Fordham International Law Journal

Volume 15, *Issue* 3 1991 *Article* 9

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Abstract

This Note argues that, given the ambiguous language and legislative history of the statute, courts should defer to OFAC's decisions concerning the definition of other "informational materials" in the Berman Amendment. Part I describes the varying levels of protection offered by the First Amendment and the power of the executive branch to block the import or export of informational materials pursuant to TWEA. Part II sets forth the federal courts' conflicting views with respect to the scope of materials exempted from regulation. Part III argues that courts should defer to OFAC decisions regarding the materials exempted from presidential regulation because the language and legislative history of the Berman Amendment fail to specify clearly the informational materials that are exempt from regulation and because these decisions do not violate the independent constraints imposed by the First Amendment. This Note concludes that U.S. courts should refrain under the doctrine of separation of powers from legislating the meaning of "other informational materials" in this foreign affairs area where OFAC has clarified the meaning of an ambiguous statutory phrase.

TRADE WITH CUBA UNDER THE TRADING WITH THE ENEMY ACT: A FREE FLOW OF IDEAS AND INFORMATION?

INTRODUCTION

The Trading with the Enemy Act ("TWEA") authorizes the U.S. President, in times of national emergency, to impose embargoes on transactions between the United States and targeted countries.[1] Congress enacted the Berman Amendment to TWEA to limit presidential authority in regulating the import and export of informational materials.[2] The Office of Foreign Assets Control ("OFAC"), the agency charged with administering TWEA, subsequently issued regulations that interpreted the Berman Amendment to prohibit presidential regulation of the import of informational materials.[3]

U.S. federal courts disagree, however, with respect to the scope of the materials Congress exempted from presidential regulation.[4] At issue is the meaning of the phrase "other informational materials" within the Berman Amendment and its regulations.[5] Although one court has restricted the Berman Amendment to affect only tangible forms of informational materials such as books and magazines,[6] another has inter-

1. 50 U.S.C. app. § 5(b) (1988).

2. *See id.* § 5(b)(4) (1988) [hereinafter Berman Amendment].

3. 31 C.F.R. § 515.332(b)(2) (1991).

4. *See, e.g.*, Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) (deferring to OFAC decision which exempted only tangible informational materials from presidential regulation); Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fla. 1989) (stating in dicta that all informational materials are exempted by Berman Amendment from presidential regulation).

5. *See* 50 U.S.C. app. § 5(b)(4) (1988); 31 C.F.R. § 515.332 (b)(2) (1991). The Berman Amendment provides that

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

50 U.S.C. app. § 5(b)(4) (1988) (emphasis added). The Regulations define "informational materials" to exclude "intangible items such as telecommunication transmissions." 31 C.F.R. § 515.332(b)(2) (1991).

6. *Capital Cities*, 740 F. Supp. at 1015 (deferring to OFAC decision that exempts only tangible informational materials from presidential regulation because language and legislative history of Berman Amendment are unclear as to which materials are exempt from presidential regulation and because these decisions do not violate First Amendment).

preted the Berman Amendment to exempt from regulation the importation of all informational materials protected by the First Amendment.[7]

This Note argues that, given the ambiguous language and legislative history of the statute, courts should defer to OFAC's decisions concerning the definition of other "informational materials" in the Berman Amendment. Part I describes the varying levels of protection offered by the First Amendment and the power of the executive branch to block the import or export of informational materials pursuant to TWEA. Part II sets forth the federal courts' conflicting views with respect to the scope of materials exempted from regulation. Part III argues that courts should defer to OFAC decisions regarding the materials exempted from presidential regulation because the language and legislative history of the Berman Amendment fail to specify clearly the informational materials that are exempt from regulation and because these decisions do not violate the independent constraints imposed by the First Amendment. This Note concludes that U.S. courts should refrain under the doctrine of separation of powers from legislating the meaning of "other informational materials" in this foreign affairs area where OFAC has clarified the meaning of an ambiguous statutory phrase.

I. *TRADING WITH CUBA UNDER TWEA AND THE BERMAN AMENDMENT*

A. *First Amendment Protection of Freedom of Speech*

The text of the First Amendment suggests the existence of an absolute right to free speech.[8] The framers of the U.S. Constitution recognized public debate as essential to a free society[9] and, in turn, the U.S. Supreme Court recognized the

7. *Cernuda*, 720 F. Supp. at 1550 n.10. The *Cernuda* court stated that "the point of the 1988 TWEA amendment [is to] totally exempt[ ] from prohibition or regulation the import of ideas and information protected by the First Amendment." *Id.*

8. *See* U.S. CONST. amend. I. The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech or of the press." *Id.*; *see* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 110-11 (1982) (reviewing First Amendment protection of speech).

9. *See* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed. 1910). In 1822, James Madison stated that "[a] popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." *Id.*

centrality of freedom of speech as a precondition of the exercise of all other freedoms.[10] The Supreme Court, however, has limited free speech protections by means of the categorization of speech.[11]

The Court protects freedom of speech to differing degrees based on the perceived importance of the speech in preserving or encouraging political and social debate.[12] Speech of a polit-

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10. *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (stating freedom of expression essential to all other freedoms), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969). In reference to freedom of speech, the Court in *Palko* stated that "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327; *see* Schaefer v. United States, 251 U.S. 466, 474 (1920) (stating freedom of speech to be basic element of liberty). In reference to freedom of speech and of the press, the Court in *Schaefer* stated that "they are so intimate to liberty in everyone's convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them either by law or a charge under the law." *Id.*

11. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981) (reaffirming that religious worship and discussion are entitled to First Amendment protection); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976) (recognizing limited constitutional protection of commercial speech); Roth v. United States, 354 U.S. 476, 484-85 (1957) (holding obscenity to be outside First Amendment protection), *overruled on other grounds by* Miller v. California, 413 U.S. 15 (1973).

12. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (holding expression pertaining to political campaigns entitled to full First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (observing that First Amendment does not protect speech that is not essential to exposition of ideas, of little social value, and whose benefit is exceeded by societal interest in morality and order).

The Supreme Court considers certain speech, such as obscenity, to be totally undeserving of First Amendment protection. *See* Miller v. California, 413 U.S. 15, 23 (1973) (reaffirming that obscenity is not protected by First Amendment); *Roth*, 354 U.S. at 483 (same). Criminal solicitation is also unprotected by the First Amendment. *See* N.Y. PENAL LAW § 100 (McKinney 1978); *see also* Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645 (1980). The Supreme Court upholds restrictions on speech where there is a "clear and present danger" that such speech will bring about unlawful action. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). In *Schenck*, the Supreme Court stated that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck*, 249 U.S. at 52. *But see* Dennis v. United States, 341 U.S. 494 (1951). The Supreme Court in *Brandenburg* stated that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg, 395 U.S. at 447.

ical or religious nature is accorded full First Amendment protection because of its contribution to responsible discourse in a free society.[13] Moreover, the government cannot restrict speech based on its subject matter or content because to do so would curtail public debate essential to a free society.[14]

Governmental regulation of fully protected speech may be valid, however, depending on the circumstances surrounding the speech,[15] and in particular, because the expression may be considered to be incompatible with the normal activity of a given location.[16] For example, although television broadcasts are protected by the First Amendment, they must comply with applicable Federal Communications Commission regulations.[17]

The Supreme Court recognizes an intermediate level of protection for speech categorized as commercial speech, primarily with respect to advertising.[18] To protect consumers and the free flow of commercial information, the Court requires that valid restrictions on commercial speech pass a four-prong test.[19] The Supreme Court, however, has not articu-

13. *See, e.g.*, *Widmar*, 454 U.S. at 269 (recognizing full First Amendment protection of religious worship and discussion); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (recognizing full First Amendment protection of political speech).

14. *See, e.g*, Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) (refusing to uphold city ordinance that distinguished between peaceful labor picketing and other peaceful picketing).

15. *See* Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981) (reaffirming that protected speech is subject to restrictions on time, place, and manner of expression); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387-90 (1969).

16. *Grayned*, 408 U.S. at 116 (upholding anti-noise ordinance because of incompatibility with classwork in school).

17. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984); CBS, Inc. v. FCC, 453 U.S. 367 (1981); *Red Lion Broadcasting*, 395 U.S. 367 (upholding "fairness doctrine" that requires each side of public issue to be provided fair coverage).

18. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (establishing intermediate level of scrutiny for restraint of commercial speech); *see* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 68-75 (1983) (employing four-prong test to strike down postal prohibition on mailing of unsolicited contraceptive advertisements); *In re* R.M.J., 455 U.S. 191, 203-07 (1982) (employing four-prong test to strike down court rule regulating attorney advertising); Metromedia Inc. v. San Diego, 453 U.S. 490, 507 (1981) (employing four-prong test to uphold zoning ordinance restricting billboard advertising).

19. *Central Hudson*, 447 U.S. at 566. For commercial speech to receive First Amendment protection, the speech

lated clear standards for determining the nature and circumstances of expression that constitutes commercial speech.[20]

The Supreme Court also has considered government regulation of conduct involving a combination of protected speech with non-speech elements in *United States v. O'Brien*.[21] The Supreme Court in *O'Brien* held that when the conduct contains a combination of elements of speech and non-speech, an important governmental interest in regulating the non-speech element may excuse incidental restriction of free speech.[22] The *O'Brien* standard of review permits a governmental restriction of speech if the restriction is within the government's constitutional power, furthers an important governmental interest, is unrelated to the suppression of speech, and is no greater than necessary to further that interest.[23]

In the international context, courts uphold restrictions of First Amendment expression that would be unconstitutional in the domestic context.[24] In particular, courts sustain such governmental limitations of communication when these restrictions promote national security and foreign policy.[25]

> at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.; *see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (stating free flow of commercial information as central to a free enterprise economy).

20. *See, e.g.*, *Central Hudson*, 447 U.S. at 561; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). In *Pittsburgh Press*, the Supreme Court defined commercial speech as speech that does "no more than propose a commercial transaction." *Id.* at 385. The Supreme Court also defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.

21. 391 U.S. 367 (1968).

22. *Id.* at 376-77.

23. *Id.*

24. *See, e.g.*, Teague v. Regional Comm'r of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969). The Court of Appeals for the Second Circuit in *Teague* allowed a total prohibition of the import of informational materials— publications from China and North Vietnam—prior to the enactment of the Berman Amendment. *Id.* The court in *Teague* found that the restriction of communications was incidental to the pursuit of an important governmental interest in limiting the flow of currency to the "hostile" nations. *Id.* at 445.

25. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (upholding agreement by plaintiff not to divulge classified information without pre-publication clearance).

B. *The Executive's Power to Bar the Flow of Information Under TWEA*

Congress created an instrument for restricting the flow of information when it enacted TWEA.[26] Under TWEA, Congress authorizes the President to prohibit certain transactions with designated countries in an effort to advance foreign policy goals.[27] The Berman Amendment, however, limited this power by exempting the import or export of informational materials from presidential regulation.[28]

1. Executive Power Under TWEA Prior to the Berman Amendment

a. TWEA Section 5(b)

Congress broadened the executive's powers when it enacted TWEA upon the U.S. entry into World War I.[29] Section 5(b) of TWEA authorizes the President, during national emergencies, to impose embargoes on transactions between the United States and designated "hostile" countries.[30] Congress

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26. Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. app. § 5(b) (1988)). The judiciary traditionally recognizes broad executive power in the realm of foreign affairs because of national security and foreign policy interests. *See, e.g.* Regan v. Wald, 468 U.S. 222, 243 (1984); Haig v. Agee, 453 U.S. 280, 292 (1981); Zemel v. Rusk, 381 U.S. 1 (1965); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The Supreme Court in *Waterman* stated that

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Waterman, 333 U.S. at 111; *see* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984); United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

27. 50 U.S.C. app. § 5(b) (1988).

28. *Id.* § 5(b)(4).

29. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. § 5(b) (1988)).

30. 50 U.S.C. app. § 5(b) (1988). Section 5(b)(1)(B) authorizes the President to

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealings in, or exercising any right,

designed TWEA as a permanent piece of legislation to meet both present and future wartime and peacetime conditions.[31] TWEA's original purpose was at the same time designed to cause little disruption in normal relations with enemy aliens while keeping assets out of enemy control.[32] The constitutionality of this presidential power enabled the Court of Appeals for the Second Circuit in *Teague v. Regional Commissioner of Customs*[33] to uphold, pursuant to TWEA, a total prohibition of the importation of all informational materials from China and North Vietnam prior to the Berman Amendment, because the limitation of communication was incidental to the important purpose of the statute of limiting the flow of currency to those countries.[34]

b. The Cuban Assets Control Regulations

In 1962, President Kennedy declared a national emergency after Communist forces gained control of Cuba as a re-

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power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest.

Id. It should be noted that the word "authorizes" is used to indicate that such power does not inherently lie with the Executive. *See* U.S. CONST. art. I, § 8, cls. 1, 3. This power is granted by Congress, which itself has the power to regulate foreign commerce and commerce among the states. *Id. See generally Regan*, 468 U.S. at 226 n.2; *Yoshida*, 526 F.2d 560 (stating that President and OFAC have no inherent power to regulate foreign commerce); Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1008 (S.D.N.Y. 1990).

31. IREDELL MEARES, THE TRADING WITH THE ENEMY ACT 7 (1924).

32. Tagle v. Regan, 643 F.2d 1058, 1065 (5th Cir. 1981). In *Miller v. Robertson*, the Court stated that "[t]he purpose [of TWEA] was to weaken enemy countries by depriving their supporters of power to give aid." Miller v. Robertson, 266 U.S. 243, 248 (1924). Also, in *Sutherland v. Mayer*, the Court stated that "[t]he purpose of the restriction is . . . to preclude the possibility of aid or comfort, direct or indirect, to the opposing forces." Sutherland v. Mayer, 271 U.S. 272, 287 (1926).

33. 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969).

34. *Id.* at 445. The court in *Teague* stated that

> [i]t is true that the regulations result in some limitation on the availability of publications and films originating in China, North Korea, and North Vietnam. To the extent of this limitation the regulations impinge on first amendment freedoms. However, restricting the flow of information or ideas is not the purpose of the regulations. The restriction of first amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations.

Id.; *see* Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) (rejecting First Amendment challenge to TWEA in denial of travel to Cuba); American Documentary Films, Inc. v. Secretary of Treasury, 344 F. Supp. 703 (S.D.N.Y. 1972) (rejecting First Amendment challenge to TWEA for denial of retroactive license because film distributor would not divulge sources of Cuban film).

sult of the Cuban Revolution led by Fidel Castro.[35] Pursuant to TWEA, President Kennedy placed a trade embargo on Cuba which continues in effect today.[36] The Treasury Department, which was designated to administer TWEA,[37] delegated its authority to OFAC,[38] which in turn, promulgated the Cuban Assets Control Regulations (the "Regulations").[39]

The Regulations purport to stop the flow of hard currency from the United States to Cuba.[40] The Regulations prohibit transactions involving any property of Cuba or its nationals ex-

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35. *See* Proclamation 3447, 27 Fed. Reg. 1085 (1962); *see also* Regan v. Wald, 468 U.S. 222, 226 n.2 (1984).

36. *See Wald*, 468 U.S. at 226. Diplomatic ties with Cuba had already been severed in the previous year. *See* DEP'T ST. BULL., Jan. 1961, at 103-04. In 1977, Congress amended section 5(b), making TWEA applicable only in times of war. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. app. § 5 (1988)). The International Emergency Economic Powers Act [hereinafter IEEPA] now governs peacetime emergencies. *See* 50 U.S.C. §§ 1701-1706 (1988). However, existing exercises of the President's "national emergency" authorities were continued by a grandfather clause. *See* Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977). *See generally Wald*, 468 U.S. at 227-29; De Cuellar v. Brady, 881 F.2d 1561, 1563 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 245 (1989); Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1008 n.2 (S.D.N.Y. 1990). IEEPA does not authorize the President to interfere with the international flow of mail or other communications. 50 U.S.C. § 1702(b) (1988).

37. Exec. Order No. 9193, 2 C.F.R. §§ 1174, 1175 (1942). The President delegated his authority under TWEA to the Secretary of the Treasury. *Id.*

38. Deleg. Order No. 128 (Rev. 1) (Oct. 15, 1962).

39. 31 C.F.R. pt. 515 (1963) [hereinafter Regulations]; *see, Capital Cities*, 740 F. Supp. at 1008.

40. Department of State Press Release 360, July 8, 1963, DEP'T. ST. BULL., July 1963, at 160. Three major purposes of TWEA and the Regulations are

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

Real v. Simon, 510 F.2d 557, 563 (5th Cir. 1975) (footnotes omitted). Other purposes, stressed by U.S. courts, are

> (1) isolating Cuba,
> (2) protecting Cubans from having their assets in the United States confiscated by Cuban authorities,
> (3) preserving Cuban assets for future disposition,
> (4) implementing of our economic defense program by
> (a) denying Cuba access to dollar earnings and
> (b) denying Cuba access to dollar financial facilities.

Carl F. Goodman, *United States Government Foreign Property Controls*, 52 GEO. L. J. 767, 793 (1964); *see Real*, 510 F.2d at 563 n.7; Cheng Yih-Chun v. Federal Reserve Bank, 442 F.2d 460, 465 (2d Cir. 1971). In *Sardino v. Federal Reserve Bank*, the court stated that "[h]ard Currency is a weapon in the struggle between the free and the commu-

cept transactions undertaken pursuant to a general or specific licensing provision.[41] Willful violation of TWEA or its Regulations is a felony.[42]

The Regulation's general licensing provision allows individuals to engage in authorized transactions without prior OFAC approval.[43] Authorized transactions involve the receipt or transmission of mail,[44] the transmission of television news programming originating in Cuba by U.S. news organizations,[45] and travel to Cuba for the purpose of gathering news, making news or documentary films, or professional research.[46]

For other transactions, individuals must receive a specific license from OFAC.[47] OFAC grants specific licenses on a case-by-case basis.[48] Under the Regulations, however, OFAC does not issue specific licenses for payment of television rights, appearance fees, royalties, pre-performance expenses, or other similar payments resulting from any public exhibition or performance in Cuba or the United States.[49]

2. Executive Authority Under the Berman Amendment

a. The Berman Amendment and TWEA Section 5(b)

In 1988, Congress amended section 5 of TWEA through enactment of the Berman Amendment.[50] The Berman Amendment restricts presidential authority by retracting the presidential power to regulate the import or export of informational materials.[51] The Berman Amendment, in pertinent

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nist worlds." Sardino v. Federal Reserve Bank, 361 F.2d 106, 112 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966).

41. 31 C.F.R. § 515.201(b) (1991); *see, e.g.*, Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981); Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990); Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fla. 1989).

42. 50 U.S.C. app. § 16 (1988). The resulting punishment for a willful violation of TWEA and the Regulations may be imprisonment for up to ten years and/or a fine of up to US$50,000. *Id.*

43. *See, e.g.*, 31 C.F.R. §§ 515.542, 515.560 (1991).

44. *Id.* § 515.542(a).

45. *Id.* § 515.542(b).

46. *Id.* § 515.560(a)(1)(ii).

47. *Id.* § 515.801(b).

48. *See, e.g., id.* §§ 515.542(c), 515.560(b), 515.565(b).

49. *Id.* § 515.565(c)(1).

50. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 50 U.S.C. app. § 5(b) (1988)).

51. 50 U.S.C. app. § 5(b)(4) (1988).

part, provides that

> [t]he authority granted to the President in this subsection does not include the authority to regulate or prohibit, directly or indirectly, the importation . . . or the exportation . . . whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or *other informational materials*, which are not otherwise controlled for export under section 5 of the Export Administration Act of 1979 . . . or with respect to which no acts are prohibited by chapter 37 of title 18, United States Code.[52]

This restriction of presidential authority represents a reaction to several seizures at the U.S. border of shipments of magazines and books from embargoed countries.[53]

The legislative history of the Berman Amendment emphasizes the importance of the free flow of ideas and information.[54] The legislative history stresses that the U.S. government should not prohibit the import of informational materials protected by the First Amendment.[55] The legislative history

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52. *Id.* (emphasis added).

53. Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and The Free Flow of Ideas*, 26 WM & MARY L. REV. 719, 731 n.52 (1985). The letter sent to those affected by such enforcement stated that

> [y]ou are the addressee of a mail shipment containing publications from Cuba. This mail has been detained by the United States Customs Service because its unlicensed importation is prohibited by the Cuban Assets Control Regulations (31 C.F.R. pt. 515).
>
> This office may not release this merchandise to you unless you present to us, together with this notice, either in person or by mail a Foreign Assets Control License.

Id.

54. H.R. REP. No. 40, 100th Cong., 1st Sess., pt. 3, at 113 (1987) [hereinafter HOUSE REPORT]. The Berman Amendment, not itself the subject of legislative debate, specifically provides that the legislative history of its predecessor bill be treated as its own. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1119 (1988); *see* Cernuda v. Heavey, 720 F. Supp. 1544, 1547-48 (S.D. Fla. 1989).

55. HOUSE REPORT, *supra* note 54, at 113. The Berman Amendment's legislative history encompasses the Report of the Committee on Foreign Affairs of the House of Representatives, which accompanied the predecessor bill. *Id.* The House Report noted the American Bar Association House of Delegates' resolution that stressed the importance of no barriers in the importation of informational materials. *Id.* The House Report merely noted the American Bar Association House of Delegates' resolution that stated that "no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment." *Id.*

also includes concern that the Berman Amendment allow a free flow of ideas across international borders.[56]

The House Report to the Berman Amendment also noted an intent to codify within the Berman Amendment the trade practices under the Libyan and Nicaraguan embargoes.[57] Both the Libyan and the Nicaraguan regulations contain language similar to the Berman Amendment.[58] Both the Libyan and Nicaraguan embargoes, however, contain separate provisions authorizing the import of telecommunications.[59]

b. The Berman Amendment and the Regulations

OFAC subsequently amended its Regulations to reflect changes made by the Berman Amendment.[60] The amended Regulations made several key alterations to the general and specific licensing provisions.[61] OFAC retained the authority to

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56. *See* 132 CONG. REC. 6550, 6551 (1986). Senator Mathias of Maryland, the sponsor of the predecessor bill identical in pertinent part to the Berman Amendment, also stated its intent to allow a free flow of information. *Id.* Senator Mathias stated that the bill's intent is to remove "barriers that inhibit the free exchange of ideas across international frontiers." *Id.* at 6550. In addition, he stated that "[t]oday's telecommunications media can bring into our living rooms the images and voices of exponents of every political and artistic tendency around the globe. To deny . . . information entry or exit not only injures our freedom but insults the intelligence of the American people." *Id.* at 6551. Senator Mathias also stated that abstract ideals contained in the First Amendment are "articulated in tangible forms." *Id.* at 6550.

Indeed, after the enactment of the Berman Amendment and the Regulations, the sponsor of the Berman Amendment wrote that telecommunications, contrary to the Regulations, should be included in any definition of "informational materials" to avoid illogical results inconsistent with its intent. *See* Brief of Amici Curiae, CBS, Inc. and the National Broadcasting Company, Inc. at Ex. A, Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) (No. 90-6200).

57. HOUSE REPORT, *supra* note 54, at 113. The House Report stated that "[the Berman Amendment] codif[ies] current practice . . . in the recent embargoes of trade with Nicaragua and Libya of exempting information materials and publications from import restrictions." *Id.*

58. 31 C.F.R. § 540.536 (1991) (Nicaragua) (authorizing importation of "publications, including books, newspapers, magazines, films, phonograph records, tape recordings, photographs, microfilm, microfiche, posters and similar materials"); *id.* § 550.201 (Libya) (authorizing "publications and materials imported for news publication or news broadcast dissemination"). *But see id.* § 540.535 (Nicaragua) (authorizing importation of services in connection with "conference, performance, exhibition or similar event"); *id.* §§ 550.502, 550.504 (Libya) (authorizing export of "technical data" under specific circumstances).

59. *Id.* § 540.542 (Nicaragua); *id.* § 550.510 (Libya).

60. 54 Fed. Reg. 5229, 5231 (1989).

61. *See, e.g.*, 31 C.F.R. §§ 515.206(a), 515.545(b) (1991).

grant specific licenses on a case-by-case basis,[62] but expanded the general licensing provisions to include transactions involving other "informational materials."[63] OFAC thus enabled parties dealing with Cuban informational materials to proceed without OFAC prior approval.[64]

The Regulations narrowly define other "informational materials."[65] The Regulations qualify other "informational materials" as items in tangible form, excluding intangible informational materials such as telecommunication transmissions.[66] In addition, the Regulations prohibit transactions involving other "informational materials" not yet in existence at the time of the transaction, such as commissioning a book to be written or the payment of royalties for such works.[67]

3. Deference to Decisions of Administrative Agencies

The decisions of executive agencies such as OFAC receive great deference from the judiciary.[68] Courts often determine administrative agencies to be better situated than courts to make decisions concerning statutes that they administer because of their specialized knowledge of the technical aspects of the statute.[69] Under the doctrine of separation of powers, courts must recognize the spheres of power given each branch

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62. *See, e.g., id.* §§ 515.542(c), 515.560(b), 515.565(b).

63. *Id.* §§ 515.206(a), 515.545(b).

64. *Id.*

65. *Id.* § 515.332(b). The Regulations define "informational materials" to exclude "intangible items such as telecommunication transmissions." *Id.*

66. *Id.*

67. *Id.* §§ 515.206(c), 515.545(b). The Regulations prohibit "transactions related to informational materials not fully created and in existence at the date of the transaction," as well as the "remittance of royalties or other payments relating to works not yet in being." *Id.*

68. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (deferring to Environmental Protection Agency's definition of "statutory source" in Clean Air Act Amendments of 1977).

69. *Id.*; *see, e.g.*, Public Citizen v. Young, 831 F.2d 1108, 1122 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (deferring to administrative agency decision as to whether *de minimis* exception to statutory ban on use of carcinogens as food additives should exist). *But see* Lechmere Inc. v. NLRB, 60 U.S.L.W. 4145 (1992) (refusing to defer to administrative agency's decision); Equal Employment Opportunity Comm'n. v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (stating administrative agency's decision not entitled to deference); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (refusing to defer to agency where Court could ascertain congressional intent on precise question).

of government.[70] Accordingly, courts defer to agencies because they are considered to be indirectly accountable to the people, through the executive's direct accountability, for policy choices such as the choice between First Amendment freedoms and foreign policy goals.[71] Courts may also defer to administrative agencies when they believe that Congress has implicitly left gaps for the agency to fill.[72]

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[73] the Supreme Court developed a high standard for deference to administrative agencies.[74] In *Chevron*, the Supreme Court deferred to the Environmental Protection Agency's construction of the term "statutory source" in the Clean Air Act Amendments of 1977.[75] The Court decided that it must defer to an agency interpretation unless Congress addressed the precise issue at hand in either the plain language of the statute or in clear legislative history.[76] According to the *Chevron* Court, if Congress failed to address the issue, a court must defer to the agency's reasonable interpretation.[77]

Although entitled to substantial deference, administrative

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70. *See, e.g.*, *Chevron*, 467 U.S. at 843-44. The structure of the articles in the U.S. Constitution reflects the concept of separation of powers by the delegation of distinct powers to each branch of government. U.S. CONST. arts. I, § 1, II, § 1, III, § 1.

71. *See, e.g.*, *Chevron*, 467 U.S. at 864-66.

72. *See, e.g.*, *id.* at 843-44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). In *Chevron*, the Supreme Court stated that

> "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.

Id. (quoting *Morton*, 415 U.S. at 231).

73. 467 U.S. 837 (1984).

74. *Id.*

75. *Id.* at 866; *see* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified at 42 U.S.C. § 7401 (1977)).

76. *Chevron*, 467 U.S. at 842-43.

77. *Id.* The *Chevron* Court stated that

> [f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

agencies' decisions are not insulated from judicial review.[78] The courts will reverse agency decisions if those decisions are determined to be arbitrary and capricious.[79] Courts also overrule administrative agency decisions that are inconsistent with statutory authority or that frustrate congressional policy.[80] Finally, courts do not defer to decisions of administrative agencies that interpret statutes inconsistently with previous agency decisions.[81]

II. *APPROACHES ADOPTED BY COURTS IN DETERMINING THE MEANING OF "INFORMATIONAL MATERIALS" IN THE BERMAN AMENDMENT*

Currently, two lower federal courts disagree with respect to the proper interpretation of the phrase "informational materials" in the Berman Amendment and its Regulations.[82] Deferring to an OFAC decision, the District Court for the Southern District of New York in *Capital Cities/ABC, Inc. v. Brady*[83] interpreted the Berman Amendment narrowly to exempt strictly tangible forms of information from the scope of the Regulations. In contrast, the District Court for the Southern District of Florida in *Cernuda v. Heavey*[84] interpreted the Berman Amendment broadly to protect all ideas and informa-

78. *See, e.g.*, Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981).

79. *See, e.g.*, De Cuellar v. Brady, 881 F.2d 1561, 1565 (11th Cir.), *cert. denied*, 111 S. Ct. 245 (1989); *see also* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988) (stating that "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

80. *See, e.g.*, *Federal Election Comm'n*, 454 U.S. at 37.

81. *See, e.g.*, United States v. Leslie Salt Co., 350 U.S. 383, 396 (1956) (refusing to defer to administrative agency's statutory interpretation because of prior, long-standing, consistent and contrary interpretation). *But see* Rust v. Sullivan, 111 S. Ct. 1759 (1991). The Supreme Court in *Rust* affirmed a decision by the Department of Health and Human Services regarding advice to clients about abortions. *Id.* The Court rejected the argument that such decisions should not be given deference because it represents a sharp break from previous decisions on the basis of the agency's reasoning that the agency must be given ample latitude. *Id.* at 1769.

82. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990); Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fla. 1989).

83. 740 F. Supp. 1007 (S.D.N.Y. 1990).

84. 720 F. Supp. 1544 (S.D. Fla. 1989).

tion exported from Cuba to the United States if such ideas and information are protected by the First Amendment.

A. *The* Capital Cities *Approach*

1. Factual Background and OFAC's Decision

In *Capital Cities*, the Southern District of New York deferred to OFAC's decision that found that the proposed transaction, involving the live broadcast of the Pan American Games in the United States, would violate TWEA.[85] In October 1988, Capital Cities successfully placed a bid with the Pan American Sports Organization ("PASO")[86] for the exclusive right to televise the 1991 Pan American Games, which were to be held in Havana, Cuba.[87] For the right to televise the games live, Capital Cities agreed to pay US$8.7 million to PASO with the express understanding that 75 percent would be remitted to the host organizer of the game, Cimesports, S.A., a Cuban entity.[88] OFAC informed Capital Cities that the proposed transaction required a specific license pursuant to TWEA and the Regulations.[89] OFAC would approve the license only if royalty payments were made to a blocked account[90] and if travel expenses were minimal.[91] OFAC also informed the plaintiff that a news-gathering general license would be available if no royalty payments were made and certain guidelines were followed.[92] In addition, OFAC stated that the plaintiff could import videotapes of the games on a conditional basis.[93]

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85. *Capital Cities*, 740 F. Supp. at 1013.

86. *Id.* at 1009. The Pan American Sports Organization [hereinafter PASO] is an international organization headquartered in Mexico. *Id.*

87. *Id.* The Pan American Games are a multidisciplinary sports competition held every four years in a different member nation. *Id.*

88. *Id.* at 1009-10.

89. *Id.* at 1010. Capital Cities subsequently retracted and renewed its specific license application. *Id.*

90. *Id.*; *see* 31 C.F.R. § 515.508(a) (1991) (authorizing payments to blocked accounts).

91. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1010 (S.D.N.Y. 1990).

92. *Id.* (citing Notice of Motion at Ex. 5). OFAC guidelines required that Capital Cities' activities "essentially consist of reports or documentaries of, or information about, the Games and related events accessible to the press on a non-exclusive basis." *Id.* at 1010 n.5 (citing Notice of Motion at Ex. 5).

93. *Id.* at 1010. The videotapes could be imported if plaintiff did not "fund, or provide or contract for services in connection with, the production of the tapes." *Id.* (quoting Notice of Motion at Ex. 5).

OFAC denied plaintiff's application for a specific license, however, because the transaction involved would result in a substantial payment of funds to Cuba.[94] Plaintiff, unable to abide by OFAC's specific license guidelines, filed suit seeking a declaratory judgment that the Berman Amendment and the Constitution authorized the proposed transaction.[95]

2. Opinion of the U.S. District Court for the Southern District of New York

Deferring to OFAC's decision, the District Court for the Southern District of New York in *Capital Cities* followed the reasoning of the Supreme Court in *Chevron*.[96] The court deferred to OFAC's decision because neither the statutory language nor the legislative history of the Berman Amendment clearly specified the meaning of "informational materials."[97] The court also rejected the plaintiff's First Amendment arguments, citing the existence of a lower standard of judicial scrutiny for matters implicating foreign affairs.[98]

a. Statutory Construction and Legislative History

In *Capital Cities*, the district court concluded that the word "materials" in the phrase "other informational materials" was subject to interpretation because it may refer to both tangible

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94. *Id.*

95. *Id.*

96. 467 U.S. 837 (1984). Under *Chevron*, a court must defer to an agency interpretation unless Congress has addressed the precise issue at hand in either the plain language of the statute or in clear legislative history. *Id.* at 842-43; *see supra* text accompanying notes 73-81 (discussing *Chevron's* deference standard). The Court in *Chevron* stated that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

97. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1012 (S.D.N.Y. 1990).

98. *Id.* at 1012-13. Capital Cities sought

> a declaratory judgment that the Berman Amendment and/or the Constitution authorizes the transaction proposed by ABC; that the Regulations are null and void to the extent that they regulate the importation of television signals and related informational materials; and that the Berman Amendment, the Administrative Procedures Act and/or the United States Constitution bar the Government from initiating any proceeding against ABC to prohibit ABC from televising the 1991 Games.

Id. at 1010 (citations omitted). The case was not appealed and has since been settled. Webster, *Treasury, ABC Sports Settle Suit*, Proprietary to the United Press International, Dec. 13, 1990, Washington News Section.

and intangible items.[99] In the statute, the term "informational materials" follows a list of tangible informational materials such as books and magazines.[100] The court considered the rule of statutory construction that general words following a specific list should be given a meaning similar to the specific list.[101] According to the court, application of this rule to the Berman Amendment was inconclusive because the general phrase "other informational materials" is set off by the disjunctive word "or," possibly indicating an intent to broaden the preceding class.[102] The court found persuasive the argument that when Congress intends to include intangibles such as telecommunications, it does so clearly.[103]

The court also noted that the legislative history failed to clarify the definition of "other informational materials."[104] The court found that at best there existed a general purpose to allow a free flow of ideas and information, but it could find no definition of "informational materials" or any distinction between tangible and intangible informational materials.[105] A

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99. *Capital Cities*, 740 F. Supp. at 1011. For a view disagreeing with the court, see A. Sanford, *Foreign Affairs and First Amendment Rights: Office of Foreign Assets Control Prohibits ABC's Pan American Games Broadcast*, 21 GA. J. INT'L & COMP. L. 177, 181 (1991).

100. 50 U.S.C. app. § 5(b)(4) (1988).

101. *Capital Cities*, 740 F. Supp. at 1011 (citing Dole v. United Steelworkers, 494 U.S. 26 (1990)). The principle referred to is *ejusdem generis*. *See* Garcia v. United States, 469 U.S. 70, 74 (1984) (discussing rule that general words following specific words in statute encompass objects only similar in nature to those enumerated); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (5th ed. 1992). The principle of statutory construction *ejusdem generis* has been defined as "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* This principle has been called "a common drafting technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply." *Id.*

102. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1011 (S.D.N.Y. 1990) (citing FCC v. Pacifica Found., 438 U.S. 726, 739-40 (1978); United States v. Powell, 423 U.S. 87, 90 (1975)); *see supra* text accompanying note 52 (citing Berman Amendment).

103. *Capital Cities*, 740 F. Supp. at 1011 n.8. The court pointed to 47 U.S.C. § 397(14) (1982) in which Congress included intangibles in the meaning of "informational material" when it included the phrase "informational materials that may be transmitted by means of electronic communications." *Id.* (citing Wire or Radio Communications Act, 47 U.S.C. § 397(14) (1982)). In addition, Congress does not refer to telecommunications as informational materials. *See, e.g.*, 47 U.S.C. § 522(2) (1988) (referring to "television broadcast signals").

104. *Capital Cities*, 740 F. Supp. at 1011.

105. *Id.* The American Bar Association House of Delegates' resolution was not

comparison with the situations involving the Nicaraguan and Libyan embargoes proved to be of no avail because they failed to address agreements for exclusive broadcast rights and because they contain exclusions similar to those of the Regulations.[106] Because the statutory language and the legislative history failed to clarify the meaning of "other informational materials," the court held that deference to OFAC was demanded unless precluded by the First Amendment.[107]

b. First Amendment Challenge

The court in *Capital Cities* rejected plaintiff's First Amendment challenge to the validity of OFAC's prohibition of payment for intangible information. The court found that, in the area of foreign affairs, congressional or executive power is not subject to the same level of judicial scrutiny and limitations that the First Amendment demands in a domestic context.[108] Finding the rule inapplicable in foreign affairs, the court dismissed the rule of statutory construction that a court should construe a statute to avoid raising serious constitutional problems.[109] To construe the statute otherwise, the court

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dispositive because Congress only noted the resolution, which was included within the legislative history, without accepting or rejecting it. *See supra* notes 54-55 and accompanying text (discussing American Bar Association resolution). Also, no definition of "informational materials" was given in the resolution. *Capital Cities*, 740 F. Supp. at 1012 n.9. Senator Mathias's statements also lacked the desired definition. *Id.*; *see supra* note 56. In addition, Senator Berman's statements that Congress intended to include telecommunications in the Berman Amendment were given little if any weight because they were made after the enactment of the statute and elicited in light of this case. *Capital Cities*, 740 F. Supp. at 1012 n.9 (citing County of Washington v. Gunther, 452 U.S. 161, 176 n.16 (1981)).

106. *Capital Cities*, 740 F. Supp. at 1012.

107. *Id.*

108. *Id.* (citing Teague v. Regional Comm'r of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969)). *Teague* upheld the constitutionality of a total prohibition of importation of all informational materials from China and North Vietnam. *Teague*, 404 F.2d at 446. Factors considered in the application of the First Amendment in a domestic context are "the nature of the regulation imposed, the type of speech at issue, the context in which the regulation arises, and the purpose for which the regulation is imposed." Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1013 (S.D.N.Y. 1990) (citing Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Red Lion Broadcasting v. FCC, 395 U.S. 367, 387-90 (1969); *Teague*, 404 F.2d at 446)).

109. *Capital Cities*, 740 F. Supp. at 1013; *see* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76 (1988) (refusing to defer to NLRB's interpretation to avoid raising constitutional issues); *see also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 507 (1979) (refusing to bring

held, would raise constitutional issues of separation of powers and the authority of the executive in foreign affairs.[110] The court advised the use of extreme care in balancing First Amendment issues raised by deference to OFAC with a separation of powers issue raised by any judicial limitation on executive authority in foreign affairs.[111]

The *Capital Cities* court also rejected First Amendment arguments relating to form and content.[112] The court failed to find discrimination between print and broadcast media because both forms of media have the right to obtain the Pan American Games in tangible form, such as videotapes.[113] In addition, the court found no content-based discrimination because OFAC's decision was based upon the payment for the telecommunications, not the subject matter of the telecommunications.[114] The *Capital Cities* court thus concluded that the Berman Amendment, as construed by OFAC, presented no First Amendment problems that required a result other than deference to the agency's decision.[115]

B. *The* Cernuda *Approach*

1. Factual Background and OFAC's Decision

Cernuda involved the pre-indictment seizure of 200 paintings allegedly imported in violation of TWEA and the Regula-

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teachers of church-operated schools within the NLRB's jurisdiction in order to avoid constitutional problems of separation of church and state).

110. *Capital Cities*, 740 F. Supp. at 1013.

111. *Id.* The court in *Capital Cities* stated that a "[c]ourt must . . . be careful to balance the First Amendment constitutional issues that could arise from deference to the agency's interpretation against those constitutional issues which may arise if insufficient latitude is given to the Executive in the conduct of foreign affairs." *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1013-14 (citing Ward v. Rock Against Racism, 491 U.S. 781, 787 (1989)). The Supreme Court in *Ward* found that regulations are content-neutral if the message conveyed is not considered by the government and the regulations serve a purpose unrelated to suppression of speech. *Id.* Yet the Court in *Lakewood v. Plain Dealer Publishing Co.* struck down an ordinance giving the mayor unbridled discretion to grant or deny permits for placement of newspaper racks on public property because there was substantial danger that content-based discrimination would occur. Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988). The court in *Capital Cities* found *Plain Dealer* inapplicable because there was no showing of discrimination. Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1014 (S.D.N.Y. 1990).

115. *Capital Cities*, 740 F. Supp. at 1013.

tions.[116] The plaintiff, Ramón Cernuda, the director of the Cuban Museum in Miami, sought the return of the seized paintings.[117] Ramón Cernuda did not personally "trade with the enemy,"[118] but rather attempted to obtain a license from OFAC to exhibit the Cuban paintings at issue.[119] Although OFAC never responded specifically to Mr. Cernuda's application, an OFAC official wrote that the amended TWEA does not exempt art-work from the scope of the applicable regulation.[120]

Political turmoil surrounded the controversy in this case.[121] The controversy arose because the exhibition included works of art created by artists living in Cuba and by those who had not renounced allegiance to the Communist regime.[122] The Cuban Museum and the Cuban American National Foundation possessed drastically different views of Cuba that erupted in violence.[123] Involved were death threats, a car bomb, and numerous protest rallies.[124]

2. Opinion of the District Court for the Southern District of Florida

In *Cernuda*, the District Court for the Southern District of Florida emphasized the statutory language of the Berman Amendment and its legislative history and concluded that regulation of ideas and information lies outside the authority of

116. Cernuda v. Heavey, 720 F. Supp. 1544, 1545 (S.D. Fla. 1989).

117. *Id.* at 1545. Rule 41(e) of the Federal Rules of Criminal Procedure gives courts "discretion to hear pre-indictment requests for the return of unconstitutionally seized property." *Id.* at 1546 (citations omitted).

118. *Id.* at n.4.

119. *Id.* at 1546. The plaintiff sought both a license and a retroactive license. *Id.* The only response to the request for a retroactive license was OFAC's director making a speech to critics of Mr. Cernuda and the Cuban Museum in which he pledged to work with those who opposed the museum's activities. *Id.* at 1552.

120. *Id.* at 1551 (citing Government's Memorandum at 9, app. at 20).

121. *Id.* at 1545.

122. *Id.*

123. *Id.* The Cuban Museum was intended to be "a forum in which Cuban culture could be shared with the community at large." Brief for Plaintiff at 5, Cernuda v. Heavey, 720 F. Supp. 1544 (S.D. Fla. 1989) (No. 89-2613). The Cuban American National Foundation is an ultra-conservative group politically opposed to Fidel Castro. *Id.* at 6-7.

124. Cernuda v. Heavey, 720 F. Supp. 1544, 1545 (S.D. Fla. 1989). Outside a benefit auction, protestors shouted insults and political slurs demonstrating against the display of Marxist-Leninist propaganda. Brief for Plaintiff at 7, *Cernuda* (No. 89-2613).

the executive.[125] The court interpreted the legislative history of the Berman Amendment to find the absence of any congressional prohibition on the free flow of ideas and information that are protected by the First Amendment.[126] Although acknowledging the importance of deference to agencies charged with administering a statute, the court found the OFAC interpretation both arbitrary and capricious, and ruled in favor of the plaintiff to release the paintings at issue as exempt from regulation under TWEA.[127]

a. Statutory Construction and Legislative History

The *Cernuda* court found that original paintings qualify as "informational materials" under the Berman Amendment to TWEA.[128] The court decided that paintings were informational, as demonstrated by the community's conflicting reactions to the possibility of their exhibition.[129] The court also quoted passages from art history books praising the informational qualities of art.[130]

Examining congressional intent, the court held that informational materials should be exempt from regulation to avoid violation of the First Amendment.[131] The court cited the House Report as indicative of congressional intent to exempt from regulation all materials protected by the First Amendment.[132] Although recognizing that the House Report did not

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125. *Cernuda*, 720 F. Supp. at 1550 n.10.

126. *Id.* at 1549.

127. *Id.* at 1552.

128. *Id.* at 1553.

129. *Id.* at 1551.

130. *Id.* The court reiterated the artwork's informational value when it stated that:

> "[g]reat works of art are more than aesthetically pleasing objects, more than feats of human skills and ingenuity: they deepen our insight into ourselves and others, they sharpen our awareness of our own and other religious beliefs, they enlarge our comprehension of alternative and often alien ways of life—in short they help us to explore and understand our own human nature."

Id. (quoting H. HONOUR & J. FLEMING, THE VISUAL ARTS: A HISTORY 15 (2d ed. 1986)).

131. *Id.* at 1553.

132. *Id.* at 1549. The court in *Cernuda* stated that

> [i]n explaining the [Berman Amendment], the House Foreign Affairs committee expressly noted that the American Bar Association House of Delegates, the ABA's representative body, had approved "the principle that no

explicitly accept a resolution to exempt from regulation all First Amendment materials, the court inferred it to be congressional intent from the plain language of the Report.[133]

b. First Amendment Challenge

Although it based its decision on statutory construction and congressional intent, the *Cernuda* court discussed the First Amendment implicitly.[134] The *Cernuda* court noted that the First Amendment protects art.[135] The court rejected the government's argument that OFAC Regulations have an incidental effect on First Amendment concerns, and that this incidental impact is justified by the important governmental interest in limiting the flow of U.S. currency to Cuba.[136] The court examined the legislative history and the phrase "informational materials" in the Berman Amendment.[137] Distinguishing authority cited by the government, the court concluded that the Berman Amendment exempts from the scope of regulation

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prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment."

Id. (citing HOUSE REPORT, *supra* note 54, at 113).

133. *Id.* at 1549-50. In response to the argument that the resolution was not expressly accepted, the *Cernuda* court stated that "[t]he government offers no support for this argument, which seems to ignore the plain language of the report and the obvious First Amendment orientation of the words 'informational materials.' " *Id.* at 1550.

134. *Id.* at 1549-50.

135. *Id.* at 1549. The court concluded that "[a]rtwork . . . is within the ambit of speech that receives First Amendment protection." *Id.* (citing Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988); Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985)).

136. Cernuda v. Heavey, 720 F. Supp. 1544, 1549 n.10 (S.D. Fla. 1989). This standard was established by United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding law prohibiting burning of draft cards during Vietnam War because of sufficiently important governmental interest). *See supra* text accompanying notes 21-23 (discussing *O'Brien* standard). The government further argued that economic regulation has been established as a sufficiently important governmental reason. *Cernuda*, 720 F. Supp. at 1549 n.10 (citations omitted). The court in *Cernuda* distinguished this case from *Teague v. Regional Commissioner of Customs* and *American Documentary Films, Inc. v. Secretary of Treasury*, stating that "[t]he courts rendering those decisions emphasized that the regulations involved made limited incursions on First Amendment activity and thus the restrictions involved were truly incidental." *Id.* at 1549-50 n.10.

137. *Cernuda*, 720 F. Supp. at 1549-50, 1553. The court rejected the argument that Congress did not explicitly accept the ABA resolution. *Id.* Similarly, the canon of *ejusdem generis* was discarded because it must be applied according to the statute's purpose viewed in light of its legislative intent. *Id.* at 1550 n.12.

ideas and information that are protected by the First Amendment.[138] The court concluded that Congress must have intended to exempt all informational materials from presidential control in order to prevent the statute from violating the First Amendment.[139]

c. Arbitrary and Capricious Standard

The court found OFAC's decision in refusing to include paintings within the definition of "other informational materials" and refusing to respond to plaintiff's specific license applications to be arbitrary and capricious and thus reversed it, allowing the plaintiff to recover the seized paintings.[140] The court based its reversal on three factors.[141] First, it stated that OFAC failed to consider whether the general term "informational materials" included artwork.[142] Second, it reasoned that the Regulations require a more generous reading than OFAC gave them in this case because the Regulation's list of what

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138. *Id.* at n.10. The court reasoned that the Berman Amendment "totally exempts from prohibition or regulation the import of ideas and information protected by the First Amendment." *Id.* Yet the court limited its holding such that only paintings are exempt from regulation under TWEA; art itself was not decisively exempt from TWEA. *Id.* at 1553 n.15. The court in *Cernuda* stated that "[a]dmittedly, the general term 'informational materials' may be construed to exempt other items besides paintings from the TWEA . . . . However, this petition presents only the question of whether paintings are exempt from the TWEA. No occasion exists to decide whether other art falls within the rubric of 'informational materials.' " *Id.*

139. *Id.* at 1553. The court believed that it avoided constitutional questions, thereby remaining consistent with the principle embodied in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979), that a court should construe a statute to avoid raising constitutional issues. *See supra* note 109 and accompanying text; *see also Cernuda*, 720 F. Supp. at 1553. The *Cernuda* court held that

> statutory construction and the legislative history of the 1988 TWEA amendment show that Congress amended the TWEA to exempt "informational materials," in order to prevent the statute from running afoul of the First Amendment. Original paintings fall within the statutory exemption. This construction avoids serious questions about the constitutionality of the TWEA.

Id. (footnote and citations omitted).

140. *Cernuda*, 720 F. Supp. at 1551. The standard of review applied by the court is consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988). Note that the court did not use or discuss the method of a court's analysis in reviewing an agency's decision that was established in *Chevron*. *See Cernuda*, 720 F. Supp. 1544.

141. Cernuda v. Heavey, 720 F. Supp. 1544, 1551-52 (S.D. Fla. 1989).

142. *Id.* at 1551. OFAC stated that it would not include artwork in any interpretation of "publication." *Id.*

constitutes informational materials is merely exemplary, not exclusionary.[143] Third, the court found that OFAC's inaction with regard to Mr. Cernuda's license applications was unreasonable.[144] For these three reasons, the court held OFAC's decision to be arbitrary and capricious and thus found the paintings to be exempt from regulation under TWEA.[145]

III. *U.S. COURTS SHOULD DEFER TO OFAC'S DECISIONS REGARDING THE PHRASE "OTHER INFORMATIONAL MATERIALS"*

The judiciary should defer to OFAC's definition of the phrase "other informational materials" and thereby allow presidential regulation of intangible informational materials under TWEA.[146] When an agency considers congressional intent and previous agency decisions to determine the proper interpretation of an ambiguous statutory phrase, reviewing courts should defer to the agency's decision to avoid an issue of separation of powers.[147] In addition, TWEA's overall purpose of preventing the flow of hard currency to Cuba, in conjunction with its statutory language and legislative history, suggests courts should defer to the decisions of OFAC. Such deference does not raise First Amendment problems because any resulting restriction of First Amendment expression is incidental to the pursuit of an important governmental interest that implicates the foreign affairs authority of the executive branch. Moreover, as a result of these factors, the *Cernuda* court's interpretation of the phrase "other informational materials" to include all informational materials is overly broad in reaching beyond the facts of that case.

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143. *Id.*

144. *Id.* at 1552; *see supra* text accompanying note 120 (discussing OFAC's inaction to plaintiff's application).

145. *Cernuda*, 720 F. Supp. at 1552.

146. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990). Although the holding in *Capital Cities* deferred to OFAC's decision limiting "other informational materials" to include only tangible informational materials, the court in *Cernuda* referred in dicta to "other informational materials" as including all informational materials protected by the First Amendment. Cernuda v. Heavey, 720 F. Supp. 1544, 1550 n.10 (S.D. Fla. 1989).

147. Previous OFAC decisions occurred prior to the Berman Amendment.

A. *Separation of Powers Demands Deference*

Under the doctrine of separation of the powers, U.S. courts generally defer to executive authority in the area of foreign affairs.[148] The U.S. Constitution delegates foreign affairs policy to the executive.[149] In addition, the judiciary often lacks the necessary understanding of technical executive decisions or diplomatic compromises.[150]

OFAC, as an administrative body, is uniquely situated and was specifically created to administer TWEA, and possesses a specialized knowledge of U.S.-Cuban relations.[151] The courts would infringe executive authority specifically delegated by Congress if the judiciary usurped the power of a technically oriented agency.[152] The judiciary must oversee only agency abuse and consistent application of the statute.[153]

The courts in *Capital Cities* and *Cernuda* both acknowledged the separation of powers doctrine and the importance of defer-

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148. *See, e.g.*, Regan v. Wald, 468 U.S. 222, 243 (1984); Haig v. Agee, 453 U.S. 280, 292 (1981); Zemel v. Rusk, 381 U.S. 1, 17 (1965); Chicago & S. Air Lines Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *see supra* note 26 and accompanying text (discussing executive authority in foreign affairs).

149. U.S. CONST. art. II § 2. The President is the Commander-in-Chief of the nation's military forces and may make treaties with other nations as well as appoint ambassadors subject to the Senate's approval. *Id.* It has also been claimed that the Constitution implicitly authorizes presidential power to conduct foreign relations. *See Curtiss-Wright*, 299 U.S. 304; *see also* BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 178 (1991). The court in *Youngstown Sheet & Tube Co. v. Sawyer* stated that "[t]he President's power, if any, to issue the order [the seizure of steel plants] must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). Critics have commented that the President's power fluctuates with the strength of the particular President and that

> [n]o complete answers can be found in the text of the Constitution to the burning questions of the extent of presidential power in foreign affairs or the proper roles of Congress and the President in those areas where their powers overlap. Those questions are often resolved in the political process, without the benefit of much judicial intervention.

CARTER & TRIMBLE, *supra*, at 179-80.

150. *See supra* note 69 and accompanying text (discussing specific knowledge of agencies).

151. *See* 31 C.F.R. pt. 515 (1991).

152. *See supra* text accompanying notes 68-81 (discussing deference to agency decisions).

153. *See supra* text accompanying notes 73-77 (discussing standard of deference to administrative agency).

ence to administrative agency decisions.[154] The *Capital Cities* court correctly balanced the separation of powers issue with the First Amendment issue and found that deference was mandated.[155] The *Cernuda* court should have decided the case without raising a separation of powers issue by examining exclusively the informational and tangible nature of paintings.[156] By examining the nature of the paintings, the court would not have infringed upon OFAC's rightful authority to refine ambiguous statutory language.[157]

B. *TWEA's Purpose, Statutory Language, and Legislative History Mandate Judicial Deference*

OFAC's definition of informational materials, excluding intangibles such as telecommunications, is consistent with the purpose of TWEA and the Regulations.[158] In blocking the flow of U.S. currency to Cuba, Congress exempted from regulation only those items of limited economic significance such as books, magazines, and newspapers.[159] Allowing the import of items such as books and magazines is consistent with the Berman Amendment's general notion of allowing a free flow of information.[160] To allow telecommunications of comparatively large economic significance to go unregulated would result in millions of U.S. dollars pouring into the Cuban economy, contrary to the purpose of TWEA.[161]

The statutory language fails to specify clearly the meaning of the phrase "other informational materials," thereby prop-

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154. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1013 (S.D.N.Y. 1990); Cernuda v. Heavey, 720 F. Supp. 1544, 1551-52 (S.D. Fla. 1989).

155. *Capital Cities*, 740 F. Supp. at 1013.

156. *See Cernuda*, 720 F. Supp. at 1550-51.

157. *Id.* at 1550 n.10.

158. *See Capital Cities*, 740 F. Supp. 1007; *see supra* notes 31-32, 40 and accompanying text (discussing purpose of TWEA and Regulations).

159. *See* Brief for Defendant at 26-27, Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) (No. 90-6200).

160. *See supra* notes 54-56 and accompanying text (discussing Berman Amendment's general notion of allowing free flow of information). The Berman Amendment represents a reaction to the seizure of such items at the U.S. border. *See supra* notes 52-56 and accompanying text (discussing seizure at border of books and magazines pursuant to TWEA).

161. *See* Brief for Defendant at 26-27, *Capital Cities* (No. 90-6200). At the time of the *Capital Cities* litigation, there were US$47.5 million in blocked accounts as a result of telecommunications which could have been released as a consequence of a contrary decision in the case. *Id.* at 37 n.17.

erly leaving its interpretation to OFAC.[162] Both district courts in *Capital Cities* and *Cernuda* found the statutory language ambiguous.[163] Congress may have intentionally left a "gap," the definition of informational materials, for OFAC to fill.[164] Indeed, when Congress wishes to include intangible forms of information within this phrase, it does so clearly.[165]

The legislative history of the Berman Amendment contains no definition of the phrase "other informational materials."[166] The legislative history does stress, however, the importance of the free flow of ideas and information.[167] Although both *Capital Cities* and *Cernuda* acknowledged that Congress never explicitly accepted or rejected this notion,[168] this does not lead to a conclusive understanding of the phrase "informational materials."

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162. *See supra* text accompanying notes 99-103 (discussing ambiguous statutory language of Berman Amendment).

163. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1011 (S.D.N.Y. 1990); Cernuda v. Heavey, 720 F. Supp. 1544, 1550-51 (S.D. Fla. 1989).

164. *See supra* note 72 and accompanying text (discussing gaps left by Congress for agencies).

165. *See supra* note 103 and accompanying text (discussing instances when Congress includes intangible informational materials within statutes).

The doctrine established by the Court in *United States v. Midwest Oil Co.* that "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent" may not apply to these cases because there is not a long-standing practice of not including telecommunications within the definition of informational materials. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). Justice Jackson's concurring opinion in *Youngstown* stated that congressional acquiescence may lead to independent presidential power:

> [When] the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

166. *See supra* text accompanying notes 54-59 (discussing legislative history of Berman Amendment).

167. *See supra* notes 54-56 and accompanying text (discussing general notion of flow of information in legislative history of Berman Amendment).

168. *See* Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007, 1011-12 n.9 (S.D.N.Y. 1990); Cernuda v. Heavey, 720 F. Supp. 1544, 1550 (S.D. Fla. 1989).

The legislative history also reveals congressional intent to codify current trade practice involving Libya and Nicaragua.[169] This congressional intent, acknowledged in *Capital Cities* and *Cernuda*, does not lead to a conclusive definition of "other informational materials" because both the Libyan and Nicaraguan regulations contain explicit and separate provisions relating to television which were not incorporated in the Berman Amendment.[170] Because neither the statutory language nor the legislative history furnishes a clear meaning of "informational materials," the *Chevron* standard mandates deference to an agency's interpretation unless a constitutional problem exists.[171]

The Berman Amendment was not intended or designed to be a major loophole in the President's authority in foreign affairs.[172] Excluding the grandfathered embargo programs, TWEA applies to other countries only in times of war.[173] To allow deregulation of telecommunications in wartime would entail serious ramifications for the effectiveness and flexibility of the executive in foreign affairs.[174]

C. *First Amendment Problems Are Not Raised*

OFAC's refusal to allow payment for telecommunication coverage to Cuba in *Capital Cities* passes the *O'Brien* test and thus does not violate the First Amendment. In *United States v. O'Brien*, the Supreme Court established a test for the validity of domestic regulations affecting First Amendment speech.[175] When speech and non-speech elements are combined, an important governmental interest in regulating the non-speech element of the conduct may justify an incidental restriction of free speech.[176] This governmental restriction on speech is per-

169. *See supra* notes 57-59 and accompanying text (discussing House Report).

170. *See* 31 C.F.R. §§ 540.536, 540.542, 550.510 (1991).

171. *See supra* text accompanying notes 73-77 (discussing *Chevron*'s deference test); *see infra* text accompanying notes 175-87 (arguing that no First Amendment problem exists).

172. *See* Brief for Defendant at 13, Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) (No. 90-6200).

173. *See* 50 U.S.C. app. § 5(b) (1988).

174. *See supra* note 26 and accompanying text (discussing need for presidential flexibility in foreign affairs).

175. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

176. *Id.*

mitted if it is within the government's constitutional power, furthers an important governmental interest, is unrelated to the suppression of speech, and is no more restrictive than necessary to further that interest.[177]

The *O'Brien* test is applicable to OFAC's regulation of payment for telecommunication rights because the Regulations control telecommunications and related payments to Cuba, a situation that includes both speech and non-speech elements.[178] In *Teague*, the restriction of the flow of U.S. currency to designated countries was found to be a sufficiently important governmental interest to pass constitutional muster under a First Amendment challenge.[179] The government properly controls the flow of currency to Cuba in light of executive power under TWEA and the constitutional power of the President in foreign affairs.[180] When OFAC refused to allow the payment for the telecommunication transmission in *Capital Cities*, it followed its stated goal of preventing U.S. currency from flowing to Cuba.[181] Such restriction is no greater than necessary given OFAC's willingness to allow the transmission if no royalty fees were paid to Cuban nationals.[182] Any restriction on the First Amendment is therefore incidental to the pursuit of a sufficiently important governmental interest.[183]

The *O'Brien* test is a strict test originally applied in a domestic context.[184] By meeting the standards set by this strict domestic test, the actions by OFAC in *Capital Cities* are certainly justified in the area of foreign affairs.[185] Although speech expressed through both television and artwork is constitutionally protected by the First Amendment, such protections are less

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177. *Id.*; *see supra* notes 21-23 and accompanying text (discussing *O'Brien's* requirements).

178. *See* 31 C.F.R. § 515.565 (1991).

179. *See* Teague v. Regional Comm'r of Customs, 404 F.2d 441, 445-46 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969).

180. *See supra* note 26 and accompanying text (discussing power of executive).

181. *See supra* text accompanying notes 94-95 (discussing OFAC's denial of licenses in pursuit of stated goal).

182. *See supra* text accompanying notes 90-93 (discussing OFAC conditions to transaction).

183. *See Teague*, 404 F.2d at 445.

184. *See* United States v. O'Brien, 391 U.S. 367 (1968); *see supra* notes 21-23 and accompanying text (setting forth *O'Brien* test).

185. *See supra* notes 24-25 and accompanying text (discussing lessening of Constitutional protections in foreign affairs).

expansive in the area of foreign affairs than they would be in a domestic context.[186] The extent of foreign policy concerns that were implicated in both *Capital Cities* and *Cernuda* are such that governmental restrictions pursuant to TWEA both should have been sustained.[187] The regulation by OFAC of informational materials, such as was demonstrated in *Capital Cities*, should be considered constitutional because any limitation of First Amendment concerns is merely incidental to the pursuit of an important governmental interest in foreign affairs.

D. *The* Cernuda *Decision Is Overly Broad*

In dicta, the *Cernuda* court went too far in stating that the Berman Amendment exempted all First Amendment materials from regulation.[188] The court in *Cernuda* considered an issue surrounded by political turmoil that erupted into violence.[189] These extreme circumstances were perhaps influential in the court's formulation of an extremely broad and over-inclusive definition of informational materials.[190] The court's definition is dictum because the case could have been resolved by examining either the tangible nature of paintings or OFAC's arbitrary actions.[191] Although misstating the meaning and intent of the Berman Amendment, the court reached the correct result given the tangible and informational nature of paintings.[192] In addition, OFAC's lack of response to the two licensing applications can be seen as arbitrary and capricious.[193] The court in *Cernuda* should have dispensed with the litigation without reaching its own definition of "other informational

186. *See supra* notes 24-26 and accompanying text (discussing lessening of Constitutional protections in foreign affairs).

187. *See supra* notes 24-26 and accompanying text (discussing foreign policy and the First Amendment).

188. *See* Cernuda v. Heavey, 720 F. Supp. 1544, 1550 n.10 (S.D. Fla. 1989).

189. *See supra* text accompanying notes 121-24 (discussing political turmoil surrounding controversy).

190. *See Cernuda*, 720 F. Supp. at 1545, 1550 n.10.

191. *See supra* text accompanying notes 140-45 (discussing OFAC's actions as arbitrary and capricious).

192. *See supra* notes 128-30 and accompanying text (discussing informational aspect of paintings).

193. *See supra* text accompanying notes 140-45 (discussing OFAC's actions as arbitrary and capricious).

materials."[194]

If the *Cernuda* definition of "other informational materials" were to be adopted, the definition could potentially affect statutes other than TWEA.[195] Defining "other informational materials" to include intangible items could possibly affect technical data that are regulated under various statutes that consider technical data to be informational.[196] Not only would such a definition raise separation of powers issues and create a loophole in presidential embargo powers, but it would also create a conflict among U.S. statutes.[197]

CONCLUSION

U.S. courts should defer to OFAC decisions regarding the scope of materials exempted from presidential regulation by the Berman Amendment because the statutory language and legislative history are unclear as to the meaning of "other informational materials," and because these decisions do not violate the First Amendment. A clarification of the statutory directive at issue would prove decisive in this matter. Until Congress acts, however, the doctrine of separation of powers mandates that the judiciary must not usurp congressional power by legislating the definition of "other informational materials." Thus, OFAC's interpretation must stand until Congress determines otherwise by means of statutory clarification of the meaning of the phrase "other informational materials."

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194. *See supra* text accompanying note 191 (discussing *Cernuda* court's definition as dicta).

195. *See, e.g.*, Arms Export Control Act, 22 U.S.C. § 2751 (1988); Export and Administration Act of 1979, 50 U.S.C. app. § 2401 (1988).

196. *See, e.g.*, Arms Export Control Act, 22 U.S.C. § 2751 (1988); Export and Administration Act of 1979, 50 U.S.C. app. § 2401 (1988). To prevent the export of U.S. technical data to unfriendly foreign nations, Congress can restrict the flow of information contained in certain items. *See* Neuborne & Shapiro, *supra* note 53, at 740.

197. *See supra* text accompanying notes 195-96 (discussing potential conflicts between statutes).

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