INFORMATION WANTS TO BE FREE (OF SANCTIONS): WHY THE PRESIDENT CANNOT PROHIBIT FOREIGN ACCESS TO SOCIAL MEDIA UNDER U.S. EXPORT REGULATIONS

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"The fact that we disapprove of the government of a particular country ought not to inhibit our dialog with the people who suffer under those governments.... We are strongest and most influential when we embody the freedoms to which others aspire."[1]— *Rep. Howard L. Berman*

INTRODUCTION

Social media and other digital technologies play a crucial role in assisting ordinary citizens to speak up and organize themselves against repressive governments.[2] One of the principal catalysts of the Arab Spring,[3] for example, has been social media's "power to put a human face on political oppression ... [through] stories told and retold on Facebook, Twitter, and YouTube in ways that inspire[ ] dissidents to organize protests, criticize their governments, and spread ideas about democracy."[4] Social media helps to obviate collective action problems by enabling "a combination of real-time and group coordination that helps tip the balance" away from governments in favor of citizen activists.[5] There is perhaps no better confirmation of social media's usefulness to popular dissent than the decisions by Egyptian, Syrian, Chinese, and Libyan leaders to shut

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1. 138 CONG. REC. 15,052 (1992).

2. *See, e.g.*, PHILIP N. HOWARD ET AL., PROJECT ON INFO. TECH. & POLITICAL ISLAM, OPENING CLOSED REGIMES: WHAT WAS THE ROLE OF SOCIAL MEDIA DURING THE ARAB SPRING? 2-3 (2001), *available at* http://www.scribd.com/doc/66443833/Opening-Closed-Regimes-What-Was-the-Role-of-Social-Media-During-the-Arab-Spring; Wim van de Donk et al., *Introduction: Social Movements and ICTs*, *in* CYBERPROTEST: NEW MEDIA, CITIZENS, AND SOCIAL MOVEMENTS 1 (Wim van de Donk et al. eds., 2004); Larry Diamond, *Liberation Technology*, J. DEMOCRACY, July 2010, at 69, 69-70; Lee Baker, Note, *The Unintended Consequences of U.S. Export Restrictions on Software and Online Services for American Foreign Policy and Human Rights*, 23 HARV. J.L. & TECH. 537, 555-57, 560-61 (2010).

3. The term "Arab Spring" describes the series of popular protests and rebellions in the Middle East and North Africa in 2010 and 2011. *See, e.g.*, Steven Lee Myers, *Arab Hopes, U.S. Worries: Fears of Radicalism and Israeli Isolation*, N.Y. TIMES, Sept. 18, 2011, at A1.

4. HOWARD ET AL., *supra* note 2, at 2. *But see, e.g.*, Evgeny Morozov, *Internet Alone Cannot Free the Middle East*, FIN. TIMES (Mar. 27, 2011, 11:00 PM), http://www.ft.com/intl/cms/s/0/6f6f0c3c-58bc-11e0-9b8a-00144feab49a.html (warning that authoritarian regimes might use social media as a means of surveillance or propaganda).

5. CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 186 (2008); *see also id.* at 143-60; Zeynep Tufekci, *Social Media and Dynamics of Collective Action Under Durable Authoritarianism: Observations from Tahrir Square*, 62 J. COMM. 363 (2012).

off or filter Internet access amidst widespread protests in their countries.[6]

Censorship by authoritarian governments, however, is not the only reason that users sometimes cannot reach social media services; sometimes, the American companies producing social media services prevent users in certain countries from accessing them.[7] These companies do not restrict access because of disagreement with foreign users' revolutionary causes; on the contrary, some social media companies quite vocally believe that their services may help promote freedom in the face of tyranny.[8] Rather, what motivates these companies to block foreign users is the fear that failing to do so would subject them to liability under America's economic sanctions regime—specifically, the export and import regulations administered by the Treasury Department's Office of Foreign Assets Control (OFAC).[9]

Export regulations are just one of many tools in America's economic sanctions arsenal.[10] The penalties can include steep fines and even imprisonment.[11] Many export attorneys agree that U.S. export regulations cover foreign access to social media tools and advise their clients to block users in embargoed countries.[12] Faced with

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6. Sam Gustin, *Digital Diplomacy*, TIME (Sept. 2, 2011), http://www.time.com/time/specials/packages/article/0,28804,2091589_2091591_2091592,00.html.

7. *See, e.g.*, Eric Lai, *Should Facebook, Twitter Follow IM Providers and Block Access to U.S. "Enemies"?*, COMPUTERWORLD (June 11, 2009, 10:34 AM), http://www.computerworld.com/s/article/9134233/Should_Facebook_Twitter_follow_IM_providers_and_block_access_to_U.S._enemies_.

8. *See, e.g.*, Biz Stone & Alexander Macgillivray, *The Tweets Must Flow*, TWITTER BLOG (Jan. 28, 2011, 12:27 PM), http://blog.twitter.com/2011/01/tweets-must-flow.html.

9. *See, e.g.*, EVEGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM 205-06 (2011); Cindy Cohn & Jillian C. York, *EFF to Obama Administration: Syrians Deserve Access to Communications and Information Tools*, ELECTRONIC FRONTIER FOUND. DEEPLINKS BLOG (July 6, 2011, 2:10 PM), https://www.eff.org/deeplinks/ 2011/07/eff-u-s-treasury-and-commerce-time-clarify-u-s; *While White-Listing Syria, LinkedIn Keeps Sudan's Internet Users Blocked!*, ARABCRUNCH EN (Apr. 20, 2009), http://arabcrunch.com/2009/04/while-white-listing-syria-linkedin-keeps-sudan-blocked.html; *see also* Lai, *supra* note 7.

10. *See* Richard N. Haass, *Introduction* to ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY 1, 1-2 (Richard N. Haass ed., 1998). To conserve space and promote clarity, this Note will hereinafter refer to export and import regulations jointly as "export regulations."

11. For example, criminal penalties for willful violation of the Iranian embargo include fines of up to $1,000,000 and imprisonment for up to twenty years. 31 C.F.R. § 560.701 (2011). Civil penalties consist of fines ranging from $250,000 to twice the value of each wrongful transaction, whichever is greater. *Id.*

12. *See* Lai, *supra* note 7.

such potentially crippling liability, some companies have gone further to block entirely U.S.-based users if they have even a weak affiliation with a sanctioned country.[13] Although some export regulations target only those individuals appearing on a "specially designated nationals" list for a given country, smaller companies operating under tight legal budgets—or even large companies that conclude their limited resources are better spent elsewhere—may decide that blocking all users in that country is the easiest, cheapest, or safest option.[14]

Paradoxically, America's highest-ranking officials have repeatedly highlighted the critical importance of American social media in helping politically repressed populations organize and express themselves.[15] Secretary of State Hillary Clinton has actively embraced the cause of "Internet freedom," proclaiming that the United States "want[s] to put [social media] tools in the hands of people who will use them to advance democracy and human rights."[16] Indeed, in mid-2009 the State Department asked Twitter —a popular social media tool that enables users to publish and exchange short messages with each other[17]—to postpone scheduled maintenance so that the service would be available during a crucial period of protests in Iran.[18] Even President Obama has referenced social media's power to galvanize political opposition. In a 2011 speech criticizing Syria for mimicking Iran's violent response to

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13. *See, e.g.*, Evegeny Morozov, *Do-It-Yourself Censorship*, NEWSWEEK (Mar. 6, 2009), http://www.thedailybeast.com/newsweek/2009/03/06/do-it-yourself-censorship.html (describing the decision by Bluehost, an American web hosting provider, to suspend the blog of the U.S.-based Belarussian American Association, "one of the oldest and most visible U.S.-based groups pushing for democracy in Belarus," because of its association with that sanctioned country).

14. *See* MOROZOV, *supra* note 9, at 206; Morozov, *supra* note 13 ("[Bluehost] probably doesn't have the time or resources to match ... OFAC['s] [specially designated Belarus nationals list] with its own customer ranks. Banning everyone from Belarus takes much less time and effort."); *see also* Baker, *supra* note 2, at 555.

15. *See* MOROZOV, *supra* note 9, at 205-06.

16. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010), http://www.state.gov/secretary/rm/2010/01/135519.htm; *see also* Hillary Rodham Clinton, U.S. Sec'y of State, Internet Rights and Wrongs: Choices and Challenges in a Networked World (Feb. 15, 2011), http://www.state.gov/secretary/rm/2011/02/156619.htm.

17. *See About Twitter*, TWITTER, http://twitter.com/about (last visited Sept. 23, 2011).

18. *See* Mark Landler & Brian Stelter, *With a Hint to Twitter, Washington Taps into a Potent New Force in Diplomacy*, N.Y. TIMES, June 17, 2009, at A12.

popular uprisings, Obama remarked that "[t]he image of a young woman dying in the streets is still seared in our memory,"[19] a reference to a YouTube video viewed hundreds of thousands of times around the world depicting the graphic death of twenty-six-year-old Neda Agha-Soltan in Tehran.[20]

Fortunately, the Obama administration has substantiated its support of foreign access to American social media through efforts to immunize social media companies from liability under export regulations. In March 2010, OFAC issued a general license "authorizing the exportation of certain personal Internet-based communications services—such as instant messaging, chat and email, and social networking" to Iran, Sudan, and Cuba.[21] Treasury officials boasted that the move would "foster and support the free flow of information—a basic human right—for all Iranians."[22] When President Obama announced an escalation in U.S. sanctions against Syria in August 2011,[23] OFAC issued another general license authorizing the exportation to Syria of "services incident to the exchange of personal communications over the Internet ... provided that such services are publicly available at no cost to the user."[24] And in March 2012, OFAC published interpretive guidance on the personal communications license for Iran, providing more specific examples of the types of services the general license encompasses and

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19. Barack Obama, President of the U.S., Remarks by the President on the Middle East and North Africa (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa.

20. *See* Nazila Fathi, *In a Death Seen Around the World, a Symbol of Iranian Protests: A Young Woman's Fate Resonates*, N.Y. TIMES, June 23, 2009, at A1.

21. Press Release, U.S. Dep't of the Treasury, Treasury Department Issues New General License to Boost Internet-Based Communication, Free Flow of Information in Iran (Mar. 8, 2010), http://www.treasury.gov/press-center/press-releases/Pages/tg577.aspx. General licenses authorize a certain category of transactions, whereas specific licenses authorize particular entities to engage in particular transactions. 31 C.F.R. § 501.801 (2011).

22. *See* Press Release, U.S. Dep't of the Treasury, *supra* note 21.

23. *See* Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 17, 2011).

24. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, GENERAL LICENSE NO. 5: EXPORTATION OF CERTAIN SERVICES INCIDENT TO INTERNET-BASED COMMUNICATIONS AUTHORIZED (2011), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl5.pdf.

establishing a "favorable licensing policy" for certain services not covered by the general license.[25]

Despite these efforts, however, it is not clear that social media companies actually need any license to avoid liability under the export regulations. Although welcoming the government's willingness to make exceptions for certain countries, the Electronic Frontier Foundation (EFF)—a public interest organization dedicated to defending civil liberties online[26]—has criticized these efforts as "piecemeal" and has called for the "unlicensed distribution of communications tools and services to people in all countries of the world."[27] EFF argues that Congress affirmatively revoked the President's power to regulate the exportation of social media services, meaning that no license is required for a company to do so.[28] Specifically, in 1988, Congress amended the Trading with the Enemy Act (TWEA)[29] and the International Emergency Economic Powers Act (IEEPA)[30] to withdraw the President's "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."[31] This is known as the Berman Amendment.[32] The 1994

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25. BARBARA C. HAMMERLE, ACTING DIR., OFFICE OF FOREIGN ASSETS CONTROL, INTERPRETIVE GUIDANCE AND STATEMENT OF LICENSING POLICY ON INTERNET FREEDOM IN IRAN (Mar. 20, 2012), http://www.treasury.gov/resource-center/sanctions/Programs/documents/internet_freedom.pdf. President Obama announced the new guidance in a video address to the Iranian people, underscoring the administration's recognition of the significance of this problem. *See* Ben Rhodes, *On Nowruz, President Obama Speaks to the Iranian People*, WHITE HOUSE BLOG (Mar. 20, 2012, 9:05 AM), http://www.whitehouse.gov/blog/2012/03/20/ nowruz-president-obama-speaks-iranian-people.

26. *About EFF*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/about (last visited Sept. 23, 2012).

27. *See* Jillian C. York & Cindy Cohn, *Stop the Piecemeal*, ELECTRONIC FRONTIER FOUND. DEEPLINKS BLOG (Sept. 26, 2011, 10:00 AM), https://www.eff.org/deeplinks/ 2011/09/stop-the-piecemeal-export-approach. The author researched this topic as a summer legal intern at EFF in 2011.

28. *See* Cohn & York, *supra* note 9.

29. 50 U.S.C. app. §§ 1-44 (2006).

30. 50 U.S.C. §§ 1701-1707 (2006).

31. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371-72 (amending 50 U.S.C. app. § 5(b)(4), 50 U.S.C. § 1702(b)(3)).

32. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1009, 1011 n.9 (S.D.N.Y. 1990) (noting that the amendment was named after its congressional sponsor, Representative

Free Trade in Ideas Act expanded the Berman Amendment to apply "regardless of format or medium of transmission" to "*any* information or informational materials."[33] It also added examples of relatively newer media to the Berman Amendment's examples of exempt media.[34]

This Note argues that the Berman Amendment and Free Trade in Ideas Act—hereinafter referred to jointly as the "Informational Amendments"—do in fact prohibit the President from regulating foreign access to American social media under the U.S. sanctions regime.[35] Some commentators have considered the effect of export restrictions on social media from a pure First Amendment perspective,[36] and others have reviewed the effect of the Informational Amendments on the regulation of more traditional media.[37] Although one author has highlighted the costs of "regulatory confusion" over the applicability of the Informational Amendments to social media, his study did not attempt to clarify the confusion.[38] This Note carries the inquiry forward by directly analyzing the Informational Amendments and OFAC's export regulations in the context of social media, primarily through the lenses of statutory interpretation and case law analysis. Although the First

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Howard L. Berman).

33. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (amending 50 U.S.C. app. § 5(b)(4), 50 U.S.C. § 1702(b)(3)) (emphasis added).

34. *Id.* (adding "compact disks, CD ROMs, ... and news wire feeds").

35. There is a separate argument that the President may not regulate access to social media under a different IEEPA provision that exempts "any postal, telegraphic, telephonic, or other personal communication." 50 U.S.C. § 1702(b)(1). Nevertheless, this Note concentrates exclusively on the Informational Amendments. Not only has there been more litigation focusing on the informational exemptions, *see infra* Part IV.B, but the communications exemption's focus on *personal* communications raises the complicated question of whether social media primarily facilitates personal communications, commercial communications, both, or neither.

36. *See* Nadia L. Luhr, Note, *Iran, Social Media, and U.S. Trade Sanctions: The First Amendment Implications of U.S. Foreign Policy*, 8 FIRST AMENDMENT L. REV. 500, 502 (2010).

37. *See, e.g.*, Tracy A. Chin, Note, *An Unfree Trade in Ideas: How OFAC's Regulations Restrain First Amendment Rights*, 83 N.Y.U. L. REV. 1883, 1885 (2008) (publishing activities); 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, 165 (1992) (live television broadcasts); Leslie Jose Zigel, Comment, *Constricting the Clave: The United States, Cuban Music, and the New World Order*, 26 U. MIAMI INTER-AM. L. REV. 129, 137-38 (1994) (live music performances).

38. *See* Baker, *supra* note 2, at 552-55.

Amendment is critical to this inquiry,[39] courts prefer to dispose of issues on nonconstitutional grounds when possible.[40] Consequently, the First Amendment plays a supporting, rather than principal, role in this Note's argument.

Part I provides an overview of the President's export regulatory authority under TWEA and IEEPA, including the legislative history of the Informational Amendments and OFAC's implementation of informational exemptions in its export regulations. Part II analyzes OFAC's regulations as well as its interpretative letters to determine whether the Agency could indeed conclude that providing access to social media violates export regulations. Part III examines whether OFAC's regulations comport with the requirements of the Informational Amendments. Part IV reviews four cases in which federal courts have considered the Informational Amendments and OFAC's regulations in the context of traditional media. It then discusses the implications of those decisions for a potential social media plaintiff. Finally, Part V outlines and evaluates the choices that American social media companies face as they navigate the statutory, regulatory, and judicial frameworks in this area.

I. OVERVIEW OF THE PRESIDENT'S EXPORT REGULATORY AUTHORITY

A. TWEA, IEEPA, and the President's Delegation of Power to OFAC

Two statutes authorize the President to regulate exports and imports during national crises: the Trading with the Enemy Act of 1917 (TWEA)[41] and the International Emergency Economic Powers Act of 1977 (IEEPA).[42] Enacted shortly after the United States declared war on Germany during World War I,[43] TWEA "codif[ied]

39. *See, e.g.*, *infra* notes 55-57, 61, 143-49, 160-66, 192-98 and accompanying text.

40. *See, e.g.*, Cernuda v. Heavey, 720 F. Supp. 1544, 1553 (S.D. Fla. 1989) (declining to reach constitutional claims "when statutory interpretation suffice[d]" to find that OFAC acted inappropriately). *See generally* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

41. 50 U.S.C. app. §§ 1-44 (2006).

42. 50 U.S.C. §§ 1701-1707 (2006).

43. *See* Suanne C. Milligan, Comment, *Another Inning in Cuban-United States Relations:* Capital Cities/ABC Inc. v. Brady, 2 IND. INT'L & COMP. L. REV. 281, 293 (1991).

the principle that it is illegal for a person subject to United States jurisdiction to engage in trade or commerce with a declared enemy of the United States."[44] Regarding exports and imports, TWEA enables the President "[d]uring the time of war ... [to] investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any ... importation or exportation of ... any property in which any foreign country or a national thereof has any interest."[45] TWEA originally required a congressional declaration of war, but a 1933 amendment enabled the President to exercise his TWEA powers by simply declaring a "state of national emergency" during peacetime.[46] Decades later, however, Congress reacted to growing executive overreach in foreign affairs by restoring TWEA's strict wartime requirement.[47]

The same year, Congress enacted IEEPA to separately govern the President's peacetime emergency regulatory powers.[48] Although it "recodifies virtually the same range of [peacetime] powers" that the President formerly enjoyed under TWEA, IEEPA added requirements that the President consult with and report to Congress before and during his exercise of peacetime regulatory powers.[49] The President has not generally exercised his TWEA and IEEPA powers directly. In 1942, Franklin Roosevelt delegated his economic regulatory powers under TWEA to the Treasury Department.[50] Two decades later, the Treasury Department created OFAC to exercise these delegated powers.[51] On the other hand, the President delegates his IEEPA powers to the Treasury Department on a case-by-case basis.[52] The Treasury Department typically redelegates the

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44. Jason Luong, Note, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1187 (2000).

45. 50 U.S.C. app. § 5(b)(1)(B) (2006).

46. KERN ALEXANDER, ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY 93 (2009).

47. *Id.* at 95; Luong, *supra* note 44, at 1188.

48. ALEXANDER, *supra* note 46, at 95.

49. *Id.*; *see also* 50 U.S.C. § 1703 (2006).

50. Exec. Order No. 9193, 7 Fed. Reg. 5205, 5206 (July 9, 1942).

51. Office of Foreign Assets Control: Authority and Functions, 32 Fed. Reg. 3472, 3472 (Feb. 27, 1967) (amending Treasury Department Order 128).

52. *See, e.g.*, Exec. Order No. 13,582, 76 Fed. Reg. 52,209, 52,210-11 (Aug. 17, 2011) (delegation to implement Syrian sanctions); Exec. Order No. 12,211, 45 Fed. Reg. 26,685, 26,685-86 (Apr. 17, 1980) (delegation to implement Iranian sanctions).

President's IEEPA authority to OFAC within the export regulations themselves.[53]

B. The Informational Amendments to TWEA and IEEPA

1. The Berman Amendment

Beginning in 1988, Congress undertook to exclude from the President's TWEA and IEEPA powers the ability to regulate the importation or exportation of certain types of information and informational materials. Its first attempt was the Berman Amendment, which specified that the President's powers under those acts "do[ ] 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."[54] Aside from a bare repetition of its text, the Berman Amendment's direct legislative history offers few details about its genesis or purpose.[55] However, a House Foreign Affairs Committee report stated that Congress premised the Berman Amendment on a 1985 resolution by the American Bar Association's House of Delegates, which declared that "no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First

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53. *See, e.g.*, 31 C.F.R. § 542.802 (2011) (delegation to OFAC in the Syrian Sanctions Regulations).

54. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371-72 (amending 50 U.S.C. app. § 5(b)(4), 50 U.S.C. § 1702(b)(3)). It is important to note that neither of the Informational Amendments exempt materials that are separately regulated under 18 U.S.C. §§ 792-799 or under certain sections of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. app. §§ 2401-2420 (2006)) [hereinafter EAA], both of which largely regulate exports raising direct national security threats. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994); Omnibus Trade and Competitiveness Act of 1988 § 2502. However, free and publicly available software—even when it contains encryption—is exempt from EAA regulation. *See* 15 C.F.R. §§ 734.3(b)(3), 734.7(b)-(c) (2011); 76 Fed. Reg. 1059, 1059-60 (Jan. 7, 2011). This Note assumes that social media is not regulated under the EAA or 18 U.S.C. §§ 792-799, and so would be exemptible under the Informational Amendments.

55. *See* H.R. REP. NO. 100-576, at 839 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1872; *see also* Cernuda v. Heavey, 720 F. Supp. 1544, 1547-48 (S.D. Fla. 1989).

Amendment."[56] The Foreign Affairs Committee concluded that this principle should apply to exports as well."[57]

2. The Free Trade in Ideas Act

Congress subsequently amended TWEA and IEEPA with the 1994 Free Trade in Ideas Act (FTIA).[58] FTIA broadened the informational exception to the President's export regulation powers, expanding the Berman Amendment to deny the President the authority to regulate the export or import of informational materials "whether commercial or otherwise, regardless of format or medium of transmission."[59] FTIA also affirmed the illustrative nature of the Berman Amendment's list of exempt media by prepending to it the phrase "including but not limited to," as well as by adding to it examples of newer media that had emerged in the six years after the enactment of the Berman Amendment.[60]

FTIA's legislative history explicitly confirms the First Amendment basis for the Informational Amendments.[61] The conference report explained that the Berman Amendment "was explicitly intended, by including the words 'directly or indirectly,' to have a broad scope."[62] Indeed, Congress positioned FTIA in such a way as a response to OFAC's attempts to narrowly interpret the Berman Amendment, for example by limiting "the type of information that is protected or ... the medium or method of transmitting the information."[63] The conference report also detailed FTIA's objective: to expand the scope of the Amendment to include "transactions and activities incident to the flow of information and informational materials," particularly transactions related to "electronically transmit-

56. H.R. REP. NO. 100-40, pt. 3, at 113 (1987); *see also Cernuda*, 720 F. Supp. at 1548.
57. H.R. REP. NO. 100-40, pt. 3, at 113.
58. Foreign Relations Authorization Act § 525.
59. *Id.*
60. *See id.* (adding "compact disks, CD ROMs, artworks, and news wire feeds").
61. *See* H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 398, 483 ("[The Berman Amendment] established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment.").
62. *Id.*
63. *Id.*

ted information, ... which must normally be entered into in advance of the information's creation."[64]

C. OFAC's Implementation of the Informational Amendments

After Congress enacted the Berman Amendment in 1988, OFAC amended its existing export regulations to implement the required informational exceptions.[65] OFAC has included informational exceptions in its subsequently issued export regulations as well.[66] The beginning text of OFAC's informational exceptions mimics that of the Informational Amendments. For instance, the Iranian Transactions Regulations (ITRs) provide that "[t]he importation from any country and the exportation to any country of information and informational materials as defined in section 560.315, whether commercial or otherwise, regardless of format or medium of transmission, are exempt from the prohibitions and regulations of this part."[67]

Thereafter, however, OFAC's informational exceptions deviate from the text of the Informational Amendments—sometimes subtly, sometimes less so. For example, the ITRs' definition of informational materials includes the exact same list of exempt media as in FTIA, yet OFAC prepends the ITRs' list with the term "includes" rather than FTIA's seemingly broader phrase "including but not limited to."[68] More significantly, OFAC affirmatively narrows the scope of exempted information by retaining the authority to regulate

> transactions related to information and informational materials *not fully created and in existence at the date of the transactions*, or ... the *substantive or artistic alteration or enhancement* of informational materials, or ... the provision of *marketing and*

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64. *Id.*

65. *See, e.g.*, Foreign Assets Control Regulations and Cuban Assets Control Regulations, 54 Fed. Reg. 5229, 5230 (Feb. 2, 1989) (to be codified at 31 C.F.R. pts. 500, 515) (amending the Cuban embargo).

66. *See, e.g.*, 31 C.F.R. §§ 542.206(b), 560.210(c) (2011).

67. *Id.* § 560.210(c)(1).

68. *Compare* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994), *with* 31 C.F.R. § 560.315(a). Not all of OFAC's regulations make this omission, however. *See, e.g.*, 31 C.F.R. § 548.304 (informational exception in Belarus Sanctions Regulations).

> *business consulting services* ... [or] *services to market, produce or co-produce, create or assist in the creation* of information and informational materials.[69]

OFAC appears to have exercised independent discretion in implementing this narrowing provision, as there is no clear basis for it in the Informational Amendments or other authority.[70]

II. OFAC'S REGULATIONS AND SOCIAL MEDIA

Although there is no evidence that OFAC has actively enforced its regulations against American companies providing access to social media in sanctioned countries, the Agency's decision to issue general licenses for such activity in certain countries strongly suggests that OFAC believes its regulations otherwise apply.[71] This Part examines the basis upon which OFAC might reach that conclusion.

A. OFAC's Regulations Construed Against a Hypothetical Social Media Service

The best starting point in determining whether and how OFAC believes its export regulations reach social media services is to walk through the regulations themselves and consider how OFAC might apply them to such activity. Consider, for example, the restrictions laid out in the ITRs.[72] The ITRs forbid "the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran."[73] "Services"

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69. 31 C.F.R. § 560.210(c)(2) (emphasis added).

70. *See* Memorandum regarding OFAC's Interpretation of IEEPA's "Informational Materials" Exemption, from Allan Adler & Marc Brodsky, Ass'n of Am. Publishers, to Interested Persons 3 (Jan. 23, 2004), *available at* http://www.pspcentral.org/commpublicaffairs/attachPubAff-PubIss/OFAC_background.doc.

71. *See supra* notes 21-25 and accompanying text.

72. This Section purposefully ignores the recent general license authorizing access to American social media in Iran. *See supra* note 21. Indeed, the purpose of this Note is to demonstrate that a license is not required for such activity. *See supra* text accompanying note 28.

73. 31 C.F.R. § 560.204. "Iran" includes any territory "over which the Government of Iran claims sovereignty," *id.* § 560.303, and "person" includes business entities such as corporations, *id.* § 560.305.

encompass any service provided by an American entity whether performed entirely in the United States or overseas.[74] The threshold question is therefore not *where* the service is itself performed, but rather whether the service is performed "on behalf of a person in Iran or ... the benefit of such services is otherwise received in Iran."[75]

With these regulations in mind, consider a hypothetical U.S. company called Blabber that operates an eponymous social media service. Blabber allows its users to publicly or privately share typed messages with other users. Blabber is incorporated and based in California, and all of its employees, assets, and computer servers are located in the United States. However, the service is available to users worldwide when they navigate their desktop or mobile web browsers to http://www.blabber.com. Suppose Blabber quickly becomes popular in Iran and soon has several thousand active users there. In the vocabulary of the ITRs, the company is a "United States person" providing a "service," the benefit of which is "received in Iran" because it is used and accessed by users located there.[76] The ITRs thus prohibit Blabber from making its service available to Iranian users; absent some exception, the company would have to block access in Iran or face serious liability.[77]

The critical question is whether the ITRs' informational exceptions, which OFAC implemented pursuant to the Informational Amendments,[78] prohibit the agency from regulating Blabber's activity. The ITRs purport to exempt from regulation "information and informational materials ... whether commercial or otherwise, regardless of format or medium of transmission."[79] However, OFAC has enumerated the types of informational media that the exemption "includes."[80] Although the list incorporates some computer media like CD ROMs, it does not refer to information created, stored, and exchanged exclusively online.[81] If OFAC interprets the

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74. *See id.* § 560.410(a).

75. *See id.*

76. *Cf. supra* notes 73-75 and accompanying text.

77. *See supra* note 11. Again, this analysis ignores the recent general license authorizing this activity. *See supra* note 72.

78. See *supra* Part I.C.

79. 31 C.F.R. § 560.210(c)(1).

80. *See id.* § 560.315(a)(1).

81. *See id.*

ITRs' list of exempt media as exhaustive rather than illustrative, the agency might find an entirely Internet-based service like Blabber to fall outside the scope of the ITRs' informational exceptions. Of course, OFAC or, more importantly, a court might well interpret the ITRs' exempt media list to be illustrative rather than exhaustive.[82] Ultimately, the question matters little in light of the ITRs' affirmative narrowing of the scope of exempted transactions.[83] OFAC retains the right to regulate any "service[ ] to ... produce or co-produce, create or assist in the creation of information" as well as "transactions related to information ... not fully created and in existence at the date of the transactions."[84] As a service that empowers users to write and exchange text-based messages, Blabber has no other purpose than to enable the creation of new information. OFAC would undoubtedly find Blabber in violation of the ITRs if the company allowed individuals in Iran to access and use the service.

B. Guidance from OFAC's Interpretative Letters

Because there is no record of OFAC enforcing its export regulations in the context of social media, the previous Section constitutes a mere educated guess at how the Agency could construe its regulations against a social media service like the hypothetical Blabber. However, an additional source of information sheds further light on OFAC's potential reasoning on this subject: the interpretative letters that OFAC has issued in response to requests for guidance from private entities.[85] Eight of the twenty-four letters published on OFAC's website relate to the Agency's informational exceptions;[86] the informational exceptions therefore appear to be an area of great confusion—or, at least, great interest—for exporting organizations.

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82. *See infra* note 107 and accompanying text.

83. *See supra* text accompanying note 69.

84. 31 C.F.R. § 560.210(c)(2).

85. Interpretative letters are "nonbinding, situation-specific rulings issued by OFAC to interested parties to give guidance on whether OFAC will interpret certain activities as either authorized or unauthorized by a trade embargo program." Chin, *supra* note 37, at 1890 n.40.

86. *See Interpretative Rulings on OFAC Policy*, OFFICE OF FOREIGN ASSETS CONTROL, http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/rulings-index.aspx (last visited Sept. 23, 2012).

OFAC's interpretative letters reveal two basic trends in the Agency's application of its informational exceptions. First, the Agency embraces a fairly nuanced definition of "substantive or artistic alteration or enhancement of informational materials," which is one of the categories of transactions that OFAC places outside the scope of its informational exceptions.[87] For instance, OFAC advises that activities such as translating and copy-editing text, resizing and repositioning images, checking spelling and grammar, and deleting superfluous words are nonsubstantive alterations to information and therefore fit within the Agency's informational exceptions.[88] This interpretation renders moot any concern that a social media service like Blabber would violate OFAC's regulations by merely reformatting or restyling information provided by users in sanctioned countries.

Second, OFAC clearly believes that providing embargoed users with read-only access to an electronic database of preexisting information is an exempt activity under the Agency's informational exceptions.[89] In fact, a read-only database service is exempt even if it visually enhances or reformats information provided by sanctioned users; so long as the enhancement does not alter the information's *substance*, add new information, or provide a paid marketing service, OFAC will not regulate it.[90] A company may even allow sanctioned users to conduct searches across electronic databases of preexisting information, so long as the search function "does no more than search and sort the exempt information."[91] The key

87. *See* 31 C.F.R. § 560.210(c)(2).

88. *See* Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control (July 19, 2004), http://www.treasury.gov/resource-center/sanctions/Documents/gn071904.pdf [hereinafter Letter of July 19, 2004]; Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control, (July 6, 2004), http://www.treasury.gov/resource-center/sanctions/Documents/ia070604.pdf [hereinafter Letter of July 6, 2004]; Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control (Apr. 2, 2004), http://www.treasury.gov/resource-center/sanctions/Documents/ia040504.pdf [hereinafter Letter of April 2, 2004].

89. *See* Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control (Dec. 11, 2003), http://www.treasury.gov/resource-center/sanctions/Documents/ia121603.pdf.

90. *See id.*; Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control (July 8, 2003), http://www.treasury.gov/resource-center/sanctions/Documents/ia070803.pdf.

91. *See* R. RICHARD NEWCOMB, DIR., OFFICE OF FOREIGN ASSETS CONTROL, GUIDANCE ON INFORMATIONAL MATERIALS (Feb. 4, 2003), http://www.treasury.gov/resource-center/sanctions/Documents/infomat2.pdf; Letter from R. Richard Newcomb, Dir., Office of Foreign Assets Control (Apr. 30, 2003), http://www.treasury.gov/resource-center/sanctions/Documents/ia043003.pdf.

takeaway from these interpretative letters is OFAC's emphasis that its informational exceptions do not extend to services that exceed the facilitation of access to, or the superficial enhancement of, preexisting information; if a service goes beyond providing access to information and enables the addition or creation of new information, it is no longer exempt from OFAC's regulations. The essence of a social media service like the hypothetical Blabber, of course, is not only the access it provides to existing information, but also the ability it gives users to create and share new information. OFAC's interpretative letters thus affirm the conclusion that the Agency would find Blabber and similar services to fall outside the informational exceptions and be subject to standard export regulations.[92]

Yet OFAC's interpretative letters conceal a subtle contradiction that warrants closer scrutiny. The Agency's purported rationale for not exempting services and transactions for new information is to avoid incentivizing the creation of information that would not exist without American assistance or enticement.[93] Nevertheless, OFAC permits print publishers to accept and publish journal articles or newspaper op-eds from sanctioned authors.[94] The opportunity to be published in a newspaper or academic journal surely incentivizes many authors to create new works, yet this is the very encouragement that OFAC seeks to avoid by regulating information creation services. In terms of incentivizing the creation of information, there appears to be little distinction between print publishing services and an electronic service like Blabber that enables authors to publish new information directly.

Perhaps OFAC would argue that electronic media differs from print media in that print authors do not create information directly in the medium itself; instead, authors prepare their works in advance and then submit them through a human-powered editorial and publication process. As a result, the Agency might argue that printed information is exempted as "preexisting" because it appeared in another format before it was published, whereas a social media service like Blabber provides a mechanism for authors to

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92. *See supra* Part II.A.

93. *See* Falk, *supra* note 37, at 169.

94. *See* Letter of July 19, 2004, *supra* note 88; Letter of July 6, 2004, *supra* note 88; Letter of April 2, 2004, *supra* note 88.

create and publish new information instantaneously, rendering it nonexempt.[95]

But in light of OFAC's rationale for regulating the creation of new information, the appropriate measure would not be how the information is published but rather whether the service incentivizes the creation of new information at all. Academic journals and newspapers incentivize authors to create information in the same manner as social media. If OFAC is ever asked to issue an interpretative letter on social media, the Agency faces the dilemma of attempting to justify its exemption of print publishing in the face of continued regulation of social media publishing, when both equally incentivize the creation of new information.

III. OFAC'S INFORMATIONAL EXCEPTIONS AND THE REQUIREMENTS OF THE INFORMATIONAL AMENDMENTS

Assuming that OFAC would find a social media service like Blabber to violate export regulations despite the informational exceptions, the next question is whether the Agency's informational exceptions comply with the requirements of the Informational Amendments. Two facets of the Informational Amendments bear scrutiny in this regard: their prohibition on indirect regulation and their definition of information.[96]

A. The Prohibition on Indirect Regulation

OFAC excludes from the scope of its informational exceptions all "transactions related to information ... not fully created and in existence at the date of the transactions" as well as any "services to ... produce or co-produce, create or assist in the creation of information."[97] One commentator has suggested that OFAC implemented these provisions to avoid incentivizing the creation of information that would not exist without American support.[98] However, the Informational Amendments withdraw from the President's TWEA and IEEPA powers "the authority to regulate or prohibit, directly *or*

95. *See* 31 C.F.R. § 560.210(c)(2) (2011).
96. This Section uses the ITRs for purposes of analysis.
97. *See* 31 CFR § 560.210(c)(2).
98. *See, e.g.*, Falk, *supra* note 37, at 169.

indirectly," the exportation or importation of information.[99] OFAC's continued regulation of services and transactions related to new information is suspect as an impermissible indirect regulation of information, especially in the context of a social media service like Blabber. Social media services not only provide a means to create new information but also simultaneously constitute the very medium of both new and preexisting information.[100] True, separating the "information creation" function from the "information consumption" function in a service like Blabber is not technically impossible.[101] However, it is unlikely that a company would ever implement such a measure. For instance, the value of Blabber to an Iranian user would be greatly diminished if neither she nor anyone else in her country could create and share new information; although there is something to be said for social media as a tool for information consumption alone, the inherent value of social media is the ability to create and share new information with others.

Instead of blocking the information creation function for sanctioned countries, companies like Blabber would likely choose to exclude those users from their services altogether; it makes little sense for a company to spend time and resources implementing a special read-only version of a service when it will offer the user significantly reduced value. When a company does completely block access to its social media service for a sanctioned country, the existing information in the service created by users from the United States and other countries will also be blocked. For social media,

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99. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (emphasis added).

100. Contrast social media with newspaper or video recordings; one can readily regulate printers without simultaneously regulating newspapers, or regulate video cameras without simultaneously regulating videotapes, because they are physically separate from each other. On the other hand, social media information—a Tweet, a Facebook update, etc.—is usually created and consumed in the exact same online interface.

101. For example, the hypothetical Blabber company could create a version of its social media service for Iranian users that allows them to read preexisting information but disables their ability to create new information themselves. Software is available that allows companies to serve different content or features to users based on their location. *See, e.g.*, GEOPLUGIN, http://www.geoplugin.com (last visited Sept. 23, 2012). Notably, users can easily evade such measures by directing their Internet connection through a proxy server located in another country. *See* Nik Cubrilovic, *On the Internet, Nobody Knows You're Not in the USA*, TECHCRUNCH (Oct. 5, 2009), http://techcrunch.com/2009/10/05/internet-anonymizer-web-surf-vpn-hulu-pandora-spotify.

therefore, OFAC's direct regulation of services to create new information constructively amounts to a forbidden indirect regulation of preexisting information.[102]

B. Definition of Information

The Informational Amendments set the scope of exempt information broadly, prohibiting the President from regulating "*any* information or informational materials."[103] This prohibition extends to information "whether commercial or otherwise, regardless of format or medium of transmission."[104] In contrast, OFAC's regulations—the ITRs, for example—include a separate section that describes precisely which categories of information are exempt and which are not.[105] The ITRs' definition of information deviates from the Information Amendments in two potentially problematic ways.

First, whereas the Informational Amendments' list of exempt media is specified as "including but not limited to" the items in the list,[106] OFAC says the ITRs' list only "includes" those items.[107] The omission of the words "but not limited to" might suggest that OFAC intends for the ITRs' exempt media list to be exhaustive rather than illustrative. Ultimately, what OFAC intends will not matter: courts generally interpret the term "including," even when used on its own, to imply illustration rather than restriction.[108] Although it is encouraging that a court would likely find OFAC's omission of "but not limited to" to have no express limiting effect on the scope of information exempted by the ITRs, the danger remains that lawyers will counsel companies like Blabber to interpret the omission conserva-

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102. *See supra* notes 98-100 and accompanying text.

103. *See* Foreign Relations Authorization Act § 525 (emphasis added).

104. *See id.*

105. *Compare id.*, *with* 31 C.F.R. § 560.210(c)(1) (2011). Although OFAC does retain the Informational Amendments' statement that informational materials are exempt "whether commercial or otherwise, regardless of format or medium of transmission," this language refers to the separate definitional section and thus the two must be read in conjunction. *See* 31 C.F.R. § 560.210(c)(1).

106. Foreign Relations Authorization Act § 525.

107. *See* 31 C.F.R. § 560.315(a). Again, however, not all of OFAC's export regulations omit "but not limited to" from their exceptions. *See supra* note 68.

108. *See In re* Mark Anthony Constr., Inc., 886 F.2d 1101, 1106 (9th Cir. 1989) (collecting cases).

tively as evidence of OFAC's intent to regulate any media not included in the ITRs' list.

Second, the narrowing provision in the ITRs' definition of information affirmatively retains OFAC's power to regulate not-yet-existing information as well as services that create information.[109] Although OFAC might defend this restriction on pragmatic grounds,[110] there is no discernible support for its position in the Informational Amendments.[111] Quite the contrary, in fact: the legislative history of FTIA specifically states that the Informational Amendments should be read to prohibit the regulation of "electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation."[112] In light of such clear congressional intent to exempt any transactions required to create and transmit electronic information, OFAC's purported regulation of social media services like Blabber appears to be improper.

IV. LESSONS FOR SOCIAL MEDIA FROM CASE LAW

Although there has yet to be a formal legal challenge to OFAC's purported regulation of social media in light of the Informational Amendments, courts have considered the question in the context of more traditional media such as posters, paintings, television broadcasts, and even educational travel.[113] These precedents could help to guide a company's litigation strategy should it decide to sue OFAC for impermissibly regulating its social media service.[114] This Part begins with a discussion of the standard of review that courts use when reviewing executive agencies' interpretations and implementations of statutory requirements. It then briefly describes the facts and holdings from four cases in which plaintiffs challenged OFAC's interpretation of the Informational Amendments in the context of traditional media. The Part concludes by extrapolating

109. *See* 31 C.F.R. § 560.210(c)(2); *see also supra* Part III.B.
110. *See supra* text accompanying note 98.
111. *See supra* text accompanying note 69.
112. *See* H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 398, 483.
113. *See infra* Part IV.B.
114. *See infra* notes 227-32 and accompanying text.

from these varied precendents a potential strategy for making a legal challenge to OFAC's regulation of social media.

A. The Standard of Judicial Review: The Chevron *Test*

The critical starting point is to understand the standard of review that courts apply in reviewing an agency's interpretation and implementation of a statute. The Supreme Court established the standard in the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[115] *Chevron* held that when reviewing a challenge to an agency's interpretation of a statute the agency is charged with administering, a court must first ask whether Congress has clearly addressed the issue in question through the legislative process.[116] If it has, the court "must give effect to the unambiguously expressed intent of Congress."[117] If Congress was silent or ambiguous on the matter, however, the court must determine whether the agency's interpretation and implementation of a measure is "based on a permissible construction of the statute."[118] A permissible construction is one that is reasonable; that is, the agency's action cannot be "arbitrary, capricious, or manifestly contrary to the statute."[119] As will be seen, the courts that have reviewed OFAC's implementation of the Informational Amendments have split as to whether OFAC is entitled to deference under the *Chevron* standard.

B. Traditional Media Case Law

1. Walsh*: The Scope of the Prohibition on "Indirect" Regulation*

The earliest cases to scrutinize the effects of the Informational Amendments on access to media arose shortly after Congress enacted the Berman Amendment. In 1989, the District Court for the District of Columbia considered Daniel Walsh's complaint against OFAC for having denied him a license to travel to Cuba in order to

115. 467 U.S. 837 (1984).
116. *Id.* at 842.
117. *Id.* at 843.
118. *Id.*
119. *Id.* at 844.

negotiate for, purchase, and arrange the importation of political posters from Cuba into the United States.[120] Although the Cuban Assets Control Regulations (CACRs) generally prohibited Americans from traveling to Cuba, they authorized OFAC to issue discretionary licenses for travel related to the "[e]xportation, importation, or transmission of information or informational materials."[121] Walsh argued that because traveling to Cuba was critical to his ability to import posters from that country, OFAC's denial of a travel license constituted an impermissible indirect regulation on the importation of informational materials under the Berman Amendment.[122] Whereas Walsh argued that the Berman Amendment broadly prohibited the President from indirectly regulating informational materials, OFAC narrowly interpreted the amendment to mean that only "transactions *directly incident* to the physical importation or exportation of informational materials" were immune from regulation and argued that travel restrictions did not fall in that category of transactions.[123]

OFAC argued that the Berman Amendment required this narrow reading for two reasons. First, Congress had "long been aware" of travel restrictions in OFAC's sanctions regulations, yet it did not directly address travel restrictions in the Berman Amendment's text.[124] Second, the broad interpretation that Walsh proposed would infringe on the President's "established foreign policy" prerogatives.[125] The court agreed with OFAC.[126] It cited Supreme Court precedent holding that unless Congress "clearly indicates the contrary," courts must presume that Congress ratifies the President's restriction of travel "in furtherance of this nation's foreign affairs."[127]

120. *See* Walsh v. Brady, 729 F. Supp. 118, 118 (D.D.C. 1989).

121. 31 C.F.R. § 515.560(a)(11) (2011).

122. *See Walsh*, 729 F. Supp. at 118-19. It is important to note that this case preceded the 1994 enactment of FTIA.

123. *See id.* at 119 (emphasis added) (quoting Foreign Assets Control Regulations and Cuban Assets Control Regulations, 54 Fed. Reg. 5229, 5234 (Feb. 2, 1989) (to be codified at 31 C.F.R. pts. 500, 515)).

124. *Id.*

125. *Id.*

126. *See id.* at 120.

127. *Id.* (citing Regan v. Wald, 468 U.S. 222, 236 (1984)).

The *Walsh* court held that OFAC had reasonably interpreted and implemented the Berman Amendment because the amendment "lack[ed] any meaningful legislative history" and its text did not clearly indicate a congressional intent to prohibit travel-related restrictions.[128] The court said that Walsh "reache[d] too far" in arguing that the court should simply infer such a broad "intrusion on presidential authority in the field of foreign policy."[129] Concluding that the Berman Amendment's prohibition on indirect regulation did not prevent OFAC from regulating Walsh's travel, despite the criticality of such travel to his ability to import informational materials from Cuba, the court denied Walsh relief.[130]

The Circuit Court of Appeals for the District of Columbia reviewed *Walsh*, specifically examining whether OFAC was entitled to *Chevron* deference in its interpretation and application of the Berman Amendment.[131] Under the first prong of the *Chevron* test, Walsh argued that Congress clearly intended for the Berman Amendment's exemptions to extend to travel because the prohibition on indirect regulation "extinguish[ed] any executive authority ... to impose *any* regulation that significantly burdens trade in informational materials."[132] The D.C. Circuit rejected this interpretation as dangerously broad because it could theoretically empower the Cuban government to short-circuit the larger economic embargo.[133] The court found no basis in the Berman Amendment's text or legislative history to suggest that Congress intended such an outcome.[134] On the second prong of *Chevron*, the court concluded that OFAC's travel regulations were not an unreasonable application of the Berman Amendment as they balanced Congress's desire to "relax" restrictions on informational imports with the need to retain the vitality of the wider Cuban embargo.[135] The D.C. Circuit

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128. *Id.* at 119-20.

129. *Id.* at 120.

130. *Id.*

131. *See* Walsh v. Brady, 927 F.2d 1229, 1231-34 (D.C. Cir. 1991). Walsh also appealed on First and Fifth Amendment grounds; the court rejected those claims, using rational basis review but held in the alternative that OFAC's implementation of the information exception should withstand strict scrutiny review if applied. *Id.* at 1234-38.

132. *Id.* at 1232 (citation omitted) (internal quotation marks omitted).

133. *Id.*

134. *Id.*

135. *Id.* at 1233-34.

therefore affirmed the trial court's ruling and denied relief to Walsh.[136]

2. Cernuda*: The First Amendment and the Scope of "Informational Materials"*

Shortly before the *Walsh* court issued its decision in 1989, the District Court for the Southern District of Florida delivered its opinion in *Cernuda v. Heavey*, another case involving the importation of Cuban artwork.[137] Rather than deciding the extent to which OFAC could regulate information as in *Walsh*, the *Cernuda* court had to determine the scope of the term "information or informational materials."[138] Ramon Cernuda, a museum director, sued OFAC for seizing from him approximately two hundred Cuban paintings following an art exhibition in Miami.[139] Although Cernuda had sought a license from OFAC to import and show the paintings, the Agency had never responded to his request.[140] Cernuda argued that Congress meant for the Berman Amendment to exempt all works protected by the First Amendment.[141] OFAC, on the other hand, claimed that the Berman Amendment protected strictly "informational" works, not works that were "merely aesthetic."[142]

Because the Berman Amendment did not expressly enumerate artwork in its list of exempt media,[143] the *Cernuda* court turned to the amendment's legislative history to determine whether Congress intended "other informational materials" to encompass works of art.[144] Noting that the Berman Amendment's direct legislative history offered little to no assistance, the court relied on the House Foreign Affairs Committee's report, which adopted the American Bar Association's conclusion that "no prohibitions should exist on imports to the United States of ideas and information if their cir-

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136. *Id.* at 1238.
137. 720 F. Supp. 1544, 1545 (S.D. Fla. 1989).
138. *See id.* at 1549.
139. *Id.* at 1545.
140. *Id.* at 1546.
141. *Id.* at 1549.
142. *Id.*
143. *See id.*; *see also supra* note 54 and accompanying text.
144. *Cernuda*, 720 F. Supp. at 1549.

culation is protected by the First Amendment."[145] The court rejected OFAC's argument that Congress merely referenced, and did not adopt, the ABA resolution.[146] Under *Chevron*, the court concluded that Congress had clearly intended for the Berman Amendment to protect any information covered by the First Amendment.[147] Because the First Amendment clearly encompasses artwork, OFAC's actions violated Congress's clear intent to protect that medium.[148] The court declined to defer to OFAC under *Chevron*, and granted relief to Cernuda.[149] The government did not appeal.

3. Capital Cities/ABC*: Tangibility and the Scope of "Informational Materials"*

In *Capital Cities/ABC, Inc. v. Brady*, the District Court for the Southern District of New York heard another case concerning the scope of information protected by the Berman Amendment.[150] This time, however, the question was not whether "informational materials" included a discrete medium like artwork, but rather whether OFAC could reasonably interpret "informational materials" to include only tangible media and broadly exclude intangible media like television signals.[151]

ABC sued OFAC after the agency denied the television network a license to broadcast live coverage of the 1991 Pan American Games from Cuba.[152] ABC asked the court for a declaratory judgment that, even without a license, the Berman Amendment per-

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145. *See id.* (quoting H.R. REP. NO. 100-40, pt. 3, at 113 (1987)); *see also supra* notes 54-57 and accompanying text.

146. *See Cernuda*, 720 F. Supp. at 1549-50 (finding that the "First Amendment orientation of the words 'informational materials'" was "obvious").

147. *Id.* at 1549 n.10 (emphasis omitted).

148. OFAC had conceded that artwork was protected by the First Amendment. *Id.* at 1549 & n.10.

149. *Id.* at 1552-54. Even had it found Congress's intent unclear, the court concluded that OFAC's administration of the Berman Amendment was unreasonable under the second prong of *Chevron* because the Agency could not justify its ban on importing Cuban paintings with its simultaneous authorization of the importation of Cuban films; moreover, the court deemed OFAC's failure to respond to Cernuda's original license request to be "arbitrary and capiricious." *Id.* at 1551-52.

150. 740 F. Supp. 1007, 1008 (S.D.N.Y. 1990).

151. *See id.* at 1010-11.

152. *Id.* at 1008.

mitted live broadcasts from otherwise-sanctioned countries.[153] At the time, the CACRs specifically retained OFAC's authority to regulate "[i]ntangible items such as telecommunications transmissions."[154] If the court found that Congress had clearly addressed the question of tangibility "in either the plain language of the [Berman Amendment] or its clear legislative history," it would have been required under *Chevron* to enforce Congress's intent; otherwise, the court would defer to OFAC's interpretation so long as that interpretation was not unreasonable.[155]

The court determined that the Berman Amendment's use of "other informational materials" was "clearly susceptible to more than one reasonable interpretation."[156] Reviewing dictionary definitions, the court found that although the term "materials" normally refers to physical media, it can also refer to "intangibles such as ideas, perceptions, observations or data that may be worked into a more finished form."[157] The court did not find it dispositive that the Berman Amendment's illustrative list of media included only tangible media,[158] nor could it find any distinction made in the Berman Amendment's legislative history between tangible and intangible media.[159] Indeed, in contrast to *Cernuda*, the *Capital Cities/ABC* court expressly declined to acknowledge a congressional adoption of the ABA resolution stating that all First Amendment-protected information should be exempt from export regulations.[160]

Because neither the Berman Amendment's text nor its legislative history provided the court with sufficient evidence of a congressional intent "so clear as to make judicial deference [to OFAC's continued regulation of intangible information] inappropriate," the court concluded that *Chevron* required deference to OFAC's interpretation unless doing so was "precluded by the First Amendment" or unless

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153. *Id.* at 1010.

154. 31 C.F.R. § 515.332(b)(2) (1989).

155. *Capital Cities/ABC*, 740 F. Supp. at 1011 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)); *see also supra* Part IV.A.

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

157. *Id.* (internal quotation marks omitted).

158. *Id.*

159. *Id.* at 1011-12.

160. *Id.* at 1011 n.9 (concluding that the legislative history "does *not* explicitly adopt or reject the ABA's [First Amendment] position" (emphasis added)).

OFAC's interpretation was arbitrary or capricious.[161] The court found that the First Amendment did not preclude deference to OFAC's continued regulation of intangible informational materials.[162] It defended this conclusion by citing a Second Circuit opinion that found no constitutional violation in the pre-Berman Amendment CACRs, which prohibited the importation of any informational materials whether tangible or intangible.[163] The *Capital Cities/ABC* court reasoned that if it was constitutional to ban the importation of *any* informational materials, it must also be constitutional to ban the importation of *some* informational materials.[164] Similar to *Walsh*,[165] the court noted that the countervailing constitutional principles of separation of powers and the Executive's foreign affairs prerogative outweighed any potential First Amendment problems.[166]

The court also held that OFAC's exclusion of intangible information was neither arbitrary nor capricious.[167] It concluded that OFAC's disparate treatment of tangible and intangible materials did not deny ABC any special benefit enjoyed by entities trading in tangible media like newspapers or magazines,[168] nor did it create a danger of impermissible content-based speech discrimination.[169] The court rejected ABC's plea that it evaluate the "wisdom" of OFAC's distinction between tangible and intangible media, once again deferring to the Executive's broad discretion in deciding which actions will best accomplish foreign policy objectives.[170] Because it found that neither the Berman Amendment's text nor its legislative history clearly addressed whether intangible media were included in "informational materials," and because it concluded that OFAC's decision to exclude intangible information was neither arbitrary,

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161. *Id.* at 1012.
162. *Id.*
163. *Id.* at 1012-13 (citing Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 446 (2d Cir. 1968)).
164. *Id.*
165. *See supra* note 125 and accompanying text.
166. *Capital Cities/ABC*, 740 F. Supp. at 1013.
167. *See id.* at 1014.
168. *Id.* at 1013 (noting that print media companies were also prohibited from paying Cuba for coverage rights, and that print and broadcast media retained equal opportunities to obtain recordings of the event).
169. *Id.* at 1013-14.
170. *Id.* at 1014.

capricious, nor constitutionally forbidden, the court deferred to OFAC's regulation of intangible media and denied ABC's request for relief.[171]

4. Emergency Coalition*: The Effect of the Informational Amendments' Prefatory Language*

In *Emergency Coalition to Defend Educational Travel v. U.S. Department of the Treasury*, the District Court for the District of Columbia took on another case dealing with travel restrictions and the Cuban embargo.[172] As opposed to *Walsh*, however, this time the court did not face a decision as to whether travel restrictions were an indirect regulation of information. The court instead had to decide whether the Informational Amendments' introductory language, which suggested a legislative desire to preclude regulation of information-related travel, was sufficiently indicative of congressional intent so as to warrant a judicial override of OFAC's regulation of study abroad programs.[173]

In 2004, OFAC amended the CACRs to impose three new requirements on American study abroad programs in Cuba: (1) participating students must be enrolled in a degree-granting program with the sponsoring American institution; (2) participating professors must be full-time, permanent faculty with the sponsoring American institution; and (3) the program must last at least ten weeks.[174] OFAC adopted these requirements pursuant to a State Department study that found students were abusing educational travel licenses to engage in "disguised tourism."[175] The plaintiffs in *Emergency Coalition* included a Johns Hopkins University professor who for many years had facilitated two-to-three-week academic trips to Cuba, as well as two Johns Hopkins students who planned on participating in an upcoming trip to Cuba with that professor.[176]

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171. *Id.* at 1015. ABC later reached a confidential agreement with OFAC that permitted the network to secure the broadcast rights it originally sought. *See* Milligan, *supra* note 43, at 307.

172. 498 F. Supp. 2d 150, 153 (D.D.C. 2007).

173. *Id.* at 153-55.

174. *See id.* at 153-54 (citing 31 C.F.R. §§ 515.560(a), 515.565 (2006)).

175. *See id.* at 154.

176. *Id.* at 154-55.

Together, the plaintiffs argued that OFAC's action would cause them material injury because it would force Johns Hopkins to terminate the Cuban travel programs.[177] This time the court faced not the interpretation of the Berman Amendment as in *Walsh*, but rather the superseding FTIA.[178] The plaintiffs claimed under *Chevron* that OFAC had acted "in direct contravention of the intent of Congress" by implementing a measure that was not only not rationally related to the purpose of FTIA but was also arbitrary and capricious.[179] However, rather than framing OFAC's travel restrictions as an indirect regulation of information as in *Walsh*,[180] the plaintiffs argued that Congress had clearly evinced its intent to prohibit the regulation of educational travel in FTIA's introductory language: "It is the sense of the Congress that the President should not restrict travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes ... between the United States and any other country."[181]

The district court flatly rejected the plaintiffs' argument, noting that courts regularly hold such introductory language to be "merely precatory and non-binding." Finding nothing in the "mandatory provisions" of FTIA that prohibited travel regulations, the court concluded that the plaintiffs had failed to demonstrate that OFAC's heightened educational travel restrictions thwarted a clear congressional purpose for FTIA.[182] If Congress had wanted to restrict the President's power to regulate travel, the court suggested, "it could

177. *Id.* at 155. The plaintiffs argued the programs would become "economically infeasible" absent the enrollment of students from other institutions. *Id.* The court spent much of its opinion deciding whether the plaintiffs had standing, ultimately determining that they did. *See id.* at 155-61.

178. *Id.* at 164-65. By the time it reached the interpretation of FTIA, the court had already rejected the plaintiffs' First Amendment claims because the regulations were content neutral, burdened academic speech only incidentally, and were supported by an important and substantial government interest. *See id.* at 161-63. The court also rejected the plaintiffs' Fifth Amendment "right to travel internationally" claim because the government had already offered a substantial and important interest for the regulation. *See id.* at 155, 163-64.

179. *Id.* at 155, 164-65. Plaintiffs made a similar claim regarding the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7209 (2006). *Emergency Coal.*, 498 F. Supp. 2d at 165-66.

180. The plaintiffs likely decided that *Walsh* preempted an indirect regulation theory. *See supra* Part IV.B.1.

181. *See Emergency Coal.*, 498 F. Supp. 2d at 165 (quoting Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994)).

182. *Id.*

have done so explicitly" in the body of FTIA.[183] Finding OFAC's reliance on the State Department's study abroad report to be reasonable, nonarbitrary, and noncapricious, the court deferred to OFAC under *Chevron*.[184] Although the plaintiffs apparently dropped their FTIA claims on appeal, the D.C. Circuit nevertheless affirmed the lower court's conclusion that FTIA's precatory statement of congressional intent "is not law."[185]

C. Analysis and Lessons for Social Media

The foregoing cases present a confusing and sometimes conflicting set of precedents. The *Walsh*, *Capital Cities/ABC*, and *Emergency Coalition* courts deferred to OFAC under *Chevron* because they found that Congress had failed to clearly or directly address either travel restrictions or the distinction between tangible and intangible materials.[186] Those decisions also found that OFAC's regulatory actions were not unreasonable, arbitrary, or capricious.[187] The *Cernuda* court, on the other hand, refused to defer to OFAC under *Chevron* because it found that the legislative history of the Informational Amendments exposed Congress's clear purpose to exempt from regulation all First Amendment-protected works.[188] This subsection attempts to synthesize and reconcile these varied holdings.

1. Intangibility

To quickly dispose of one potential concern for social media, *Capital Cities/ABC*'s deference to OFAC's regulation of intangible information is mooted by FTIA, which Congress almost assuredly enacted in response to that opinion.[189] FTIA broadened the scope of exempted information to encompass all information "regardless of format or medium of transmission,"[190] which forced OFAC to amend

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183. *Id.* at 165 n.9.

184. *Id.* at 165-66.

185. Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 545 F.3d 4, 14 n.6 (D.C. Cir. 2008).

186. *See supra* notes 128, 155-60, 181-85 and accompanying text.

187. *See supra* Parts IV.B.1, IV.B.3, and IV.B.4.

188. *See supra* Part IV.B.2.

189. *See supra* text accompanying note 63.

190. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994).

its regulations and relinquish the regulatory control it had retained over intangible materials.[191] Thus, a company like Blabber need not worry that its social media service will be subject to OFAC regulations merely because the information it transmits is intangible in nature.

2. Effect of First Amendment Protection

The strongest precedential support for the proposition that the Informational Amendments prohibit OFAC from regulating a service like Blabber is *Cernuda*'s conclusion that Congress intended the Informational Amendments to reach all works protected by the First Amendment.[192] The Supreme Court has found there to be "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech as compared to other forms of expression.[193] Accordingly, any court following *Cernuda*'s reasoning would undoubtedly find that social media information is protected by the First Amendment and is therefore exempt from regulation. In contrast to *Cernuda*, however, *Capital Cities/ABC* explicitly rejected the argument that Congress clearly intended to exempt all First Amendment-protected information from regulation.[194] These divergent outcomes turn on the extent to which a court credits the Informational Amendments' legislative history.

3. The Relevance of Legislative History

One might argue that the discrepancy between the *Cernuda* and *Capital Cities/ABC* cases is moot because, unlike the Berman Amendment, the legislative history of FTIA explicitly states that Congress intended the Informational Amendments to reach all First Amendment-protected information.[195] Yet when the *Emergency Coalition* court examined FTIA, it not only failed to examine the

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191. *See* 60 Fed. Reg. 39,255, 39,255-56 (Aug. 2, 1995) (amending the CACRs to comply with FTIA).

192. *See supra* notes 144-49 and accompanying text.

193. Reno v. ACLU, 521 U.S. 844, 870 (1997).

194. *See supra* note 160 and accompanying text.

195. *See supra* note 61 and accompanying text.

Amendment's legislative history,[196] but even found parts of FTIA's text to have no bearing on the interpretation of congressional intent.[197] The choice to examine only the Informational Amendments' mandatory text—to the exclusion of supporting congressional statements like prefatory language or legislative history—is a critical one, for the analysis of Congress's statutory intent is the threshold inquiry that determines whether an agency like OFAC is entitled to *Chevron* deference.[198] Although FTIA's clear affirmation of the Informational Amendments' First Amendment roots is a positive development for a possible challenge to OFAC's regulation of social media, the *Emergency Coalition* court's failure to give any weight to the legislative history or prefatory language of the Informational Amendments may well negate that benefit.

4. *Effect on Indirect Regulation Theory*

The *Walsh* and *Emergency Coalition* opinions are not necessarily detrimental to the argument that OFAC's regulation of information creation services, like social media, constitutes an impermissible indirect regulation of information.[199] The courts in those cases found that the Informational Amendments did not limit the President's authority to regulate travel in a sufficiently clear or direct manner so as to defeat *Chevron* deference to OFAC.[200] In contrast, FTIA's legislative history very clearly conveys Congress's intent to immunize "electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation."[201] Indeed, Congress was so confident in the clarity of its intent to protect such incidental electronic transactions that it explicitly declined to specifically refer to them in FTIA's binding text.[202] A social media plaintiff could therefore persuasively argue

196. This may partly be due to the fact that the *Emergency Coalition* plaintiffs did not invoke FTIA's legislative history in their complaint. *See* Complaint ¶ 31, Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury, 498 F. Supp. 2d 150 (D.D.C. 2007) (No. 06-CV-01215), 2006 WL 2377876.

197. *See supra* notes 181-83 and accompanying text.

198. *See supra* Part IV.A.

199. *See supra* Part III.A.

200. *See supra* Parts IV.B.1 and IV.B.4.

201. *See* H.R. REP. NO. 103-482, at 239 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 398, 483.

202. *See id.*

that FTIA embodies a clear congressional purpose to exempt not only electronic information like that contained in social media but also the transactions required to create that information. Again, however, this strategy presumes that a court would examine and credit the Informational Amendments' legislative history—a conclusion that is not necessarily foregone.[203]

5. Disparate Treatment Based on Medium

Even if a court declines to acknowledge legislative history as an indication of clear congressional intent, a social media plaintiff could still argue that OFAC's regulation of social media as an information creation service is arbitrary or capricious in light of the Agency's seemingly unjustifiable disparate treatment of print and electronic publishers.[204] The *Cernuda* court noted that it would have found OFAC's prohibition on importing Cuban paintings to be arbitrary and capricious in light of the Agency's authorization of the importation of Cuban films;[205] correspondingly, the *Capital Cities/ABC* court found that OFAC's regulation was not arbitrary or capricious because OFAC was not denying television broadcasters a benefit that it conferred to print publishers.[206] Thus, even if OFAC's supposed justification for regulating social media services were facially reasonable,[207] the Agency's arbitrary or discriminatory application of the regulations would not be entitled to judicial deference.

6. Relationship to the President's Foreign Affairs Powers

One curious feature of these cases is their insistence that a broad interpretation of the Informational Amendments would unduly interfere with the separation of powers and the President's foreign affairs prerogative.[208] This conclusion is misguided. The President's power to regulate international exports, imports, travel, and other activities in the context of national emergencies or wartime is

203. *See supra* notes 196-97 and accompanying text.
204. *See supra* notes 93-95 and accompanying text.
205. *See* Cernuda v. Heavey, 720 F. Supp. 1544, 1551 (S.D. Fla. 1989).
206. *See supra* notes 167-68 and accompanying text.
207. *See supra* text accompanying note 98.
208. *See supra* notes 129, 166, 170 and accompanying text.

explicitly granted to him by Congress through TWEA and IEEPA.[209] The Informational Amendments represent an act by Congress to withdraw power it had previously delegated to the President under those acts.[210] In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court recognized that Congress may constitutionally delegate broad foreign affairs authority to the President without imposing limitations that might otherwise be required in the domestic setting.[211] Indeed, the Second Circuit under *Curtiss-Wright* found TWEA to be a constitutional delegation of legislative power.[212] However, these decisions do not change the basic fact that TWEA and IEEPA are *permissive* delegations.[213] Simply because Congress, in light of the executive's constitutional primacy in foreign affairs, *may* constitutionally grant the President broad foreign affairs authority does not imply that it is unconstitutional for Congress to later circumscribe that authority. Executive latitude under congressionally delegated foreign affairs powers is constitutionally permitted,[214] not constitutionally required.

Some have argued persuasively that Congress's failure to clearly address travel restrictions in the Informational Amendments constitutes congressional acquiescence under Justice Jackson's famous tri-partite test for the legitimacy of executive power.[215] However, it would be difficult to sustain the same argument in the case of social media. Congress has clearly expressed its intent to deregulate electronic information and all transactions incident to the creation of that information.[216] Far from acquiescing to it, Congress has an-

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209. *See supra* Part I.A.

210. *See supra* notes 28-34 and accompanying text.

211. 299 U.S. 304, 319-22 (1936).

212. Sardino v. Fed. Reserve Bank of N.Y., 361 F.2d 106, 110 (2d Cir. 1966).

213. *Accord* Falk, *supra* note 37, at 180-81.

214. *See supra* text accompanying note 209.

215. *See* Milligan, *supra* note 43, at 298. Justice Jackson's *Youngstown Sheet & Tube Co. v. Sawyer* concurrence identified three "situations in which a President may doubt, or others may challenge, his powers": (1) when Congress affirmatively authorizes the exercise of power, (2) when Congress acquiesces or shows indifference to the exercise of power, and (3) when Congress formally disapproves of or revokes the power. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Although executive activities in the first category enjoy the highest presumption of validity and those in the third category take the President's power to "its lowest ebb," those in the middle category exist in a "zone of twilight" in which congressional inaction may "enable, if not invite, measures on independent presidential responsibility." *Id.* at 637.

216. *See supra* text accompanying note 64.

nounced that the President's continued regulation of such information and transactions is "incompatible with [its] expressed or implied will"[217] and is therefore invalid.[218]

V. RECOMMENDATIONS

In light of the foregoing analysis, a social media company like the hypothetical Blabber faces three potential courses of action if it wishes to make its service available in sanctioned countries. The first option is for the company to simply maintain the status quo and allow worldwide access to its service. The strongest support for this course of action is the absence of any known enforcement of export regulations by OFAC against Twitter, despite the company making its services available worldwide; indeed, the U.S. government has done nothing but praise Twitter and ask it to make itself more available in embargoed countries, not less.[219] On the other hand, it is unclear whether other companies that have blocked access to their services in certain countries are doing so in response to quiet pressure from OFAC or merely acting conservatively and of their own accord.[220] The danger of a company like Blabber making its service available worldwide, of course, is the potentially crippling criminal liability if OFAC does enforce its regulations and a court finds the company's actions to be a willful violation of the regulations.[221] Although one could see the apparent lack of enforcement by OFAC against Twitter and other companies as a positive sign, it would be dangerous for a company to rely solely on OFAC's historical acquiescence as assurance that the Agency will not enforce its regulations in the future.

A second option is for a social media company to request an interpretative letter from OFAC that answers whether social media services are exempt from regulation.[222] The advantage to this approach is that it lends itself to a nonadversarial and perhaps even collaborative dialogue with OFAC. Indeed, in one previous interpre-

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217. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

218. This presumes that a court would even consider the Informational Amendments' legislative history.

219. *See supra* notes 15-20 and accompanying text.

220. *See supra* notes 7, 9, 13 and accompanying text.

221. *See supra* note 11.

222. *See supra* note 85.

tative letter OFAC thanked academic publishers for their efforts "to work ... in good faith" by personally meeting with the agency to discuss and resolve ambiguities in the regulations.[223] Unlike the status quo approach, however, an interpretative letter request brings the matter squarely to OFAC's attention and forces the Agency to clearly rule on it.

Given OFAC's previous guidance on electronic information services,[224] it would not be surprising if the Agency concluded that a social media service like Blabber falls outside the informational exceptions. On the other hand, an interpretative letter request might provide the social media company with an opportunity to highlight the preferential treatment that OFAC appears to give to print publishers.[225] Moreover, forcing OFAC to contemplate the prospect of issuing a negative interpretation for social media, and thereby publicly declaring that furnishing access to American social media in certain authoritarian countries—a practice so heartily encouraged by the State Department[226]—is presumptively illegal, might incentivize OFAC to amend its restrictions to more clearly exempt social media services from regulation.

A final option is for a social media company to sue OFAC for improperly administering the Informational Amendments. Unless OFAC had already enforced its regulations against the company, the lawsuit should mirror the procedural posture of *Capital Cities/ABC*: a request for a declaratory judgment that (1) authorizes the company to provide access to its social media service in sanctioned countries, (2) declares null and void OFAC's regulations to the extent that they regulate foreign access to social media services, and (3) prohibits any proceeding by OFAC to prohibit such access.[227] Using *Chevron*, the complaint should allege that the Informational Amendments clearly express a congressional intent to exempt from regulation all information that the First Amendment protects, including online speech.[228] The plaintiff company should further assert that Congress clearly expressed a particular purpose to immunize all transactions incidental to the creation of new elec-

223. *See* Letter of April 2, 2004, *supra* note 88, at 1.
224. *See supra* notes 89-92 and accompanying text.
225. *See supra* text accompanying notes 93-95.
226. *See supra* notes 16-18 and accompanying text.
227. *Cf.* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1010 (S.D.N.Y. 1990).
228. *See supra* notes 61, 192 and accompanying text.

tronic information.[229] To that end, the complaint should dispute OFAC's exclusion of information creation services from its informational exceptions, at least as applied to social media, as an usurpation of congressional intent. The complaint should also allege that regulating access to a social media service constitutes an impermissible indirect regulation of pre-existing information.[230]

In response to the argument that such an interpretation of the Informational Amendments impinges on the President's foreign affairs prerogatives, the social media plaintiff should urge that although the President may constitutionally exercise broad, legislatively delegated powers over foreign affairs, there is no clear constitutional issue when Congress chooses to revoke aspects of that delegated authority.[231] Finally, the plaintiff company should argue that even if the court finds Congress's intent to be absent or ambiguous, it should not defer to OFAC's judgment. The plaintiff should argue that the Agency's regulations are arbitrary and capricious insofar as they presumptively prohibit services through which sanctioned users may publish electronic information but nevertheless permit services through which sanctioned users may publish print information.[232]

Of course, there are two events that would obviate a company's need to take any of these steps: Congress could enact a third amendment to TWEA and IEEPA, or the President could direct OFAC to amend its regulations. The likelihood of congressional action is difficult to gauge. On one hand, there has been great public enthusiasm for the role that American social media has played during the Arab Spring;[233] championing the liberalization of restrictions on exporting social media might be politically favorable for Congress. On the other hand, Congress simply may not deem the issue sufficiently important to warrant spending political energy on it, especially because the executive branch has issued licenses

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229. *See supra* text accompanying note 64.

230. *See supra* Part III.A.

231. *See supra* notes 208-14 and accompanying text.

232. *See supra* notes 204-07 and accompanying text.

233. For example, the story crowning "the protester" as *Time*'s 2011 "Person of the Year" praised social media as a "key tactical tool[ ]" that "turbocharge[d]" protesters' efforts, and noted that "[t]hroughout the Middle East and North Africa, *new media* and *blogger* are now quasi-synonyms for *protest* and *protester*." Kurt Andersen, *The Protester*, TIME (Dec. 14, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132_2102373,00 .html.

permitting the activity in several sanctioned countries, and because there are no concrete examples of the regulations being actively enforced for other countries. Capturing Congress's attention would likely require lobbying by the social media companies who presently block their services either out of an abundance of caution or under quiet pressure from OFAC. It is unclear whether companies would be willing to spend their own political capital on this issue.

In a sense, the President has already directed OFAC to amend its regulations through the Agency's issuance of several country-specific general licenses for Internet-based personal communications.[234] Licensing is inadequate, however, for two reasons. First, as EFF has noted, licensing is a slow and piecemeal process.[235] Six months of Syrian unrest elapsed before OFAC finally issued a general license to export social media services to that country.[236] Further, OFAC has issued social media licenses for Cuba, Iran, Sudan, and Syria,[237] yet restrictions remain for several other countries, including Belarus, Lebanon, Zimbabwe, and Burma.[238] Second, licensing depends entirely on whether OFAC decides to act. Although a failure by OFAC to respond to a specific license request could result in a court finding the Agency to have acted arbitrarily or capriciously,[239] OFAC may decide whether to issue a general license entirely at its discretion.[240] The government's willingness to issue country-by-country licenses for social media certainly deserves praise. However, as this Note has sought to explain, these exceptions are ultimately not the Executive's to make: the Informational Amendments preclude the President from regulating social media information in the first place.

CONCLUSION

The U.S. government is publicly committed to promoting so-called "Internet freedom."[241] The State Department condemns the "numer-

234. *See supra* notes 21-25 and accompanying text.
235. *See supra* notes 26-27 and accompanying text.
236. *See "Day of Rage" Protest Urged in Syria*, MSNBC.COM NEWS (Feb. 3, 2011, 6:02 PM), http://www.msnbc.msn.com/id/41400687/ns/world_news-mideast_n_africa/.
237. *See supra* notes 21-24 and accompanying text.
238. *See* 31 C.F.R. §§ 537.210, 541.206, 548.206, 549.206 (2011).
239. *See supra* note 149.
240. *See supra* note 21.
241. *See supra* notes 15-20 and accompanying text.

ous governments [that] seek to deny the rights [that digital technologies] enable," especially those "imposing laws that restrict online discourse and access to information."[242] Beginning at least in 1988, Congress recognized that, through its economic sanctions programs, the United States threatened to become such a regime itself. The Informational Amendments "significantly promote the foreign policy objectives of encouraging democracy and human rights abroad, and improving understanding of and goodwill toward the United States abroad."[243] Congress recognized that "private initiatives represent the lion's share of U.S. exchanges with the world, and that private citizens engaged in private activity are frequently the best purveyors of the values of American civilization."[244]

The Berman Amendment's namesake, Representative Howard L. Berman, put it best: "The fact that we disapprove of the government of a particular country ought not to inhibit our dialog with the people who suffer under those governments.... We are strongest and most influential when we embody the freedoms to which others aspire."[245] Before the U.S. government can legitimately promote the cause of Internet freedom in other countries, it must first ensure it is not stifling that freedom itself. Only then will social media's true potential to catalyze widespread political change in authoritarian countries be unlocked.[246]

Jarred O. Taylor III[*]

242. *See Internet Freedom*, U.S. DEP'T OF ST., http://www.state.gov/e/eb/cip/netfreedom/ (last visited Sept. 23, 2012).

243. H.R. REP. NO. 103-482, at 238 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 398, 482.

244. *Id.*

245. 138 CONG. REC. 15,052 (1992).

246. *See* MOROZOV, *supra* note 9, at 211 ("Until [export regulations] are simplified and purged of unnecessary hurdles, the Internet is only working at half of its fully democratizing capacity."); York & Cohn, *supra* note 27 (calling for the "unlicensed distribution of communications tools and services to people in all countries of the world").

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