206 (c); § 515.545 (b).

178. *Id.* at § 515.565 (c) (1).

179. *Indianapolis Star*, Dec. 14, 1990, p. \_\_\_\_.

able to broadcast twenty hours of coverage of the competition.<sup>180</sup> Cuba again won the gold medal in baseball with a win over Puerto Rico, while the United States had to be satisfied with the bronze.

#### V. CONCLUSION: THE FINAL SCORE

Hosting the Games was a dream realized for Fidel Castro, his symbol that communism is still vital in the Western Hemisphere. While the Games could have some economic benefit, they will not provide a long term solution to the economic or political difficulties in Cuba. Cuba has gained some long-lasting facilities, but most of the benefit will be intangible.

The government's case in *Capital Cities/ABC* seemed formidable, with the separation of powers issue looming large and tilted toward the Executive in foreign affairs. The President was acting within power specifically delegated to the Executive under the TWEA and its amendments. The Congress had ample opportunity to consider United States relations with Cuba when the TWEA was amended in 1977. At that time the Congress specifically considered the national emergency status of Cuba and allowed for the extension of that status. In this posture, the President has significant strength. Even if Congress were not held to have specifically granted this power to the President, Congress had acquiesced to a long-standing exercise of power by the President. In addition, the court could even have found this case nonjusticiable because of the need for the Executive to speak as the "sole organ" of the nation in this area of foreign policy.

The court worked through the arguments cautiously, deciding only what was necessary, declining to get into larger issues. The interpretation was found to be not plainly erroneous or inconsistent or offensive to constitutional rights. If the court had considered separation of powers issues regarding the TWEA, then the delegation of authority to the President to regulate Cuban trade could have been deemed a practical, historic, and appropriate action. The court could have found the Presidential power at its maximum, combining all the President's authority with that delegated by Congress. The United States has enjoyed some success with economic sanctions. Involving no violence, embargoes provide a symbolic protest that is politically valuable to President Bush. Changes in Europe, the Soviet Union, and South and Central America strengthen the United States' position because those changes effectively erode Cuba's military threat and Communist prestige. Within the

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180. Indianapolis Star, Aug. 2, 1991, C-1,2, col. 1.

parameters set by TWEA as amended, the United States can continue to use embargo pressure for change in Cuba. Given the present diminished stature of Cuba in relation to other countries and her desperate internal situation, perhaps the time is ripe for a gesture from the United States. Perhaps the opportunity is at hand for a loosening of the embargo to the benefit of both the United States and Cuba.

This case seems to illustrate the delicate position of each branch of government in the area of foreign policy. The Executive branch, through the Treasury Department and OFAC, fought to preserve the embargo set out by Congress against Cuba through court enforcement of TWEA. Nevertheless, after winning, the Treasury Department was evidently willing to negotiate in order to pursue some more limited foreign policy objective. Parties, such as ABC, desiring interaction with Cuba will have to be satisfied with the limited contacts which fit within the Executive's policy goals. Such goals may even vary from time to time.

*Capital Cities/ABC* is also an illustration of the mix of politics and sport in the Games. Because the details of the settlement are not available, one can only speculate on its meaning. The compromise reached between the parties could signal a shift in affairs between the United States and Cuba; and if so, the Pan American Games will live up to its noble ideal of improved relations in the Americas.

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