NOTES

AN UNFREE TRADE IN IDEAS: HOW OFAC'S REGULATIONS RESTRAIN FIRST AMENDMENT RIGHTS

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The Office of Foreign Assets Control (OFAC) is charged with administering the United States' trade sanctions programs. These programs conflict with the First Amendment when they prevent publishers and editors from working with authors from sanctioned countries. This Note highlights the shortcomings of OFAC's publishing regulations. It focuses on the agency's exclusion of foreign government officials ("the government exception") from the First Amendment protections given to those who engage in publishing-related activities. The Note argues that the government exception amounts to an improper prior restraint under the First Amendment and creates the potential for censorship. The Note then challenges and critiques national security– and economic-based justifications for the government exception. Lastly, it proposes regulatory and policy-based reforms to ensure that sanctions programs can function without sacrificing the rights and protections to which publishers, authors, and editors are entitled under the First Amendment.

INTRODUCTION

In December 2003, Shirin Ebadi, a judge and lawyer, won the Nobel Peace Prize for her human rights and advocacy work in her home country of Iran. After receiving the award, Ebadi wanted to write and publish a memoir of her experiences in the United States. However, that same year, the United States Office of Foreign Assets Control (OFAC), the agency charged with administering economic sanctions[1] against countries subject to U.S. trade embargoes, developed a new policy that prohibited creators and distributors of First

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[1] In this Note, I refer to "trade sanctions," "economic embargoes," and "economic sanctions" interchangeably.

Amendment–protected works from entering into transactions with persons or entities from countries under embargo without first receiving approval in the form of a license from an OFAC official.[2]

Because of negative public attention and lawsuits brought by Ebadi and several publishing organizations, OFAC added certain exemptions for Cuba, Burma, Sudan, and Iran[3] to its embargo programs in December 2004.[4] These exemptions permit publishers and authors to engage in certain publishing-related activities without seeking prior approval from OFAC.[5] However, OFAC has categorically excluded government officials from these exemptions.[6] As a result, government-official authors and their publishers must continue to seek approval from OFAC before their works can be printed. OFAC, moreover, has defined governments and their officials broadly,[7] so many speakers from affected countries fall under this exception.

OFAC's regulation of "informational materials"—all First Amendment–protected works—has been longstanding, and scholars had identified problems with such regulation even before two congressional acts[8] removed the executive branch's power to regulate infor-

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[2] Rachel Donadio, *Is There Censorship?*, N.Y. TIMES BOOK REV., Dec. 19, 2004, at 16. OFAC indicated that it might be willing to grant Ebadi a specific license to publish her works, but Ebadi chose to pursue a lawsuit against OFAC. Ebadi ultimately settled her suit with OFAC, *see* Ebadi v. Office of Foreign Assets Control, No. 04CIV8420RCC, 2005 WL 1287040 (S.D.N.Y. Apr. 22, 2005), and her book, *Iran Awakening: A Memoir of Revolution and Hope*, was published by Random House in 2006.

[3] See *infra* note 24 for a list of the countries and regions in which OFAC runs sanctions programs. OFAC refers to its sanctions program against Burma/Myanmar as the "Burma Sanctions." *See* OFAC, Sanctions Program Summaries, http://www.treas.gov/offices/enforcement/ofac/programs (last visited Oct. 12, 2008) (listing sanctions programs administered by OFAC). To avoid confusion and to remain consistent in references to OFAC's sanctions programs, this Note uses the name Burma rather than Myanmar.

[4] Though all of these suits have either been withdrawn or settled, questions regarding the validity of OFAC's publishing regulations remain. *See* Press Release, Ass'n of Am. Univ. Presses, Government Issues New Regulations on Publications from Cuba, Iran, and Sudan: Publishers' and Authors' Groups End Litigation That Prompted Change (Oct. 1, 2007), http://aaupnet.org/ofac/release100107.html [hereinafter October 1 Press Release] (reporting authors' and publishers' continued opposition under First Amendment to government licensing of books and journals and noting that OFAC's publishing regulations remain open to potential future challenges).

[5] *See* 31 C.F.R. § 515.577 (2007) (authorizing publishing activities under Cuban Assets Control Regulations program); § 537.526 (equivalent regulation under Burmese Sanctions Regulations program); § 538.529 (equivalent regulation under Sudanese Sanctions Regulations program); § 560.538 (equivalent regulation under Iranian Transactions Regulations program).

[6] *See infra* note 74 and accompanying text.

[7] *See infra* note 75 and accompanying text.

[8] These statutes, which provide what has been collectively termed the "informational materials exemption" to OFAC's authority, are known as the Berman Amendment, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371 (1988) (codified at 50 U.S.C. app. § 5(b)(4)

mational materials.[9] While, as a result of these statutes, OFAC's conduct under current law is arguably ultra vires—or beyond OFAC's administrative authority[10]—this Note instead focuses on a fundamental right: the freedom under the First Amendment from being silenced. While courts avoid deciding cases on constitutional grounds whenever possible,[11] this Note takes the position that First Amendment claims challenging OFAC's publishing regulations are strong enough for a court to consider seriously.[12] Thus, OFAC should be concerned about the First Amendment problems its licensing scheme creates.[13] To that end, after identifying the constitutional deficiencies in its regulation of publishing activities, I discuss ways for the agency to remedy these deficiencies.

This Note proceeds as follows: Part I gives a brief overview of OFAC's history, mission, and structure. It also discusses OFAC's licensing scheme generally. Part II addresses the history of OFAC's regulation of First Amendment works and the creation of a licensing scheme for publishing activities. Part III gives an overview of the First

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(2000)), and the Free Trade in Ideas Act (FTIA), Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (codified as amended at 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000)). *See also infra* Part II (discussing statutes in detail).

[9] *See generally* Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 728–33 (1985) (addressing regulation of informational materials prior to Berman Amendment and FTIA). For literature prior to the enactment of the FTIA but after the Berman Amendment, see generally Eric Michael Bland, Comment, *Constitutionality of Regulating International Sports Broadcasting:* Capital Cities/ABC, Inc. v. Brady, 44 FED. COMM. L.J. 363 (1992) (discussing OFAC's interpretation of informational materials to exclude broadcasting), Pamela S. Falk, Note, *Broadcasting from Enemy Territory and the First Amendment: The Importation of Informational Materials from Cuba Under the Trading with the Enemy Act*, 92 COLUM. L. REV. 165 (1992) (same), and Marielise Kelly, Case Comment, *Artwork from "Enemy" Nations: Informational Material Under the Trading with the Enemy Act, a Relic of the Perceived Communist Threat,* Cernuda v. Heavey*, 720 F. Supp. 1544 (S.D. Fla. 1989)*, 14 SUFFOLK TRANSNAT'L L.J. 567 (1991) (discussing informational materials regulated by OFAC, specifically artwork).

[10] *See, e.g.*, Falk, *supra* note 9, at 165 (arguing for interpretation of Berman Amendment as withdrawal of congressionally delegated authority and finding that issues of heightened deference and First Amendment remain ripe for appellate review). *But see* Laura A. Michalec, Note, *Trade with Cuba Under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L.J. 808, 809 (1992) (arguing courts should defer to OFAC's interpretation of Berman Amendment).

[11] *E.g.*, Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 98 (1992) (White, J., concurring).

[12] *See* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 223 n.19 (1960) (Black, J., dissenting) ("The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us." (alteration in original) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821))).

[13] In this Note, I refer to OFAC's licensing of First Amendment–protected activities (specifically, those connected to book publishing) as its "licensing scheme."

Amendment's prior restraint doctrine and applies this analysis to OFAC's licensing scheme, which prohibits works from being published by government officials without OFAC's prior approval. Part IV suggests ways OFAC can reform its regulatory program for publishing activities to remedy constitutional problems.

I
OFAC's Structure and Decisionmaking Processes

In this Part, I provide an overview of OFAC's history, mission, and structure and then describe the evolution of its scheme for licensing informational materials.

A. Overview of OFAC's History, Mission, and Structure

OFAC is responsible for administering and enforcing "economic and trade sanctions based on [U.S.] foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction."[14] The agency is charged with enforcing the Trading with the Enemy Act (TWEA),[15] which gives the executive branch the power to wage economic warfare against hostile nations during wartime,[16] and the International Emergency Economic Powers Act (IEEPA), which provides for the application of TWEA powers beyond wartime.[17]

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[14] OFAC, Our Mission, http://www.treas.gov/offices/enforcement/ofac/mission.shtml (last visited Aug. 5, 2008) [hereinafter Mission Statement].

[15] TWEA was originally enacted in 1917, after the United States entered into World War I. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. §§ 1–6, 7–39, 41–44 (2000)). It gave the President the power to wage economic warfare against hostile nations during wartime. 50 U.S.C. app. §§ 3, 5(b). The President delegated this authority to the Secretary of the Treasury in 1942. Exec. Order No. 9193, 7 Fed. Reg. 5205, 5206 (July 6, 1942). The Secretary then delegated authority to OFAC to administer and implement TWEA. Treas. Dep't Order No. 128 (Rev. 2) (Oct. 15, 1962) (as amended by Office of Foreign Assets Control: Authority and Functions, 32 Fed. Reg. 3472 (1967)).

[16] TWEA states:

> [T]he president may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise . . . investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition[,] holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . .

50 U.S.C. app. § 5(b)(1).

[17] 50 U.S.C. §§ 1701–1706 (2000). IEEPA was enacted in 1977. To exercise his powers under IEEPA, the President must declare a national emergency. § 1701. Then, he must prepare a report to Congress specifying the circumstances that require the use of IEEPA powers, why the circumstances constitute an "unusual and extraordinary threat" to the

OFAC is the successor agency to the Office of Foreign Funds Control (FFC), whose "initial purpose was to prevent Nazi use of the occupied countries' holdings of foreign exchange and securities" during World War II.[18] The FFC conducted "economic warfare against the Axis powers by blocking enemy assets and prohibiting foreign trade and financial transactions."[19] OFAC itself was created in 1950, when China entered the Korean War; President Truman declared the event a national emergency and charged the agency with blocking all Chinese and North Korean assets subject to U.S. jurisdiction.[20]

Today, OFAC is one of several agencies situated within the Treasury Department[21] and is overseen by the Under Secretary for Terrorism and Financial Intelligence.[22] The size and scope of OFAC's work have steadily expanded: As of February 2006, its staff had grown to over 125 employees,[23] who administer both country-based and list-based sanctions programs.[24] While international financial institutions have long been familiar with the agency, OFAC has become increasingly involved with any organization that has international ties.[25]

United States, what actions the President proposes to take, and the justifications for those actions. § 1703(b). The President must also continue to report to Congress every six months so long as his IEEPA powers are exercised. § 1703(c).

[18] OFAC, Frequently Asked Questions and Answers, http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml (last visited Aug. 5, 2008) [hereinafter OFAC FAQ].

[19] *Id.*

[20] *Id.*; *see also* National Archives, Records of the Office of Foreign Assets Control, http://www.archives.gov/research/guide-fed-records/groups/265.html#265.1 (last visited Sept. 16, 2008) (stating that Division of Foreign Assets Control was established in December 1950 to administer control over frozen Chinese and North Korean assets after China's October 1950 intervention in Korea).

[21] U.S. DEP'T OF THE TREASURY, TREASURY ORGANIZATION CHART (2008), http://www.treas.gov/organization/org-chart-04242008.pdf.

[22] *Id.*

[23] *Weapons of Mass Destruction: Stopping the Funding—the OFAC Role: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 109th Cong. 2 (2006) (statement of Rep. Luis V. Gutierrez); *id.* at 15–17 (statement of Robert W. Warner, Director, OFAC).

[24] As of October 2008, OFAC oversees sanctions programs for the following countries and regions: the Balkans, Belarus, Burma, Côte d'Ivoire (the Ivory Coast), Cuba, Democratic Republic of the Congo, Iran, Iraq, Former Liberian Regime of Charles Taylor, North Korea, Sudan, Syria, and Zimbabwe. *See* OFAC, Sanctions Program Summaries, http://www.treas.gov/offices/enforcement/ofac/programs (last visited Oct. 28, 2008). List-based sanctions programs focus on prohibiting Americans from engaging in certain activities with designated individuals. OFAC administers list-based sanctions programs for terrorism, diamond trading, narcotics trafficking, nuclear proliferation, and anti-Lebanon activities. *Id.*

[25] For example, OFAC has frozen the assets of international charities it has suspected of supporting terrorist activity. *See, e.g.*, Kathryn A. Ruff, Note, *Scared To Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447,

OFAC administers and enforces economic sanctions programs against countries and groups of individuals, such as terrorists or narcotics traffickers.[26] These sanctions programs broadly prohibit transactions by persons in the United States with the sanctioned country or group unless those transactions are expressly authorized by OFAC.[27] Therefore, to engage in these prohibited activities, one must obtain a license from OFAC.[28] While a comprehensive examination of how OFAC issues licenses for all of its various programs is beyond the scope of this Note, I discuss below OFAC's licensing scheme for the regulation of informational materials.

B. OFAC's Licensing Scheme

OFAC exempts certain transactions from the broad prohibitions imposed under sanctions programs, so that "transactions consistent with U.S. policy are permitted" even with otherwise sanctioned countries or individuals.[29] There are two possible licenses OFAC can grant to create such exemptions: general licenses, which give blanket authority to engage in certain preapproved activities,[30] and specific licenses,[31] which are issued for a particular purpose.[32]

If a person engages in a prohibited activity or transacts with a prohibited person either without or beyond the scope of a license, OFAC will consider such conduct to be a violation of its embargo pro-

458–64 (2006) (describing OFAC's role in designating four Islamic charities as terrorist organizations and freezing their assets).

[26] OFAC FAQ, *supra* note 18.

[27] *Id.*

[28] A "license" is an authorization issued by OFAC that permits a transaction that is otherwise prohibited. *Id.* OFAC's regulations themselves do not provide much guidance on the definition of "license." *See* 31 C.F.R. § 515.316 (2007) ("Except as otherwise specified, the term *license* shall mean any license or authorization contained in or issued pursuant to this part.").

[29] *Oversight of the Department of Treasury: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 108th Cong. 91 (2004) [hereinafter *Testimony*] (testimony of R. Richard Newcomb, Director, OFAC).

[30] OFAC's definition of "general license" is not very detailed. *See* § 515.317 ("A general license is any license or authorization the terms of which are set forth in this part."). In practice, however, a general license "authorizes a particular type of transaction for a class of persons without the need to apply for a license." OFAC FAQ, *supra* note 18.

[31] Similarly, "specific license" is not well defined. *See* § 515.318 ("A specific license is any license or authorization issued pursuant to this part but not set forth in this part."). OFAC clarifies on its website that a specific license is "a written document issued by OFAC to a particular person or entity, authorizing a particular transaction in response to a written license application." OFAC FAQ, *supra* note 18.

[32] Travel to Cuba to visit an immediate family member, for example, requires a person to submit an application for a specific license. *See* OFAC FastRequest, https://fastrequest.ofac.treas.gov/default.aspx (last visited Aug. 5, 2008) (allowing individuals to apply for specific license to visit immediate family members who are Cuban nationals).

gram, subject to criminal and civil penalties. Such penalties for OFAC violations can be quite high: Criminal fines can range from $50,000 to $10,000,000, and imprisonment can range from ten to thirty years for willful violations;[33] civil penalties are lower but can still be steep—up to $1,075,000 for each violation—depending on the sanctions program and the nature of the violation.[34] In response to congressional criticism in 2002, OFAC drafted a detailed procedure for appealing penalties assessed against an individual or organization based on the violation of a license, rule, or regulation.[35] However, there is no equivalent opportunity to contest a license denial. A license denial is a final agency action and can only be reviewed for "good cause."[36]

Violations of OFAC embargo programs incur strict liability[37] on the theory that even an inadvertent violation "can jeopardize critical foreign policy and national security goals."[38] Nonetheless, self-disclosure of past violations is considered a mitigating factor with regard to the civil penalties that OFAC might assess.[39] Overall,

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[33] OFAC FAQ, *supra* note 18. However, criminal penalties and imprisonment terms for violating a regulation differ by program. For example, willful violations of TWEA (under which the Cuban embargo program is regulated) can incur penalties of up to $1,000,000 for an organization and $100,000 for an individual, or up to ten years imprisonment. § 501.701(a)(1). Read in conjunction with 18 U.S.C. § 3571, which governs the sentencing of fines, criminal penalties for violations of the Cuban embargo program can reach $250,000 for an individual and $1,000,000 for an organization or twice the pecuniary gain or loss from the violation, whichever is greater. § 501.701(b). A willful violation of the Iran embargo program, which is administered under IEEPA, can trigger criminal penalties of up to $50,000, up to twenty years' imprisonment, or both. § 535.701(a)(2).

[34] OFAC FAQ, *supra* note 18. For violations of its Cuban embargo program, OFAC can impose a civil penalty of up to $65,000 on any person who violates any license, order, or regulation issued under TWEA. § 501.701(a)(3). For violations of its Iranian embargo program, OFAC can impose civil penalties of up to $50,000. § 535.701(a)(1). Between 1993 and 2004, OFAC collected $30 million in civil penalties. *Testimony*, *supra* note 29, at 92.

[35] *See* §§ 501.703–.745 (detailing, for example, service of process procedures, evidentiary standards, hearing requests, and mandatory waiting period before penalty payment is required).

[36] *See infra* note 105 and accompanying text.

[37] Although the regulations call for a knowing or willful violation of TWEA and its regulations in order to incur a penalty, OFAC seems to take the approach that violators will be held strictly liable. *Compare* § 501.701, *with* OFAC FAQ, *supra* note 18.

[38] OFAC FAQ, *supra* note 18.

[39] *Id.* OFAC does not provide information on how penalties are assessed or when they are reduced as a result of self-disclosure. *See generally* Mark D. Menefee, *Voluntary Self-Disclosures: Choosing Among Bad Options To Survive*, *in* 1 COPING WITH U.S. EXPORT CONTROLS 2007, at 361 (PLI Commercial Law & Practice, Course Handbook Series No. 901, 2007) (contrasting Commerce Department's Bureau of Industry and Security and Treasury Department's Directorate of Defense Trade Controls, which provide clear guidance on how to submit self-disclosures and what information is required, with OFAC, which does not).

OFAC has substantial leeway through its licensing power to exercise tight control over a broad range of activities.

II
Evolution of a General License for Publishing Activities

In 2003, the Institute of Electrical and Electronics Engineers (IEEE) received an interpretative letter[40] from OFAC concerning manuscripts that IEEE had received from Iranian authors for potential publication in its scientific journal.[41] The letter stated that engaging in publishing activities with individuals from a sanctioned country was prohibited unless OFAC specifically approved the transaction. Following negative media attention and lawsuits from publishers, authors, and scholars, OFAC altered its harsh position and issued regulations in December 2004 that granted a general license for publishing activities.[42] In this part, I discuss the relevant history of OFAC's attempts to regulate First Amendment–protected activities, Congress's response to those attempts, and the general licensing scheme through which OFAC currently regulates publishing activities.

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[40] Interpretative letters are nonbinding, situation-specific rulings issued by OFAC to interested parties to give guidance on whether OFAC will interpret certain activities as either authorized or unauthorized by a trade embargo program. *See* OFAC FAQ, *supra* note 18 (stating that "[g]reat care should be taken" before relying on previously issued or published materials by OFAC, including interpretations of regulations); Letter from Robert W. Werner, Director, OFAC, to Nelson G. Dong, Esq., Dorsey & Whitney LLP (May 9, 2005), *available at* http://www.ieee.org/portal/cms_docs_iportals/iportals/aboutus/ofac/OFAC_letter_to_IEEE_050905.pdf [hereinafter Werner Letter] (responding to letters sent on behalf of Institute of Electrical and Electronics Engineers (IEEE) seeking interpretative guidance on IEEE's membership activities). These letters also explain whether the party needs to take further steps to secure prior approval in the form of a specific license prior to engaging in a particular activity. Werner Letter, *supra*. It should be noted that OFAC has used the term "interpretative rulings" interchangeably with "interpretative letters." *See* OFAC, Report of Licensing Activities Pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000, at 1 n.1 (Oct.–Dec. 2007), *available at* http://www.treas.gov/offices/enforcement/ofac/licensing/agmed/1quarter2008.pdf (referring to "interpretative letter"); OFAC, Interpretative Rulings, http://www.treas.gov/offices/enforcement/ofac/rulings/index.shtml (last visited Sept. 18, 2008) (referring to "interpretative rulings"). This Note uses the term "interpretative letters" throughout.

[41] For an overview of industry reaction to the IEEE letter, see, for example, Press Release, PEN Am. Ctr., First Amendment Problems Remain in Wake of Latest OFAC Pronouncement (Apr. 5, 2004), http://www.pen.org/viewmedia.php/prmMID/261/prmID/1331, and Action Letter, PEN Am. Ctr., Write to the Treasury Dept. in Protest of OFAC Regulations (Mar. 2004), http://www.pen.org/page.php/prmID/440.

[42] *See supra* notes 4–5 and accompanying text.

A. The Informational Materials Exemption and OFAC Regulation

Prior to 1988, informational materials could be regulated by the executive branch under the Trading with the Enemy Act.[43] Out of concern that OFAC's administration of the trade sanctions programs was interfering with the free exchange of ideas and information,[44] Congress passed two acts that reined in executive authority over the importation and exportation of informational materials: the Berman Amendment in 1988[45] and the Free Trade in Ideas Act (FTIA) in 1994.[46]

The Berman Amendment was passed in response to the United States' border seizures of books and magazines from embargoed countries. It created an informational materials exemption to OFAC's authority, stating that executive authority to regulate imports and exports under TWEA and IEEPA did not include the ability to regulate, either "directly or indirectly," informational materials such as publications, films, posters, and photographs.[47] After the Berman Amendment was passed, OFAC amended its regulations to include this "informational materials" exemption.[48]

Despite this clear limitation of OFAC's regulatory power, OFAC took a restrictive view of what fell within the informational materials exemption.[49] The agency initially argued that the Berman Amend-

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[43] *See, e.g.*, Veterans & Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs, 459 F.2d 676, 679–81 (3d Cir. 1972) (upholding TWEA and finding that OFAC's regulation of Northern Vietnamese literature under TWEA was valid); Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 445–46 (2d Cir. 1968) (holding that, under TWEA, OFAC can regulate informational materials).

[44] 132 CONG. REC. 6550 (1986) (statement of Sen. Mathias) ("'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[s] it.'" (quoting President Ronald Reagan)).

[45] Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371 (1988) (codified at 50 U.S.C. app. § 5(b)(4) (2000)).

[46] Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (codified as amended at 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000)). The notion of a "free trade in ideas" is similar to "the marketplace of ideas." Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 134 (1989); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[47] § 2502(a)–(b), 102 Stat. at 1371.

[48] 31 C.F.R. § 500.206 (1990) (exempting informational materials under OFAC's regulations governing prohibitions); § 500.550 (exempting informational materials under OFAC's licensing provisions). This exemption was later amended to include newer forms of media. 31 C.F.R. § 500.206 (1996).

[49] *See* 31 C.F.R. § 500.332 (1990) (defining informational materials). OFAC's exemption excluded, *inter alia*, intangible items (e.g., telecommunications transmissions), transactions related to informational materials not fully created and in existence at the time of the

ment did not cover all activities protected by the First Amendment, such as original artwork, because it was aesthetic, not informational.[50] However, this argument was rejected in *Cernuda v. Heavey*.[51] The *Cernuda* court cited numerous instances in which "[a]rt convey[ed] information through its unique form of expression, often political expression,"[52] and affirmed that "[a]rtwork, like other forms of expression, is within the ambit of speech that receives First Amendment protection."[53] Since the term "informational materials" had an "obvious First Amendment orientation,"[54] artwork was included in the ambit of informational materials.

In contrast, one year later, in *Capital Cities/ABC, Inc. v. Brady*, OFAC denied ABC's specific-license request to broadcast a sporting event from Cuba.[55] OFAC took the position that the informational materials exemption only applied to physical works in existence, which did not extend to broadcasting.[56] In analyzing ABC's First Amendment claim, the *Brady* court noted that "it [was] far from clear that the OFAC's construction of the Berman Amendment . . . violate[d] the First Amendment"[57] and held that OFAC's interpretation was a reasonable construction of the informational materials exemption.[58] The court also viewed OFAC's narrow construction of the

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transaction, substantive or artistic alterations or enhancements, and marketing services by a person subject to the jurisdiction of the United States. §§ 500.206, .332, .550.

50 When the Customs Service seized over 200 Cuban paintings from Ramon Cernuda, director of the Cuban Museum in Miami, the government claimed the paintings violated TWEA. Cernuda v. Heavey, 720 F. Supp. 1544, 1545 (S.D. Fla. 1989). Cernuda applied twice for licenses to display the Cuban artwork, both before and after the seizure, but both license applications went unanswered. *Id.* at 1546 & n.2. The court noted in dicta that there appeared to be selective enforcement by OFAC, since other institutions such as Sotheby's, Christie's, and the Museum of Modern Art in New York had displayed Cuban artwork without obtaining specific licenses. *Id.* at 1546 n.4.

51 *Id.* at 1550–51.

52 *Id.* at 1550 (citing Eugene Delacroix painting, Pablo Picasso's political statement against Fascism in *Guernica*, and political cartoons in newspapers as examples).

53 *Id.* at 1549.

54 *Id.* at 1549–50.

55 Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1010–12, 1014–15 (S.D.N.Y. 1990) (affirming OFAC's barring of live broadcast of 1991 Pan-American Games from Cuba and deferring to OFAC's interpretation that information exemption applied only to physical works in existence).

56 *See id.* at 1009, 1011–12. OFAC also denied the permit on the basis of ABC's exclusivity arrangement in broadcasting the games and intimated that a nonexclusive broadcast might have been permitted. *See id.* at 1010 & n.5. Additionally, ABC had paid Cuban officials for the right to broadcast the games, which violated OFAC's mission to deny any economic benefit to embargoed countries. *Id.* at 1010 & n.5. However, the payment to officials has been questioned as a viable economic benefit to Cuba itself, since the payment went toward the games and not to the government of Cuba. Falk, *supra* note 9, at 169.

57 *Brady*, 740 F. Supp. at 1013.

58 *Id.* at 1014–15.

informational materials exemption as necessary to avoid a separation of powers problem, and it underscored the importance of carefully balancing First Amendment issues while keeping in mind both agency deference and the Executive's ability to conduct foreign affairs.[59]

After *Brady*, Congress passed the FTIA, both to clarify the scope and to reaffirm the intention of the Berman Amendment. In the FTIA, Congress's stated intention was 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."[60] The FTIA contains an explicit "informational materials" exemption:

> The authority granted to the President [by TWEA and IEEPA] 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.[61]

Representative Howard L. Berman, sponsor of both the Berman Amendment and the FTIA, stated that the purpose of the acts was 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 countries."[62] The apparent overall effect of the two congressional acts was to remove OFAC's ability to regulate informational materials.

B. OFAC's General License for Publishing Activities

Despite the passage of the Berman Amendment and the FTIA, controversy and confusion over the relationship between informational materials and the economic sanctions programs continued. In the interpretative letter[63] issued by OFAC to IEEE regarding manuscripts that IEEE had received from Iranian authors for potential publication in its scientific journal, OFAC acknowledged that informational materials were outside the scope of its regulations but then pro-

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[59] *Id.* at 1013.

[60] Free Trade in Ideas Act, Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (codified as amended at 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000)).

[61] *Id.* § 525(b)(1), 108 Stat. 474; *see also id.* § 525(c)(1), 108 Stat. 474.

[62] 138 CONG. REC. 15,052 (1992) (statement of Rep. Berman). Representative Berman also added, "[T]he insignificant sums of money . . . 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 . . . ." *Id.*

[63] See *supra* note 40 for a definition of interpretative letters.

ceeded to construe narrowly the meaning of "informational materials," just as it always had.[64] According to OFAC, IEEE could only accept "camera-ready copies of manuscripts" from an Iranian author for journal publication.[65] Anything more would require IEEE to apply for a specific license from OFAC:

> The collaboration on and editing of manuscripts submitted by persons in Iran, including 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, may result in a substantively altered or enhanced product, and is therefore prohibited under [the regulations] unless specifically licensed. Such activity would constitute . . . prohibited services to Iran, regardless of the fact that such transactions are part of [IEEE's] normal publishing activities.[66]

OFAC's interpretation was problematic for IEEE since full manuscripts were rarely "camera-ready" for immediate publication.[67] The publishing community[68] was likewise concerned about the impact of OFAC's interpretation,[69] since OFAC asserted that in addition to

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[64] *See supra* notes 49–59 and accompanying text.

[65] Letter from R. Richard Newcomb, Director, OFAC (Sept. 30, 2003), *available at* http://www.treas.gov/offices/enforcement/ofac/rulings/ia100203.pdf [hereinafter September 30 Letter]. The letter has been removed from OFAC's list of interpretative guidance rulings, but it is still available on OFAC's website. Addressee information has been redacted, but IEEE has identified itself as the recipient. IEEE & OFAC, Information Update, http://www.ieee.org/web/aboutus/ofac/index.html (last visited Aug. 7, 2008); *see also* Letter from Rep. Howard L. Berman to R. Richard Newcomb, Director, OFAC (Mar. 3, 2004), *available at* http://www.house.gov/list/speech/ca28_berman/newcomb_letter.html.

[66] September 30 Letter, *supra* note 65. Another puzzling aspect of OFAC's interpretative rulings was OFAC's differential treatment of newspapers, who, like IEEE, had inquired as to whether they could publish the works of writers from Cuba, Iran, and Sudan. *See* Letter from R. Richard Newcomb, Director, OFAC (July 19, 2004), *available at* http://www.treas.gov/offices/enforcement/ofac/rulings/gn071904.pdf (responding to inquiry from newspaper after letter sent to IEEE). In an interpretative letter issued to a newspaper, the same activities that OFAC told IEEE either were prohibited outright or required a specific license were exempt as "informational materials" with respect to newspapers. *Id.* The Berman Amendment and FTIA never distinguished between newspapers and other informational materials, such as journals. This is not the only instance of differing treatment of First Amendment–protected activities within the informational materials exemption: The Court has previously rejected a challenge to the distinction drawn by OFAC between print and broadcast media. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1013 (S.D.N.Y. 1990) ("[T]he Court is not persuaded by ABC's claim that the Regulations impermissibly discriminate between the print and broadcast media."). These distinctions make it unclear what rules will be applied to varying types of informational materials.

[67] For an explanation of why OFAC's requirement that manuscripts be "camera-ready" was considered problematic, see Potter Wickware, *US Pressures Publishers To Honor Trade Embargoes*, 10 NATURE MED. 109, 109 (2004).

[68] I include authors, editors, publishers, translators, agents, publicists, and academic institutions within this definition.

[69] *See supra* note 41 and accompanying text.

being prohibited from editing the work of foreign authors, publishers could not promote, market,[70] or translate works without first receiving a specific license from the agency.[71]

In response to several lawsuits—brought by Shirin Ebadi and her agent, and by the Association of American Publishers, the Association of American University Presses, the PEN American Center, and Arcade Publishing—and negative media coverage prompted by its letter to IEEE, OFAC issued in 2004 general licenses covering publishing-related activities for four sanctioned countries.[72] These general licenses gave blanket approval to activities conducted in the ordinary course of publishing, such as editing, translating, and marketing.[73] The governments of these four countries and their officials were categorically excluded from the general license, however; publishers, co-authors, translators, and agents working with a government official to publish the official's work are still required to seek preapproval from OFAC before doing so.[74]

"Government" is defined very broadly for the purposes of the regulations.[75] In addition to the enumerated categories, which include

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[70] In response to concerns raised by IEEE and publishers of books and journals, OFAC declared that marketing was acceptable only if it was "incidental" and on behalf of the whole journal publication, rather than for the individual contributors. September 30 Letter, *supra* note 65. This may have seemed an appropriate compromise for journals, but it was not feasible for books, which are commonly written by a single author.

[71] *Id.* Publishing houses seek to publish books that can find an audience, which requires good editing, marketing, and publicity efforts. They do this not only to ensure a financial return by publishing high-quality works but also for reputational reasons. *See generally* ANDRÉ SCHIFFRIN, THE BUSINESS OF BOOKS (2000).

[72] *See supra* note 5 and accompanying text.

[73] *Id.*

[74] 31 C.F.R. § 515.577(a) (2007) (stating that provision does not apply if parties to transaction include "Government of Cuba"); § 537.526(a) (equivalent exception for "State Peace and Development Council of Burma or the Union Solidarity and Development Association of Burma"); § 538.529(a) (equivalent exception for "Government of Sudan"); § 560.538(a) (equivalent exception for "Government of Iran").

[75] For example, the "Government of Cuba" under the embargo program's government exclusion includes:

> [T]he state and the Government of Cuba, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Cuba; any person occupying the positions identified in § 515.570(a)(3); employees of the Ministry of Justice; and any person acting or purporting to act directly or indirectly on behalf of any of the foregoing with respect to the transactions described in this paragraph.

§ 515.577(a). The additional "prohibited officials" from § 515.570(a)(3) are:

> Ministers and Vice-ministers, members of the Council of State, and the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Min-

officials such as editors of state-run media organizations (including television, newspaper, and radio), government officials also include anyone working directly or indirectly on behalf of the government.[76] Thus, in countries with a significant number of state-run institutions, the government exception can be expansive and all-encompassing.

Because of its broad sweep, the government exception might offset any First Amendment legitimacy provided by the general license issued by OFAC. Considering that license violations follow a strict liability regime,[77] publishing houses might avoid publishing a foreign national from any embargoed country for fear of violating the government exception. Many translated works and foreign literary works are published by small presses that cannot afford the potential costs arising from an OFAC violation or from the appeal of a disputed violation.[78] Publishing houses would not be the only entities held responsible for violating an OFAC rule: If an American author or translator wished to collaborate with an artist from Cuba, Iran, Sudan, or Burma, she would be exposed to the same risks faced by publishing houses. Thus, the risk of self-censorship is great.

The broad scope of OFAC's exclusion of government officials from its general license for publishing activities means that Americans who want to collaborate with them in creating First Amendment–protected works must still apply to OFAC for a specific license. In the next Part, I examine how this licensing scheme regulates publishing and conclude that it chills the ability of Americans to create, engage in, and be exposed to First Amendment–protected works from trade-sanctioned countries.

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istry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio; and members and employees of the Supreme Court (Tribuno Supremo Nacional).

§ 515.570(a)(3).

[76] *E.g.*, *id.* § 515.577(a).

[77] See *supra* Part I.B for a discussion of license enforcement.

[78] The scarcity of resources affects those publishing houses most likely to publish works from international writers in the first place. *See* Stacy Perman, *Small Publishers Book Big Rewards*, BUS. WK. ONLINE, May 2, 2006, http://www.businessweek.com/smallbiz/content/may2006/sb20060502_704137.htm (noting that English translation of non-U.S. authors is "one of the most neglected and least profitable segments of book publishing" and that small nonprofit houses are one of few avenues for such works to be published).

III
OFAC's Regulations Create an Invalid Prior Restraint on First Amendment Rights

Currently, OFAC completely excludes government officials from the general license for publishing. Instead, one must apply to OFAC for a specific license to engage in publishing activities—such as editing and marketing—with government officials. In this section, I discuss the First Amendment implications of the government exception under the doctrine of prior restraint.

A. Overview of Prior Restraint Analysis

The doctrine of prior restraint states that government may not suppress material that has not yet been published, except in the most extreme situations.[79] Unlawful prior restraints are an important part of First Amendment jurisprudence[80] and have been called the "most serious and the least tolerable infringement[s] on First Amendment rights."[81] Licensing schemes—requiring an individual or entity to apply for a permit before "speaking"—and prescreening schemes—requiring individuals to submit their desired or proposed speech for prior approval before dissemination—are the paradigm examples of prior restraint.[82]

In a facial challenge to an existing licensing system on prior restraint grounds, courts focus on three questions: (1) whether the

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[79] *See* Freedom of Expression in the Supreme Court: The Defining Cases 26 (Terry Eastland ed., 2000) (defining doctrine and describing Court's establishment of presumption against prior restraint and exceptional instances where prior restraint may be constitutional, such as incitements to riot or overthrow of government or wartime obstruction of military recruitment).

[80] *See, e.g.*, City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757, 772 (1988) (finding mayor's ability to grant or deny permits for newspapers to be invalid and unconstitutional prior restraint); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (finding that *New York Times* and *Washington Post* were entitled to publish contents of classified government study of Vietnam War known as "Pentagon Papers"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 59–60, 64 (1963) (striking down state law creating commission to review literature for its potential to "corrupt" youth and to issue notices to publishers to cease publication of such materials); Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938) (invalidating ordinance requiring written permission from city manager before distributing pamphlets and stating that "[t]he struggle for the freedom of the press was primarily directed against the power of the licensor").

[81] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[82] Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases and Policy Arguments 513 (2d ed. 2005) ("Whenever you see a licensing scheme ('to parade here you need a license'), a prescreening scheme ('to display this work you need to have cleared it first with this board'), or an injunction ('you may not say this and such, on pain of a contempt of court conviction'), you know there's a potential prior restraint issue involved.").

regulation or restriction vests standardless discretion in the government official to permit or deny expression;[83] (2) tied to the first inquiry, whether the decision to grant or deny a license is made within a specified and reasonable time period and whether there is a process for prompt judicial review if the license is denied;[84] and (3) whether the restriction on speech is content neutral or content based.[85] Generally, a regulation is content based if it makes distinctions based on content, viewpoint, or speaker[86]—in other words, if the regulation is related to the speech it is attempting to restrict. A regulation is content neutral if it imposes burdens on speech without reference to the ideas or views expressed.[87]

Unlike challenges to vague or overbroad regulations, the prior restraint doctrine focuses on the prospective effects of a regulation. It seeks to prevent writers and publishers from having to engage in self-censorship before any actual creation takes place. This concern is based on the origins of prior restraint—an alarmed English Crown implemented a licensing requirement for publication in order to halt the spread of uncensored ideas after the invention of the printing press, causing many publishers to self-censor.[88] As a result, there has

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[83] *Plain Dealer*, 486 U.S. at 759. In *Plain Dealer*, the Court struck down an ordinance provision that gave the mayor the ability to grant or deny permits for newspaper racks to be placed on public property. *Id.* at 772. The Court noted that the lack of explicit standards and guidelines cabining an official's discretion made it impossible to determine whether a denial was "unconstitutionally motivated" by censorship or whether there was a proper restraint for legitimate reasons. *Id.* at 760. According to the Court, such standardless guidelines created the potential for newspapers to conform their editorial practices to the mayor's preferences—a result incongruent with First Amendment law. *Id.* at 769–72.

[84] *Bantam Books*, 372 U.S. at 70–71 ("We have tolerated [a restraint of expression] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."). *Bantam Books* involved a challenge by book publishers to a law creating a Rhode Island Commission charged with combating juvenile delinquency. *Id.* at 60 n.1. The Commission notified distributors of books and publications that it found obscene, informally ordering them to remove such publications from circulation under threat of criminal prosecution for failure to comply. *Id.* at 61. The Court found that the Rhode Island Commission's actions had the "capacity for suppression of constitutionally protected publications . . . far in excess of . . . the typical licensing scheme held constitutionally invalid by this Court" because it contained "no provision . . . for judicial review of the Commission's determination of objectionableness." *Id.* at 71.

[85] *E.g.*, CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1280 (11th Cir. 2006).

[86] *See* Texas v. Johnson, 491 U.S. 397, 411–12 (1989) (analyzing whether criminal conviction for flag burning was content based or content neutral and deciding which test to apply as consequence of that distinction).

[87] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570–72 (1991) (finding that Indiana public indecency law requiring nude dancers to wear pasties and G-strings was content neutral and applying *O'Brien* test to find that law was valid under First Amendment).

[88] FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS 2–3 (1952). Licensing was also used for

long been a strong presumption against the constitutional validity of prior restraints in the United States.[89] Therefore, the government bears a heavy burden of justifying such restraints.[90] A court, moreover, will be "vigilant in its oversight of prior restraints because of the fear that they deprive or delay access to information."[91]

Next, I argue that OFAC's regulation of publishing activities and, in particular, its treatment of government officials under its licensing scheme constitute a prior restraint that improperly restricts First Amendment–protected works.

B. Application to OFAC's Licensing Scheme

In this section, I will evaluate OFAC's licensing scheme for publishing activities and its exclusion of government officials under the three inquiries of the prior restraint doctrine outlined above.

1. Standardless Discretion

Prior restraint is implicated if a licensing scheme is found to be "standardless."[92] In *City of Lakewood v. Plain Dealer Publishing Co.*,[93] the Court found that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[94] This concern is not unfounded. When news of OFAC's interpretative letter to the IEEE[95] spread through the academic, scientific, and publishing communities, several projects were terminated or suspended due to the uncertainty over OFAC's regulatory regime.[96]

No standards govern OFAC's decision to create, end, or modify its general publishing licenses. OFAC can add additional exceptions

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similar purposes in America. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 22 (2004) (outlining seventeenth- and eighteenth-century efforts to restrict publishing via issuances of licenses in colonial America).

89 N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

90 *Id.*

91 Graff v. City of Chicago, 986 F.2d 1055, 1063 (7th Cir. 1993).

92 *See supra* note 83 and accompanying text.

93 486 U.S. 750 (1988).

94 *Id.* at 757.

95 Recall that OFAC's interpretative letter issued to IEEE narrowly construed informational materials and implied that publishing Iranian manuscripts in its scientific journal would violate the Iran sanctions program. *See supra* notes 40–41, 63–66, and accompanying text.

96 For a list of projects that were endangered, suspended, or canceled altogether, see Ass'n of Am. Univ. Presses, Materials for Suit: Endangered Projects, http://aaupnet.org/ofac/projects.html (last visited Aug. 5, 2008). Some of these projects have since moved forward. October 1 Press Release, *supra* note 4.

to its general license at any time,[97] without public participation, since the agency is not subject to the notice-and-comment rulemaking procedures of the Administrative Procedure Act.[98] At present, the general license for publication activities has only been added for four of the embargo programs OFAC runs: Sudan, Iran, Cuba, and Burma.[99] Nothing forecloses OFAC from removing the general license from these sanctions programs, and nothing compels OFAC to extend general license provisions to other embargo programs.[100] Currently, there are no protections for publishing activities under any of the other country-based programs, so if OFAC wished to apply a different standard of evaluating activities ordinary and incidental to publishing in, for example, its North Korean sanctions program,[101] it could do so.[102]

OFAC also has complete discretion over granting or rejecting a specific-license application. OFAC officials' determinations are "guided by U.S. foreign policy and national security concerns."[103] License denials constitute "final agency action,"[104] and there is no formal appeals process; OFAC merely assures applicants whose licenses are denied that it will reconsider its decisions for "good cause."[105]

There is no form for requesting a specific license, and each country's program has different requirements.[106] While OFAC does make available interpretative guidance letters, it cautions against reliance on these letters, since it reserves the right to change its interpre-

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97 31 C.F.R. § 501.803 (2007) ("Except as otherwise provided by law, the provisions of each part of this chapter and any rulings, licenses (whether general or specific), authorizations, instructions, orders, or forms issued thereunder may be amended, modified or revoked at any time.").

98 *Id.* § 501.804(a). However, interested parties can contact the Director of OFAC in writing and request the issuance, repeal, or amendment of a rule. § 501.804(b).

99 *See supra* note 5.

100 *See infra* text accompanying note 107.

101 OFAC administers a country-based sanctions program against North Korea. OFAC, North Korea Sanctions, http://www.treas.gov/offices/enforcement/ofac/programs/nkorea/nkorea.shtml (last visited Aug. 16, 2008).

102 Under the Berman Amendment and FTIA, OFAC is not required to issue general licenses to cover publishing activities. Arguably, OFAC's attempt to regulate informational materials itself through such general licenses exceeds the agency's authority in light of these two statutes. *See supra* note 10 and accompanying text (discussing how OFAC's issuance of general licenses could be considered ultra vires after passage of Berman Amendment and FTIA but that such argument is beyond scope of this Note).

103 OFAC FAQ, *supra* note 18.

104 31 C.F.R. § 501.802 (2007).

105 An applicant shows "good cause" when there are "changed circumstances" or "additional relevant information not previously made available to OFAC." OFAC FAQ, *supra* note 18.

106 *Id.*

tations of its own regulations without any public notice.[107] In addition, these letters are reactive and fact-specific. Instead, OFAC advises that the best way to ensure compliance with the licensing scheme is to contact OFAC directly and seek the opinion of an OFAC official.[108]

As the foregoing discussion illustrates, OFAC's specific-licensing requirement for government officials places standardless discretion in the hands of OFAC officials. Little guidance exists as to what a license application entails or what its outcome will be: OFAC itself encourages guidance on permitted and prohibited activities through informal telephone calls, there exists no specific form for license applications, and OFAC has never specified the information an applicant should provide in order to receive a license.

2. Length of Time To Render a Decision and Lack of Review

To be valid under the First Amendment, license applications must be reviewed in a reasonable period of time, and a denial must be subject to appeal.[109]

OFAC officials are not required to answer license applications within any specified time period.[110] In *Matos v. O'Neill*,[111] Carlos Matos, a publisher of Spanish-language books, sought to compel OFAC to issue him specific licenses to participate in a book fair in Cuba.[112] OFAC rejected Matos's initial application for a specific license to attend the book fair and told him that the agency would reconsider his application only if he provided a summary of past activities and an agenda for proposed activities during the book fair.[113] Matos resubmitted his application with the requested information, but the application remained pending even after the book fair had passed.[114] By the time Matos's grievance against OFAC reached the court, the court rejected as moot his challenge to OFAC's inaction.[115]

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[107] *Id.*

[108] *Id.* For example, the Director of OFAC testified in 2004 that the agency received over 1000 phone calls per week requesting advice on compliance matters. *Testimony*, *supra* note 29, at 92.

[109] See *supra* note 84 and accompanying text for a discussion of the *Bantam Books* case, which required a reasonable time period and an appeals process.

[110] OFAC recommends that license applicants wait for two weeks before checking on the status of their applications but reserves discretion in determining how long it will take to issue a license approval or denial. OFAC FAQ, *supra* note 18.

[111] 220 F. Supp. 2d 99 (D.P.R. 2002).

[112] *Id.* at 100.

[113] *Id.* at 101.

[114] *Id.* at 102.

[115] *Id.* For a similar discussion on timeliness, see *supra* note 50.

In addition to the lack of standards or guidelines in OFAC's licensing scheme, there is no appeals process for license denials; instead, a license denial constitutes final agency action,[116] providing no opportunity for judicial review—a result disfavored by the courts in First Amendment cases.[117] The result is that there are virtually no procedural protections to limit the standardless discretion granted to OFAC officials.

3. Regulated Speech as a Content-Based or Content-Neutral Restriction

The third inquiry under a prior restraint analysis is whether the speech that is restricted is content based or content neutral. If a regulation is content based, strict scrutiny applies and the regulation is presumed to be invalid.[118] This level of scrutiny means that the government must have a compelling state interest in regulating speech, and the regulation must be narrowly tailored to further that articulated interest.[119] However, courts analyze content-neutral regulations under an intermediate form of scrutiny and apply a four-factor test (known as the *O'Brien* test),[120] which finds a regulation valid if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest;[121] (3) the governmental interest is unrelated to the suppression of free expression;[122] and (4) the restriction is not greater than is essential to the furtherance of the governmental interest, or, in other words, is "narrowly tailored" to the purported interest.[123]

My analysis proceeds in two parts: First, I make the case that OFAC's exclusion of government officials from its general license for

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116 *See supra* note 104 and accompanying text.

117 *See supra* note 84 and accompanying text (citing case in which Court struck down First Amendment restrictions for not providing opportunity for judicial review).

118 *E.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

119 *Id.*

120 United States v. O'Brien, 391 U.S. 367, 376–77 (1968); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 296, 301–02 (2000) (describing *O'Brien* test).

121 Compared to the last two prongs, these first two prongs are generally uncontroversial and seem to be met easily. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991) (finding that public indecency statutes are clearly within constitutional power of Indiana and that they further substantial governmental interests, even though "[i]t is impossible to discern . . . exactly what governmental interest the Indiana legislators had in mind when they enacted this statute").

122 Texas v. Johnson, 491 U.S. 397, 407 (1989) (holding that governmental interest was related to suppression of expression and therefore failed *O'Brien* test).

123 Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 753, 755 (1996) (finding that statute provisions requiring cable system operators to block offensive sex-related materials on television channels were not narrowly tailored to government's interest in protecting children).

publishing activities is a content-based regulation that would receive strict scrutiny from the courts as an improper prior restraint. Second, I argue that even if the courts considered the licensing scheme to be a content-neutral regulation, it would fail the *O'Brien* test, thus also rendering it an improper prior restraint.

a. The Government Exception Is Content Based

OFAC's general license allows activities related to publishing when carried out by parties unrelated to government officials. Such individuals and organizations do not need to seek prior approval from OFAC. On the other hand, publishing houses and similar parties must ask for the agency's permission before engaging in the same kinds of activities under the general licensing scheme if the author is a government official from Iran, Sudan, Cuba, or Burma. A publisher thus would be precluded from publishing particular content without first asking OFAC for a specific license. The regulation then gives an OFAC official discretion to decide whether to allow the speech, based on whether a government official is involved. If OFAC denies the license, the publisher is not permitted to publish the work of the government-official author. However, a publisher who wishes to publish a non-government-official author or an author from a country not under a trade embargo could do so without having OFAC review the nature of the book or the identity of an author. This divergent treatment demonstrates that the regulation easily can be categorized as a content-based restriction, since an OFAC official must consider and review the nature of the speech and render a decision based on its speaker and its content. Thus, the regulation would be deemed invalid under a strict scrutiny analysis.[124]

b. The Government Exception Is Content Neutral

Though this Note takes the view that the government exception is a content-based restriction, this Section argues that should the court determine this to be a content-neutral restriction (thus analyzing the restriction under the less stringent intermediate scrutiny test), the government exception would still fail. Content-neutral restrictions embody the principle that First Amendment protections are not absolute;[125] if the burden to the First Amendment that is caused by a restriction is incidental and unrelated to another important or sub-

[124] *See supra* note 118 and accompanying text.

[125] DECKLE MCLEAN, ESSAY ON THE FIRST AMENDMENT 2–4 (2000).

stantial governmental interest,[126] the restriction may still be found valid.[127] I now turn to the test established by the Court in *United States v. O'Brien* to evaluate two interests that OFAC might proffer to argue that the government exception only incidentally burdens First Amendment rights: OFAC's economic interest and its national security interest.[128]

i. Economic Interest

One justification OFAC asserts for restricting publishing activities is its concern with the economic nature of publication; any restrictions on informational materials are incidental to the aim of preventing embargoed countries from benefiting financially from transactions with the United States.[129] Even under the less stringent content-neutral analysis, the economic justification does not meet all four prongs of the *O'Brien* test, and thus it fails to turn the general licensing scheme into a valid prior restraint.

Taking each of the four prongs of the *O'Brien* test in turn, the first prong considers whether the regulation is within the constitutional power of the government. While one could argue that OFAC does not have the power to regulate informational materials, it is clear that the ability to regulate First Amendment rights is within the constitutional power of the government.[130] Therefore, the first prong is met.

The second prong asks whether the regulation serves an important or substantial governmental interest. OFAC's argument that its primary concern is the prevention of financial benefit to nationals of

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[126] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (stating that content-neutral regulation will be upheld under *O'Brien* if "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest'" (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[127] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (stating that prior restraints are not per se unconstitutional).

[128] See *supra* text accompanying notes 120–23 for a reminder of the *O'Brien* test. This Note focuses on OFAC's economic and national security interests, since they are emphasized by the agency itself. *See supra* notes 14–20 and accompanying text (describing OFAC's mission, origin, and history of regulating economic and national security interests through administration of U.S. embargo programs).

[129] *See, e.g.*, Am. Documentary Films, Inc. v. Sec'y of Treasury, 344 F. Supp. 703, 707 (S.D.N.Y. 1972) ("The Government . . . maintains that this is not a censorship question but solely a question of administering the Foreign Assets Control regulations to prevent hard currency from finding its way to Cuba. It asserts that everything it has done is within the ambit of that purpose.").

[130] *See supra* Part III.A (describing prior restraint doctrine and treatment of various ordinances and laws restricting expression under First Amendment); *see also supra* note 121 (explaining that generally, first prong is easily satisfied).

hostile countries has considerable weight: Congress initially created OFAC to wage economic warfare.[131] Courts have varied in their treatment of this economic justification. They have allowed such a justification where the regulations made no distinction among publications or their content, and where OFAC allowed the publications to be accessed by research institutions and through noneconomic transactions.[132] Courts have rejected an economic justification where, for example, OFAC has expansively interpreted its own authority to include the right to preapprove or deny all internal management decisions by a corporation that was designated a Cuban national, including the corporation's choice of counsel.[133]

Unlike the instances in which the court has upheld regulation on an economic-interest justification, OFAC's regulations over publishing activities distinguish between publications by requiring those authored by government officials to obtain a license from OFAC in advance while permitting others to engage in the same activity without preapproval. Further, the regulations do not make allowances for noneconomic transactions that occur with government officials. In addition, Representative Berman rejected OFAC's economic interest

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[131] *See supra* Part I.A (discussing history of OFAC and its predecessor). This has been the justification offered for the continuation of the Cuban embargo program. The agency has argued that the original purpose of the trade sanctions in Cuba was to "isolate the Cuban government economically and deprive it of U.S. dollars that the Cuban Government would otherwise use to maintain or strengthen its repressive apparatus, enforce its information blockade on the Cuban people, and arrange for . . . the continuation of the totalitarian Communist government." Cuban Assets Control Regulations, Sudanese Sanctions Regulations, and Iranian Transactions Regulations, 69 Fed. Reg. 75,468 (Dec. 17, 2004).

[132] *E.g.*, Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 445–46 (2d Cir. 1968). The *Teague* court held that withholding publications from North Korea, North Vietnam, and mainland China unless OFAC issued licenses approving their release was valid, because the purpose of the regulations was to restrict the flow of currency to hostile nations, all of the publications were treated alike, there was no inquiry into the materials' content, and the release of the publications was permitted if they were sent as gifts or to research institutions. *Teague* was decided prior to the enactment of the Berman Amendment, which exempted informational materials from OFAC's authority. *See* Cernuda v. Heavey, 720 F. Supp. 1544, 1550 n.10 (S.D. Fla. 1989) ("Through the [Berman Amendment], Congress eliminated the sort of constitutional questions that arose in cases like . . . *Teague*.").

[133] *E.g.*, Am. Airways Charters, Inc. v. Regan, 746 F.2d 865, 867, 872 (D.C. Cir. 1984) (rejecting economic justification for OFAC's disallowance of attorney-client relationship between Florida-chartered corporation that was designated as Cuban national and attorney seeking to represent corporation). The court in *Regan* stated that OFAC's authority over a corporate entity only extended to a corporation's external commercial relations and not to its internal decisions. *Id*. at 874–75. Though OFAC could regulate corporate counsel's payment and fees, the court also stated that the nature of the attorney-client relationship required the court's "special care" when reviewing an attempt by an administrative agency to "expose to licensing the very creation of that relationship." *Id.* at 872.

argument as it applied to informational materials.[134] Even in the United States, few consider the publishing industry to be a lucrative business.[135] Many embargoed countries have experienced great turmoil in this trade[136] and do not have the freedom to publish without censorship.[137] Some writers, filmmakers, and artists rely on the distribution and display of their works outside their native countries, since these works have been banned in their own countries. Ultimately, however, the government presumably can meet the second prong with respect to its economic interest, since courts have regularly found that the government has a compelling interest in regulating the flow of money to designated countries.[138]

The inquiry in the third prong is whether the governmental interest is unrelated to the suppressed expression. Under this prong, one can argue that the governmental interest is related to the prohibition of government official publications, since embargoes are traditionally enacted due to a disagreement with the practices and beliefs of that country's political or governing bodies.[139] However, presuming the court accepts an economic justification for the regulation, this economic interest may be deemed unrelated to the content of the government official's speech.

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134 Representative Berman called money from trade in books, art, and other informational materials "insignificant" and questioned using the economics of informational materials as a reason for restricting the flow of ideas. *See supra* note 62.

135 *See supra* note 78 and accompanying text (discussing market for publishing works by non-U.S. authors).

136 Though Cuba's publishing industry has experienced a minor resurgence, the entire industry effectively collapsed in the early 1990s. This has left little opportunity for Cuban authors to publish works in their own country, even today. *See* Isora Rodríguez Rojas, Cuba National Report to the Workshop Seminar "Access to Information in Latin America" (Sept. 1999) (unpublished paper), *available at* http://www.ifla.org/VI/2/conf/cuba-e.pdf.

137 The Sudanese government has suppressed the publication of books and unfavorable news articles. *See Sudanese Authorities Ban a Novel Dealing with Darfur Atrocities*, SUDAN TRIB., June 24, 2008, http://www.sudantribune.com/spip.php?article27623 (detailing confiscation of Sudanese book from Canadian publisher); Bill Marx, *Undesirable Reception*, PRI'S THE WORLD, June 29, 2008, http://www.theworld.org/?q=node/19061 (explaining how Sudanese authorities censor independent newspapers, making it impossible for them to function).

138 *See, e.g.*, Veterans & Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs, 459 F.2d 676, 680, 682 (3d Cir. 1972) (stating government's compelling interest and adding that "money is an important weapon in any international struggle"); Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 445–46 (2d Cir. 1968) (upholding regulations that incidentally restrict free speech because of government's compelling interest in restricting flow of money to "hostile nations"). Recall also that the first two prongs of the *O'Brien* test are generally easy to meet. *See supra* note 121.

139 Fiona McGillivray & Allan C. Stam, *Political Institutions, Coercive Diplomacy, and the Duration of Economic Sanctions*, 48 J. CONFLICT RESOL. 154, 154, 156, 158 (2004) (discussing use of sanctions as way to change policy or leadership).

Still, even if OFAC can prove that its regulation meets the first three *O'Brien* prongs, the regulation does not satisfy the fourth and final prong, which asks if the regulation is narrowly tailored to the governmental interest. Given that the amount of money flowing to embargoed countries from the sale of books is small, a broad ban on government officials' writing books without a specific license is not narrowly tailored to the economic interest asserted by OFAC. If economic advantage is the focus of OFAC's trade sanctions programs, then a narrowly tailored regulation would include government officials' writings as part of its general license so long as the publishing house did not pay the government official for his or her work. As written, however, the regulations require publishers, translators, coauthors, and other involved parties to subject themselves to OFAC's discretion to grant or deny such permits by applying for specific licenses, regardless of whether the officials receive any kind of economic benefit. Because the OFAC regulation does not satisfy this final prong, it fails the content-neutral test of *O'Brien*.

ii. National Security Interest

Applying the same *O'Brien* test outlined above, a national security justification for publishing regulations meets some, but not all, of the prongs. As with the economic justification, OFAC's national security interest meets the first prong, since the government has the constitutional power to conduct foreign affairs.[140] It also meets the second prong since national security is indisputably an important governmental interest.[141]

The next prong is more difficult for OFAC to satisfy. Under the third prong, which requires the suppressed expression to be unrelated to the government's asserted interest, OFAC's prohibition of government officials' speaking without prior OFAC approval seems closely related to a national security interest. OFAC has asserted that it "administers and enforces" the economic embargo programs "based on [U.S.] foreign policy and national security goals."[142] The suppres-

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[140] *See* U.S. CONST. art. I, § 8, cls. 1, 3, 11 (giving Congress power to regulate commerce with foreign nations and to declare war); *id.* art. II, § 2, cl. 2 (giving President power to make treaties and to appoint ambassadors).

[141] Osborne v. Ohio, 495 U.S. 103, 141 n.16 (1990) (Brennan, J., dissenting) ("Although our decisions even in the First Amendment area have taken special note of the paramount importance of national security interests, we nonetheless have required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed." (citation omitted)); *see also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (citing instances of national security interests that would justify overriding First Amendment protections).

[142] *See* Mission Statement, *supra* note 14.

sion of speech by disfavored governments and their personnel appears to be directly related to this interest;[143] OFAC presumably requires that publication of government officials' works (and not those of civilians) receive specific approval because the agency is concerned that such works will have some impact on the relationship between the sanctioned country and the United States. Thus, OFAC's national security justification for the government exception would fail the third prong of the *O'Brien* test.

Moreover, as with the economic justification, the national security justification does not meet the fourth and final prong, because the regulation does not appear narrowly tailored to the national security interest that is being asserted. I apply the "clear and present danger" test, established by Justice Holmes in the landmark case *Schenck v. United States*[144] and further elaborated upon by *New York Times Co. v. United States*,[145] to illustrate why the government exception is not a narrowly tailored response to the purported national security interest.

When a First Amendment–protected activity comes into conflict with national security interests, courts will generally balance these First Amendment rights against national security needs[146] using a variation of the "clear and present danger" test.[147] The test asks "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[148] What constitutes a clear and present danger is a "question of proximity and degree."[149] However, in *Schenck*, Holmes intimated that, during wartime, the words used must be such that "no Court could regard them as protected by any constitutional right."[150]

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143 Economic embargoes are enacted and maintained to indicate disfavor with a country's political or social policies or because such countries are considered a national security risk to the United States. OFAC itself concedes that the original intentions for the Cuba sanctions are now "historical" but nevertheless considers Cuba a country that "support[s] international terrorism." *Testimony*, *supra* note 29, at 90.

144 249 U.S. 47 (1919).

145 403 U.S. 713 (1971) (per curiam).

146 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 286–87 (Clarendon Press 2d ed. 1996).

147 *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1037–39 (1991) (describing "clear and present danger" test in relation to free expression); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 522 (2004) (citing Supreme Court's affirmance of "clear and present danger" test).

148 *Schenck*, 249 U.S. at 52.

149 *Id.*

150 *Id.*

In *New York Times Co.*, the U.S. government sought to prevent the *New York Times* and *Washington Post* newspapers from publishing a classified study on Vietnam policy (better known as the "Pentagon Papers").[151] In a per curiam opinion, the Court ruled in favor of the newspapers, allowing publication of the Pentagon Papers.[152] In a strongly worded concurrence, Justice Black noted that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."[153] While Justice Brennan agreed in his concurrence that publication of the Pentagon Papers should not be suppressed, he also described the "narrow class of cases" in which prior restraint might be justified.[154] Such cases, he noted, "may arise only when the Nation 'is at war.'"[155] Even then, he added, the publication in question must be found to "inevitably, directly, and immediately" cause danger before it legitimately can be prohibited from publication.[156]

Specific examples of publications that would "inevitably, directly, and immediately" cause danger include the publication of sailing dates of military ships and transports and the location and number of troops.[157] These are situations in which the safety and security of military personnel are implicated. Applying these examples to the government exception, the national interest appears extremely tenuous when, for example, preapproval by OFAC would be required for a state-run newspaper editor's book of poetry, even if the poetry raises no national security concerns. Currently, OFAC's broad prohibition on publishing all government officials without prior OFAC approval is not narrowly tailored to serve the government's national security interest. In the next Part, I offer ways for OFAC to draw a narrowly

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151 N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

152 *Id.*

153 *Id.* at 719 (Black, J., concurring).

154 *Id.* at 726 (Brennan, J., concurring).

155 *Id.* (quoting *Schenck*, 249 U.S. at 52). One immediate problem in applying OFAC's licensing scheme in the current context is the question of whether the United States is "at war." It is difficult to analogize the "war on terror" to previous wars, since the authorization of force is general and not specifically directed to a particular country. *See* Authorization for Use of Military Force Against September 11 Terrorists, 50 U.S.C. § 1541 (Supp. V 2005) (authorizing President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); *see also* RICHARD F. GRIMMETT, CONG. RES. SERV., AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY (2006), *available at* http://www.fas.org/sgp/crs/natsec/RS22357.pdf (summarizing legislative history surrounding AUMF).

156 *N.Y. Times Co.*, 403 U.S. at 726–27 (Brennan, J., concurring).

157 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

tailored regulation that reconciles its economic and national security interests with the protections afforded by the First Amendment.

IV
MOVING FORWARD: SUGGESTIONS FOR OFAC

This Note has sought to demonstrate that there is a strong First Amendment argument for the courts to strike down OFAC's current regulatory regime for publishing activities. However, in this Part, I discuss ways in which, without intervention by the courts, OFAC can comply with the current mandates of the Berman Amendment, the FTIA, and the First Amendment. I suggest opportunities for OFAC to provide greater clarity in its regulations and decisionmaking processes. This clarity, in turn, can give organizations and individuals a better understanding of not only their own rights with respect to informational materials but also what is required of them with respect to their interactions with the agency.

A. Reforming the Regulations

1. Eliminate the General License Regulation

Assembled in 2004 as a way to appease authors and publishers, the general license for publishing activities presented problems, though it purported to address concerns that OFAC's actions were discouraging the publication of dissident speech.[158] One of these problems is conceptual. This general license embodies the notion that the agency has granted "permission" to engage in publishing activities without applying for a specific license, which is inconsistent with the idea that OFAC is not authorized to regulate informational materials beyond the bounds of the FTIA and the Berman Amendment. Eliminating the general license regulation would honor the congressional intent that OFAC refrain from regulating informational materials at all.

Currently, the general license covers publishing activities in Cuba, Iran, Sudan, and Burma.[159] But no equivalent license exists in North Korea, Zimbabwe, or any of the other country-based sanctions programs that OFAC administers. This creates unnecessary confusion and inconsistency. Eliminating the general license regulation would also obviate the problem that government officials are categorically

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[158] *See* Press Release, Treasury Issues General License for Publishing Activities (Dec. 15, 2004), http://treasury.gov/press/releases/js2152.htm (clarifying that OFAC does not "discourag[e] the publication of dissident speech" and explaining that new rule permits "most ordinary publishing activities").

[159] *See supra* note 5.

excluded from its provisions, which I discuss below. Under this proposal, once the general license is eliminated, U.S. entities could engage in publishing activities with embargoed countries without any OFAC involvement.[160]

2. Eliminate or Fine-Tune the Government Exception

Even if OFAC is unwilling to eliminate the general license provision—admittedly, the general license could provide some measure of express protection for publishing activities relating to transactions with those who are not government officials—OFAC should eliminate the government exception.

Courts may be reluctant to strike down OFAC's entire licensing scheme, despite the strong presumptions against the validity of licensing schemes that restrain First Amendment rights. However, as this Note has demonstrated, the government exception to the general license can be challenged on the grounds that it constitutes an invalid prior restraint under the First Amendment, a much more difficult charge to defend against. Therefore, OFAC might be able to withstand a challenge to its general license of publishing activities by eliminating its greatest weakness—the government exception.

A variation on this suggestion is to fine-tune the government exception so that it permits a government official to fall under the general license if the sanctioned government derives no economic benefit from that official's publishing activities and if that government official poses no national security threat, as defined by the Berman Amendment and the FTIA. These two provisions would address the narrowly tailored prong that the current incarnation of the regulation fails to meet (as this Note explained in Part III). However, publishers in the United States may be reluctant to determine whether government officials meet these standards, thus leading to self-censorship or a restoration of standardless discretion to OFAC officials.

3. Retain the Informational Materials Exemption

OFAC's trade embargo programs should only deal with informational materials to the extent that an informational materials exemption is created pursuant to the Berman Amendment and the FTIA.[161] Congress has twice indicated that informational materials fall outside

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[160] *See infra* Part IV.A.3.

[161] *See supra* text accompanying note 61.

the realm of OFAC's regulatory ability,[162] yet OFAC continues to regulate informational materials.[163]

This recommendation will not require any restructuring of OFAC's regulations, since the agency already includes the informational materials exemption in its administration of all trade sanctions programs.[164] Instead, narrowly tailoring the exemption to what is provided for in the FTIA would honor congressional intent, clarify OFAC's regulations and regulatory authority, and create consistency and harmony in OFAC's regulatory regime. As a result, OFAC would be forced to stop regulating the exchange of informational materials, as defined and intended by Congress.

B. Cabin OFAC Discretion Through Increased Process

Even if no policy changes are made, clearer guidelines, statutory timeframes, and greater disclosure of penalty information must be put in place to provide greater administrability, transparency, and notice to individuals and organizations seeking specific licenses. These changes might also protect OFAC's regulations from being deemed a prior restraint on speech.

In order to cabin OFAC's discretion, OFAC should create, disseminate, and make publicly available detailed guidelines and standards for accepting and rejecting license applications. While the use of guidance letters provides the flexibility to decide issues on a case-by-case basis, those who make a good-faith effort to comply with OFAC's regulations can find themselves confused by the contradictory messages such guidance letters provide. Currently, OFAC officials confronting specific-license applications are motivated by U.S. foreign policy and national security concerns.[165] Instead, OFAC officials should apply specific, legally grounded standards to determine whether a proposed activity should be granted a license.

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[162] See *supra* Part II.A for a discussion of the congressional reaction to OFAC's regulation of informational materials.

[163] The court in *Capital Cities/ABC, Inc. v. Brady* deferred to OFAC's determination that ABC's broadcast of the Pan-American Games from Havana did not fall under the informational materials exemption. 740 F. Supp. 1007, 1014 (S.D.N.Y. 1990). Calling it a political question, the court reasoned that OFAC must have had a legitimate reason for distinguishing between televised broadcasts and other First Amendment–protected works. *Id.* Today, there is no license analogous to the publishing general license for activities incidental to filmmaking, music production, or artwork.

[164] *See* 31 C.F.R. § 500.206 (2007) (exempting informational materials from prohibited activities applicable to all trade-sanctioned countries). OFAC also provides informational materials exemptions under specific programs. *See, e.g.*, § 515.206 (under Cuban Assets Control Regulations); § 537.210 (under Burmese Assets Control Regulations); § 538.211 (under Sudanese Assets Control Regulations).

[165] *See supra* Part I.

If a specific license is denied, OFAC should clearly state the grounds for its denial[166] and provide an appeals process akin to what is provided when a license violation is being enforced. Currently, a denied license will only be reviewed for "good cause," as defined by the OFAC official.[167] Instead, there should be an opportunity to appeal license denials through judicial review. Further, OFAC should add statutory timeframes. The informal timeline is two weeks,[168] but this timeframe should be mandatory rather than advisory. OFAC should also provide standardized forms that applicants can use to apply for a specific license. Each of these steps will make the process more consistent and accessible.

OFAC should also provide more information about enforcement by detailing why a person or entity has been fined. Though OFAC compiles a list of penalties assessed on a monthly basis[169] and will provide varying degrees of violation information, each entry should answer the following questions: What was the actual imported or exported good that required a license and subsequently violated the requirement? How are license violations assessed? Were assessments negotiated or mitigated by self-disclosure? Additionally, OFAC should disclose which individuals and organizations it has sanctioned informally, through the use of warning letters or other nonmonetary means, for violating a license requirement.

These suggestions are meant to be neither conclusive nor categorical. Instead, they are intended to underscore the areas of OFAC's regulatory regime that raise First Amendment issues: (1) the problems arising from administering the general license granted to publishing activities; (2) the government exception limiting that grant; and (3) the lack of guidelines, timeframes, accountability, and transparency that leads to the standardless discretion of OFAC officials.

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166 Currently, OFAC can deny a license without providing a clear reason. *See* Martha Brannigan, *Trade Group Barred from Cuba*, MIAMI HERALD, Jan. 25, 2007, at 1C (reporting that OFAC denied trade group's permit because its application did not meet unspecified criteria).

167 *See supra* note 105 and accompanying text.

168 *See supra* note 110 and accompanying text.

169 *See, e.g.*, OFAC, CIVIL PENALTIES ENFORCEMENT INFORMATION FOR FEB. 1, 2008, *available at* http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/02222008.pdf; OFAC, CIVIL PENALTIES ENFORCEMENT INFORMATION FOR JAN. 4, 2008, *available at* http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/01112007.pdf; OFAC, CIVIL PENALTIES ENFORCEMENT INFORMATION FOR DEC. 7, 2007, *available at* http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/12112007.pdf.

Conclusion

This Note expresses no opinion on the legitimacy of economic sanctions generally. While I explore an agency whose overall decisionmaking processes have previously escaped examination in the legal literature, my examination of OFAC's activities is restricted to its licensing scheme of publishing activities. I do not dismiss the complexities that OFAC must consider in its administration of the various embargo programs, but I hope to have demonstrated in this Note that this particular licensing scheme is an invalid prior restraint under First Amendment law.

Because of the fundamental rights implicated by OFAC's regulation of publishing activities and the prohibition of American publishing houses, writers, and editors from exercising these rights with respect to government officials from other countries, this Note has analyzed OFAC's conduct under First Amendment law. Though my analysis has demonstrated that the current regulatory regime violates the First Amendment, I have concluded by proposing ways in which the agency can reconcile its desire to effectively administer its trade sanctions program without infringing on the constitutionally protected right to import and export informational materials.