

Exhibit A

**\*\*1547 P.L. 100-418, OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988  
DATES OF CONSIDERATION AND PASSAGE**

House July 13, 1988  
Senate August 3, 1988  
Cong.Record Vol. 134 (1988)

**RELATED REPORTS**

- House Report (Ways and Means Committee) No. 100-40(I),  
Apr. 6, 1987 [To accompany H.R. 3]
- House Report (Energy and Commerce Committee) No. 100-40(II),  
Apr. 6, 1987 [To accompany H.R. 3]
- House Report (Foreign Affairs Committee) No. 100-40(III),  
Apr. 6, 1987 [To accompany H.R. 3]
- House Report (Banking, Finance and Urban Affairs Committee)  
No. 100-40(IV), Apr. 6, 1987 [To accompany H.R. 3]
- House Report (Education and Labor Committee) No. 100-40(V),  
Apr. 6, 1987 [To accompany H.R. 3]
- House Report (Agriculture Committee) No. 100-40(VI),  
Apr. 7, 1987 [To accompany H.R. 3]

No Senate or House Report was submitted with this legislation. A related report is set out.

Much of Public Law 100-418 is derived from H.R. 3, the predecessor bill vetoed by President Reagan on May 24, 1988, primarily because of the inclusion of a subtitle requiring employers to provide employees with notice of plant closings and mass layoffs; that subtitle has been separated from Public Law 100-418 (see Pub.L. 100-379). The conference report to accompany H.R. 3 is to be treated as the legislative history to accompany Public Law 100-418 (see section 2 of Public Law 100-418 for applicability and exceptions). The conference report to accompany H.R. 3 (H.R. Rep. No. 100-576, Apr. 20, 1988) is set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

**HOUSE CONFERENCE REPORT NO. 100-576**

April 20, 1988

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**\*\*1548 \*515 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF  
CONFERENCE**

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3) to enhance the competitiveness of American industry, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

Present law

Discretionary sanctions authority is provided in the Trade Expansion Act of 1962. A ban on Defense procurement from Toshiba Corporation and Kongsberg Vaapenfabrikk is included in the Continuing Resolution for 1988.

House bill

No provision.

Senate amendment

No provision.

Conference agreement

The conference agreement strikes the sanctions language in section 233 of the Trade Expansion Act of 1962 and sections 8124 and 8129 of the 1988 Continuing Resolution.

SUBTITLE E--MISCELLANEOUS PROVISIONS

TRADING WITH THE ENEMY ACT

(Sec. 361 of the House bill; Sec. 2501 of the Conference Agreement)

Present law

Section 39 of the Trading with the Enemy Act established an Office of Alien Property to litigate and adjudicate World War II claims. All World War II claims activities have ended.

House bill

Section 361 of the House bill provides for the termination of alien property activities, transfers remaining funds to the Treasury, and repeals various reporting requirements in existing law.

Senate amendment

No provision is contained in the Senate amendment.

Conference agreement

The conference agreement is identical to the House provision.

**\*\*1872 \*839 LIMITATION ON EXERCISE OF EMERGENCY AUTHORITIES**

(Sec. 362 of the House bill; Sec. 2502 of the Conference Agreement)

Present law

The Passport Act authorizes controls on exports and imports of informational material not otherwise regulated under the Export Administration Act. Presently, regulations exempt controls on the export and import of informational material.

House bill

Section 362 of the House bill clarifies that the Trading with the Enemy Act and the International Emergency Economic Powers Act do not authorize regulations on the export or import of informational material not otherwise controlled under the Export Administration Act.

Senate amendment

The Senate amendment contains no provision.

Conference agreement

The conference agreement is identical to the House provision.

BUDGET ACT

(Sec. 364 of the House bill; Section 2503 of the Conference Agreement)

Present law

Present law contains no such provision.

House bill

Section 364 of the House bill provides that any new spending authorized by this act be subject to appropriations acts.

Senate amendment

The Senate amendment contains no provision.

Conference agreement

The conference agreement is identical to the House provision.

TITLE III--INTERNATIONAL FINANCIAL POLICY

SUBTITLE A--EXCHANGE RATES AND INTERNATIONAL ECONOMIC

Exhibit B

CONGRESS  
Session

HOUSE OF REPRESENTATIVES

REPT. 100-4  
Part 3

TRADE AND INTERNATIONAL ECONOMIC POLICY REFORM  
ACT OF 1987

APRIL 6, 1987.—Ordered to be printed

Mr. BONNER, from the Committee on Foreign Affairs,  
submitted the following

REPORT

to accompany H.R. 8 which on January 6, 1987, was referred jointly to the Committees on Ways and Means, Agriculture, Banking, Finance, and Urban Affairs, Education and Labor, Energy and Commerce, and Foreign Affairs]

[Including cost estimate of the Congressional Budget Office]

The Committee on Foreign Affairs to whom was referred the bill (H.R. 8) to enhance the competitiveness of American industry, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

The amendment is as follows:

Strike out title III and insert in lieu thereof the following:

**TITLE III—EXPORT ENHANCEMENT**

**301. SHORT TITLE.**

This title may be cited as the "Export Enhancement Act of 1987."

**302. FINDINGS AND PURPOSES.**

(a) FINDINGS.—The Congress makes the following findings:

(1) While a free and open world trading system has contributed substantially to world growth and prosperity in the 20th century, current macroeconomic policies and trade imbalances seriously threaten that system.

(2) The world trading system cannot be sustained unless the United States and its trading partners implement balanced growth policies.

(3) World economic growth requires both a financial system which fosters and supports stable exchange rates and th

in developing trade between the United States and Caribbean nations. It sets forth congressional intent that changes in laws by this bill to improve U.S. competitiveness should not be construed as diminishing the importance of the Caribbean Basin Initiative, affirming the current duty-free trade system available to designated beneficiaries of the CBI, or imposing an additional burden on Caribbean nations' ability to compete with exports from U.S. trading partners.

*Section 347—Limitation on procurement in foreign assistance programs*

Section 347 amends section 604(g)(1) of the Foreign Assistance Act of 1961 to prohibit the use of foreign assistance funds for procurement of goods and services from any advanced industrialized nation which is competitive in international markets with U.S. producers, unless the U.S. goods and services are competitive in the market where the goods and services are used.

The provision clarifies that foreign assistance funds only apply to projects entered into after enactment of this bill and do not apply to purchases of goods or services for countries that compete with the United States in international markets for sales of comparable goods and services. The committee is particularly concerned about the use of foreign assistance funds to enhance the competitive advantage of emerging industrialized countries, such as Brazil, South Korea, and Taiwan, which may compete directly with the United States in developing country markets. This provision prohibits AID from financing the procurement of or procurement of services in a developing nation from non-U.S. sources in cases where such U.S. goods or services are not competitive in the market where they will be used. Examples would include such U.S. goods or services cannot be purchased from a foreign source in a timely manner, or when spare parts or repair services for U.S. goods and services are not available.

**SUBTITLE D—PROTECTION OF UNITED STATES BUSINESS IN ABROAD**

*Section 351—Protection of United States intellectual property*

Section 351 recognizes the importance of protecting United States intellectual property, prompted by the losses sustained by U.S. companies and their employees, as well as the consuming public, in the protection of U.S. copyrighted works causing an annual loss of more than \$1.3 billion to the copyright industry. Foreign piracy and counterfeiting has resulted in the loss of more than 130,000 jobs and between \$6 billion and \$8 billion in domestic and export sales by U.S. firms. Substandard fraudulent goods can pose a significant safety threat to consumers, and endanger the reputation of legitimate U.S. companies. Inadequate patent protection has resulted in an annual loss of \$200 million for one U.S. industry alone. Paragraph (1) states that the Secretary of State, in consultation with the States Trade Representative, and relevant U.S. agencies should conduct bilateral talks with appropriate countries to reduce instances of piracy and counterfeiting, obtain

existing international conventions which encompass intellectual property issues, and gain support for inclusion of intellectual property codes in future multilateral trade negotiations. Further, it encourages the negotiation of an international convention to protect trademark works, since at present, none of the international conventions covers this important new intellectual property.

Paragraph (2) urges the United States to seek to incorporate enforcement mechanisms into international intellectual property agreements. One of the important aspects of securing an intellectual property agreement under the aegis of the General Agreement on Tariffs and Trade (GATT) is that the GATT has a dispute settlement and enforcement procedures. The committee recommends that the United States, in intellectual property rights by adopting civil remedies under domestic intellectual property and trade laws among other remedies.

Paragraph (3) urges the United States to seek the involvement of the U.S. business community in intellectual property negotiations. The structure of advisory committees to help with past trade negotiations has helped to inform U.S. negotiators. A similar mechanism should be employed to utilize the experience of the American business community.

Paragraph (4) states that the Secretary of State, in consultation with the United States Trade Representative, should urge the development of intellectual property codes in multilateral trade negotiations by providing its technical expertise in standard setting. The WTO has demonstrated its deliberative role in establishing international standards for copyrights, patents and trademarks. It is intended that the relationship between WTO and MTN efforts will be parallel that of the International Organization for Standardization and GATT. Intellectual property codes would be included in MTN efforts to ensure the establishment of a dispute settlement mechanism for intellectual property issues.

Paragraph (5) encourages the President to use retaliatory measures against those countries unwilling to commit formally to improvements in intellectual property protection. The 98th Congress should urge the President to persuade countries which condone piracy or create other barriers to discontinue such practices.

Paragraph (6) encourages the Agency for International Development (AID) to include in its development programs technical training in enforcement for officials of patent, copyright and trademark offices in recipient countries. AID is to consult with the Patent and Trademark Office and Copyright Office of the Department of Commerce in its effort to provide such technical training.

*Section 352—Foreign business practices*

Section 352 amends section 30A of the Securities and Exchange Act of 1934 (15 U.S.C. 78dd-1) and makes parallel amendments to section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2) to modify standards of culpability in current law and to clarify the definition of illegal payments by issuers and to address concerns. Prohibited payments include those for the purpose of financing acts or decisions of foreign officials in order to assist cor-

porations and individuals "in obtaining or retaining business for or with, or directing business to, any person, including the procurement of legislative, judicial, regulatory or other action in seeking more favorable treatment by a foreign government."

Willful bribes to foreign officials are prohibited, as in current law. The "reason to know" standard of culpability in the present statute was replaced by a split standard. Under the new standard, corporations or individuals with "knowledge" of bribes or attempted bribes by third parties (for example, their agents) are subject to criminal and civil penalties. Corporations or individuals which act with "reckless disregard" of a substantial risk that third parties would bribe or attempt bribery would be subject only to civil penalties.

For purposes of this provision, the definition of "retaining business" shall not be limited to the renewal of contracts or other business, but shall include the completion of existing contracts and the carrying out of existing business. Payments for the procurement of legislative, judicial, regulatory or other actions in seeking more favorable treatment from a foreign government which have a bearing on the completion of contracts or the carrying out of existing business would be prohibited by the act. For example, a payment to a foreign official for the purpose of obtaining favorable tax treatment would be prohibited. The prohibition does not include payments made for purposes other than obtaining or retaining business, which may be prosecuted at the discretion of the foreign government.

A company may not be held vicariously liable if it can show that it had established procedures to prevent its employees from making bribes and that its supervisory employees had used "due diligence" to prevent employees or third parties from making bribes.

A corporation or individual may raise as a simple defense to prosecution under the Act a showing that a payment was made for the purpose of expediting or securing the performance of a routine governmental action, or where that payment was "expressly permitted" by the laws or regulations of the foreign country. A "routine governmental action" includes processing papers (including visas and work orders), loading and unloading cargoes, and scheduling inspections associated with contract performance. A routine governmental action does not include any decision or whether to award new business or continue existing business, including legislative, judicial, regulatory or other action in seeking more favorable treatment by a foreign government. The reference to a "simple" defense means that an affirmative defense is not required for purposes of fulfilling the conditions of this subsection.

As in current law, enforcement responsibility rests with the Department of Justice and the Securities and Exchange Commission. Guidelines for compliance may be issued by the Attorney General, after consultation with the SEC, the Secretary of Commerce, the United States Trade Representative, the Secretary of State and the Secretary of the Treasury, and after obtaining the views of the business community and others through public notice and comment in public hearings. The Attorney General shall establish procedures, after consultation with appropriate agencies, to provide re-

sponses to specific inquiries relating to compliance within 30 days after receiving a request.

SUBTITLE E

Section 361—Trading With the Enemy Act

Section 361 provides for the termination of the administration of alien enemy property activities by eliminating subsections (b) through (e) of section 39 of the Trading With the Enemy Act, and directs the Attorney General to place in the miscellaneous receipts account of the Treasury all sums from property vested in or transferred to him under that act. This section also repeals an unnecessary reporting requirement in section 6 of that act. The committee notes that all litigation and adjudication of World War II claims under this law has ended. The committee acted favorably on similar legislation proposed by the Justice Department in 1977 and 1980, but that no action has been taken in the Senate.

Section 362—Limitation on exercise of emergency authorities

Section 362 amends section 5(b) of the Trading with the Enemy Act and section 208(b) of the International Emergency Economic Powers Act to clarify that the authority granted to the President by these sections does not include the authority to regulate imports from and exports to any country of informational materials, which are not otherwise under National Security export controls under section 5 of the Export Administration Act of 1979 or are not the subject of the prohibitions contained in chapter 37 of title 18, United States Code.

These sections amend the Trading With the Enemy Act and the International Emergency Economic Powers Act to exempt from regulation or prohibition, directly or indirectly, "the importation from any country, or exportation to any country, commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other information materials, which are not otherwise controlled for export under section 5 of the Export Administration Act of 1979 or with respect to which acts are not prohibited by chapter 37 or title 18, United States Code." These provisions codify current practice under the International Emergency Economic Powers Act, as in the recent embargoes of trade with Nicaragua and Libya, of exempting information materials and publications from import restrictions. The committee notes that the American Bar Association House of Delegates approved, in February 1985, the principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment. That principle applies with equal force to the exportation of ideas and information from this country to the rest of the world. Accordingly, these sections also exempt informational materials and publications from the export restrictions that may be imposed under these acts.

Section 363—Relations with Mexico

This section was adopted by voice vote in 1986, during House floor consideration of H.R. 4800 (the Trade and International Eco-



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conomic Policy Reform Act of 1986). It includes findings on the importance of United States-Mexican relations, the current inadequate and ad hoc nature of United States policymaking regarding Mexico, and the need for improving our government's approach to issues involving Mexico. Section 363 also creates an interagency group, the United States-Mexico Interagency Commission, and calls for the convening of a United States-Mexico bilateral summit.

Mexico is of great strategic importance to the United States, both politically and geographically, and is our third largest trading partner. The alliance between the United States and Mexico is substantially economic in nature, yet our trade and diplomatic relations with this neighbor are often taken for granted or are handled in a fractured manner. The interagency group, to be established in a President, is to include the Secretary of State, the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, and the United States Trade Representative, and is to be chaired by the Secretary of State. The purpose of the Commission is to coordinate United States policy toward Mexico and to allow for greater deliberation and input from the various government agencies. The Commission also is meant to serve as an official channel of communication between the United States Government and the Government of Mexico in order to raise issues of bilateral concern, particularly in the area of trade and economic matters, to a higher level of discussion. The bill requires that the Commission report to Congress on an annual basis on its actions, and urges that the Commission meet semiannually with Mexican representatives.

Section 363 includes a sense of the Congress that a bilateral economic summit be held and outlines potential areas to be considered. These items include: Mexico's relationship to the General Agreement on Tariffs and Trade; Mexico's graduation from the Generalized System of Preferences; U.S. direct investment in Mexico; U.S. fishing rights in Mexican waters; the potential for a U.S.-Mexico free trade agreement; as well as greater coordination in the areas of immigration, pollution, research and development, debt and foreign investment, and trucking and transportation.

#### *Section 364—budget act*

Section 364 provides that any new spending authority pursuant to this act shall be effective for any fiscal year only to the extent or in such amounts as are provided in appropriations acts.

#### REQUIRED REPORTS SECTION

##### COST ESTIMATE

The committee estimates that, assuming the full appropriation of the amounts authorized in this title, the total budget authority required to carry out the provisions of this title will be \$133 million for fiscal year 1987. The fiscal year allocation of the total cost is set forth in the Congressional Budget Office estimate below. The committee agrees with the projected cost estimate of the Congressional Budget Office.

This bill would authorize new spending, above the normal operating level of the programs covered and funds not otherwise avail-

able, of \$9 million in fiscal year 1988 and of \$6 million in fiscal year 1989.

#### INFLATIONARY IMPACT STATEMENT

Enactment of title III will have no identifiable inflationary impact. In fact, as the purpose this title is to promote U.S. exports, the enactment of this legislation should lead to a healthier, more prosperous U.S. economy.

#### STATEMENTS REQUIRED BY CLAUSE 2(i) (3) OF HOUSE RULE XI

##### (a) *Oversight findings and recommendations*

Title III is the result of extensive hearings and oversight in 1986 and 1987, particularly by the Subcommittee on International Economic Policy and Trade, but also by other subcommittees, and by the full committee. The oversight activities have included various briefings and study missions by both members and staff of the committee. The hearings and other activities by the Subcommittee on International Economic Policy and Trade have covered the following: General U.S. trade policy; operations of the U.S. and Foreign Commercial Service; export trading companies; mixed credits (including reporting H.R. 3667, as amended, in 1986); national security, foreign policy and short supply export controls and the implementation of the Export Administration Amendments Act of 1985; the Overseas Private Investment Corporation; the Trade and Development Program; the Foreign Corrupt Practices Act; and, the agricultural export and trade provisions of the Food Security Act of 1985. The committee has also considered Government Operations Committee reports on "Federal Government Export Promotion Activities: Oversight of Foreign Commercial Service" (36th Report, April 11, 1984) and on "The Role of the Overseas Private Investment Corporation" (22nd Report, November 5, 1985), and several studies by the General Accounting Office: (GAO/NSIAD-86-42, February 1986); "Export Promotion: Activities of the Commerce Department's District Offices" (GAO/NSAID-86-43, February 1986); "Foreign Aid: Potential for Diversion of Economic Support Funds to Unauthorized Use" (GAO/NSAID-87-70); "Foreign Assistance: How the Funds Are Spent" (GAO/NSAID-86-73); "Assessment of Commerce Department's Foreign Policy Report to Congress" (GAO/NSAID-86-172); "Commerce-Defense Review of Applications to Certain Free World Nations" (GAO/NSAID-86-169); "Assessment of Commerce Report on Extending Controls for South Africa" (GAO/NSAID-87-3); and confidential report entitled, "Export Controls: Need Strengthening But Some Licensing May Be Unnecessary" (GAO/C-NSAID-86-10). Last, the committee considered the report of the National Academy of Sciences' report, "Balancing the National Interest: U.S. National Security Export Controls and Global Economic Competition."

##### (b) *Budget authority*

The enactment of these provisions will create no new budget authority, credit authority or spending authority.

Exhibit C

132 Cong.Rec. S3707-04

(Publication page references are not available for this document.)

operating expenses from plant and capital amounts, section 1011 is an unnecessary technical requirement.

Section 602 would clarify the definition of the term "minority" for purposes of determining who is eligible for participation in the Department's Office of Minority Economic Impact programs. This proposal would merely conform the definition of the term "minority" in the Department of Energy Organization Act with current definitions used by the Office of Management and Budget to compile statistics under the Office of Federal Contracts Compliance Directive No. 15 titled "Race and Ethnic Standards for Federal Statistics and Administrative Reporting," and by the Department of Energy in 10 CFR Part 1040.3, which lays the foundation for requirements concerning non-discrimination in Department of Energy federally assisted programs. The proposal would not affect substantively who would be covered by the term "minority" in the DOE Act.

The Office of Management and Budget advises that enactment of this legislative proposal would be in accord with the program of the President.

Sincerely,

J. MICHAEL FARRELL,  
General Counsel.

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By Mr. MATHIAS (for himself and Mr. SIMON);

S. 2263. A bill to protect the public's right to receive and communicate information freely across the American border, and to ensure the right of international travel; to the Committee on the Judiciary.

#### INTERNATIONAL COMMUNICATION AND TRAVEL ACT

Mr. MATHIAS. Mr. President, today the Senator from Illinois, Mr. SIMON, and I introduced a bill amending the ideological exclusions in the McCarran-Walter Immigration Act and restrictions on travel in the Passport Act, and removing restrictions on the import and export of information. The thread that ties all of these changes together is an ideal embodied in the first amendment: The removal of barriers that inhibit the free exchange of ideas across international frontiers.

A free trade in ideas, Oliver Wendell Holmes wrote, is the theory underlying our Constitution:

When men have realized that time has upset many fighting faiths, they may come to believe the very foundation of their own conduct: that the ultimate good desired is better reached by the free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out.

A free flow of information and ideas among American citizens is the foundation of our democratic society. Through open and robust debate in the marketplace of ideas, American citizens inform themselves of choices that affect their lives. However, this liberty, secured by the first amendment, is thwarted by a number of laws which permit the Government to restrict the flow of information and the travel of individuals into and out of the United States. These laws can exclude foreigners from our shores and inhibit the ability of

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American citizens to travel overseas on the basis of the political beliefs the individuals espouse. They can also be used to restrict the import and export of information on the basis of the political doctrines contained in the information.

Abstract ideals such as freedom of speech are promoted and articulated in tangible forms and concrete actions. If we deny citizens the right to travel, or hear the views and opinions of others, than we trample on this ideal. Diversity, dialog, and exchange of ideas are the life-giving elements-the water and air-of American tradition; exclusion, restriction, repression of ideas are the features of far more troubled, less confident nations. As President Reagan has said:

Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase confidence; sealing off one's people from the rest of the world reduce it.

To be sure, we have a legitimate right and duty to maintain proper border controls. Those controls are particularly important in this day of supersonic travel, sophisticated espionage, and increased terrorist activity. And this is all the more reason to update our laws so officials can concentrate on true threats to our national security and public welfare.

Today's telecommunications media can bring into our living rooms the images and voices of exponents of every political and artistic tendency around the globe. To deny individuals or information entry or exit not only injures our freedom but insults the intelligence of the American people. The legislation we introduce today has six major provisions. The first deals with restrictions on visitors to this country based on speech.

Sections of the 1952 McCarran-Walter Act permit our Government, acting on secret evidence, to ban from the United States a wide range of people. Many visitors overcome initial charges that brand them as everything from anarchists and Communists to professional beggars and prostitutes. But the process is a demeaning and embarrassing ritual that suggests we are not as confident, mature, and truly free a nation as we so often assert.

Under the sweeping rubric of activities "prejudicial to the public interest" or "subversive to the national security," sections 212(a) 27 and 28 of the Immigration and Nationality Act have been used to bar British actor Charlie Chaplin; Canadian author and naturalist Farley Mowat; and Japanese pacifists. Our bill would stop this. In essence the bill says that activities which would be protected by the first amendment if conducted by American citizens in the United States cannot be the sole basis for an alien's exclusion or deportation.

This bill eliminates the exclusions in section 212(a) of the Immigration and Nationality Act that are based solely on speech, nonviolent political activity, political beliefs or associations. This bill would also impose analogous restrictions on the broad authority to deport aliens contained in section 241(a) of the act. In addition, the bill permits Americans to go to court if denied the opportunity to communicate with an alien visitor because of speech-based restrictions.

Not affected by the proposed legislation is the authority of the U.S. Government to deny admission to those aliens likely to engage in criminal or terrorist activities. In addition, those who would come to this country to engage in activities that endanger the national security or jeopardize the public welfare are excludable. Finally, the President would retain the broad authority to exclude aliens by proclamation under section 212(f) of the

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### Immigration and Nationality Act.

The changes that would be made to the Immigration and Nationality Act would make it consistent with congressional intent when the McGovern amendment was enacted in 1977. In addition, these changes are in accord with a recent U.S. court of appeals decision ruling that temporary visas to aliens cannot be denied because of political beliefs or associations.

The free exchange of ideas may also be inhibited by restricting the rights of U.S. citizens to travel abroad. Under the Passport Act of 1926, the executive branch has the authority to restrict travel by denying or revoking passports. While travel restrictions are necessary where there is imminent danger to the public health or physical safety of U.S. travelers, at times the executive branch has abused its discretion. In the past, passports have been denied to individuals of the caliber of playwright Arthur Miller, actor and singer Paul Robeson, and Nobel prize winner Linneas Pauling on the basis of their political beliefs. Passports were denied not only to artists, actors, and scientists, but also lawyers, congressional investigators, and even Federal judges have been denied passports on the basis of their political activities.

This bill amends the Passport Act by eliminating passport restrictions based on activities that would be protected by the first amendment to the Constitution if they were conducted in the United States. This bill doesn't inhibit the authority of the Secretary of State to restrict passports to areas where there are health or safety risks to U.S. travelers.

In addition to denying passports, the U.S. Government has inhibited travel to certain countries by restricting or prohibiting normal business transactions incidental to travel. This bill would amend the Trading With the Enemy Act and the International Emergency Economic Powers Act to allow U.S. citizens traveling or living in foreign countries to engage in these transactions, such as the payment of living expenses.

The Trading With the Enemy Act and the International Emergency Economic Powers Act have also been used by the Government to restrict the importation of information. Under this authority, the executive branch has embargoed informational materials such as films, posters, and phonograph records. These restrictions are inconsistent with the philosophy underlying the first amendment.

Our bill amends these statutes to ensure the free and unfettered importation of informational material from abroad, thereby promoting uninhibited and fully informed debate. This bill will not affect the Government's legitimate power in times of war or national emergency to regulate or prohibit any other transactions involving property.

The importation and dissemination of information is also limited by the Foreign Agents Registration Act, under which the Government can classify certain foreign material as "political propaganda." This label can have a chilling effect on political debate. In a free society, citizens not the government, should decide for themselves the merits of the information they read. This bill does not affect either who must register under the Foreign Agents Act, or what materials must be registered. It only reduces reporting requirements and provides for a more neutral label-"advocacy materials"-on material indicating that it was produced by an agent of a foreign power.

Besides restrictions on the importing of information, statutes regulating exports can also inhibit the dissemination of ideas. Scientific progress, in

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(Publication page references are not available for this document.)

particular, depends on freedom of communication. Yet, under the Arms Export Control Act, the publishing of unclassified research and participation in scholarly conferences have been restricted and curtailed. Our bill amends the Arms Export Control Act to declare a policy endorsing the importance of vigorous scientific debate through scholarly interchange. Although a policy statement would not directly prevent excessive interference with scientific interchange, this provision shifts the balance a little more toward the free exchange of scholarly ideas, in acknowledgement of Albert Einstein's insight that "the progress of science presupposes freedom of expression in all realms of intellectual endeavor."

Some of my colleagues may be familiar with another bill, S. 2177, that Senator SIMON and I recently introduced. While attempting to further the same principles, it is much more limited in scope. S. 2177 focuses only on the issue of nonimmigrant visa exclusions. This legislation is a more comprehensive package, removes more barriers that stand in the way of free debate. In sum, this free trade in ideas legislation simply applies the ideal embodied in the first amendment of the Constitution to the laws governing the travel of individuals and the movement of information.

As Justice Brandeis wrote in a 1927 decision, "Those who won our independence believed that the final end of the State was to make men free to develop their faculties \* \* \* freedom to think as you will and to speak as you think" as a "means indispensable to the discovery and spread of political truth." That belief still animates thoughtful Americans today. The legislation we introduce today strengthens the means to that important end.

I ask unanimous consent that a copy of the bill and a list of the organizations that endorse this legislation be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2263

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION. 1. This Act may be cited as the "International Communication and Travel Act of 1986".

SEC. 2. (a) Section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)) is amended-

(1) in paragraph (27)-

(A) by striking out "be prejudicial to the public interest, or"; and

(B) by inserting "national" after "welfare, safety, or";

(2) by striking out paragraph (28);

(3) by redesignating paragraphs (29) through (33) as paragraphs (28) through (32), respectively; and

(4) in paragraph (28), as redesignated by paragraph (3) of this subsection-

(A) by striking out "(A)"; and

(B) by striking out "in other activity subversive" and all that follows through "1950" and inserting in lieu thereof "the overthrow of the Government of the United States by force, violence, or other unconstitutional means".

(b) Section 212(c) of such Act is amended by striking out "(30) and (31)" and inserting in lieu thereof "(29) and (30)".

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(Publication page references are not available for this document.)

(c) Section 212(d) of such Act is amended-

(1) by striking out paragraph (2);

(2) by redesignating paragraphs (3) through (8) as paragraphs (2) through (7), respectively;

(3) in paragraphs (2) and (7), as redesignated by paragraph (2) of this subsection, by striking out "(29)" each place it appears and inserting in lieu thereof "(28)"; and

(4) in paragraph (2), as redesignated by paragraph (2) of this subsection, by striking out "(33)" each place it appears and inserting in lieu thereof "(32)".

(d) Section 212(f) of such Act is amended-

(1) by striking out "aliens" the first place it appears and inserting in lieu thereof "alien";

(2) by striking out "all aliens or any class of" and inserting in lieu thereof "such alien or"; and

(3) by inserting "such alien or" after "or impose on the entry of".

(e) Section 212 of such Act is further amended by adding at the end thereof the following new subsection:

"(m) ((1) Notwithstanding any other provision of this section, no alien may be denied a visa or excluded from admission into the United States because of (A) any past or expected speech, activity, belief, affiliation, or membership which, if held or conducted within the United States by a United States citizen, would be protected by the First Amendment to the Constitution, or (B) the expected consequences of any activity with the alien may conduct in the United States if that activity would be protected by the First Amendment to the Constitution if conducted within the United States by a United States citizen.

"(2) An alien granted a visa to enter the United States shall not be subjected to restrictions or conditions on the use of the visa because of (A) any past or expected speech, activity, belief, affiliation, or membership which, if held or conducted within the United States by a United States citizen, would be protected by the First Amendment to the Constitution, or (B) the expected consequences of any activity which the alien may conduct in the United States if that activity would be protected by the First Amendment to the Constitution if conducted within the United States by a United States citizen.

"(3) Any citizen of the United States or other person within the jurisdiction thereof who intends to communicate in person with, including attending a function for purposes of listening to, any alien who is denied a visa, excluded from admission into the United States, or subjected to visa restrictions in violation of the provisions of this subsection, may bring a civil action on his or her own behalf against any official of the United States Government who is alleged to have acted in violation of this subsection. Any civil action under this district in which the intended communication was to have occurred, in the district of the plaintiff's residence or principal place of business, in the district in which any defendant in the action resides, or in the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to grant such legal or equitable relief as will enforce the provisions of this subsection."

SEC. 3. (a) Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1251(a)) is amended-

(1) by striking out paragraph (6);

(2) by redesignating paragraphs (7) through (19) as paragraphs (6) through

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(Publication page references are not available for this document.)

(18), respectively; and

(3) in paragraph (6), as redesignated by paragraph (2) of this subsection-

(A) by striking out "(29)" each place it appears and inserting in lieu thereof "(28)"; and

(B) by striking out ", unless the Attorney General" and all that follows through "Communist organization".

(b) Section 241(b) of such Act is amended by striking out "subsection (a)(11)" and inserting in lieu thereof "subsection (a)(10)".

(c) Section 241(e) of such Act is amended by striking out "or (7)".

(d) Section 241(f) of such Act is amended-

(1) in paragraph (1), by striking out "subsection (a)(19)" and inserting in lieu thereof "subsection (a)(18)"; and

(2) in paragraph (2), by striking out "subsection (a)(11)" and inserting in lieu thereof "subsection (a)(10)".

(e) Section 241 of such Act is further amended by adding at the end thereof the following new subsection:

"(g) Notwithstanding any other provision of this section, no alien may be deported because of (1) any past or expected speech, activity, belief affiliation, or membership which, if held or conducted within the United States by a United States citizen, would be protected by the First Amendment to the Constitution, or (2) the consequences of any activity which the alien has conducted or may conduct in the United States if that activity would be protected by the First Amendment to the Constitution if conducted within the United States by a United States citizen."

SEC. 4. Section 1 of the Act entitled "An Act to regulate the issue and validity of passports, and for other purposes", approved July 3, 1926 (22 U.S.C. 211a) is amended by adding at the end thereof the following: "A passport may not be denied issuance, revoked, restricted, or otherwise limited because of any speech, activity, belief, affiliation, or membership, within or outside the United States, which, if held or conducted within the United States, would be protected by the First Amendment to the Constitution. Any denial, revocation, restriction, or other limitation of a passport shall not extend beyond that necessary to prevent conduct not encompassed by the preceding sentence."

SEC. 5. Section 6 of the Subversive Activities Control Act of 1950 is repealed (50 U.S.C. 785).

SEC. 6. Section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)) is amended-

(1) by striking out "or" at the end of paragraph (1);

(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following:

"(3) any transactions ordinarily incident to travel to and from any country;

"(4) any transactions ordinarily incident to travel within any country, including the payment of living expenses and the acquisition of goods for personal consumption; or

"(5) any transactions ordinarily incident to the importation, commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials from any country."

SEC. 7. Section 5 of the Trading With the Enemy Act (50 U.S.C. App. 5(b)(1))



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(Publication page references are not available for this document.)

is amended by adding at the end thereof the following new subsection:

"(c) The authority granted to the President in this section does not include the authority to regulate or prohibit, directly or indirectly-

"(1) the importation, commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other information materials from any country; or

"(2) any transactions-

"(A) ordinarily incident to travel to and from any country; or

"(B) ordinarily incident to travel within any country, including payment of living expenses and the acquisition of goods for personal consumption there."

SEC. 8. (a) Section 1(j) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(j)) is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

(b) Section 1(o) of such Act is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

(c) (1) Section 4 of such Act (22 U.S.C. 614(a)) is amended by striking out in the section heading "Political Propaganda" and inserting in lieu thereof "Advocacy Material".

Section 4(a) of such Act is amended by striking out "and a statement, duly signed by" and all that follows through "transmittal".

(3) Section 4(b) of such Act is amended-

(A) by striking out "political propaganda" each time it appears and inserting in lieu thereof "advocacy material";

(B) by striking out "and such propaganda" and inserting in lieu thereof "and such material";

(C) by striking out "registered under this Act with the Department of Justice, Washington, District of Columbia, as":

(D) by striking out "and address"; and

(F) by striking out "; that, as required by this Act, his registration statement" and all that follows through "as may be appropriate".

(d) Section 4(e) of such Act is amended-

(1) by striking out "political propaganda" and inserting in lieu thereof "advocacy material"; and

(2) by striking out "propaganda" the second place it appears and inserting in lieu thereof "advocacy material".

(e) (1) Section 6(a) of such Act (22 U.S.C. 616(a)) is amended-

(A) by striking out in the first sentence "all statements concerning the distribution of political propaganda furnished" and inserting in lieu thereof "other filings made"; and

(B) by striking out in the second sentence "statements" and inserting in lieu thereof "filings".

(2) Section 6(b) of such Act is amended by striking out "propaganda material" and inserting in lieu thereof "advocacy material".

(3) Section 6(c) of such Act is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

(f) (1) Section 8(a) of such Act (22 U.S.C. 618(a)) is amended by striking out "or in any statement under section 4(a) hereof concerning the distribution of political propaganda".

(2) Section 8 of such Act is further amended-

(A) by striking out subsection (d); and

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(Publication page references are not available for this document.)

(B) by redesignating subsections (e) through (h) as subsections (d) through (g), respectively.

(g) Section 11 of such Act (22 U.S.C. 621) is amended by striking out "political propaganda" and inserting in lieu thereof "advocacy material".

SEC. 9. Section 38(a) of the Arms Export Control Act (22 U.S.C. 2778(a)) is amended by adding at the end thereof the following new paragraph:

"(4) Decisions on issuing export licenses under this section shall take into account the policy of the United States to sustain vigorous scientific enterprise and to respect the ability of scientists and other scholars freely to communicate their research findings by means of publication, teaching, conferences, and other forms of scholarly exchange."

SEC. 10. Section 1 of Public Law 89-634 (19 U.S.C. 2051) is amended by inserting at the end thereof the following new sentence: "In carrying out this authority, visual or auditory material shall not fail to qualify as being of international educational character simply because it advocates a particular position or viewpoint."

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#### COALITION FOR FREE TRADE IN IDEAS

Amalgamated Clothing and Textile Workers Union  
 American Academy of Arts and Sciences  
 American Civil Liberties Union  
 American Friends Service Committee  
 American Society of Journalists and Authors, Inc.  
 Americans for Democratic Action  
 Americas Watch  
 Association of American Publishers (International Freedom to Publish Committee)  
 Association of Independent and Video Filmmakers  
 Authors League of America  
 Center for National Security Studies  
 Commission on Social Action of Reform Judaism  
 Committee to Protect Journalists  
 Environmental Action  
 Federation of American Scientists  
 Friends Committee on National Legislation  
 Fund for Free Expression  
 Fund for Open Information and Accountability, Inc.  
 Fund for Peace  
 Helsinki Watch  
 International Reading Association  
 Lawyers Committee for International Human Rights  
 League of United Latin American Citizens  
 Mobilization for Survival  
 Modern Language Association of America  
 National Committee Against Repressive Legislation  
 National Emergency Civil Liberties Committee  
 National Lawyers Guild  
 National Science Teachers Association

132 Cong.Rec. S3707-04

(Publication page references are not available for this document.)

National Writers Union  
 New York Academy of Sciences  
 Newspaper Guild  
 PEN American Center  
 People for the American Way  
 Society of American Law Teachers  
 Society of Children's Book Writers  
 Theatre Communications Group, Inc.  
 Union of Concerned Scientists  
 United Electrical, Radio and Machine Workers of America (UE)  
 Washington Office on Haiti  
 Washington Office on Latin America

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By Mr. D'AMATO:

S. 2264. A bill to amend the Truth in Lending Act; to the Committee on Banking, Housing, and Urban Affairs.

#### CREDIT CARD DISCLOSURE ACT

Mr. D'AMATO. Mr. President, I am introducing the Credit Card Disclosure Act of 1986 in response to concerns that were addressed in a hearing on this subject conducted by the Committee on Banking, Housing, and Urban Affairs. On January 28, 1986, the Banking Committee conducted a hearing to discuss two pieces of legislation. One introduced by my colleague from Florida, Senator HAWKINS, and the other, S. 1922, the Credit Card Protection Act, which I introduced on December 11, 1985.

These bills are designed to benefit consumers by imposing limits on the interest that credit card issuers can charge cardholders. Specifically, S. 1922 imposed a floating ceiling on credit card issuers that would allow them to charge an interest rate four points above the rate charged by the Internal Revenue Service for delinquent payments. This rate is based upon a 6-month average of the prime rate and would ensure that card issuers are making a fair profit on their credit card operations rather than the excessive profits they presently enjoy.

My feelings on the rates that these issuers charge is no secret. At a time when the costs of funds to banks have fallen dramatically, these cost savings have not been reflected in the rates that credit card holders are charged. The card issuers are gouging the public by charging an average rate of 18.6 percent while the discount rate, the cost of funds to the banks, has been recently lowered to 9 percent. I find it unconscionable that some banks charge credit card interest rates as high as 21 percent when their cost of funds is 14 points lower. They are earning excessive profits at the expense of the consumer and the interest cap that was contained in S. 1922 as designed to remedy this situation.

However, the hearings revealed that S. 1922 was vehemently opposed by the banking industry. The banking industry supported raising of interest rate levels when it was to their benefit but is now opposed to lowering interest rates to realistic and reasonable rates when consumers will benefit. Despite this opposition, I remain committed to seeing that credit card interest rates are

Exhibit D

## Citation

138 Cong.Rec. E1856-04  
 138 Cong. Rec. E1856-04, 1992 WL 132816 (Cong.Rec.)  
 (Cite as: 138 Cong. Rec. E1856-04)

Found Document

Rank(R) 1 of 1

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Congressional Record --- Extension of Remarks  
 Proceedings and Debates of the 102nd Congress, Second Session

Material in Extension of Remarks was not spoken by a Member on the floor.

In the House of Representatives  
 Tuesday, June 16, 1992

FREE TRADE IN IDEAS ACT OF 1992

HON. HOWARD L. BERMAN OF CALIFORNIA

Tuesday, June 16, 1992

Mr. BERMAN.

Mr. Speaker, I am pleased to introduce today the Free Trade in Ideas Act of 1992, and to be joined in this by my colleagues, Mr. HAMILTON, Mr. MILLER of Washington, Mr. GEJDENSON, Mr. PANETTA, Mr. MILLER of California, Mr. GONZALEZ, Mr. CONYERS, Mr. FRANK, Mr. WEISS, Mr. MCCLOSKEY, Mr. LEVINE of California, Mr. WAXMAN, Mr. KOSTMAYER, Mr. PAYNE of New Jersey, Ms. PELOSI, Mr. MINETA, Mr. KOPETSKI, Mr. ATKINS, Mr. NAGLE, and Mr. RANGEL.

The purpose of this legislation is to protect the right of Americans to travel abroad and to exchange information and ideas with foreigners. This bill would amend the Trading With the Enemy Act and the International Emergency Economic Powers Act, to ensure that the President's power to regulate economic relations with foreign countries is not used to inhibit communication with the people of those \*E1857 countries. 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.

Bans on travel by U.S. citizens, and on other communicative activity, do not serve U.S. interests. Even at the height of the cold war, we did not prohibit travel to Eastern bloc countries. And when it came to other forms of communication, we positively promoted the exchange of literary and artistic work in an attempt to liberalize and open up the cultural and political climate in those countries. Recent events in the formerly Communist world suggest that contact with Americans and the exposure to American ideas were crucial to the momentous changes which are taking place there, to our great national advantage.

Moreover, consistent adherence to our own democratic principles is the surest way to promote our political values abroad. We are strongest and most influential when we embody the freedoms to which others aspire. There is a growing consensus that foreign policy goals should and can be pursued without infringing on the first amendment rights of Americans to impart and receive information and ideas. My amendment to the Omnibus Trade and Competitiveness Act of 1988 to allow the export and import of books and other informational materials, subject to protections for national security information, was enacted with bipartisan support in Congress, and with the imprimatur of the administration.

Nevertheless, the Treasury Department, which is charged with enforcement of

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 (Cite as: 138 Cong. Rec. E1856-04, \*E1857)

this law, has attempted to interpret it so as to limit the exchange of public information between Americans and foreigners. Moreover, the administration continues to use its economic embargo authority to effectively prohibit travel by Americans, at their own expense, to certain countries.

I firmly believe that the rights of Americans to travel and to communicate are basic liberties that ought not to be infringed for anything less than compelling national purposes. The negligible amount of money spent by Americans traveling abroad, and the insignificant sums of money that may be realized by foreign governments from trade in books, works of art, and other informational materials, cannot be a valid reason for curtailing the rights of Americans, or for cutting off the flow of ideas to captive peoples who are starved of contact with the larger world of ideas and information.

I urge my colleagues to support this measure, and to ensure its swift approval by the House.

The provisions of the bill are summarized below:

#### SUMMARY OF THE BILL

##### SECTION 1. SHORT TITLE

##### Section 2. Exchange of Information and Related Transactions

Section 2 (a) amends the International Emergency Economic Powers Act (IEEPA) to prohibit restraints on exchanges of information or information materials.

Section 2 (b) amends the Export Administration Act of 1979 (EAA) to the same effect.

Section 2 continues the exception under current law to allow national security controls under Section 5 of the Export Administration Act.

This section is necessary to clarify the intent of Congress in adopting the Berman amendment to the Omnibus Trade and Competitiveness Act of 1988 (Section 2502 of Public Law 100-418) That provision provided protection from embargoes for materials protected by the First Amendment of the U.S. Constitution. The Executive branch has interpreted the 1988 provision narrowly, to exclude many informational and artistic materials. That has resulted in litigation, with results adverse to the Administration position. Nevertheless, delays resulting from attempts to restrict information exchanges have effectively prevented the free flow of information which was contemplated by the 1988 provision. Section 2 makes clear and explicit that all First Amendment protected materials and activities, including paintings, telecommunications, and travel necessary for trade in information, are within the ambit of the statute's protection.

##### SECTION 3. FREEDOM OF TRAVEL FOR U.S. CITIZENS.

Amends IEEPA and TWEA to ensure that U.S. citizens are not prevented from traveling abroad at their own expense. This section would not curtail the executive branch's power to restrict use of U.S. passports when travel to a particular country poses a danger to Americans.

##### SECTION 4. EDUCATIONAL, CULTURAL, AND SCIENTIFIC EXCHANGES.

Amends IEEPA and TWEA to prohibit restrictions on academic, cultural, and

138 Cong.Rec. E1856-04  
(Cite as: 138 Cong. Rec. E1856-04, \*E1857)

scientific exchanges, except to the extent that they might result in the evasion of national security controls under Section 5 of the Export Administration Act.

SECTION 5. ESTABLISHMENT OF NEWS BUREAUS.

Amends IEEPA and TWEA to ensure that bureaus of U.S. news organizations may be established in embargoed countries, and that foreign news organizations may establish news bureaus in the U.S.

SECTION 6. FOREIGN ASSISTANCE ACT OF 1961.

Amends the Foreign assistance act to ensure that it is not used to restrict the activities which are freed from restriction by Section 2 through 5 of this bill.

SECTION 7. UNITED NATIONS PARTICIPATION ACT.

Amends the U.N. Participation Act to ensure that it is not used to restrict activities which may not be restricted under the International Emergency Economic Powers Act (IEEPA), as amended by this bill.

SECTION 8. APPLICABILITY.

Provides that the protections established by this bill apply to embargoes currently in effect as well as to future embargoes.

In order to ensure that no prejudice results to the interests of American parties to disputes with the Cuban government over compensation for nationalized property, this section also provides that the amendments made by this bill do not alter the status of assets already blocked pursuant to the Trading With the Enemy Act, or the Foreign Assistance Act.

138 Cong. Rec. E1856-04, 1992 WL 132816 (Cong.Rec.)

END OF DOCUMENT





140 Cong.Rec. S15462-02

(Cite as: 140 Cong. Rec. S15462-02, \*S15465)

FN8 See "Speech by Alexander F. Watson, Assistant Secretary of State for Inter-American Affairs before the Cuban American National Foundation" (Oct. 26, 1993) ("Human rights and democracy are two of the pillars of United States foreign policy under the Clinton administration, and are at the core of our policy towards Cuba.").

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**\*S15466** THE SECRETARY OF STATE,

Washington, DC, June 7, 1993.

Hon. HOWARD L. BERMAN,

Chairman, Subcommittee on International Operations, Committee on Foreign Affairs, House of Representatives.

DEAR MR. CHAIRMAN: I am writing in regard to the "Free Trade in Ideas Act of 1993", which is contained in Title II, Part E, of your legislation to authorize appropriations for FY 1994 and 1995 for the Department of State.

I am pleased to take this opportunity to affirm the Administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy, a central tenet of our foreign policy. If conducted in a manner which safeguards national security, and which does not merely constitute an informational pretext for evasion of the larger financial purposes of economic embargoes, the free flow of ideas and information is also consistent with the maintenance and enforcement of economic embargoes. Indeed, the free flow of information can advance rather than hinder the foreign policy goals which embargoes seek to accomplish.

Accordingly, the Department endorses the underlying objectives of the Free Trade in Ideas Act. Nonetheless, like you, we believe the Administration should retain the authority to control information flow for non-prolife action, anti-terrorism, export control and other highly compelling foreign policy or national security purposes. We also believe that the objectives of your legislation, for the most part, can be achieved through regulation although some statutory clarification of these matters may be useful.

I propose that the Department conduct, on an expedited basis, an inter-agency review of our existing sanctions programs, policies, and legislation to ensure they properly reflect our mutual commitment to the dissemination of information and ideas. We will consult closely with you and your staff during this review. In return, I ask that you agree to withdraw this Title from the bill when it comes before the full committee.

I hope this proposal will be satisfactory to you. I look forward to hearing from you.

Sincerely,

WARREN CHRISTOPHER.

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THE WHITE HOUSE,

Washington, DC, September 19, 1994.

AUDREY CHAPMAN,

Exhibit F

|  |                |                |          |
|--|----------------|----------------|----------|
| Citation   | Found Document | Rank(R) 1 of 1 | Database |
| H.R. CONF. REP. 103-482  |                |                | LH       |
| H.R. CONF. REP. 103-482, H.R. Conf. Rep. No. 482, 103RD Cong., 2ND Sess. 1994, |                |                |          |
| 1994 U.S.C.C.A.N. 398, 1994 WL 151669 (Leg.Hist.)                              |                |                |          |

Page 1

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(Cite as: H.R. CONF. REP. 103-482, 1994 U.S.C.C.A.N. 398)

P.L. 103-236, \*1 FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL  
YEARS 1994 AND 1995

DATES OF CONSIDERATION AND PASSAGE

House: June 15, 16, 22, 1993; April 28, 1994  
 Senate: January 25, 26, 27, 28, 31, February 1, 2, April 29, 1994  
           Cong. Record Vol. 139 (1993)  
           Cong. Record Vol. 140 (1994)  
 House Report (Foreign Affairs Committee) No. 103-126,  
           June 11, 1993 (To accompany H.R. 2333)  
 Senate Report (Foreign Relations Committee) No. 103-107,  
           July 23, 1993 (To accompany S. 1281)  
 House Conference Report No. 103-482,  
           Apr. 25, 1994 (To accompany H.R. 2333)

HOUSE CONFERENCE REPORT NO. 103-482  
 April 25, 1994  
 [To accompany H.R. 2333]

Page 2

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(Cite as: H.R. CONF. REP. 103-482, \*1, 1994 U.S.C.C.A.N. 398)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2333), to authorize appropriations for the Department of State, the United States Information Agency, and related agencies, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Foreign Relations Authorization Act, Fiscal Years 1994 and 1995".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

(Cite as: H.R. CONF. REP. 103-482, \*97, 1994 U.S.C.C.A.N. 398, \*\*97)

SEC. 525. FREE TRADE IN IDEAS.

(a) Sense of Congress.-It is the sense of the Congress that the President should not restrict travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions, between the United States and any other country.

(b) Amendments to Trading With the Enemy Act.- (1) Section 5(b)(4) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)(4)) is amended to read as follows:

"(4) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 5 of the Export Administration Act of 1979, or under section 6 of that Act to the extent that such controls promote the nonproliferation or antiterrorism

(Cite as: H.R. CONF. REP. 103-482, \*97, 1994 U.S.C.C.A.N. 398, \*\*97)

policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18, United States Code."

(2) The authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, and are being exercised on the date of enactment of this Act, do not include the authority to regulate or prohibit, directly or indirectly, any activity which, under section 5(b)(4) of the Trading With the Enemy Act, as amended by paragraph (1) of this subsection, may not be regulated or prohibited.

(c) Amendments to International Emergency Economic Powers Act.-

(1) Section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)) is amended by striking paragraph (3) and inserting the following new paragraphs:

"(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export

(Cite as: H.R. CONF. REP. 103-482, \*97, 1994 U.S.C.C.A.N. 398, \*\*97)

under section 5 of the Export Administration Act of 1979, or under section 6 of such Act to the extent that such controls promote the nonproliferation or \*98 \*\*98 antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18, United States Code; or

" (4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages."

(2) The amendments made by paragraph (1) to section 203(b)(3) of the International Emergency Economic Powers Act apply to actions taken by the President under section 203 of such Act before the date of enactment of this Act which are in effect on such date and to actions taken under such section on or after such date.

(3) Section 203(b)(4) of the International Emergency Economic Powers Act (as added by paragraph (1)) shall not apply to restrictions on the transactions and activities described in section 203(b)(4) in force on the date of enactment of this Act, with respect to countries embargoed under the International Emergency Economic Powers Act on the date of enactment of this Act.

(Cite as: H.R. CONF. REP. 103-482, \*98, 1994 U.S.C.C.A.N. 398, \*\*98)

#### SEC. 526. EMBARGO AGAINST CUBA.

It is the sense of the Congress that the President should advocate and seek a mandatory international United Nations Security Council embargo against the dictatorship of Cuba.

#### SEC. 527. EXPROPRIATION OF UNITED STATES PROPERTY.

(a) Prohibition.-None of the funds made available to carry out this Act, the Foreign Assistance Act of 1961, or the Arms Export Control Act may be provided to a government or any agency or instrumentality thereof, if the government of such country (other than a country described if subsection (d))-

(1) has on or after January 1, 1956-

(A) nationalized or expropriated the property of any United States person,

(B) repudiated or nullified any contract with any United States person, or

(C) taken any other action (such as the imposition of discriminatory taxes or other exactions) which has the effect of seizing ownership or control of the property of any United States person, and

(2) has not, within the period specified in subsection (c), either-

(A) returned the property,

(Cite as: H.R. CONF. REP. 103-482, \*238, 1994 U.S.C.C.A.N. 398, \*\*481)

The House bill contains no comparable provision.

The conference substitute (sec. 524) is similar to the Senate amendment, but it does not include a provision which would have deleted two items from the President's written policy justification. The conference substitute also makes appropriate technical changes to reflect actions taken by the committee of conference on part E of this title.

#### Free trade in ideas

The Senate amendment (sec. 755) expresses the sense of the Congress that the President should not restrict informational, educational, \*\*482 religious, or humanitarian exchanges, or exchanges for public performances or exhibitions, or travel for any such exchanges, activities, performances or exhibitions, between the United States and any other country.

The House bill contains no comparable provision.

The conference substitute (sec. 525) amends the Senate language.

The House bill had in its original form included a Part entitled Facilitation of Private Sector Initiatives (the "**Free Trade in Ideas Act**"), dealing with all these issues. This provision was withdrawn in committee at the request of the Secretary of State, whose letter "endorse[d] the underlying objectives of the **Free Trade In Ideas Act**", asked for the opportunity to

(Cite as: H.R. CONF. REP. 103-482, \*238, 1994 U.S.C.C.A.N. 398, \*\*482)

implement those objectives by means of regulation, and suggested that statutory and regulatory changes might be useful in the future.

The provisions of the conference substitute seek to protect the constitutional rights of Americans to educate themselves about the world by communicating with peoples of other countries in a variety of ways, such as by sharing information and ideas with persons around the world, traveling abroad, and engaging in educational, cultural and other exchanges with persons from around the world. Such activities can also significantly promote the foreign policy objectives of encouraging democracy and human rights abroad, and improving understanding of and goodwill toward the United States abroad, thus enhancing the declining U.S. government resources available for such purposes. The committee of conference notes 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.

The committee of conference believes that these protections should be broadly recognized and apply universally. While the statutory amendments made by this section do not include amendments to the U.N. Participation Act, the committee of conference has acted on the assurance of the executive branch that it intends \*239 to work to exclude limits on the free flow of information and restrictions on travel from multilateral embargoes.

(Cite as: H.R. CONF. REP. 103-482, \*239, 1994 U.S.C.C.A.N. 398, \*\*482)

Subsection (a) is a sense of the Congress resolution that the President should not in any way restrict travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions between the United States and any other country, whether such restrictions are imposed pursuant to the Trading with the Enemy Act, the International Emergency Economic Powers Act, the United Nations Participation Act, the Immigration and Nationality Act, or any other authority. The committee of conference understands that it is the policy of the executive branch to now undertake to incorporate this principle through regulatory and administrative changes, including issuance of visas for these purposes, and removal of currency restrictions for such activities, in all existing and future embargoes.

Subsection (b) amends Section 5(b)(4) of the Trading with the Enemy Act (TWEA), 50 U.S.C. App. S 5(b)(4), to clarify it by eliminating \*\*483 some of the unintended restrictive administrative interpretations of it.

The first part of paragraph (1) of Subsection (c) amends Section 203(b)(3) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. S S 1702(b)(3), in identical terms and to the same effect.

These provisions in their original form, identical in terms in each statute, were adopted in 1988, (the Berman Amendment to the Omnibus Trade and Competitiveness Act), and established that no embargo may prohibit or restrict

(Cite as: H.R. CONF. REP. 103-482, \*239, 1994 U.S.C.C.A.N. 398, \*\*483)

directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution. The language was explicitly intended, by including the words "directly or indirectly," to have a broad scope. However, the Treasury Department has narrowly and restrictively interpreted the language in ways not originally intended. The present amendment is only intended to address some of those restrictive interpretations, for example limits on the type of information that is protected or on the medium or method of transmitting the information.

The committee of conference intends these amendments to facilitate transactions and activities incident to the flow of information and informational materials without regard to the type of information, its format, or means of transmission, and electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation.

The committee of conference further understands that it was not necessary to include any explicit reference in the statutory language to "transactions incident" to the importation or exportation of information or informational materials, because the conferees believe that such transactions are covered by the statutory language.

The second part of paragraph (1) of subsection (c) amends the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. S S 1702(b) to add a new

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subsection (4) that would prohibit restrictions of any kind, including currency restrictions, on travel and transactions ordinarily incident to travel by Americans under embargoes implemented pursuant to the IEEPA. This section does not apply to restrictions that are currently in place under existing \*240 IEEPA embargoes against Libya and Iraq. Because the embargoes on Cuba and North Korea are imposed not under IEEPA but under TWEA, this change would also not apply to either of those embargoes. The new paragraph 203(b)(4) would apply to new restrictions on travel under existing or future embargoes imposed under IEEPA. This is a further effort to protect Americans' constitutional rights and to facilitate international freedom of movement.

#### Embargo against Cuba

The conference substitute (sec. 526) expresses the sense of Congress that the President should advocate and seek a mandatory international U.N. Security Council embargo against the dictatorship of Cuba.

#### \*\*484 Expropriation of American property

The Senate amendment (secs. 744 and 759) revises section 620(e) of the Foreign Assistance Act, section 21 of the Inter-American Development Bank Act,

(Cite as: H.R. CONF. REP. 103-482, \*240, 1994 U.S.C.C.A.N. 398, \*\*484)

section 18 of the Asian Development Bank Act, and section 12 of the International Development Association Act regarding the prohibition of assistance to governments which expropriate the property of American citizens.

The House bill contains no similar provisions.

The conference substitute (sec. 527) combines and revises current law, known as the Hickenlooper and Gonzalez amendments, to state clearly the steps which must be undertaken by a foreign government to ensure that U.S. bilateral and multilateral aid is not terminated when the property of an American is expropriated.

The committee of conference believes that existing law has not been adequately applied by the executive branch in successive administrations and has included the Helms amendment to address this problem. The Hickenlooper law, which is intended to prohibit bilateral U.S. foreign assistance to nations which confiscate Americans' property, has been applied only twice since 1962 (and not once in the past 15 years). Similarly, the Gonzalez law, which requires that the U.S. vote against multilateral bank loans to governments which expropriate American property, has only been applied against two countries in 23 years. The committee of conference, however, is aware that the expropriation of Americans' property by foreign governments is a growing problem; there are currently more than 1,400 such cases in Central America alone.





UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITAL CITIES/ABC, INC.,

Plaintiff,

v.

Civil No. 89 Civ. 8006  
(J.E.S.)

NICHOLAS F. BRADY, et al.,

Defendants.

---

DEFENDANTS' MEMORANDUM OR POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITAL CITIES/ABC, INC.,

Plaintiff,

v.

Civil No. 89 Civ. 8006  
(J.E.S.)

NICHOLAS F. BRADY, et al.,

Defendants.

---

INTRODUCTION

By this action, plaintiff ABC seeks judicial sanction for a business proposal that would result in the payment of \$6.5 million to a Cuban entity, a payment that is contrary to nearly 30 years of United States foreign policy relating to its embargo of Cuba. In an attempt to avoid the embargo, ABC asserts that its monetary arrangement to pay a total of almost \$9 million for the exclusive rights to broadcast the 1991 Pan American Games into the United States falls within an exception to the Cuban embargo contained in the 1988 amendment to the Trading with the Enemy Act (TWEA). That amendment authorizes the importation and exportation of "publications, films, posters . . . or other informational materials." ABC's arrangement does not, however, provide for importation or exportation of existing tangible informational materials but, instead, provides for payments for a telecommunications transmission, which is intangible, of an event not yet in existence and which will be financed, in part, from the payments made by ABC. As such, it does not fit within the 1988 Amendment or the Secretary of Treasury's regulations implementing TWEA.

As defendants demonstrate, Congress did not intend through the 1988 Amendment to require abandonment of long-standing foreign policy practices and to restrict severely the flexibility of the Executive regarding the Cuban embargo. Instead, Congress created a narrow exception for tangible informational

materials, consistent with the economic sanctions programs for Libya and Nicaragua, which did not, either expressly or impliedly, include within its purview transactions involving intangible items like "telecommunications transmissions" or materials to be created, if at all, in the future. As to ABC's challenge to the Secretary's regulations implementing TWEA, it is axiomatic that the Secretary's contemporaneous interpretation of a statute which he administers is entitled to great deference. When, as here, that statute involves foreign policy matters, the Secretary's interpretation must be accorded an even greater degree of deference. The Secretary's regulations are supported by the terms of the statute, its legislative history, and settled legal principles. Plaintiff's claim that Congress sanctioned the monetary arrangement whereby Cuba will reap \$6.5 in much needed royalty payments to help finance the 1991 Games must therefore fail.

ABC's alternative argument that its business proposal falls within a general or specific "license" from Treasury is also unavailing. The Office of Foreign Assets Control (OFAC), exercising its broad discretion, has established exceptions to the Cuban embargo, and interprets them as not including transactions involving the payment of royalties or rights fees. Further, the Executive Branch, through OFAC, has stated that the granting of a specific license for ABC's monetary arrangement would undermine the interests of the United States.

This Court should therefore reject ABC's request that the Court intrude in this delicate area of foreign affairs -- an area entrusted almost exclusively to the Executive -- to order relief that is in direct contradiction to the economic sanctions program. OFAC has properly imposed only a narrow prohibition on ABC based on overriding foreign policy concerns, which leaves the plaintiff network

numerous options, including payments to a blocked account, coverage of the games on a non-exclusive basis, and acquisition of videotapes of the games for broadcast in the United States. What ABC cannot do, consistent with TWEA and foreign policy needs, is pay millions of dollars to a Cuban entity under the circumstances presented here.

#### BACKGROUND

##### 1. Trading with the Enemy Act

For nearly three decades the United States has not had normal diplomatic or economic relations with Cuba, a country that has persistently supported armed violence and terrorism and has pursued objectives inimical to the interests of the United States and its allies. See Declaration of R. Richard Newcomb, Director of OFAC (Newcomb Decl.), ¶¶ 4-5 (exhibit 1); Declaration of Robert M. Kimmitt, Undersecretary of State for Political Affairs (Kimmitt Decl.), ¶ 2 (exhibit 2). In February 1962, following the expropriation of United States property in Cuba and other hostile acts by the Castro regime, President Kennedy imposed an embargo on all trade with Cuba pursuant to his authority under the Trading with the Enemy Act. Proclamation 3447 of February 3, 1962, 27 Fed. Reg. 1085 (1962), 3 C.F.R. 1959-1963 Comp., p. 157.

For nearly 75 years, Congress has recognized the need for the United States to be able to utilize specific economic powers in relation to its conduct of foreign affairs. Section 5(b) of TWEA, which is the statutory basis of the Cuban embargo, originally authorized the use of specified economic powers only during times of war. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411. In 1933, those powers were extended to times of peacetime national emergency. Act of March 9, 1933, ch. 1, 48 Stat. 1. The 1977 International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, et seq. (IEEPA), confined the President's use of section 5(b)

economic powers to periods of war. However, an uncodified provision of IEEPA "grandfathered" the President's authority under section 5(b) with respect to countries for which financial and trade transactions were then subject to embargo, including Cuba. Pub. L. No. 95-223, § 101(b). Pursuant to this authority, Presidents have annually since 1978 determined that it is in the national interest to continue the exercise of emergency powers with respect to Cuba. See, e.g., 54 Fed. Reg. 37,089 (Sept. 7, 1989).

## 2. The Cuban Assets Control Regulations

In July 1963, the Secretary of the Treasury (the Secretary) promulgated the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (1963), pursuant to his authority under TWEA.<sup>1</sup> Contrary to ABC's suggestion,<sup>2</sup> these regulations impose a comprehensive economic embargo by prohibiting all unlicensed transactions, either direct or indirect, between persons subject to the jurisdiction of the United States and Cuba or Cuban nationals. 31 C.F.R. §§ 515.201(b), 515.305, 515.310, 515.311. The general prohibition against economic transactions with Cuba is very broad and prohibits, for example, transactions incident to travel to and within Cuba, the sale of all goods and services, and banking transactions. Newcomb Decl., ¶ 8.

As an exception to the general prohibition of section 515.201, the Secretary's regulations permit the licensing by Treasury of otherwise prohibited

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<sup>1</sup> By Executive order, the President has delegated his authority under the TWEA to the Secretary of the Treasury who, in turn, has delegated his authority to the Office of Foreign Assets Control of the Department of the Treasury. E.O. No. 9193, 3 C.F.R. §§ 1174, 1175 (1942); Treasury Dep't Order No. 128 (Rev. 1, Oct. 15, 1962), now Order No. 105-01 (1979).

<sup>2</sup> ABC, in its Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (P's Mem.), suggests that the economic sanctions program against Cuba is limited largely to "commercial dealings," to the exclusion of television and radio broadcasts. P's Mem. at 3.

transactions. Such transactions may be authorized by either a "general" license or a "specific" license. See 31 C.F.R. §§ 515.801(a)-(b) (describing licensing procedures). The Secretary has, however, expressly reserved the right

to exclude from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof.

31 C.F.R. § 515.503.

The Treasury Department has provided for general licenses which authorize certain judicial proceedings with respect to property of designated nationals (31 C.F.R. § 515.504), payments to "blocked" accounts in domestic banks (31 C.F.R. § 515.508),<sup>3</sup> the purchase and sale of certain securities (31 C.F.R. § 515.513), all transactions incident to the use of satellite channels for the transmission of television news and news programs originating in Cuba (31 C.F.R. § 515.542(a)), and travel transactions for the purpose of "gathering news, making news or documentary films . . . ." (31 C.F.R. § 515.560(a)(1)(ii)).<sup>4</sup>

Specific licenses, by contrast, are issued by Treasury on a case-by-case basis for specific transactions, such as the importation of Cuban origin goods claimed by the importer to be a bona fide gift (31 C.F.R. § 515.544(b)), payment to a surviving spouse from a blocked bank account of a Cuban decedent (31 C.F.R.

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<sup>3</sup> By regulation, "blocked account" is defined as follows:

an account in which any designated national has an interest, with respect to which account payments, transfers, or withdrawals or other dealings may not be made or effected except pursuant to an authorization or license authorizing such action.

31 C.F.R. § 515.319.

<sup>4</sup> General business and tourist travel is expressly excluded from this license. 31 C.F.R. §§ 515.206(e), 515.560(a)(3).

§ 515.550), and certain communications-related transactions not otherwise authorized under the general license described above, 31 C.F.R. § 515.542(c).<sup>5</sup>

3. The 1988 Amendment to TWEA

In 1988, through section 2502(a)(1) of the Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, 102 Stat. 1371 (1988 Amendment), Congress again amended section 5(b) of TWEA to provide, in pertinent part, as follows:

(b)(4) The authority granted to the President in this subsection does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials, which are not otherwise controlled for export under section 5 of the Export Administration Act of 1979 or with respect to which no acts are prohibited by chapter 37 of title 18, United States Code.<sup>6</sup>

In response, the Secretary amended the Foreign Assets Control Regulations and Cuban Assets Control Regulations. 54 Fed. Reg. 5229, 5231, 5233 (Feb. 2, 1989), to be codified at 31 C.F.R. Parts 500 and 515. Paralleling the statute, the amended regulations exempt from prohibition or regulation "[t]he importation from any country, and the exportation to any country, whether commercial or

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<sup>5</sup> Section 515.542(c) provides:

Specific licenses may be issued on a case-by-case basis for transactions incident to the receipt or transmission of communications between the United States and Cuba, other than communications covered by paragraph (b) of this section. Specific licenses are generally issued for such transactions as entry into traffic agreements to provide telephone and telegraph services, provision of services, and settlement of charges under traffic agreements.

<sup>6</sup> Section 5 of the Export Administration Act of 1979 authorizes the President to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States" for national security purposes. 50 U.S.C. App. § 2404(a)(1). Title 18 of chapter 37 authorizes the President to prohibit or censor acts relating to espionage.

otherwise, of informational materials . . . ." 31 C.F.R. § 515.206(a). Amended section 515.545(a) authorizes "[a]ll financial and other transactions directly incident to the physical importation or exportation of informational materials . . . ." 54 Fed. Reg. 5234 (Feb. 2, 1989). Amended section 515.443(a) states that "informational materials" includes "publications, films, posters, phonograph records, photographs, microfilms, tapes, and other informational articles," including certain specified tangible materials. But "[i]ntangible items such as telecommunications transmissions" are specifically excluded from the definition of "informational materials." 31 C.F.R. § 515.332(b)(2) (emphasis added).

The amended regulations also provide that while the importation and exportation of informational materials from any country are exempt from the Foreign Assets Control prohibitions, "transactions related to informational materials not fully created and in existence at the date of the transaction" are not authorized. Id. at § 515.206(c). These prohibited transactions include "payment of advances for informational materials not yet created and completed, provision of services to market, produce or coproduce, create or assist in the creation of informational materials . . . ." Id.<sup>7</sup>

#### 4. Factual Background

The specific factual background to this case is set forth in the Newcomb Declaration at ¶¶ 18-23, and is incorporated herein. In brief, OFAC met several times with representatives of ABC in May and June of 1989, to discuss ABC's

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<sup>7</sup> In addition, OFAC's amended regulations provide several examples of transactions permissible under the new regulations. These examples include the shipment of book copies to Cuba; exportation of a single master copy of a Cuban motion picture to the United States for distribution and showing in the United States; and contracting to purchase and import preexisting recordings by a Cuban musician or to copy the recordings in the United States, with a percentage of income received to be paid to a Cuban party. 31 C.F.R. § 515.206.



proposal to broadcast the 1991 Pan American Games. Newcomb Decl., ¶ 18. ABC was proposing to pay approximately \$8.7 million to the Pan American Sports Organization (PASO) for exclusive rights to broadcast the games from Havana, Cuba, which would involve a payment of approximately \$6.5 million to a Cuban entity. Id.

In June 1989, ABC filed a license application for this proposed transaction. Id., ¶ 19. ABC later withdrew its application. Id. By letter dated November 15, 1989, ABC requested OFAC's concurrence that pursuant to the 1988 Amendment, ABC did not need a license to conduct its proposed transaction and also requested that, if necessary, OFAC grant it a specific license. Id. By letter dated December 1, 1989 (Exhibit 5 to Lulla Decl.), Director Newcomb advised ABC that a license was required and that ABC could obtain a specific license authorizing ABC to procure the United States broadcast and exhibition rights to the 1991 Games on the condition that any royalty payment to Cuba be made into a blocked account. Id. at ¶ 21. ABC could also avail itself of the general license for news gathering by providing reports or documentaries of or information about the Games and related events available to the media on a non-exclusive basis and not involving the payment of rights or royalties. Id. Finally, ABC was advised that under the 1988 legislation, ABC could acquire videotapes of the Games, including from a Cuban source, which could then be broadcast by ABC. Id.

#### ARGUMENT

- I. THE EXECUTIVE BRANCH VALIDLY EXERCISED ITS SUBSTANTIAL AUTHORITY TO IMPOSE ECONOMIC SANCTIONS AGAINST CUBA BY INTERPRETING THE 1988 AMENDMENT TO TWEA AS AFFECTING ONLY TANGIBLE INFORMATIONAL MATERIALS IN BEING

OFAC has interpreted the 1988 Amendment as authorizing only a specific, narrow range of transactions involving tangible, informational materials in

being. As discussed below, this interpretation by the Executive Branch exercising its foreign policy authority is entitled to the utmost deference, is supported by the language of the statute, and is reinforced by the overall statutory scheme and the legislative history, which documents Congress' intent in the 1988 Amendment to codify OFAC's treatment of informational materials as tangible, products in being in the Libya and Nicaragua sanctions programs.

A. The Executive Branch Acted At The Very Apex Of Its Authority And Is Entitled To Substantial Deference

In considering this challenge to OFAC's interpretation of the 1988 Amendment to TWEA, it must be remembered that when OFAC determined that ABC's proposal to pay nearly \$9 million to acquire the exclusive rights to broadcast the 1991 Pan American Games would be in violation of the sanctions program and contrary to United States foreign policy, it acted at the apex of its authority in the conduct of foreign relations.<sup>8</sup> The Executive Branch's authority to make and implement foreign policy is a "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). Accordingly, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981).

In such cases, courts do not look behind the exercise of the Executive's discretion, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972), except in a case of "clear abuse amounting to bad faith." Mitchell v. Laird, 488 F.2d 611, 616 (D.C.

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<sup>8</sup> See Dames & Moore v. Regan, 453 U.S. 654, 668 (1984); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J. concurring); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); American Ass'n of Exporters & Importers v. United States, 751 F.2d 1239 (Fed. Cir. 1985).

Cir. 1973). And where, as here, a litigant seeks to enjoin a particular exercise of the Executive's foreign policy authority, courts are particularly loathe to intrude into the "core concerns of the executive branch." Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978).

Congress also, in the foreign affairs area, "paint[s] with a brush broader than it customarily wields in domestic areas," because of the "changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature . . . ." Zemel v. Rusk, 381 U.S. 1, 17 (1965). Congress therefore ordinarily refrains from narrow, defined standards by which the Executive is to be governed in recognition of the fact that "the form of the President's action -- or, indeed, whether he shall act at all -- may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive . . . ." United States v. Curtiss-Wright Corp., 299 U.S. at 321. Accord American Ass'n of Exporters and Importers v. United States, 751 F.2d at 1248 ("[i]n the area of international trade, 'intimately involved in foreign affairs,' 'Congressional authorizations of presidential power should be given a broad construction and not 'hemmed in' or 'cabined, cribbed, or confined' by anxious judicial blinders'" (citations omitted)).

The authority and deference accorded the Executive under TWEA are extensive, and the judiciary has repeatedly recognized that its role is quite circumscribed. See Dames & Moore v. Regan, 453 U.S. at 672; DeCuellar v. Brady, 881 F.2d 1561, 1570 (11th Cir. 1989) (OFAC's approach under the Cuban Assets Control Regulations entitled to "great deference"); Teague v. Regional Comm'n of Customs, 404 F.2d 441, 445 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969) (OFAC's regulations

"contribute to the furtherance of a vital interest of the government."); Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 109 (2d Cir.), cert. denied, 385 U.S. 898 (1966) (determination of national emergency under section 5 of TWEA is "peculiarly within the province of the chief executive"). The authority delegated by Congress to the President under TWEA is "consistent with the President's constitutionally vested role as the nation's authority in the field of national affairs . . . the President commands all the political authority of the United States." Miranda v. Secretary of Treasury, 766 F.2d 1 (1st Cir. 1985). See also Walsh v. Brady, No. 89-112, slip op. at 7 (D.D.C. Nov. 1, 1989) (Exhibit 3) ("it is obviously not this Court's function to usurp the authority of the Secretary" in administering the Cuban embargo).

This judicial deference is confirmed by the Supreme Court's continued recognition that the success of economic sanctions programs requires broad executive authority and administrative flexibility to adjust the program as the diplomatic and national security situation changes. Thus, in cases involving World War II TWEA programs regulating the right of persons subject to United States jurisdiction to engage in a broad range of property transactions, the Supreme Court upheld the Executive's actions and interpreted the statute as indicating a "congressional purpose to put control of foreign assets in the hands of the President . . . so that there might be a unified national policy in the administration of the Act." Propper v. Clark, 337 U.S. 472, 493 (1949). See also Dames & Moore v. Regan, 453 U.S. at 673; Zittman v. McGrath, 341 U.S. 446, 463-64 (1951); Lyon v. Singer, 339 U.S. 841 (1950). As the Supreme Court noted in Dames & Moore v. Regan, the legislative history of TWEA and the cases interpreting it "fully sustain the broad authority of the Executive when acting under this congressional grant of power." 453 U.S. at 672.

In this case, the Treasury Department exercised its foreign affairs authority under TWEA. Accordingly, the Court must be very wary of accepting ABC's invitation to intrude into the domain of the political branches.<sup>9</sup> A ruling by the Court contrary to OFAC's interpretation would raise the very problem Congress sought to avoid -- conflicting voices speaking for the United States in the international arena. See Curtiss-Wright Corp., 299 U.S. at 320.

B. The Plain Language Of The 1988 Amendment Supports OFAC's Interpretation

1. Informational Material As Used In The 1988 Amendment Means Only Tangible Products In Being.

Plaintiff here argues that OFAC's interpretation of the term "informational materials" in the 1988 Amendment is plainly erroneous. The dispute centers on whether Congress intended to thereby authorize all transactions with Cuba that are arguably afforded some protection by the First Amendment. ABC takes issue with OFAC's interpretation limiting the scope of the 1988 Amendment to its literal language, *i.e.*, tangible products in being that are in existence and informational in nature. See 31 C.F.R. § 515.332(a)(1) (informational material means "informational articles, including tangible items"); *id.* at § 515.322(b)(2) ("'informational materials' does not include . . . [i]ntangible items such as telecommunications transmissions."); *id.* at § 515.206(c) (transactions related to informational materials not "fully created and in existence at the date of the transaction" are not authorized).

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<sup>9</sup> Even if this case did not involve foreign affairs, OFAC's implementation of a statute it is charged with administering would be entitled to substantial deference. See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984); Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 98 n.8 (1983); Zemel v. Rusk, 381 U.S. at 11; Udall v. Tallman, 380 U.S. 1, 16 (1965).

OFAC's interpretation is fully consistent with the clear language of amended section 5(b) of TWEA,<sup>10</sup> which removes from the Executive under that Act only the authority to regulate or prohibit "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials." (emphasis added). The 1988 Amendment is striking in the specificity with which it defines the category of transactions that may now be carried out with all countries, including Cuba, consistent with Congress' practice to very narrowly draw limits on the Executive's foreign policy powers.<sup>11</sup> One of the most salient factors relating to the instant dispute is Congress' use of the term "materials," which denotes something that is a physical or corporal work in existence.<sup>12</sup> Because there is no congressional indication to the contrary, the ordinary meaning of "material" should prevail. See INS v. Phinpathya, 464 U.S. 183, 189 (1984); Russello v. United States, 464 U.S. 16, 21 (1983). OFAC's

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<sup>10</sup> It is a basic tenet of statutory construction that the plain language of the statute controls. See, e.g., 2A Singer, Sutherland Statutory Construction, § 46.01 (rev. 4th ed. 1984); Regan v. Wald, 468 U.S. 222, 237 (1984) ("clear, generic meaning" controls); Brastex Corp. v. Allen Internat'l, Inc., 702 F.2d 326, 330-331 (2d Cir. 1983).

<sup>11</sup> While Congress sweeps very broadly in conferring foreign policy powers on the Executive, pp. 9-12, supra, as a necessary corollary, congressional limitations on the Executive's foreign policy powers must be narrowly construed. Id.

<sup>12</sup> This conclusion is supported by the commonly accepted meaning of the word "material," as illustrated by its dictionary definition:

the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made . . . (2): the finished stuff of which something physical . . . is made . . .  
. the whole or a notable part of the elements or constituents or substance of something physical . . . .

Webster's Third New International Dictionary 1392 (1981).

interpretation, as incorporated in its regulatory amendments, embodies this ordinary meaning.

OFAC's interpretation of the 1988 Amendment as encompassing only tangible products in being is further buttressed by the internationally accepted definition of "telecommunication" as derived from the International Telecommunication Convention (Nairobi 1982):

Any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.

See Exhibit 4 (attached). In the 1988 Amendment, Congress used "informational materials" as the concluding term in a list of physical objects, although it had available to it a broader, internationally recognized term applicable to electronic signals used to convey information. In short, Congress could have, but did not, evidenced an intent to remove from TWEA the authority to regulate the importation or exportation of telecommunications in the context of economic sanctions programs.

ABC's interpretation, by contrast, that "informational material" includes "ideas and information 'protected by the First Amendment,'" P's Mem. at 17, is not supported by the plain language of the statute. If Congress had intended to sweep this broadly it could easily and explicitly have done so, by providing that the Secretary no longer has authority under TWEA to prohibit the importation or exportation of any ideas and information protected by the First Amendment or, at a minimum, that the Secretary no longer has the authority to regulate telecommunications transmissions. That Congress did not do so but, instead, delineated a narrow category of transactions exempt from the embargo, which do not include telecommunications transmissions, indicates that Congress intended

the Executive to retain its discretion and flexibility in implementing foreign policy in the vast majority of transactions.<sup>13</sup>

It necessarily follows that ABC's argument that the regulations impermissibly regulate protected speech in contravention of First Amendment interests the 1988 Amendment was allegedly intended to protect, P's Mem. at 24-26, cannot succeed.<sup>14</sup> In Walsh v. Brady the court rejected a similar argument that the 1988 Amendment to TWEA also authorized travel to Cuba for the purpose of importing posters, and that the Secretary's interference with that right was contrary to the 1988 Amendment and the First Amendment. The court found that the Secretary's action was not intended "to deny any First Amendment rights inherent in the amendment," slip op. at 5, and characterized the 1988 Amendment as follows:

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<sup>13</sup> ABC's strained and unsupported interpretation calls to mind the Supreme Court's admonition in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976):

"To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another . . . After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Id. at 199 n.19, quoting Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-18 (1944). See also Regan v. Wald, 468 U.S. 222, 236 (1984) (Court refused to construe reference in grandfather clause of IEEPA as freezing then-existing restrictions with respect to Cuba because Congress could easily have done so explicitly, and its failure to do so "indicates that Congress intended the President to retain some flexibility to adjust existing embargoes."); Palestine Information Office v. Shultz, 853 F.2d 932, 937 (D.C. Cir. 1988).

<sup>14</sup> Although ABC's complaint raises a First Amendment claim (§§ 60-70), ABC's summary judgment motion does not address this issue, beyond the one-sentence assertion that the distinctions in the regulations "run afoul of basic constitutional principles, embodied in the First and Fifth Amendments . . . ." P's Mem. at 33. Apparently ABC has conceded that it is not entitled to summary judgment on the First Amendment issue at this time.



The amendment was directed to a perceived need to liberalize regulation of imports of posters and other "informational materials" generally, but there is no indication that Congress intended to affect existing hard currency controls developed for other reasons of national policy governing our relations with a particular country. Thus the Secretary has not interfered with congressional purpose in this situation.

Slip op. at 5-6. This reasoning is equally applicable here.

This conclusion also draws support from the Second Circuit's ruling in Teague v. Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), that OFAC regulations which required addressees of publications originating in North Vietnam and mainland China to obtain licenses to gain possession of the publications did not violate the First Amendment because "restricting the flow of information or ideas is not the purpose of the regulations." 404 F.2d at 445. To the extent the regulations resulted in a restriction on the flow of information or ideas, it was "only incidental" to their proper purpose of "restricting the dollar flow to hostile nations." Id.

Here, also, the purpose of the challenged regulations, which do not permit payments for the exclusive rights to broadcast sporting events, is to restrict the flow of hard currency to Cuba. Congress did not repudiate this goal in the 1988 Amendment; it simply carved out limited exceptions which do not include ABC's proposed business transaction. Thus, the fact that the proposed transaction remains regulated does not interfere with the purpose of the 1988 Amendment (or the First Amendment).<sup>15</sup>

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<sup>15</sup> ABC's argument is, in any event, misguided. There is no issue here as to whether televised sporting events are, in general, protected by the First Amendment, or even whether the sporting event ABC seeks to broadcast is protected by the First Amendment. Nor is there an issue as to whether the First Amendment protects the listener, which ABC does not represent, as well as the speaker. Cf. P's Mem. at 24. Moreover, even if the regulation of speech were at issue here, which it is not because the regulations inhibit action and not speech and, therefore, do not implicate First Amendment interests, Regan v. Wald, 468 U.S. at (continued...)

Moreover, ABC's interpretation sweeps so broadly that the trade embargo would lack any meaningful substance. See United States v. Fuentes-Coba, 738 F.2d 1191, 1195 (11th Cir. 1984), cert. denied, 369 U.S. 1213 (1985). For example, as Undersecretary Kimmitt has explained, if payments for telecommunications were no longer subject to regulation under TWEA, "the Cuban government might well be able to accumulate earnings which could be used for objectives contrary to United States Interests. Kimmitt Decl., ¶ 9. The United States presently holds approximately \$47.5 million in blocked accounts, which would otherwise have gone to Cuba for telecommunications transactions. Newcomb Decl., ¶ 12.

ABC argues that there is no meaningful distinction between tangible and intangible informational materials because both involve acquisition of "intangible rights to copy or disseminate the material," for which payments are authorized under OFAC's regulations. P's Mem. at 18. To the contrary, the regulations authorize payments to duplicate and show tangible products in being, 31 C.F.R. § 515.206, and payments for the reproduction, translation and other alterations to tangible informational materials, 31 C.F.R. § 515.545(b). These are certainly not payments to obtain "intellectual property rights," P's Mem. at 18, but instead payments to reproduce tangible existing products. As such, they are quite distinct from royalty payments to acquire the right to broadcast an event not yet in being, as ABC seeks with respect to the 1991 Pan American Games.

In this same vein, ABC argues that OFAC's distinction between tangible and intangible informational materials is untenable because the 1988 Amendment references the Export Administration Act, which does not distinguish between

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15(...continued)  
242, Zemel v. Rusk, 381 U.S. at 16, the Supreme Court has never held that speech cannot be regulated in any way. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

tangible and intangible information. P's Mem. at 20. Whether or not the Export Administration Act contains this distinction, Congress' clear intent in the 1988 Amendment was to leave with the Executive the discretion and authority to administer the Export Administration Act with respect to all transactions with embargoed countries.

OFAC properly exercised its discretion in the instant case with respect to telecommunications transmissions which, unlike tangible materials, "by their nature, are not administratively susceptible" to control for national security purposes. Letter of December 1, 1989, from R. Richard Newcomb (Newcomb Letter) (Exhibit 5 to Lulla Decl.). The Export Administration Act and 18 U.S.C. chapter 37 require the application of a content-based test to determine whether exportation of particular information is prohibited. It is impossible to preview the content of live telecommunications or works not in being to determine whether they meet these content-based tests. Accordingly, if the 1988 Amendment were construed to include telecommunications transmissions, it would not be feasible to determine whether a given broadcast is in compliance with the Export Administration Act and 18 U.S.C. chapter 37 and, therefore, within the exemption for information materials. See Newcomb Decl., ¶ 11.

2. OFAC's Interpretation Of The 1988 Amendment Is Reinforced By The Principle Of Eiusdem Generis.

OFAC's interpretation of the term "informational material" is also reinforced by the statutory construction principle of eiusdem generis, under which general words following specific words are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Singer, Sutherland Statutory Construction, § 47.17 (rev. 4th ed. 1984) (footnotes omitted). "[H]ad the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular

words." Id. (footnote omitted). See also General Electric Co. v. Occupational Safety & Health Review Comm'n, 583 F.2d 61, 65 (2d Cir. 1978); Di Leo v. Greenfield, 541 F.2d 949, 954 (2d Cir. 1976) (principle of ejusdem generis reveals statute's "obvious intent" and scope); Schwartz v. Romnes, 495 F.2d 844, 849 (2d Cir. 1974).

Amended section 5(b) of TWEA specifies a class of informational materials, viz., "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes . . . .," whose commonly shared trait is one of corporal being, i.e., all are tangible and all are presently existing (or "in being"). Live television broadcasts, by contrast, consist of electronic signals which do not have a corporal form and therefore are not tangible.<sup>16</sup>

ABC's contrary argument that other statutes view "informational materials" as having "independent meaning" (rather than a phrase which describes specific enumerated items), i.e., "anything that contains ideas or information protected by the First Amendment," P's Mem. at 16, is premised on statutes which address informational material in an entirely different context.<sup>17</sup> For example, the Public Telecommunications Financing Act of 1978, cited at p. 16 n. 7 of P's Mem., specifically references "informational material that may be transmitted by means of electronic communications." 47 U.S.C. § 397(14) (1982). As this statute illustrates, when Congress intends to include electronic communications it does

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<sup>16</sup> According to ABC this shared characteristic is "irrelevant." P's Mem. at 18. To the contrary, as the Newcomb Declaration makes clear, the distinction between tangible and intangible embraces OFAC's practice under other sanctions programs and substantially furthers United States foreign policy interests because it provides an effective means of preventing the flow of hard currency to Cuba. Newcomb Decl., ¶¶ 12, 15, 16.

<sup>17</sup> ABC's reliance on international trade cases (P's Mem. at 16 n.8) is equally misplaced. The Hasbro case cited by ABC involved an interpretation of the term "dolls" as a tariff term, not the interpretation of "informational material."

so explicitly. But see Cernuda v. Heavey, 720 F. Supp. 1544, 1550 n.12 (S.D. Fla. 1989).<sup>18</sup>

3. The "Work In Being" Distinction Is Consistent With The Language Of The 1988 Amendment.

ABC also takes issue with the "work in being" distinction set forth at 31 C.F.R. § 515.206(c) (exemption for informational materials does not include "transactions related to informational materials not fully created and in existence at the date of the transaction"). P's Mem. at 21. The work in being distinction is fully supported by the language of the 1988 Amendment, which authorizes only a limited number of transactions relating to tangible products, and by the goal of the Amendment, which is to permit physical importation and exportation of publications and other similar items. The commissioning of a work not yet in being and which may, in fact, never come into being, is not a transaction related to the importation or exportation of materials and necessarily involves countless transactions in which Cuban nationals have an interest and which would realize hard currency for Cuba, whether or not a trade transaction in the end product occurs. Newcomb Decl., ¶ 16. There is no indication that this was within the legislative intent. Indeed, it directly contradicts OFAC's practice with respect to Nicaragua and Libya, which Congress

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<sup>18</sup> Although the Cernuda court refused to apply the principle of eiusdem generis to the 1988 Amendment, it did so in an entirely different context than the instant case. The issue in Cernuda was whether the 1988 Amendment applied to original works of art which were tangible products in being. In concluding that it did, the court expressly noted that "this petition presents only the question of whether paintings are exempt from the TWEA." 720 F. Supp. at 1553 n. 15. Here, by contrast, the issue is whether intangible telecommunications transmissions not yet in being are exempted from TWEA by the 1988 Amendment.

specifically referenced in codifying similar exemptions from the Cuban sanctions program.<sup>19</sup>

Under ABC's interpretation, the Executive would be powerless to stop the flow to Cuba, or any other embargoed country such as Libya or Vietnam, of substantial amounts of hard currency under the guise that the money is being paid to commission a work of art or other idea arguably protected by the First Amendment, even if a final product is never ultimately realized. Such payments would run totally contrary to established practice regarding Nicaragua and Libya, and to the underlying purpose of the economic sanctions program -- to deprive Cuba of hard currency used to pursue purposes decidedly not in the interests of the United States, such as widespread support for armed violence, terrorism and destabilizing South America. Kimmitt Decl., ¶ 2; Newcomb Decl., ¶¶ 5-7.

ABC argues that the "work in being" restriction is not applicable to the transaction it has proposed -- the live broadcast of the 1991 Pan American games -- because "ABC has no intention of 'staging' the 1991 Games." P's Mem. at 21. But ABC's own statements belie this assertion. In its complaint ABC asserts that, as a condition of acquiring the right to televise the 1991 Games, the Pan American Sports Organization (PASO) requires "that the rights fee be paid to it in a form that will enable it to use the funds and remit a portion to Cuba in order to defray the costs of the Games."<sup>20</sup> Complaint, ¶ 42 (emphasis added). See also Affidavit of Robert H. Helmick, ¶¶ 8-9 (attached to P's Mem.) (same);

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<sup>19</sup> As discussed infra at 25, the regulations governing the Nicaraguan and Libyan economic sanctions programs exempt informational materials and publications from the import restriction and, in both cases, the exemption is limited to a group of tangible, specific products which do not include telecommunications transmissions.

<sup>20</sup> ABC has also rejected OFAC's proposal to license the transaction if the payments are made into a blocked account, because the money would not be available to help finance the Games. See Rana Decl., ¶ 7

Declaration of Mario Vazquez Rana, ¶ 6 (attached to P's Mem.) (same). The payments ABC seeks to make to Cuba will, by ABC's own description, not be used to import or export informational material but, instead, will be used to help bring into being a sporting event that does not yet exist and thereby free Cuban currency for other purposes. As such, those payments are contrary to OFAC's regulations and the language and intent of the 1988 Amendment.<sup>21</sup>

C. OFAC's Regulations Are Consistent With  
The Underlying Statutory Scheme

OFAC's interpretation is also consistent with the statutory scheme, of which the 1988 Amendment is but one component. Section 5(b) of TWEA gives the President (and through him the Treasury Department) the authority to regulate property transactions with Cuba. This authority is consistent with the Executive's sweeping powers to conduct foreign affairs. Given the significant foreign relations concerns at stake here, the Court should reject ABC's interpretation of the 1988 Amendment, which would unduly hamper the Executive and collide head-on with the frequent admonition that courts not read restrictively a legislative delegation to the Executive in the foreign affairs area.

Congress did not through the 1988 Amendment evidence general disagreement with the manner in which the Executive was exercising its authority under TWEA with respect to Cuba. Rather, Congress merely indicated its intent to make available with regard to Cuba and other embargoed countries the current practice regarding certain "informational materials" in the Libyan and Nicaraguan economic

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<sup>21</sup> ABC suggests that payment for magazines by subscription, permitted under the pre-amended regulations, constituted payment for a work not in being and served as a precedent for ABC's proposed payment to Cuba in connection with the production of the Games. P's Mem. at 21. Payment in advance for a copy of a magazine, however, is not analogous to ABC's payment. More analogous examples would include payment to create the publishing company and payments to writers to create the articles to be included in the magazine, which are transactions that have clearly been prohibited throughout the Cuban embargo.

sanctions programs. H.R. Rep. No. 40, 100th Cong., 1st Sess., at 113 (1987). See pp. 24-25, infra. Thus, Congress did not repudiate the underlying foreign policy objectives of the economic sanctions program, but simply balanced the interest in a free flow of ideas against the interest in denying certain countries hard currency and concluded that a limited number of transactions should be exempted from the embargo.<sup>22</sup> Indeed, Congress directed in the same legislation that a report be prepared on "appropriate recommendations for improving the enforcement of restrictions on the importation of articles from Cuba." Pub. L. No. 100-418, § 1911. The 1988 Amendment should therefore not be construed as significantly limiting OFAC's authority under TWEA, as plaintiff suggests. See Walsh v. Brady, slip op. at 5 (Exhibit 3) (recognizing a "wide gap between Congress' desire to encourage importation of . . . "informational materials" in order to expose the ideology they convey, on the one hand, and totally eliminating all special Cuban currency restrictions developed by the President for larger, more immediate policy reason, on the other."). Cf. Real v. Simon, 510 F.2d 557, 560 (5th Cir.), reh'g denied, 514 F.2d 738 (1975) (construing the Foreign Assistance Act to bolster, not narrow, the Executive's

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<sup>22</sup> ABC quotes out of context a passage from the government's brief in Walsh v. Brady, No. 89-1112, (D.D.C. Nov. 1, 1989), and argues that the government thereby conceded that Congress intended to establish "an unqualified right to import any informational material not involving national security." P's Mem. at 22, 23. This is patently untrue. The government did not state in Walsh that Congress had "thereby expressed its intent that [interests in a free flow of ideas] be accommodated," as ABC misstates (id. at 23), but that Congress had expressed its intent that "certain interests" be accommodated. See Exhibit 14 to Busby Declaration (attached to P's Mem.) (emphasis added). Moreover, Judge Gesell concluded in Walsh that Congress did not intend to affect existing hard currency controls through the 1988 Amendment and expressly rejected Walsh's argument, which ABC makes here, that Congress intended to impose no limit on the amount of currency that could be spent in Cuba with respect to transactions now authorized under the 1988 Amendment. Slip op. at 5, 6.



powers to deal with Cuba in the conduct of foreign affairs "[a]bsent clear and unequivocal evidence" to the contrary).

D. OFAC's Interpretation Is Supported By  
The 1988 Amendment's Legislative History

The legislative history of the 1988 Amendment also supports OFAC's interpretation. The House Committee Report indicates that the purpose of the amendment to section 5(b) of TWEA was to "codify current practice under the International Emergency Economic Powers Act, as in the recent embargoes of trade with Nicaragua and Libya, of exempting information materials and publications from import restrictions." H.R. Rep. No. 40, 100th Cong., 1st Sess., at 113 (1987).<sup>23</sup> Significantly, the referenced exemption practices -- as reflected in the regulations implementing the Nicaraguan and Libyan economic sanctions programs -- are just as specific and limited and are framed in substantially the same language as the 1988 Amendment to TWEA.

The applicable Nicaraguan exemption is limited to importation of "Nicaraguan publications, including books, newspapers, magazines, films, phonograph records, tape recordings, photographs, microfilm, microfiche, posters and similar materials." 31 C.F.R. § 540.536 (1988) (emphasis added). The applicable Libyan exemption is equally circumscribed. See 31 C.F.R. §§ 550.201 (authorizing importation of "publications and materials imported for news publication or news broadcast dissemination"); 550.507 (authorizing the importation of Libyan publications); 550.411 (defining "publications" as including "books, films,

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<sup>23</sup> The 1988 Amendment was derived largely from a predecessor bill, H.R. 3, which was never enacted, see 1988 U.S. Code Cong. & Admin. News 1547, but which provides the legislative history of the 1988 Amendment. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-410, § 2; 1988 U.S. Code Cong. & Admin. News 1119. The conference report for H.R. 3 provides little insight into the interpretation of the amendment to section 5(b) of TWEA, beyond reciting the bare words of the statute. See H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1872.

phonograph records, tape recordings, photographs, microfilm, microfiche, and posters"). The lists of exempt items enumerated in the 1988 Amendments are nearly identical to the definition of "publications" authorized for importation under the Nicaraguan and Libyan Trade Control Regulations, except for the substitution in the 1988 Amendment of "other informational materials" for the phrase "similar materials" (31 C.F.R. §§ 540.536; 550.411(a)).

Moreover, the definitions of exempt items under the sanctions programs referenced by Congress as a model do not encompass telecommunications transmissions, which are authorized separately in 31 C.F.R. § 540.542 (Nicaragua) and 31 C.F.R. § 550.510 (Libya). Thus, the legislative history supports OFAC's interpretation that Congress "codified" the standing distinction made in OFAC practice between tangible "publications" or "informational materials" on the one hand, and intangible "telecommunications" on the other.

ABC takes a different view of this legislative history, arguing that because the Libyan and Nicaraguan embargoes are not limited to tangible materials the congressional reference to these practices does not support OFAC's interpretation. P's Mem. at 19. But Congress's reference to OFAC's practice in Libya and Nicaragua was quite specific, viz., the exemption of "information materials and publications from import restrictions." H.R. Rep. No. 40, 100th Cong., 1st Sess., at 113 (1987). As explained above, those exemptions pertain to tangible informational materials; telecommunications, which Congress did not reference, are treated separately.<sup>24</sup>

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<sup>24</sup> ABC's citations to the regulations governing the Libya and Nicaragua embargoes also reinforce this point. For example, ABC cites to 31 C.F.R. § 550.202, which prohibits the exportation to Libya of "goods, technology (including technical data or other information) or services," P's Mem. at 19. As this regulation illustrates, technology and services are treated separately from publications and other tangible informational material.

While discounting the impact of the legislative history supporting OFAC's interpretation, ABC relies on a House Foreign Affairs Committee Report of significantly less import. P's Mem. at 14. That Report simply notes that the American Bar Association's (ABA) House of Delegates had approved "the principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment." H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 3, at 113 (1987). This scant comment cannot provide the basis for eviscerating the economic sanctions program in Cuba. First, the House Report merely noted the ABA's position, without suggesting that it actually intended "informational material" under the 1988 Amendment to include all protected First Amendment activity. Second, as discussed above, Congress employed "informational materials" to describe a more restricted category than all materials protected by the First Amendment.<sup>25</sup>

In sum, the 1988 Amendment to TWEA does not authorize the monetary payments which ABC seeks to make regarding the 1991 Games. ABC's ability to make a sizeable indirect payment to Cuba is dependent, instead, on ABC's eligibility for an OFAC license.

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<sup>25</sup> Further, the First Amendment does not mandate that the regulations exempt all arguable First Amendment activity. Regulations that have an incidental effect on First Amendment interests can be justified by sufficiently important governmental interests in the non-speech elements of conduct. United States v. O'Brien, 391 U.S. 367, 376 (1968). Thus, ABC's citations to cases recognizing that telecasts of sporting events are protected by the First Amendment, P's Mem. at 14 n.5, are not dispositive of this dispute. The rights recognized therein are not absolute, but must yield to legitimate foreign policy needs and goals. See, e.g., Regan v. Wald, 468 U.S. at 242; Teague v. Regional Comm'r, 404 F.2d at 445. Moreover, unlike many of the cases relied on by ABC (e.g., Regan v. Time, Inc., 468 U.S. 641 (1984) (P's Mem. at 14 n.5), the prohibition at issue here is content neutral and therefore does not offend the First Amendment. United States v. O'Brien, 391 U.S. at 376.

II. OFAC PROPERLY REFUSED TO LICENSE ABC'S PROPOSED TRANSACTION WITH CUBA BECAUSE IT WOULD INVOLVE A SUBSTANTIAL PAYMENT OF HARD CURRENCY TO A CUBAN ENTITY

A. OFAC Properly Determined That ABC Does Not Qualify For A License

ABC's asserted "right" to a license to pay nearly \$9 million to acquire the exclusive broadcast rights in the United States to the 1991 Pan American Games is premised on a fundamental misunderstanding about the licensing scheme established by OFAC's regulations and OFAC's practice under that scheme. This is surprising, given ABC's considerable experience as an applicant for and recipient of OFAC licenses for Cuban telecommunications transactions, and the fact that ABC has been granted licenses to broadcast live sporting events based, in part, on the condition that ABC not make any royalty or rights payments. See Newcomb Decl., ¶ 24.

The Secretary's regulations authorize certain limited transactions, but only pursuant to a license granted by OFAC. The transactions authorized by the regulations are still within the reach of the embargo program, but are specifically exempted either through a general license contained in the regulations, requiring no application to OFAC by those meeting the regulations' criteria, or on a case-by-case basis under a specific license, which is a discretionary licensing determination by OFAC upon written application. But, in either case, the Secretary has retained the authority and discretion to exclude "particular persons, transactions or property or classes thereof" from "the operation of any license or from the privileges therein conferred . . . ." 31 C.F.R. § 515.503.

In addition, the Executive retains the discretion to make changes in the regulations, allowing the flexibility required in the conduct of United States

foreign policy. For example, the regulations were changed in 1977 to permit certain travel-related transactions in light of changing relations between Cuba and the United States. See 31 C.F.R. § 515.560 (1977). Another change in foreign policy needs in 1982 required a curtailment of those transactions. See 47 Fed. Reg. 17,030 (April 30, 1982).<sup>26</sup> Thus, any license granted by the Secretary is revocable at will either on a general or specific basis, depending on foreign policy needs. ABC has no absolute "entitlement" to a license particularly where, as here, ABC fails to meet the regulatory requirements for a general license and foreign policy needs militate against granting ABC a specific license.

ABC was advised by OFAC that it did not qualify for a general license as a person traveling for the purpose of news gathering, making news, or documentary films pursuant to 31 C.F.R. § 515.560(a)(1)(ii) for two reasons. See Newcomb Letter, p. 2 (Exhibit 5 to Lulla Decl.). First, the general license for news gathering and filming activities is available only for reports, documentaries or information accessible on a non-exclusive basis and not involving royalties or other rights payments. Id. Because ABC was seeking a license to pay nearly \$9 million as a royalty or rights payment, it did not qualify for a general license. Second, OFAC's practice has been consistently to treat live telecasts of scheduled sporting events as an activity related to entertainment, not as news reporting or news gathering activity. Id. This distinction is well known to ABC from its prior OFAC licensing experience for Cuban sports events, Newcomb Decl.,

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<sup>26</sup> Because these changes, as well as the most recent changes made by OFAC to conform with the 1988 Amendment, involve foreign policy, they are exempt from the notice and comment requirement of the Administrative Procedure Act. See 5 U.S.C. § 553(a)(1). Thus, the Secretary cannot be faulted with failing to provide any justification for the changes to the regulations pursuant to the 1988 Amendment. See P's Mem. at 7.

¶ 24, and has not proven difficult for ABC to comply with in the past. Mr. Newcomb also advised ABC that it could still cover the 1991 Games under the general license by providing reports, documentaries, or information about the Games and related events. Id.

These limitations on the availability of a general license for news gathering are fully justified by the purpose of TWEA and the economic sanctions programs conducted under TWEA. The economic sanctions program is designed to deprive the Cuban economy of hard currency needed to pursue activities contrary to United States interests. By regulation, certain exceptions have been carved out which are as expansive as possible without undermining the purpose of the embargo program. In OFAC's expert judgment, filming and other activities that involve the payment of royalties or rights payments cannot be accommodated without threatening the effectiveness of the embargo. Further, news gathering has been defined by OFAC as broadly as possible within the context of an economic sanctions program. It is well within OFAC's purview to define the scope of a license it created (and can withdraw in the interests of United States foreign policy at any time), particularly where that scope is limited by the overall purpose of the underlying sanctions program.

ABC asks the Court to reject OFAC's interpretation of its own regulations, which it has applied uniformly with respect to ABC and other commercial telecommunications media,<sup>27</sup> Newcomb Decl. at ¶ 24, and substitute a "common perception" regarding the meaning of news.<sup>28</sup> P's Mem. at 28. But OFAC should

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<sup>27</sup> Compare DeCuellar v. Brady, 881 F.2d 1561, 1568 (11th Cir. 1989).

<sup>28</sup> ABC also asks the Court to accept what it contends is a "broad judicial conception of news," P's Mem. at 28. But the cases ABC cites do not involve such a broad judicial conception but, instead, an interpretation and application of state statutes in other contexts. See Ross v. Midwest Communications, Inc., 870 (continued...)

not be required to modify its regulations to reflect ABC's views on what is commonly perceived as news where the limits OFAC has chosen are within its discretion and are designed to best implement the embargo with Cuba.

ABC also relies on what it claims is "longstanding journalistic practice" of obtaining exclusive interviews and stories through the payment of royalties and rights fees. P's Mem. at 30. None of the instances cited by ABC, however, involved the payment of hard currency to a Cuban entity during the existence of an embargo with Cuba and, therefore, none of those prior practices invoked overriding foreign policy needs in the context of an economic sanctions program.<sup>29</sup>

Nor does it fall to ABC to determine whether it is in United States foreign policy interests to authorize the payment by ABC of a substantial sum of money to a Cuban entity to broadcast the 1991 Games. Regardless of how important ABC believes the Pan American Games are and the effect ABC believes its telecast of the Games will have, it is for the Executive to make and implement foreign

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<sup>28</sup> (...continued)  
F.2d 271, 273 (5th Cir.), cert. denied, 110 S. Ct. 326 (1989) (interpreting state tort law under which recovery was based, in part, on showing that the matter publicized was not "of legitimate public concern"); Lerman v. Flynt Distribution Co., 745 F.2d 123 (2d Cir. 1984), cert. denied, 471 U.S. 1054 (1985) (interpreting state right of privacy statute and terms "advertising purposes" and "trade purposes"); Valentine v. CBS, Inc., 698 F.2d 430 (11th Cir. 1983) (involving invasion of privacy claim under state law which required court to determine whether matter in question was of legitimate public or general interest). None of these cases addressed the meaning of "news" in the context of a narrow exemption allowed by regulations in an economic sanctions program administered by the Executive Branch of government.

<sup>29</sup> ABC argues that the limitations have been "invented" just to "prevent ABC from televising the 1991 Games." P's Mem. at 30. But ABC's prior experience with OFAC demonstrates otherwise. While ABC has been permitted in the past to broadcast live sporting events from Cuba, those transactions were licensed on a case-by-case basis by OFAC and the licenses expressly precluded the payment of royalties or rights. Newcomb Decl., ¶ 24. Moreover, OFAC has made clear that its objection to ABC's proposed royalty payment is based on the payment alone. Newcomb Letter, p. 1.

policy. Toward that end, the government has determined that the payment of approximately \$6.5 million to a Cuban entity, whether or not that payment has some relation to producing and broadcasting a "newsworthy" event, conflicts with the goals of the economic sanctions program. ABC has offered no basis to overturn that determination.

B. OFAC's Refusal To Grant ABC A License  
Is Neither Arbitrary Nor Capricious

ABC contends that OFAC's regulations draw "fine distinctions" between permitted and prohibited conduct that are arbitrary and capricious. P's Mem. at 33. To the contrary, the regulations are an attempt to accommodate both United States foreign policy interests and private interests in conducting certain transactions with Cuba, while also incorporating changes mandated by Congress through the 1988 Amendment to TWEA.

As discussed above, the regulations governing news gathering are reasonably related to the purposes of TWEA and the economic sanctions program imposed against Cuba, namely prohibiting the transfer of hard currency to Cuba that can be used for purposes inimical to United States interests. Toward that end, the regulations exclude transactions from the license for news gathering that would require the payment of royalties or rights payments to a Cuban entity to acquire exclusive access to events because they would result in the transfer of hard currency to Cuba. The regulations also provide that no specific license will be granted for:

[p]ayment to Cuba or any national thereof for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in the United States or in Cuba . . . .

31 C.F.R. § 515.565(c). Thus, ABC was denied a license because its proposal "would transfer very substantial sums to Cuba," which Director Newcomb emphasized



was OFAC's "sole concern . . . ." Newcomb Letter, p. 1. This is fully consistent with the fundamental purpose of the economic sanctions program -- denying Cuba hard currency.

Moreover, ABC was given a full explanation of the reasons for the denial of its license request both in writing, see Newcomb Letter, and orally in two meetings with ABC's counsel. Newcomb Decl., ¶ 18. And ABC knew, from prior experience, that the payment of royalties for live sporting events was prohibited. Id., ¶ 24. Hence, this is not a case where the administrator has failed to explain the basis for his determination. Contrast National Wildlife Federation v. Costle, 629 F.2d 118, 133 (D.C. Cir. 1980); Diplomat Lakewood, Inc. v. Harris, 613 F.2d 1009, 1019-23 (D.C. Cir. 1979) (cited at p. 32 n.27 of P's Mem.).

To the extent there are seeming inconsistencies in the regulations, it is due to actions of Congress and not defendants. For example, ABC complains that ABC may import video tapes of the Games but cannot broadcast the games live because that would involve a rights payment. P's Mem. at 32. But ABC is permitted to import tapes because of the 1988 Amendment to TWEA, which removed the Executive's authority to regulate the importation of "informational materials" including "tapes." Likewise, ABC finds an inconsistency in the fact that the United States will send a team to the 1991 Games and that all currency transactions stemming from the team's participation in the Games are authorized. P's Mem. at 33. But any participation will be pursuant to a license (which has not yet been sought) granted by OFAC in consultation with the State Department, consistent with TWEA and foreign policy needs.<sup>30</sup>

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<sup>30</sup> Moreover, it is within the purview of the Administration, not plaintiff, to make policy distinctions. By its participation in the Pan American Games, the  
(continued...)

All that ABC has been prohibited from doing is paying a substantial sum to a Cuban entity to acquire the exclusive broadcast rights to the 1991 Games. ABC can still cover the Games as a news event on a non-exclusive basis, can make a royalty payment into a blocked account and thereby acquire the broadcast rights to the Games, and can acquire videotapes of the Games, resulting in only a minor delay in the Games' broadcast. Indeed, ABC does not represent that it intends to cover the Games live, simultaneously with their occurrence, and it is frequently the case that the broadcast of such entertainment events is delayed until "prime time" to maximize the broadcaster's commercial revenues from advertising and viewership. The narrow prohibition that has been imposed on ABC serves the purpose of the embargo while not unduly restricting ABC, which has available alternatives to convey the same message. Because the prohibition is driven by foreign policy concerns executed by a branch of the government acting at the apex of its power,<sup>31</sup> it is neither arbitrary nor capricious.

#### CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment should be denied and defendants' cross-motion for summary judgment should be granted.

Respectfully submitted,

STUART M. GERSON  
Assistant Attorney General

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<sup>30</sup>(...continued)

United States team acts as an informal good-will ambassador for the United States. ABC, by contrast, is solely a private entity pursuing its own economic interests.

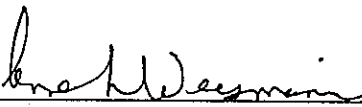
<sup>31</sup> Of note, none of the cases relied on by ABC to support its contrary claim that the regulations are impermissibly underinclusive involve the Executive's exercise of its foreign policy authority.

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CERTIFICATE OF SERVICE

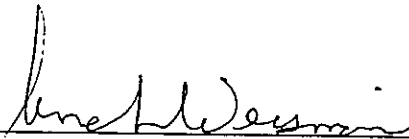
I hereby certify that copies of the foregoing Defendants' Cross-Motion for Summary Judgment, Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, exhibits thereto, Defendants' Statement of Material Facts Not in Genuine Dispute, Defendants' Response to Plaintiff's Statement of Material Facts, and draft Order were served by hand this 2nd day of February, 1990, on the following:

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\_\_\_\_\_  
ANNE L. WEISMANN

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITAL CITIES/ABC, INC.,

Plaintiff,

ORDER

v.

Civil No. 89 Civ. 8006  
(J.E.S.)

NICHOLAS F. BRADY, et al.,

Defendants.

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The Court having considered plaintiff's motion for summary judgment, defendants' opposition thereto and cross-motion for summary judgment, and the entire record herein, it is hereby

ORDERED that defendants' motion be, and hereby is, granted, and that judgment be entered for defendants.

DATED: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITAL CITIES/ABC, INC.,

Plaintiff,

v.

Civil No. 89 Civ. 8006  
(J.E.S.)

NICHOLAS F. BRADY, et al.,

Defendants.

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EXHIBITS TO  
DEFENDANTS' MEMORANDUM OR POINTS AND AUTHORITIES  
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
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CAPITAL CITIES/ABC, INC.,

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DECLARATION OF R. RICHARD NEWCOMB

Pursuant to 28 U.S.C. section 1746, I, R. RICHARD NEWCOMB, hereby declare:

1. I am the Director of the Office of Foreign Assets Control ("OFAC"), United States Department of the Treasury, and have been employed in this capacity since January 4, 1987. In this capacity I have acquired personal knowledge of the facts set forth in this declaration. I have read the documents filed in connection with Capital Cities/ABC v. Brady and am familiar with their content.

2. The Office of Foreign Assets Control is the principal office responsible for administering economic sanctions against selected foreign countries to further United States foreign policy and national security goals. In performing its function, OFAC relies primarily on the President's broad powers under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. 5, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706. I am the Executive Branch official responsible for administering the prohibitions on transactions involving property in which Cuba has an interest, as imposed pursuant to section

5(b) of TWEA and the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (the "Regulations").

3. The Executive Branch has exercised its powers under TWEA and IEEPA to prohibit or regulate commercial or financial transactions with specific foreign countries in two principal ways. First, pursuant to TWEA and IEEPA, transfer of assets in which designated foreign governments or their nationals have an interest may be blocked if those assets are subject to United States jurisdiction, or are in the possession or control of persons subject to United States jurisdiction. In such programs, the blocked assets cannot be distributed, withdrawn, set off, or transferred in any manner without a Treasury license issued by OFAC. Second, the authority granted by TWEA and IEEPA has been exercised to prohibit trade and/or financial transactions in which the foreign government or its nationals have an interest.

4. Following the expropriation of United States property in Cuba and other unfriendly acts by the Castro regime, President Kennedy imposed an embargo on all trade with Cuba, effective in February 1962. On July 8, 1963, the Regulations were issued, freezing all Cuban assets located in the United States, prohibiting all transactions involving property in which Cuba has an interest, and further implementing the embargo on trade.

5. The sanctions against Cuba have been maintained by successive United States presidents since 1963 to deal with the threat posed by the presence of a Soviet satellite state 90 miles of the United States coast. Cuba, with Soviet political,



economic, and military assistance, has provided widespread support for human rights violations and armed violence and terrorism in this hemisphere. Cuba also provides and maintains troops in various countries in Africa and the Middle East, a factor that impedes political solutions to regional problems and furthers Soviet foreign policy interests.

6. The embargo of Cuba and resulting restrictions on the amount of money Cuba can earn from United States sources serve to limit the opportunity of the Cuban government to earn hard currency through trade and communications with its largest and most natural market -- the United States -- and compound the difficulties Cuba already experiences as a result of its inefficient economic system. Cuba's need for hard currency has become even more compelling in view of recent developments in the Soviet Union and eastern Europe.

7. Restricting the resources available to Cuba helps to isolate Cuba economically and limit the Castro regime's ability to pursue policies inimical to United States national security interests. United States sanctions against Cuba also provide our principal means of expressing the United States' condemnation of Cuba's conduct. The current embargo inflicts obvious hard currency shortages and other costs on the Cuban economy, and is a critical instrument of United States foreign policy toward Cuba.

8. The Cuban embargo is comprehensive, prohibiting all unlicensed economic transactions involving Cuba or its nationals, with limited exceptions to the embargo where consistent with

United States foreign policy. For example, the transfer of technology, the sale of all goods and services, including medicines, banking transactions, owning or dealing in Cuban real estate, tourism and business travel related transactions and transfer of estate assets to residents of Cuba are prohibited under the embargo with Cuba. OFAC has exempted certain transactions from the embargo, which consist mainly of transactions permitted for humanitarian reasons or which serve to facilitate the limited diplomatic contacts that exist between Cuba and the United States.

9. Prior to the passage of the Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, 102 Stat. 1371 (the "Trade Act" or "1988 Amendment") in 1988, which enacted the "informational materials" exception to TWEA which is at issue in this case, OFAC through its Regulations had provided for certain specified exemptions from the embargo. For instance, the Regulations authorized the importation from Cuba by research or educational facilities of "[b]ooks and other publications, films, phonograph records, tapes, photographs, microfilm, microfiche, and posters of Cuban origin" by specific license for educational and research purposes. 31 C.F.R. § 515.545(a)(1) (1988) Members of the news media and professional researchers were authorized to import publications as accompanied baggage for their own professional use. 31 C.F.R. § 515.545(a)(2) (1988). Similar imports for commercial purposes were allowed once a license was obtained from OFAC, provided the licensee deposited payment into

a blocked account pursuant to section 515.545(b) of the Regulations.

10. On February 2, 1989, OFAC amended the Regulations to bring them into conformity with the Trade Act amendment. The amendments to the Regulations permit, without the need for a license, all financial and other transactions directly incident to the physical importation and exportation of informational materials, but provide specifically that transactions relating to telecommunications transmissions and works not in being are still prohibited without a license.

11. In drafting the amendments, OFAC interpreted the restriction on Presidential authority contained in section 2502(a) of the Trade Act with regard to the importation and exportation of "publications . . . or other informational materials" as not intended to encompass telecommunications transmissions, other intangible materials, and works not in being. This conclusion is based on several features of the 1988 Amendment. First, OFAC's practice authorizing imports and exports of informational materials in the Libya and Nicaragua sanctions programs, stated in terms nearly identical to those of the 1988 Amendment, does not cover telecommunications transmissions or other intangible property, or works not in being. The legislative history to the 1988 Amendment stated that OFAC practice was "codified" by the Amendment.

Second, with respect to the statutes (section 5 of the Export Administration Act and 18 U.S.C. chapter 37) restricting

the scope of the exemption created by the 1988 Amendment, both require the application of content-based tests to determine whether exportation of particular information is prohibited. OFAC determined that it could not administratively apply such content-based tests to intangible items such as live telecommunications transmissions, or works not in being. In the context of TWEA (wartime) and IEEPA (peacetime) sanctions, the inability to ensure that national security tests imposed by Congress were met for "exports" of instantaneous telecommunications transmissions and works not in being made it highly unlikely that Congress intended to deregulate them as unenumerated "other informational materials."

Third, the free circulation of such transmissions or works not in being, if exportation of their informational content were later determined to be prohibited by the Export Administration Act or the espionage laws, would not be protected by the First Amendment. Thus, these inadministrable categories appeared to be outside Congress' contemplation as "other informational materials" exempt from Presidential regulation under TWEA and IEEPA.

12. The restrictions on trade and financial transactions relating to telecommunications, royalty or license payments have been, for almost 30 years, and still are considered critical to the integrity of the embargo because of the large sums of money involved in telecommunications technology and equipment. Providing telecommunications technology or equipment to Cuba

weakens the sanctions program because technology can function as a substitute for money, and hard currency saved by obtaining technology and equipment can be directed toward Cuban objectives inimical to United States interests. For example, the United States presently holds approximately \$47.5 million in blocked accounts for telecommunications transactions, representing funds which would otherwise have flowed from the United States to Cuba.

13. Congress was aware of these restrictions and in the legislative history of section 2502 stated that the amendment to TWEA was intended to codify OFAC practice under the Libyan and Nicaraguan sanctions programs. OFAC interpreted this reference as a Congressional directive that the amendment be read in the context of the statutory purposes of TWEA and IEEPA, that implementation be guided by agency practice in two existing sanctions programs, and that the standing distinction made in OFAC practice between tangible "publications" or "informational materials" on the one hand, and intangible information carried by "telecommunications transmissions" with the corresponding prohibition on the payment of royalties or rights fees, on the other hand, be maintained.

14. In both the Libya and Nicaragua sanctions programs, the importation and exportation of publications were permitted, but the definition of "publications" was limited to tangible items. The lists of exempt items in section 2502 and in the definition of "publications" authorized to be imported under the Nicaraguan Trade Control Regulations ("NTCR"), 31 C.F.R. Part 540, 540.536,

are identical except for the substitution in the amendment of "other informational materials" for the NTCR's "other similar materials." That the NTCR definition does not encompass telecommunications transmissions is evident from the fact that transactions incident to receiving and transmitting telecommunications are separately authorized in section 540.542 of the NTCR.

The Libyan Sanctions Regulations ("LSR"), 31 C.F.R. Part 550, 550.411, include in the definition of publications, "books, newspapers, magazines, films, phonograph records, tape recordings, photographs, microfilm, microfiche, and posters, including . . . 15 CFR 399.1, Control List, Group 5, . . . microfilm . . . and similar materials . . . [and] Control List, Group 9 . . . certain publications and related materials." The Libyan sanctions also have a separate general license for telecommunications, wholly unrelated to the exemption for publications. 31 C.F.R. § 550.510.

15. OFAC administers other economic sanctions programs which restrict telecommunications and the payment of royalties or license fees. The sanctions programs administered by OFAC against Libya and Nicaragua under IEEPA and with respect to Vietnam, Cambodia, and North Korea, as well as Cuba, under TWEA contain one or more of the restrictions pertinent to ABC's application to produce a live broadcast of the 1991 Pan American Games. If section 2502(a) of the Trade Act, which amended IEEPA as well as TWEA, is read so expansively as to permit unlicensed

telecommunications transactions and payment of license and royalty fees to these countries, then persons subject to United States jurisdiction could provide a significant influx of hard currency, as well as valuable telecommunications technology and equipment, to countries that have engaged in conduct considered inimical to the national security and foreign policy interests of the United States.

16. OFAC also assumed that Congress did not intend to authorize the payment of millions of dollars in royalties and licensing fees in contravention of the essential purpose of economic sanctions programs, or to unduly restrict the ability of this President or future presidents to implement long-standing foreign policy toward Cuba or nations with which the United States is at war. The goal of the amendment is to permit physical importation and exportation of publications and similar items; it is not to dismantle the current embargo. So, while a United States citizen may engage in any financial transaction necessary to import a Cuban film, she or he could not commission the creation of a film under the authority of the Trade Act amendment because the commissioning of a work goes far beyond mere importation and necessarily involves countless transactions in which Cuban nationals would have an interest, and which are not incidental to the actual importation of the film into the United States.

17. An overly expansive reading of section 2502(a) could adversely affect the President's exercise of emergency authority,

not only with regard to existing sanctions programs, but also in emergency situations which may arise in the future, such as in time of war where TWEA might again be applied. An interpretation of section 2502(a) which would put the regulation of telecommunications beyond the President's authority even when the "live" communication is to enemy countries cannot be sustained.

18. In May of 1989, I met with ABC, Trans World International (TWI), and representatives of Cimesport, S.A. which is the Cuban host organizer of the 1991 Pan American Games, to discuss ABC's proposal to broadcast the 1991 Games. A second meeting for this purpose occurred in June 1989, at which I met with representatives of ABC and TWI. ABC was proposing to pay approximately \$8.7 million to the Pan American Sports Organization ("PASO") for exclusive rights to broadcast the games from Havana, Cuba. Under its proposal, PASO would remit 75% of this sum, or approximately \$6.5 million, to Cimesport, S.A., a Cuban entity. At both meetings, I expressed serious reservations concerning ABC's plan to make an indirect payment of approximately \$6.5 million to a Cuban entity for exclusive broadcast rights. I raised alternatives with ABC, including depositing payment into a blocked account or broadcasting videotapes of the 1991 Games.

19. In June 1989, ABC filed a license application for this proposed transaction. ABC withdrew its license application in September 1989, but in a subsequent letter of November 15, 1989, requested that OFAC grant it a specific license. ABC further



requested OFAC's concurrence in its position that, pursuant to the 1988 Amendment, ABC did not need a license to conduct its proposed transaction with a Cuban entity.

20. At no time before November 1989, did I indicate to any representative of ABC when OFAC's response to ABC's proposal or license application would be forthcoming, or that OFAC's response would be made shortly after either of the meetings between OFAC and ABC. ABC's proposal and license application required both internal review and inter-agency review, which necessitated some time to complete.


21. By letter dated December 1, 1989, I advised ABC that it could obtain a specific license authorizing ABC to procure the United States broadcast and exhibition rights to the 1991 Games on the condition that any royalty payment to Cuba be made into a blocked account. I further advised ABC that it could avail itself of the general license for news gathering and thereby provide reports or documentaries of, or information about, the Games and related events available to the media on a non-exclusive basis and not involving royalty or rights payments. Finally, I advised ABC that under the 1988 Amendment, ABC could purchase videotapes of the Games, whether from a Cuban or non-Cuban source, which could then be broadcast. As my letter explained, "any of these courses would allow American viewers to see the Games, while not conveying a substantial economic benefit on Cuba in contravention of the overriding foreign policy interests of the United States."

22. It is my understanding, based on what occurred in the meetings with ABC and TWI (apparently representing itself and Cimesport, S.A.), that Cimesport retained TWI through a subsidiary located outside of the United States to act as promoter of the 1991 Games, to provide technical assistance, and to arrange for the highest quality telecommunications connections for media coverage and broadcast of the 1991 Games. It is my understanding that these services were contracted for by Cuba to enhance the marketability, the economic value, and the revenue enhancement potential of the 1991 Games. While TWI represented that its contract with Cimesport was contingent upon OFAC approval, TWI had already provided valuable services to Cimesport prior to our meetings, by negotiating with the major United States networks and arriving at a contingent contract with ABC, placing a monetary value on the Cuban-owned broadcast rights for the United States market.

23. Several times, including most recently in my letter of December 1, 1989, ABC was informed by OFAC that it could obtain a specific license authorizing ABC to procure the United States broadcast and exhibition rights in the 1991 Games on the condition that any royalty payment to Cuba be made into a blocked account, and that travel expenses be kept to a minimum. ABC chose not to seek a specific license on these terms, and its license application was denied because it proposed a payment of approximately \$6.5 million to Cuba in contravention of United States foreign policy.

24. OFAC's decision not to grant ABC a specific license on the terms sought by ABC is consistent with past practice of OFAC, which is known to ABC. ABC has applied for other specific licenses to cover live sports events in Cuba, including but not limited to License Numbers C-9765 (November 12, 1982), C-9348 (February 19, 1982), C-9985 (March 31, 1983), and C-1211 (December 7, 1987). Consistent with OFAC practice, all such licenses contain a statement such as that included in License C-9348 of February 19, 1982, stating "No payments to Cuba or its entities or nationals, for royalties or any other similar purpose are authorized."

I declare under penalty of perjury that the foregoing is true and correct. Executed this first day of February, 1990.

  
\_\_\_\_\_  
R. RICHARD NEWCOMB  
Director  
Office of Foreign Assets Control

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITAL CITIES/ABC, INC.,

Plaintiff,

v.

Civil No. 89 Civ. 8006  
(J.E.S.)

NICHOLAS F. BRADY, et al.,

Defendants.

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DECLARATION OF ROBERT M. KIMMITT

1. I, Robert M. Kimmitt, am the Under Secretary for Political Affairs, United States State Department. My duties include assisting the Secretary of State and the Deputy Secretary of State in the formulation and conduct of United States foreign policy. I have held this position since March 2, 1989. In this capacity, I have acquired personal knowledge of the facts set forth in this declaration.

2. It is the long-standing objective of the United States and the intention of this Administration to influence the Government of Cuba to cease its unacceptable behavior internationally and towards the United States. In particular, it is a primary objective of this Administration to deter Cuba from attempting to destabilize the Central American and Caribbean region. A central source of leverage the United States has over Cuba lies in the power of the United States to prohibit persons subject to United States jurisdiction from engaging in various economic activities with Cuba or its

nationals that would benefit Cuba. This is consistent with decisions taken under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and congressional declarations. The individual regulations are intended to have a particular effect on Cuba, e.g., restricting its access to hard currency, in part to constrain its ability to finance revolutionary movements in Central America and the Caribbean region, and to disassociate the United States from contributing to such Cuban ventures.

3. This program, as implemented by comprehensive regulations issued under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. App. § 5, has been maintained for over twenty-six years. During this period, this regulatory scheme has proven to be a flexible and essential instrument of United States foreign policy. It enables the Executive to respond promptly to Cuban actions.

4. This government's Cuba policy can only succeed if the Cuban government is persuaded that the consistency of U.S. policy and its implementation will be maintained in the face of Cuba's continued intransigence, and that modification of unacceptable conduct is the sole way to effect favorable change in our bilateral relations. The Cuban Government has had to confront and consider the diplomatic fact that the United States could respond to Cuban misbehavior swiftly and flexibly through the use of TWEA authorities.

5. The Office of the Coordinator for Cuban Affairs is often consulted by the Department of Treasury's Office of Foreign Assets Control ("OFAC") regarding the foreign policy aspects of economic and trade sanctions imposed against Cuba pursuant to TWEA. The State Department was consulted by OFAC regarding a proposal by Capital Cities/ABC Inc. to pay approximately \$8.7 million to the Pan American Sports Organization ("PASO") for broadcast rights to the 1991 Pan Am Games, to be held in Havana, Cuba. Under that proposal, PASO would remit 75% of this sum (approximately \$6.5 million) to Cimesport, S.A., a Cuban entity.

6. The payment passing to the Cuban government as a result of Capital Cities/ABC Inc.'s agreement with PASO is especially significant, given the current state of the Cuban economy. Cuba is not economically self-sufficient, and is highly dependent on support from the Soviet Union and Soviet bloc countries for its economic survival. Hard currency available in Cuba for needed imports amounts to only about \$100 million, while Cuba's international debt to Western countries amounts to over \$7 billion. Thus, the payment passing to Cuba as a result of Capital Cities/ABC's agreement with PASO would provide considerable economic support to Cuba.

7. The payment of a large sum of hard currency to Cuba would be contrary to the foreign policy interests of the United States. Such a sum would contribute, directly or indirectly, to the ability of the Castro regime to improve

the Cuban military, to destabilize Central American countries, and to support governments or movements opposed to the interests of the United States, such as Cuba's support of the FMLN insurgency in El Salvador.

8. Any interpretation of the 1988 Berman amendment to TWEA that would permit the telecommunications broadcast of the 1991 Pan Am Games from Havana, as "informational material" no longer subject to regulation by OFAC, would significantly reduce the effectiveness of the current economic sanctions against Cuba. Telecommunications consistently has been considered as falling within the embargo. As a result, telecommunications to and from Cuba has been regulated as part of the economic embargo against Cuba.

9. Earnings from telephone and cable communications are deposited in blocked accounts, pursuant to economic sanctions against Cuba under TWEA. If payments for telecommunications were no longer subject to restriction under TWEA, the Cuban government might well be able to accumulate earnings from telecommunications which could be used for objectives contrary to United States interests. The United States also might be forced to pass significant sums of collected blocked money to Cuba if there were no longer restrictions on telecommunication services such as television, radio, telephone. The infusion of capital and advanced technology into the Cuban economy would improve the military and civilian technical capabilities of the Cuban government, thereby strengthening an oppressive and rigid dictatorship opposed to the United States.

10. I want to emphasize, however, that we do not object on policy grounds to the broadcast that Capital Cities/ABC seeks to effect from Cuba; rather, we object specifically to the payment of significant hard currency for broadcast rights. There have been numerous previous instances of broadcasts from Cuba by Capital Cities/ABC and other organizations, but there has never been permitted such a payment for these broadcast rights.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 2, 1990.

Robert M. Kimmitt

Robert M. Kimmitt  
Under Secretary for Political Affairs  
United States Department of State



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DANIEL J. WALSH  
d/b/a Liberation Graphics,  
Plaintiff,

v.

NICHOLAS F. BRADY,  
Secretary of the Treasury,  
ET AL.,

Defendants.

Civil Action No. 89-1112

**FILED**

NOV 1 1989

Clerk, U.S. District Court  
District of Columbia

MEMORANDUM

Plaintiff, Daniel J. Walsh ("Walsh"), an established, experienced importer of political posters from various countries around the world, seeks a license to enter Cuba solely for the purpose of arranging for the importation of Cuban posters to the United States. He challenges the decision of the Director of the Treasury's Office of Foreign Assets Control (the "Director") denying the license. Issues of statutory interpretation and First Amendment rights have been extensively briefed and argued in support of dispositive cross-motions for summary judgment. There are no material facts in dispute.

This controversy requires the Court to resolve an apparent clash between Regulation 560 of the Cuban Assets Control Regulations issued by the Secretary of the Treasury, 47 Fed. Reg. 17,030 (April 30, 1982), 31 C.F.R. Part 515, under authority of the Trading With The Enemy Act of 1917, 50 U.S.C. § 1, et seq., and a subsequent 1988 amendment of that Act affecting posters and

other "informational materials" accomplished by Section 2502 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

Regulation 560, which is implemented by the Director, was designed to "reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba" pursuant to announced national policy. 47 Fed. Reg. 17,030 (April 30, 1982). In contrast, the subsequent 1988 amendment limited the Secretary's authority in this regard as follows:

(b)(4) The authority granted to the President in this subsection does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials, which are not otherwise controlled for export under section 5 of the Export Administration Act of 1979 or with respect to which no acts are prohibited by chapter 37 of title 18, United States Code.

Walsh contends that a proper interpretation of the amendment entirely nullifies the earlier regulation as applied to his proposed trip to Cuba because Congress intended to deny the President any further authority even indirectly to regulate importation from any country of posters or other "informational materials." This position is bolstered by Walsh's uncontroverted declaration stating that it is necessary for him to proceed to Cuba to arrange for any importation of Cuban posters. He states that Cuban poster publishers require his presence in Cuba before

they will make the necessary technical, financial and transportation arrangements. Walsh wishes to spend U.S. currency in Cuba for local travel costs, hotel bills, food bills, business entertain, etc. He further notes his personal need to be in Cuba to choose from thousands of posters, to meet the artists and engage in "give and take" negotiations on the spot as well as to arrange other aspects of a commercial deal. These representations are consistent with his experience in other countries from which he has imported political posters.

The Secretary took and continues to take a much narrower view of the meaning and effect of the amendment. This is reflected in the slight change made in the Cuban Assets Control Regulations to accommodate the amendment, which now simply provides as follows:

All financial and other transactions directly incident to the physical importation or exportation of informational materials are authorized.

54 Fed. Reg. 5234 (Feb. 2, 1989).

Thus, although the Secretary recognizes that "informational materials," such as posters, are exempted from certain previous Cuban Assets Control prohibitions, he is unwilling to authorize payment of U.S. currency to Cubans for travel to or related expenditures within Cuba looking toward settling arrangements for importation of such materials. Although the amendment lacks any meaningful legislative history, the Secretary contends that it did not restrict his authority on behalf of the President to prohibit travel-related expenditures of U.S. currency to or

within Cuba. The Secretary rests his position on the need to view the amendment narrowly because of its impact on established foreign policy developed by the President and urges that the precise language of the amendment, which does not mention travel or travel-related expenses, is decisive because Congress has long been aware of travel expenditure limitations incident to the Cuban currency embargo.

The restrictions the Secretary has placed on Walsh concern use of hard U.S. currency because of the economic benefit to that country which the nation's embargo contemplates should be withheld. Walsh is free to travel to Cuba using U.S. currency payable to a non-Cuban carrier. He is simply prohibited from using or committing U.S. funds while in Cuba for any purpose. Since there is no indication that Cuban poster suppliers will subsidize him in Cuba, the rigidity of the Secretary's position would appear to create serious obstacles to Walsh's desire to import Cuban posters. However, the question remains whether or not the regulation, as thus applied, indirectly regulates importation of posters.

Clearly it affects only Cuban posters and Walsh can seek posters from other countries, even Nicaragua, where Cuban influence may be manifested. However, Walsh not only insists that the Secretary is indirectly regulating import trade in political posters contrary to the wording of the amendment, but he urges an interpretation of the amendment that would permit both limited on-site scouting of the Cuban market expenses but

also allow unlimited currency commitments for immediate and future wholesaling of political poster trade from Cuba to the United States. To further this position, existing regulations found at 31 C.F.R. § 515.560(a)(1)(1983) which permit certain travel-related expenses in Cuba by other Americans not unlike those sought at a minimum by Walsh are noted. Counsel urges that it is arbitrary to deny Walsh's request for a license in view of these dispensations.

Regan v. Wald, 468 U.S. 222 (1984), however, strongly supports the presidential authority to restrict travel to Cuba in order to curtail the flow of hard currency to Cuba in furtherance of this nation's foreign affairs. Congress will be presumed to have concurred in executive branch foreign affairs policy unless Congress clearly indicates the contrary. Id. at 236. There is a wide gap between Congress' desire to encourage importation of political posters from around the world generally and other "informational materials" in order to expose the ideology they convey, on the one hand, and totally eliminating all special Cuban currency restrictions developed by the President for larger, more immediate policy reasons, on the other.

This case is not an action of the Director or the Secretary intending to deny any First Amendment rights inherent in the amendment. The amendment was directed to a perceived need to liberalize regulation of imports of posters and other "informational materials" generally, but there is no indication that Congress intended to affect existing hard currency controls

developed for other reasons of national policy governing our relations with a particular country. Thus the Secretary has not interfered with congressional purpose in this situation.

Because Congress gave no special reference to the currency conditions affecting Cuba and chose to speak in broad, all-inclusive terms, Walsh's contention, without benefit of any legislative history, that Congress intended to impose no limit on the amount of currency that could be spent in Cuba to assure that its political posters are imported must be rejected. This reaches too far. Such an intrusion on presidential authority in the field of foreign policy cannot be inferred, particularly where the policy was fully known and well established when the amendment was enacted.

Walsh has established that travel to a foreign country is a normal and perhaps a necessary incident on occasion, as in the case of Cuba, to arrange for imports of political posters into the United States. Thus Congress must be viewed as favoring any liberalization of currency restrictions consistent with Presidential policy. This might permit the Secretary to relax controls to enable an importer interested in Cuban posters to spend a minimal amount within Cuba to determine the nature of the information material available. Indeed, it would appear to be consistent with existing regulations relating to Cuban expenditures in other connections possibly to permit such limited access by potential importers of "informational materials" to suppliers in Cuba under a license which limits funds expended

for scouting of the available market while maintaining the embargo against any significant currency benefit to the Cuban economy in the form of payment, prepayment, shipping charges, technical support, etc. during a brief visit.

However, it is obviously not this Court's function to usurp the authority of the Secretary in this area. Highly technical aspects of currency control would have to be considered. There may be persons other than Walsh interested in importing "informational materials" from Cuba and the Administrative Procedures Act provides appropriate procedures for initiating, crafting and implementing any further regulatory approach.

Summary judgment is granted the defendants and denied for plaintiff Walsh. An appropriate Order is filed herewith.

  
UNITED STATES DISTRICT JUDGE

November 1, 1989.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DANIEL J. WALSH  
d/b/a Liberation Graphics,

Plaintiff,

v.

NICHOLAS F. BRADY,  
Secretary of the Treasury,  
ET AL.,

Defendants.

Civil Action No. 89-1112

**FILED**

NOV 1 1989

Clerk, U.S. District Court  
District of Columbia

ORDER

Upon consideration of the cross-motions for summary judgment, the responses thereto, the oral arguments of counsel and the entire record, and for reasons set forth in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

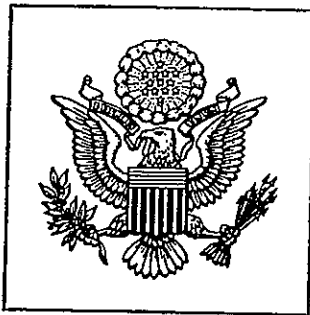
ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed.

  
UNITED STATES DISTRICT JUDGE

November 1, 1989.



# United States of America



## DEPARTMENT OF STATE

All to whom these presents shall come, Greeting:

I Certify That the attached document is a true and complete copy from the records of the United States Department of State of pages 1,31 and 147-151 of the International Telecommunication Convention, with annexes and protocols, done at Nairobi on December 6, 1982, which entered into force internationally on January 1, 1984 and definitively for the United States on January 10, 1986.

In testimony whereof, I, James A. Baker, III,

Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this thirty-first day of January, 19 90.

James A. Baker, III  
Secretary of State.

By Annie R. Maddy  
Authentication Officer, Department of State.

Issued pursuant to  
203, 5 USC  
1948, 62 Stat.  
of May 20, 1948,  
and Sect. 174  
66 Stat. 174  
5 USC 140

5 USC 161, 5 USC  
I of Act of Ju  
5 USC 1733; Sec. 4  
St. 111, 5 USC  
of Act of June 27,  
5 USC 1104, 1443,

This certificate is not valid if it is removed or altered in any way whatsoever

# **INTERNATIONAL TELECOMMUNICATION CONVENTION**

## **FIRST PART BASIC PROVISIONS**

### **Preamble**

- 1 While fully recognizing the sovereign right of each country to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the social and economic development of all countries, the plenipotentiaries of the Contracting Governments, with the object of facilitating peaceful relations, international cooperation and economic and social development among peoples by means of efficient telecommunication services, have agreed to establish this Convention which is the basic instrument of the International Telecommunication Union.

## **CHAPTER I**

### **Composition, Purposes and Structure of the Union**

#### **ARTICLE 1**

##### **Composition of the Union**

- 2 1. The International Telecommunication Union shall comprise Members which, having regard to the principle of universality and the desirability of universal participation in the Union, shall be:
- 3 a) any country listed in Annex 1 which signs and ratifies, or accedes to, the Convention;

[p. 31 follows]

ARTICLE 50

**Settlement of Disputes**

- 188 1. Members may settle their disputes on questions relating to the interpretation or application of this Convention or of the Regulations contemplated in Article 42, through diplomatic channels, or according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or by any other method mutually agreed upon.
- 189 2. If none of these methods of settlement is adopted, any Member party to a dispute may submit the dispute to arbitration in accordance with the procedure defined in the General Regulations or in the Optional Additional Protocol, as the case may be.

CHAPTER VI

**Definitions**

ARTICLE 51

**Definitions**

- 190 In this Convention unless the context otherwise requires:
- 191 a) the terms which are defined in Annex 2 to this Convention shall have the meanings therein assigned to them;
- 192 b) other terms which are defined in the Regulations referred to in Article 42 shall have the meanings therein assigned to them.

[p. 147 follows]

## ANNEX 2

### **Definition of Certain Terms used in the Convention and in the Regulations of the International Telecommunication Union**

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*Note by the General Secretariat:*

The definitions are ranged in the French alphabetical order. To facilitate consultation, they are shown hereunder in their English alphabetical order with the reference number against.

- Administration – 2002
- Broadcasting Service – 2012
- Delegate – 2006
- Delegation – 2005
- Expert – 2007
- Government Telegrams and Government Telephone Calls – 2018
- Harmful Interference – 2003
- International Service – 2013
- Mobile Service – 2014
- Observer – 2010
- Private Operating Agency – 2008
- Private Telegrams – 2019
- Public Correspondence – 2004
- Radiocommunication – 2011
- Recognized Private Operating Agency – 2009
- Service Telegrams – 2017
- Telecommunication – 2015
- Telegram – 2016
- Telegraphy – 2020
- Telephony – 2021

**Definition of Certain Terms Used in the Convention and in the Regulations of the International Telecommunication Union**

- 2001** For the purpose of this Convention, the following terms shall have the meanings defined below.
- 2002** *Administration*: Any governmental department or service responsible for discharging the obligations undertaken in the International Telecommunication Convention and the Regulations.
- 2003** *Harmful Interference*: Interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the Radio Regulations.
- 2004** *Public Correspondence*: Any telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission.
- 2005** *Delegation*: The totality of the delegates and, should the case arise, any representatives, advisers, attachés, or interpreters sent by the same country.

Each Member shall be free to make up its delegation as it wishes. In particular, it may include in its delegation in the capacity of delegates, advisers or attachés, persons belonging to private operating agencies which it recognizes or persons belonging to other private enterprises interested in telecommunications.

- 2006** *Delegate*: A person sent by the government of a Member of the Union to a Plenipotentiary Conference, or a person representing a government or an administration of a Member of the Union at an administrative conference, or at a meeting of an International Consultative Committee.

**2007** *Expert:* A person sent by a national scientific or industrial organization which is authorized by the government or the administration of its country to attend meetings of study groups of an International Consultative Committee.

**2008** *Private Operating Agency:* Any individual or company or corporation, other than a governmental establishment or agency, which operates a telecommunication installation intended for an international telecommunication service or capable of causing harmful interference with such a service.

**2009** *Recognized Private Operating Agency:* Any private operating agency, as defined above, which operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 44 of the Convention are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunication service on its territory.

**2010** *Observer:* A person sent by:

- the United Nations, a specialized agency of the United Nations, the International Atomic Energy Agency or a regional telecommunication organization to participate in a Plenipotentiary Conference, an administrative conference or a meeting of an International Consultative Committee in an advisory capacity;
- an international organization to participate in an administrative conference or a meeting of an International Consultative Committee in an advisory capacity;
- the government of a Member of the Union to participate in a non-voting capacity in a regional administrative conference;

in accordance with the relevant provisions of the Convention.

**2011** *Radiocommunication:* Telecommunication by means of radio waves.

*Note 1:* Radio waves are electromagnetic waves of frequencies arbitrarily lower than 3 000 GHz, propagated in space without artificial guide.

*Note 2:* For the requirements of No. 83 of the Convention the term "radiocommunication" also includes telecommunications using electromagnetic waves of frequencies above 3 000 GHz, propagated in space without artificial guide.

- 2012** *Broadcasting Service:* A radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission.
- 2013** *International Service:* A telecommunication service between telecommunication offices or stations of any nature which are in or belong to different countries.
- 2014** *Mobile Service:* A radiocommunication service between mobile and land stations, or between mobile stations.
- 2015** *Telecommunication:* Any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.
- 2016** *Telegram:* Written matter intended to be transmitted by telegraphy for delivery to the addressee. This term also includes radiotelegrams unless otherwise specified.
- 2017** *Service Telegrams:* Telegrams exchanged between:
- a) administrations;
  - b) recognized private operating agencies;
  - c) administrations and recognized private operating agencies;
  - d) administrations and recognized private operating agencies, on the one hand, and the Secretary-General of the Union, on the other
- and relating to public international telecommunication.
- 2018** *Government Telegrams and Government Telephone Calls:* Telegrams or telephone calls originating with any of the authorities specified below:
- the Head of a State;
  - the Head of a government and members of a government;

- Commanders-in-Chief of military forces, land, sea or air;
- diplomatic or consular agents;
- the Secretary-General of the United Nations; Heads of the principal organs of the United Nations;
- the International Court of Justice.

Replies to government telegrams as defined herein shall also be regarded as government telegrams.

**2019** *Private Telegrams:* Telegrams other than government or service telegrams.

**2020** *Telegraphy:* A form of telecommunication in which the transmitted information is intended to be recorded on arrival as a graphic document; the transmitted information may sometimes be presented in an alternative form or may be stored for subsequent use.

*Note:* A graphic document records information in a permanent form and is capable of being filed and consulted; it may take the form of written or printed matter or of a fixed image.

**2021** *Telephony:* A form of telecommunication primarily intended for the exchange of information in the form of speech.

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For Immediate Release

March 3, 2004

## Letter from Rep. Berman to Richard Newcomb, Director of OFAC

Mr. R. Richard Newcomb  
Director  
Office of Foreign Assets Control  
U.S. Department of the Treasury  
Treasury Building Annex  
Pennsylvania Ave. and Madison Pl., N.W.  
Washington, DC 20220

Dear Director Newcomb:

We have had, over the years, many conversations and exchanges regarding the correct interpretation of the amendment I authored to exempt information and informational materials from economic embargoes (Section 203(b) of the International Emergency Economic Powers Act (IEEPA)) and I have been greatly appreciative of the excellent relationship we have enjoyed. It is in that spirit that I am writing to take strong exception to OFAC's interpretation of that provision as it applies to activities related to the publication of manuscripts written by nationals of Iran (and other countries sanctioned under IEEPA) in scholarly journals in the United States. In my view, the guidance issued by OFAC on this matter – and the underlying regulations on which it is based – are clearly inconsistent with both the letter and spirit of the law.

As you know, my amendment prohibits the President from regulating or prohibiting, either directly or indirectly, "the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials..." This provision is premised on the belief that it is in our national interest to support the dissemination of American ideas and values, especially in nations with oppressive regimes. At the same time, it is intended to ensure the right of American citizens to have access to a wide range of information and satisfy their curiosity about the world around them.

In addition to these important considerations, the free flow of information is an essential prerequisite for the advancement of human knowledge. In the realm of science, a robust peer review process – which requires scientists to share data, exchange ideas and challenge assumptions – helps ensure the integrity of scientific research. Publishing the results of such research in scholarly journals is an integral part of the scientific process.

In this context, OFAC's recent interpretation of Section 203(b) – as reflected in your September 30, 2003 letter regarding permissible publishing activities by the Institute of Electrical and Electronics Engineers (IEEE) – is patently absurd. Specifically, I take strong exception with OFAC's position that, with regard to manuscripts from authors that reside in countries subject to U.S. sanctions under IEEPA, "activities such as the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons, prior to publication" of a manuscripts constitutes a "prohibited service" that requires an OFAC license.

These activities are an integral part of the peer review process that all reputable journals have established to ensure the quality of the manuscripts they publish. As such, they should be considered incidental to the publication of the manuscript, and thus covered by the information and informational materials exemption.

On a similar note, I believe the exemption should apply to activities related to the publication of literary works produced in embargoed countries, including translation and editing required to make them accessible to American readers. It is my understanding that OFAC's narrow and misguided interpretation of the law has threatened the publication of a number of worthy manuscripts, including a book of poems written by Iranian dissidents. I fail to see how this serves the interests of the United States in any way, shape or form.

In this age of rapid globalization, no country has a monopoly on scientific innovation. This reality is reflected in the fact that American publishers of scholarly journals derive a substantial portion of their content from foreign authors, including nationals of Iran and other countries subject to U.S. sanctions. Our government should not place publishers in the untenable position of having to choose between publishing manuscripts from embargoed countries "as is" without appropriate peer review or not publishing them at all, even if they have great merit.

An accurate and reasonable interpretation of Section 203(b) -- as well as common sense about America's national interests -- should compel OFAC to reconsider its decision to require a specific license for these activities and I look forward to hearing the results of such a review.

Sincerely,

HOWARD L. BERMAN  
Member of Congress

Cc: Dr. John H. Marburger III  
Science Advisor to the President



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE ASSOCIATION OF AMERICAN :  
UNIVERSITY PRESSES, INC.; :  
THE PROFESSIONAL/SCHOLARLY :  
PUBLISHING DIVISION OF THE :  
ASSOCIATION OF AMERICAN :  
PUBLISHERS, INC.; :  
PEN AMERICAN CENTER, INC.; and :  
ARCADE PUBLISHING, INC. :  
:  
Plaintiffs, :  
:  
- against - :  
:  
THE OFFICE OF FOREIGN ASSETS :  
CONTROL OF THE DEPARTMENT OF THE :  
TREASURY; JOHN W. SNOW, SECRETARY :  
OF THE TREASURY, in his official capacity; :  
and R. RICHARD NEWCOMB, DIRECTOR, :  
OFFICE OF FOREIGN ASSETS CONTROL, :  
in his official capacity, :  
Defendants. :  
----- x

Civ. No. \_\_\_\_\_

**COMPLAINT**

Plaintiffs, the Association of American University Presses, Inc. ("AAUP"), the Professional/Scholarly Publishing Division of the Association of American Publishers, Inc. ("PSP"), PEN American Center, Inc. ("PEN"), and Arcade Publishing, Inc. ("Arcade"), submit this complaint for declaratory and injunctive relief against the Office of Foreign Assets Control of the United States Department of the Treasury ("OFAC"), the Secretary of the Treasury, John W. Snow, and R. Richard Newcomb, the Director of OFAC, and allege the following:

**INTRODUCTION**

1. Plaintiffs bring this action to remove restrictions the defendants have imposed on the legislatively and constitutionally protected free exchange of information and ideas. The

defendants' regulations and rulings prohibit the publication of works by authors in certain countries that are subject to United States trade sanctions or prohibit the activities that would make publishing them in the United States possible. Congress has twice declared that U.S. trade embargoes may not be allowed to restrict the free flow of information and ideas that is vital to our understanding of the world. Yet the defendants have promulgated and maintained restrictions on publishing works from sanctioned countries, in defiance of the Berman Amendment and the Free Trade in Ideas Amendment, which explicitly deprive the Executive Branch of authority to "regulate or prohibit, directly or indirectly," transactions for "information and informational materials," including publications of all kinds.

2. OFAC has done exactly what Congress has forbidden, making ordinary publishing activities illegal if they involve works by authors in countries such as Cuba, Iran and Sudan. Congress sought to guarantee that people living under the governments of those countries could still reach the American public and that Americans would have full access to ideas and information from them. In flouting Congress's will, OFAC has also violated the First Amendment rights of publishers, authors, editors and translators to express themselves by bringing works by authors in those countries to the United States, and abridged the First Amendment rights of all Americans to learn from authors throughout the world.

3. The Berman Amendment and the Free Trade in Ideas Amendment exempt information and publications from U.S. economic sanctions programs, but OFAC has eviscerated the exemption and declared that Americans must apply to OFAC for permission if they want to engage in three categories of activities that publishing requires.

4. First, OFAC has invented a distinction between works that have already been completed and works that are not yet fully created. OFAC does not honor the Berman

Amendment and Free Trade in Ideas Amendment for works that have not been completed before anyone subject to the jurisdiction of the United States becomes involved. Transactions involving new books or articles and revised versions of publications are absolutely banned. Americans may not enter into contracts or collaborate with authors in the countries under embargo to create new works or revise works for Americans to read, or pay them advances.

5. Second, OFAC has declared that Americans may not provide substantive or artistic alterations or enhancements to works by authors in embargoed countries, whether the works are new or already exist. As a result, Americans may not substantively edit those authors' works for publication or add materials to them, such as notes, introductions, and illustrations to enhance them, as publishers, editors, and translators routinely do.

6. Third, OFAC insists that publishers, editors, and agents may not market or promote works by authors who live in the restricted countries. For all practical purposes, that means American publishers simply cannot publish their books.

7. Because of OFAC's restrictions, Americans who want information from Cuba, Iran and Sudan are limited to reading what has already been written in those countries. Because authors there work under government restrictions, OFAC has, in effect, extended the force of foreign censorship to the United States.

8. The United States has historically welcomed the works of authors whose voices may be silenced in their own countries. The Berman Amendment and Free Trade in Ideas Amendment were enacted to guarantee that trade sanctions would not interrupt the free flow of information and ideas, specifically information and ideas from countries such as Cuba, Iran, and Sudan.

9. Congress therefore expressly prohibited the restrictions OFAC has imposed. The Constitution, too, prohibits the restrictions. They impose a burden on First Amendment rights that a free society cannot bear, subjecting the members of AAUP, PSP and PEN, and Arcade, to the threat of civil and criminal penalties for their publishing activities, and depriving Americans of access to valuable information and ideas. The restrictions are, further, so vague and contradictory that they are unconstitutional for that reason, as well. And, finally, they establish an unconstitutional licensing scheme that imposes a prior restraint on speech and press.

### **JURISDICTION AND VENUE**

10. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1361, 28 U.S.C. § 1651 and 28 U.S.C. § 2201.

11. Venue is proper pursuant to 28 U.S.C. § 1391(e).

### **PARTIES**

#### **Plaintiffs**

12. The Association of American University Presses, Inc. ("AAUP") is the trade organization for non-profit scholarly publishers. Its 124 member publishers are affiliated with research universities, scholarly societies, foundations, museums and non-degree-granting research institutions and publish the vast majority of scholarly books in this country and a wide range of academic journals. AAUP is a New York not-for-profit corporation with its headquarters in New York, New York.

13. The Professional/Scholarly Publishing Division of the Association of American Publishers, Inc. ("PSP") is a formally constituted division of the not-for-profit national trade association of book and journal publishers, which is incorporated in New York and headquartered in New York City. Members of PSP publish, in print and electronic form, the vast majority of materials produced and used by scholars and professionals in science, medicine,



technology, business and law. Their publications and their publishing processes, including the peer review of research results and scholarship, form an integral part of worldwide research.

14. PEN American Center, Inc. ("PEN") is an association of authors, editors and translators, with approximately 2,700 members, which strives for the unimpeded flow of ideas and information throughout the world. In addition to representing the interests of its members, PEN funds and operates a program to promote the translation and publication in the United States of works by authors in other countries, including countries subject to trade sanctions. PEN is a New York not-for-profit corporation with its headquarters in New York, New York.

15. Arcade Publishing, Inc. ("Arcade") is an independent book publisher that publishes fiction and nonfiction by authors from around the world. Arcade is a New York corporation with its headquarters in New York, New York.

### **Defendants**

16. The Office of Foreign Assets Control is the office within the U.S. Department of the Treasury that is responsible for administering and enforcing United States trade sanctions.

17. John W. Snow is the Secretary of the U.S. Department of the Treasury and is named as a defendant in his official capacity.

18. R. Richard Newcomb is the Director of the Office of Foreign Assets Control and is named as defendant in his official capacity.

### **FACTS**

#### **U.S. Economic Sanctions**

19. U.S. economic sanctions are governed principally by two federal statutes, the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1-40, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-06. TWEA, which was initially enacted as a wartime measure in 1917, was later amended to extend to peacetime

national emergencies without a declaration of war. In 1977, Congress enacted IEEPA to provide the Executive Branch with separate and limited authority to impose sanctions in peacetime. U.S. sanctions against North Korea and Cuba, which were originally imposed in 1950 and 1963, respectively, continue under the authority of TWEA, while IEEPA authorizes sanctions imposed in subsequent years against Iran, Sudan and other countries.

20. OFAC promulgates and enforces U.S. economic sanctions pursuant to TWEA and IEEPA on behalf of the President and Secretary of the Treasury. Separate regulations set out the terms of the embargoes for each country. The regulations for Cuba, Iran, and Sudan all prohibit most forms of trade to and from the United States. Foreign Assets Control Regulations, 31 C.F.R. § 500 (2004); Cuban Assets Control Regulations, 31 C.F.R. § 515 (2004); Sudanese Sanctions Regulations, 31 C.F.R. § 538 (2004); Iranian Transactions Regulations, 31 C.F.R. § 560 (2004). The regulations challenged here are codified at 31 C.F.R. §§ 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) (the “OFAC Information Regulations”).

21. The penalties for violations of OFAC’s regulations include prison terms of up to ten years and fines totaling up to \$250,000 for individuals, and \$1,000,000 for corporations. OFAC may, in addition, impose civil penalties of up to \$65,000 under TWEA and up to \$11,000 under IEEPA through administrative proceedings. Multiple violations may be found within a single transaction. Reporting, Procedures, and Penalties Regulations, 31 C.F.R. § 501.701 (2004); 50 U.S.C. App. § 16 (2004); 50 U.S.C. § 1705 (2004); 18 U.S.C. § 3571 (2004).

#### **The Berman Amendment**

22. In 1988, in response to several seizures of shipments of magazines and books from embargoed countries at the U.S. border, Congress added an exemption to IEEPA and

TWEA to ensure that “informational materials” would not be excluded from the United States.

The “Berman Amendment” provided that:

[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation ... or the exportation ..., whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), 50 U.S.C. App. § 5(b)(4)(1988).

23. Congress ensured that the exemption for informational materials could not be exploited to interfere with controls on the export of sensitive technology or security information, by excluding materials “otherwise controlled for export under section 5 of the Export Administration Act of 1979,” which permits the President to prohibit the export of goods or technology to protect national security, “or with respect to which acts are prohibited by chapter 37 of title 18, United States Code,” which enumerates crimes involving espionage and the disclosure of classified information. *Id.*; 50 U.S.C. App. § 2404; 18 U.S.C. §§ 79-799.

24. The legislative history of the Berman Amendment confirms the importance to Congress of ensuring that trade sanctions not interfere with the international exchange of ideas and information. The conference report declares that the Amendment “clarifies that the Trading with the Enemy Act and the International Emergency Economic Powers Act do not authorize regulations on the export or import of informational material not otherwise controlled under the Export Administration Act.” H.R. Conf. Rep. No. 576, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 1547, 1872. The relevant House Foreign Affairs Committee’s report emphasized that ideas and information should flow freely into the United States and from

the United States to the rest of the world, in light of the fundamental First Amendment interests at stake. *See* H.R. Rep. No. 4, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt. 3, at 113 (1987).

### **OFAC's Response to the Berman Amendment**

25. OFAC amended its regulations purportedly to comply with the Berman Amendment in 1989. The amended regulations expanded the general licensing provisions to authorize all transactions relating to “informational materials,” 54 Fed. Reg. 5229, 5231-34 (1989); 31 C.F.R. §§ 500.206, 500.550, 515.206, 515.545 (1990, 2004), but narrowly defined “informational materials” to include only “information recorded in tangible form,” excluding “intangible items, such as telecommunications transmissions.” 54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.332, 515.332 (1990). The exemption for transactions relating to “informational materials” also contained the following unexplained carve-out:

This section does not authorize transactions related to informational materials not fully created and in existence at the date of the transaction, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services by a person subject to the jurisdiction of the United States. Such prohibited transactions include, without limitation, payment of advances for informational materials not yet created and completed, provision of services to market, produce or co-produce, create or assist in the creation of informational materials, and payment of royalties to a designated national with respect to income received for enhancements or alterations made by persons subject to the jurisdiction of the United States to informational materials imported from a designated national.

54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.206(c) (1990); 515.206(a)(2) (1990). The new regulations went into effect on February 2, 1989.

26. Within a year, OFAC's restriction of the scope of “informational materials” exempted from regulation by the Berman Amendment faced two legal challenges. In the first case, the court ruled that artworks qualified as “informational materials” exempt from regulation

pursuant to the Berman Amendment. In the second, *Capital Cities/ABC v. Brady*, 740 F.Supp. 1007 (S.D.N.Y. 1990), the court accepted OFAC's argument that the exemption did not apply to information not yet fully in being or otherwise in intangible form, such as broadcast communications.

### **Congress's Response to OFAC: The Free Trade in Ideas Amendment**

27. Distressed by OFAC's unauthorized narrowing of the Berman Amendment and the outcome in the *Capital Cities* case, Congressman Berman proposed new legislation in 1992, then known as the Free Trade in Ideas Act, to clarify Congress's original intent to allow the import and export of all materials protected by the First Amendment. A summary of the bill reiterated that the legislation was "necessary to clarify the intent of Congress in adopting the Berman amendment," because the Executive Branch had interpreted it "narrowly, to exclude many informational and artistic materials." The new law "makes clear that *all First Amendment protected materials and activities*, including paintings, telecommunications, and travel necessary for trade in information, are within the ambit of the statute's protection." 138 Cong. Rec. E1856-04, E1857 (emphasis added).

28. The Free Trade in Ideas Amendment added the words "information and" to the phrase "informational materials" in TWEA and IEEPA to make it clear that the exemption applies to information even if it has not yet been given tangible form as a "fully created" work at the time of the transaction. Congress also added four new examples of informational materials that would be covered by the exemption and expressly stated that the exemption applies regardless of format or medium of expression. The statutory language now reads:

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, *regardless of format or medium of transmission, of any information or informational*

materials, *including but not limited to*, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.

P.L. 103-236, Sec. 525(b), (c); *codified in* 50 U.S.C. § 1702(b)(3); 50 U.S.C. App. § 5(b)(4).

(The words in italics were added by the Free Trade in Ideas Amendment to the original text of the Berman Amendment.)

29. The conference committee's report on the Free Trade in Ideas Amendment specified that the Berman Amendment had been intended, "by including the words 'directly or indirectly,' to have a broad scope," and to cover all information protected by the First Amendment. It explained that the new law was designed to correct the Treasury Department's "restrictive interpretations, for example limits on the type of information that is protected or on the medium or methods of transmitting the information." H.R. Conf. Rep. No. 482, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess., 1994 U.S.C.C.A.N. 398, 483. It further clarified that Congress intended "informational materials" to include both tangible and intangible informational materials; "without regard to the type of information, its format, or means of transmission, and electronically transmitted information, *transactions for which must normally be entered into in advance of the information's creation.* *Id.* (emphasis added).

#### **The Present OFAC Information Regulations**

30. In spite of this clarification of the statutory language and Congress's explicit articulation of the legislation's purpose, OFAC has continued to misinterpret and misapply the sanctions statutes, in defiance of Congress's manifest intent.

31. OFAC revised its regulations in response to the Free Trade in Ideas Amendment. The term "information" was added, and the definition of informational materials was revised to encompass "compact disks, CD ROMs, artworks and news wire feeds." 60 Fed. Reg. 8933, 8934 (1995).

32. However, OFAC made no changes to the provisions of the regulations that forbid Americans from entering into transactions related to information “not fully created and in existence at the date of the transactions” – such as publishing agreements for new or to-be-revised books or articles. 31 C.F.R. §§ 500.206(c), 515.206(a)(2) (2004).

33. Nor did OFAC retract the prohibitions on “substantive or artistic alteration or enhancement of informational materials” and “the provision of marketing and consulting services” in connection with either existing or not-yet-fully-created works. *Id.*

34. OFAC’s regulations give the agency discretion to authorize otherwise prohibited transactions by way of licenses. *See* Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004). They provide for both general licenses, which permit entire classes or categories of transactions, and specific licenses, which require case-by-case determinations and approval by OFAC.

35. OFAC’s license determinations are not subject to any stated criteria. OFAC has stated only that “many” of them are “guided by U.S. foreign policy and national security concerns.” OFAC website, Frequently Asked Questions, *available at* <http://www.ustreas.gov/offices/enforcement/ofac/faq/#license>.

36. OFAC’s regulations permit it to amend or rescind existing licenses at any time or to exclude any person or transaction from the benefit of any general or specific license. 31 C.F.R. §§ 501.803, 500.503, 515.503, 535.503, 538.502, 560.502 (2004).

37. There is no limit to how long OFAC may take to respond to a license application. One letter ruling on publishing and the OFAC Information Regulations was issued almost a year and a half after the inquiry was made.

38. Nor is there any administrative process for appealing the denial of a license. Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004).

39. The importation of works from and exportation of services to North Korea similarly requires prior approval from OFAC, and OFAC's regulations leave open the criteria applied to such applications. 31 C.F.R. § 500.586(b) (2) (2004).

40. Anyone subject to U.S. jurisdiction who wishes to engage in the transactions or activities barred by the regulations, which are all inherent parts of the publishing process, must choose between applying for a license or approval from OFAC, which means facing delay and acceding to an unconstitutional prior restraint, and violating the regulations, which means facing civil penalties and criminal sanctions.

#### **Enforcement of the OFAC Information Regulations**

41. OFAC's enforcement division vigorously investigates violations of its regulations and the statutes it administers. According to congressional testimony of OFAC Director R. Richard Newcomb given on June 16, 2004, since 1993, OFAC has imposed penalties in more than 8,000 matters, generating fines of nearly \$30 million.

42. Among the few publicized enforcement actions involving First Amendment activity was the action taken by OFAC against the musician Ry Cooder. On information and belief, in 1999, Cooder was fined \$25,000 for collaborating with Cuban musicians to record the Grammy-winning album *The Buena Vista Social Club*. When Cooder sought to return to Cuba to record a second album, OFAC first refused to grant him a license, then reversed its position and stated that Cooder could return to Cuba only if he agreed to forgo any profits from the album. Cooder rejected that offer and instead lobbied senior members of the Clinton Administration for an unconditional license. President Clinton, during his last days in office, prevailed on OFAC to grant the license.



43. Plaintiffs do not know how often OFAC has levied sanctions for First Amendment-protected activities because OFAC has only recently begun to make reports of its enforcement actions available to the public. They are not aware of efforts by OFAC, after passage of the Berman or Free Trade In Ideas Amendments, to enforce its continued regulation of “information and informational materials” against publishers of books or journal articles, prior to September 2003.

44. Beginning late last year, however, OFAC issued a series of interpretive rulings that created increasing concern for publishers and authors.

45. In September 2003, responding to inquiries from U.S. entities interested in publishing books by Iranian authors in the United States and working with Iranian publishers to publish U.S. works there, OFAC ruled that several routine publishing activities would *not* be covered by the exemption and would therefore be barred. In two letters, OFAC stated:

- U.S. persons may not engage Iranian authors to create new works;
- U.S. persons are not authorized to assist Iranian authors by editing and otherwise preparing their manuscripts for publication, including the reordering of paragraphs or sentences, correction of syntax and grammar, and replacement of inappropriate words, since such activities “would result in a substantively altered or enhanced product”; and
- U.S. persons may not create illustrations for Iranian-authored works because that would constitute “a prohibited exportation of services.”

46. OFAC also explicitly ruled that the publication of books in the U.S. on behalf of persons in Iran or the publication of books in Iran on behalf of U.S. persons is prohibited. As OFAC wrote, “Inherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from [OFAC’s regulations]. Thus, you may not

publish books in the United States on behalf of a person in Iran, nor may a person in Iran publish books on your behalf.”

47. Also in September 2003, OFAC issued an interpretive ruling to the Institute of Electrical and Electronics Engineers (“IEEE”), which publishes scientific and technical journals, that certain ordinary activities undertaken by IEEE in the publication of works by Iranian authors fell outside the “information and informational materials exemption” and therefore were barred. These activities included “the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons,” because they “may result in a substantively altered or enhanced product, and [are] therefore prohibited under [OFAC’s regulations] unless specifically licensed.”

48. OFAC indicated that a U.S. publisher could accept “camera-ready cop[y]” from Iran and distribute it here. In addition, OFAC stated that the marketing of a periodical with articles by many authors would be permissible, although marketing a particular work by an author in a country under embargo would not, because “the provision of marketing or business consulting services is generally not permitted as incidental to the importation or exportation of informational materials.”

49. OFAC ruled that IEEE’s facilitation of a peer review process, including the selection of reviewers to collaborate with Iranian authors and transmitting the reviewers’ comments to the authors, would also violate the regulations because it would substantively enhance the articles.

50. In October 2003, IEEE submitted supplemental information to OFAC and called upon the agency to recognize that the Berman Amendment exempted all aspects of its publication process from trade sanctions, including editing and peer review. Congressman

Berman sent a letter to OFAC's director stating that its recent interpretations were "patently absurd" and "clearly inconsistent with both the letter and spirit of the law."

51. On April 2, 2004, OFAC ruled that IEEE could, without a license, engage in the limited peer review process it had described, but only so long as the process begins with completed manuscripts – not new or commissioned material – and provides only "general guidance and suggestions" from reviewers and editors that does not result in the "substantive[] re-writ[ing] or revis[ing of] the manuscript" or "a collaborative interaction ... resulting in co-authorship or the equivalent thereof."

52. This time, OFAC stated that routine copy editing, such as changing font sizes, correcting linguistic errors and repositioning illustrations, would be exempt because such acts would not amount to substantive alteration or enhancement of the work.

53. In July 2004, OFAC issued an interpretive ruling stating that it would be permissible for a U.S. person to fund the translation of already-published literary works by Iranian writers, evidently on the theory that reproducing, dubbing or translating existing works would not substantively alter or enhance them, which OFAC reiterated would not be allowed.

54. On July 19, 2004, in response to a query from the American Society of Newspaper Editors, OFAC issued another contradictory interpretation of the exemption for "information and informational materials." OFAC ruled that a U.S. newspaper could translate a completed article or op-ed commentary by a writer in a sanctioned country into English; edit such a work for space reasons by deleting superfluous text; edit it to correct grammar, syntax or spelling errors; and substantively edit it to make it more cohesive, efficient, argumentative or effective, in the same manner that it would for one of its own writers. OFAC did not explain the departure from its previous rulings or how to square its ruling with the regulations, which bar

substantive alteration. OFAC merely stated that “offering substantive edits to the work’s content ... would not constitute substantive or artistic alteration or enhancement of the article or commentary.” OFAC did not explain why “substantive edit[ing]” would not constitute “substantive alteration or enhancement” or why newspapers should be treated differently from books and journals.

55. Faced with such inconsistency in the interpretation of “substantive...alteration or enhancement,” publishers are left to wonder which rulings to follow and which transactions remain prohibited by that phrase in the regulations.

56. There is no uncertainty, however, about other prohibitions in the OFAC Information Regulations. OFAC has consistently maintained that American publishers may not enter into agreements to publish new works or substantially revised works by authors in the targeted nations. Those subject to U.S. jurisdiction may not pay them advances; may not co-author works with them; and may not engage in marketing activities for new or existing works written by them. Nor may anybody subject to OFAC’s rules “substantively or artistically alter or enhance” such works, although OFAC’s inconsistent rulings have left the meaning of that phrase dangerously unclear.

#### **The Effects of the OFAC Information Regulations**

57. The OFAC Information Regulations impede the free flow of ideas and information, in every medium, created in whole or in part by individuals in Iran, Cuba and Sudan. Because all the activities prohibited by the regulations are integral to the publishing process, the regulations effectively make it illegal for American publishers to publish any books and, in many cases, journal articles, by authors in the restricted countries.

58. In book publishing and scholarly journals, publishers have to engage in “transactions relating to information or informational materials not yet fully created” – which the

regulations prohibit – to select and shape the works they publish in keeping with their editorial vision and publishing program.

59. It is standard practice for publishers and literary agents to enter into agreements with authors for new works or works to be revised, before the works are fully created.

Publishers and their editors generally must collaborate with authors before a book or article is completed to help develop the ideas and plan the topics, structure and approach for their works.

60. Authors must often be contractually engaged by publishers before they complete a work. Many could not devote the hundreds, if not thousands, of hours required over several years to create a finished work without a prior assurance of publication.

61. Publishers also routinely pay advances on royalties for new works or even for significant revisions of works first published abroad. Compensation is a significant inducement for authors, as for all professionals, and individuals often cannot afford to spend the time necessary to write without compensation.

62. The prohibition against the substantive alteration or enhancement of a work also conflicts with the way American publishers of books and journals do their work. Substantive editing and, in many instances, expert peer review, form an integral part of the publication process for almost all authors, a function that is critical to bringing any work into conformity with a publisher's goals and standards, and to ensure that it communicates effectively and will make a worthwhile contribution to knowledge. To be meaningful, the right to publish requires the right to edit.

63. OFAC has stated that publishers may “advise the ... author of the nature and extent of th[e] problems,” but publishers also regularly “substantively rewrite or revise the

manuscript for the authors to remedy those problems,” which OFAC has generally forbidden. Barriers of language and culture for many authors makes such editing all the more important.

64. Even when language poses no problems, the role of publishing in the research process makes substantive editing crucial, especially for primary research publications. Such manuscripts are subjected to rigorous, substantive peer review so that results may be published and relied upon by other researchers, academics, and professionals.

65. Publishers also substantively alter and enhance works by translating them – a process that is far from mechanical – or by adding photographs, artworks, explanatory notes and introductions. For reference works, as well as photo essays and many other publications, such enhancements are often essential. They can produce new works that offer readers more insight and information than the original text alone.

66. OFAC has maintained that any input that rises to the level of co-authorship is forbidden. The prohibition of enhancement therefore also bars authors from working jointly on publications with other specialists in their fields. In scientific journals, in particular, collaboration and joint authorship are the rule more than the exception. The ban thus prohibits collaborations that could advance knowledge in many fields. It is especially frustrating for American researchers because it forbids them to work with co-authors in countries to which Americans do not have free access to conduct research.

67. The prohibition against marketing has the effect of rendering it impossible to publish a book authored in whole or in part by an individual in one of the restricted countries, whether it is a new work or an already completed one. Book publishers cannot feasibly publish books without marketing them. They must, at a minimum, describe their upcoming publications in marketing catalogs and employ a sales force to sell their lists. Publishers also have to be able

to solicit reviews and articles in the press and place advertisements. University and professional publishers also regularly promote their works at academic conferences and promote individual works through electronic databases.

68. According to OFAC, a journal publisher may promote a journal as a whole without violating the marketing prohibition, but a book publisher cannot realistically publish a book without marketing the individual title. As OFAC has recognized “[i]nherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from the prohibitions ....” OFAC thus correctly concluded that, without such services, one cannot publish a book.

69. The OFAC Regulations preclude publication of books and articles in medicine, chemistry, other sciences and the arts, as well as works of literature, history and social science whose observations can contribute to our understanding of the people and governments in the restricted nations. They preclude publication of eyewitness accounts and analyses of the operations of the very regimes the sanctions are intended to oppose, which could inform our conduct of foreign affairs. Often, such books and articles cannot be published in the authors’ native countries.

70. In some restricted countries – for example, Sudan – authors do not have access to the resources to permit them to publish books, so that publication in the United States represents one of the only realistic chances for Americans to have access to the authors’ work.

71. In all the restricted countries, dissidents fear repercussions for expressing their views. Because of OFAC’s restrictions, a dissident who is not free to publish at home cannot publish here, either.

### **Particular Projects That Have Been Affected**

72. Because of the OFAC Information Regulations and OFAC's recent enforcement and interpretations, several publishers, including members of AAUP and PSP, have suspended or cancelled significant publishing projects in history, literature, science and the arts, including a project sponsored by PEN. Others are concerned about the possible legal consequences of continuing with ongoing projects, including PEN and Arcade, which are collaborating on an anthology of works by authors in Iran. Many simply wish to be able to publish works by authors in the affected countries and would do so but for OFAC's restrictions.

73. Authors, editors, translators, and agents, including many who are members of PEN, have had projects stopped because of OFAC's regulations and rulings and have decided not to pursue other projects because of OFAC's restrictions. They do not want to face penalties or prosecution, but they do not believe they should have to apply for permission to publish their works.

74. Particular publications that have been cancelled, suspended or endangered by the regulations include the following examples. Some have been planned since as early as 2001.

75. The University of Alabama Press, a member of plaintiff AAUP, suspended the publication of two books in early 2004 when it learned about the OFAC Information Regulations and OFAC's recent interpretations of them. Both books, *Dialogues in Cuban Archaeology* and *A Colossus on the Sand: The Slave Revolt of 1825 in Guamacaro and the Atlantic World*, would feature recent scholarship based on materials not hitherto available to scholars in the United States – materials found in Cuban archaeological sites and the Cuban National Archives – and both would entail the close collaboration of Cuban and American scholars and editors, as well as the active marketing of the books as important contributions to their fields.



76. *Mathematical Geology*, the journal of the International Association for Mathematical Geology and a member of plaintiff PSP, has cancelled the publication of a paper by geologists at Shiraz University in Iran in March 2004. The paper, which aimed to advance the work of scientists concerned with earthquake prediction, had been subjected to rigorous peer review and substantively edited by the journal's staff in preparation for publication.

77. The Smithsonian Institution Press, a member of AAUP, planned to publish an English/Spanish edition of a book on the architecture of Havana by the Cuban novelist and cultural writer Alejo Carpentier and would have combined the text with photographs by American and Cuban photographers, an essay by a Cuban cultural critic, and a preface by an American architect. The project was dropped because OFAC prohibits substantively and artistically altering a work from Cuba, as well as publishing "not-yet-created" works by Cubans (such as the introduction and photos) and promoting the book.

78. Cornell University Press, another member of AAUP, wishes to reprint its *Field Guide to the Birds of Cuba*, a successful international collaboration that combined text by Cuban ornithologists with illustrations by an American artist and innovative designs devised by Cornell, and became an important resource for understanding bird species found in Cuba and the fragile ecosystems they inhabit, which are not easily accessible to American scientists, as well as the migration patterns of birds along the eastern coast of the Americas. To ensure its accuracy, the *Field Guide* would have to be substantively edited before being reprinted, and it would then have to be actively promoted.

79. As part of a translation program that PEN funds and operates, PEN has provided support for the translation and promotion of a selection of short stories written during the past decade by young writers in Cuba, some of whose works have not circulated freely because of

political constraints. The book would add an introduction by two American comparative literature scholars to help American readers more fully appreciate the translated works; the translators and editors would substantively and artistically alter the original works; and PEN and the publisher would market the book. The publisher, Northwestern University Press, has put the project on “hold” pending the resolution of legal concerns about OFAC’s rulings on editing, translating and marketing works from Cuba.

80. As part of a project to promote the translation of works from Iran to promote international understanding, PEN is also sponsoring the publication of *The PEN Anthology of Contemporary Iranian Literature*, which plaintiff Arcade wishes to publish, adding biographical and explanatory notes and an introductory essay that will provide historical and literary context to help American readers more fully appreciate the translated works, many of which reflect the turmoil and repression in Iran since the revolution. Both PEN and Arcade would plan to promote the book.

81. The *Journal of Democracy*, published by Johns Hopkins University Press, sought approval from the Department of the Treasury to publish excerpts of letters between Vaclav Havel, the playwright, democracy activist and former president of the Czech Republic, and Oswaldo Payá, one of Cuba’s foremost dissidents and advocates of democracy. The *Journal* is fortunate to be a project of an organization that has a license to support pro-democracy activities in Cuba and was advised that the dialogue could be published, but the editors would like to publish works by authors in other countries, including Iran and Sudan, and they do not believe they should need permission to bring those works to readers in the U.S. and around the world.

82. The journal *Technology and Culture*, also published by Johns Hopkins, has received a manuscript about technology and theology from a professor at the University of

Tehran in Iran that would require considerable substantive editing to be published. The journal wishes to make a decision based on the merits of the article, not the nationality of its author.

83. Temple University Press decided not pursue a promising project, an *Encyclopedia of Cuban Music*, which would have been the definitive work in its field. The *Encyclopedia*, by a Cuban scholar, would have required significant revisions to be published for an American audience.

84. Many other works that would interest and inform American readers cannot be published without a license, according to OFAC. The works we are missing could include the writings of political prisoners in Cuba and Iran; articles by Cuban scientists on research in infectious diseases; works by people in Sudan about the environmental disasters, famine, and religious and civil strife they have suffered; articles by earth scientists about their research in sanctioned countries; and works that could illuminate pressing issues that face us in international affairs.

85. American authors, editors and publishers, including plaintiffs and members of plaintiffs in this action, are eager to bring works of all kinds by authors in the embargoed countries to the public in the United States.

### **Irreparable Injury**

86. The continued threat posed by the OFAC Information Regulations and OFAC's recent interpretive rulings causes irreparable harm to publishers, editors, authors and translators, whose work is inhibited, and to the public, whose access to information is impaired. But for those regulations and rulings, works would be created, improved and published that would contribute to ongoing research in many fields and inform the public on matters of current and historical importance.

87. Citizens and government officials make public policy decision every day.

Scientific progress depends on the timely publication of research being performed worldwide. The clock cannot be turned back to recover the opportunities that are being lost to build on the unconstrained circulation of information and ideas.

88. The facts establish the likelihood of plaintiffs' success on the merits of the claims herein.

**FIRST CAUSE OF ACTION**  
**THE OFAC INFORMATION REGULATIONS VIOLATE TWEA AND IEEPA AS AMENDED BY THE BERMAN AND FREE TRADE IN IDEAS AMENDMENTS**

89. Plaintiffs repeat, replead, and reallege each of the allegations contained in paragraphs 1 through 88 above, as if fully set forth herein.

90. TWEA and IEEPA, as amended by the Berman and Free Trade in Ideas Amendments, prohibit OFAC from regulating or prohibiting the import and export of any and all First Amendment protected materials, directly or indirectly.

91. The OFAC Information Regulations openly defy that unconditional ban by regulating and prohibiting, directly and indirectly, the import and export of information and informational materials, violating not only the plain language of the statutes but the clearly expressed intent of Congress as evidenced in the statutes' legislative history.

92. Sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2) of Title 31 of the Code of Federal Regulations, and OFAC's recent interpretive rulings, violate TWEA and IEEPA, as they have been amended by the Berman Amendment and the Free Trade in Ideas Amendment, exceed OFAC's statutory authority, and are arbitrary and capricious.

**SECOND CAUSE OF ACTION**  
**THE OFAC INFORMATION REGULATIONS ARE UNCONSTITUTIONAL**

93. Plaintiffs repeat, replead, and reallege each of the allegations contained in paragraphs 1 through 88 of the above, as if fully set forth herein.

94. The OFAC Information Regulations are unconstitutional on their face and as applied, under the First and Fifth Amendments to the United States Constitution.

95. The prohibitions impose an unconstitutional burden on core First Amendment rights, including the rights to speak and publish and the American public's right to receive information.

96. The OFAC Information Regulations are unconstitutionally vague because they fail to provide the kind of notice that would enable ordinary people to understand what conduct is prohibited and they authorize arbitrary and discriminatory enforcement, in violation of the First and Fifth Amendments to the United States Constitution, infirmities that are highlighted by OFAC's contradictory interpretive rulings.

97. The application of the licensing scheme contained in the OFAC regulations, 31 C.F.R. § 501.801, to information and informational materials, imposes an impermissible prior restraint on First Amendment protected speech.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs request that the Court:

1. Set the case down for determination of plaintiffs' motion for a preliminary and permanent injunction.

2. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations violate TWEA and IEEPA.

3. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations abridge the freedoms secured by the First Amendment to the United States Constitution.

4. Declare that sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of the OFAC Information Regulations in Title 31 of the Code of Federal Regulations violate the First and Fifth Amendments of the Constitution because they are unconstitutionally vague.

5. Declare that 31 C.F.R. § 501.801, to the extent that it applies to information and informational materials exempted from regulation by the Berman Amendment and the Free Trade in Ideas Amendment, imposes an unconstitutional prior restraint on speech and press.

6. Preliminarily and permanently enjoin OFAC from enforcing sections 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and the second sentences of §§ 500.550(b) and 515.545(b) of Title 31 of the Code of Federal Regulation and any other sections that regulate information or informational materials exempted from regulation by the Berman Amendment and the Free Trade in Ideas Amendment, including without limitation 31 C.F.R. § 501.801, to the extent it may be applied to information or informational materials protected by the Berman Amendment and the Free Trade in Ideas Amendment.

7. Grant plaintiffs their attorneys' fees and related costs in this action.

8. Grant such additional relief as the Court deems just and proper.

Dated: New York, New York  
September 24, 2004

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