

FOREIGN AFFAIRS AND FIRST AMENDMENT RIGHTS:
OFFICE OF FOREIGN ASSETS CONTROL PROHIBITS
ABC'S PAN AMERICAN GAMES BROADCAST. *Capital
Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007
(S.D.N.Y. June 29, 1990)

I. FACTUAL BACKGROUND

The Trading With the Enemy Act of 1917 ("TWEA")¹ authorizes the President, in times of national emergency², to impose embargoes on transactions between persons subject to United States jurisdiction and countries designated as hostile by the President.³ In 1962, President Kennedy declared a national emergency and placed an embargo on Cuba.⁴ The Treasury Department, the agency that administers the TWEA⁵, delegated its authority under the Act to the Office of Foreign Assets Control ("OFAC")⁶ which in turn promulgated the Cuban

¹ 50 U.S.C.A. app. § 5(b) (West Supp. 1990). The TWEA provides in pertinent part:

(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise . . . (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest

Id. at § 5(b)(1)(B).

² Section 5(b) of the TWEA no longer applies when the nation is not at war. During peacetime the International Emergency Economic Powers Act of 1976 ("IEEPA"), 50 U.S.C. § 1701-1706 (1982), governs. The IEEPA "grandfathered" in all authorities conferred on the President by section 5(b) of the TWEA that were being exercised on July 1, 1977. Pub. L. 95-223, § 102(b), 91 Stat. 1625.; *Regan v. Wald*, 468 U.S. 222 (1984).

³ *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. June 29, 1990) (LEXIS, Genfed library, Allcts file) [hereinafter *ABC v. Brady*], *citing* *Regan v. Wald*, 468 U.S. at 226 n.2.

⁴ *ABC v. Brady*, 740 F. Supp. at 1008.

⁵ The President has delegated his authority under the TWEA to the Secretary of the Treasury. Exec. Order No. 9193, 2 C.F.R. 1174, 1175 (1942).

⁶ *ABC v. Brady*, 740 F. Supp. at 1008.

Assets Control Regulations ("Regulations").⁷ The Regulations were originally adopted to deal with the peacetime emergency created by Cuban attempts to destabilize governments throughout Latin America.⁸

The Regulations prohibit transactions with either the Cuban Government or Cuban nationals unless such transactions fall within the scope of a general or specific licensing provision.⁹ Prior OFAC approval is not necessary if a transaction falls within a general licensing provision.¹⁰ General licenses authorize "transactions incident to the use of satellite channels for the transmission of television news and news programs originating in Cuba by United States news organizations" ¹¹ They also authorize transactions in connection with travel to Cuba "for the purpose of gathering news, making news or documentary films, engaging in professional research, or for similar activities."¹²

The OFAC may, if it so chooses, grant a specific license to transactions not falling within a general licensing provision.¹³ The Regulations, however, explicitly prohibit the issuance of specific licenses for transactions involving payments to Cuba for television rights, appearance fees, royalties, pre-performance expenses, or other payments in connection with any public exhibition or performance in the United States or Cuba.¹⁴

In 1988, Congress enacted the Omnibus Trade and Competitiveness Act commonly referred to as the "Berman Amendment" to the

⁷ 31 C.F.R. § 515 (1990). *ABC v. Brady*, 740 F. Supp. at 1008. Regulation 201(b) prohibits all "transactions involv[ing] property in which [Cuba], or any national thereof, has . . . any interest of any nature whatsoever, direct or indirect . . ." 31 C.F.R. at 515.201(b) (1990).

⁸ *Regan v. Wald*, 468 U.S. 222. Statutory authority for the Cuban Assets Control Regulations can be found in the Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424. The Foreign Assistance Act provides that "[n]o assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect this policy . . . the president is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba." 22 U.S.C. § 2370(a) (1988).

⁹ *ABC v. Brady*, 740 F. Supp. at 1008.

¹⁰ *Id.*

¹¹ 31 C.F.R. § 515.542(b) (1990).

¹² *Id.* at § 515.560(a)(1)(ii).

¹³ *Id.* at §§ 515.542(c); 515.560(b); 515.565(b). For example, films of Cuban origin have been held to require a specific license. *American Documentary Films, Inc. v. Secretary of the Treasury*, 344 F.Supp. 703 (S.D.N.Y. 1972) [hereinafter *American Films*].

¹⁴ 31 C.F.R. at § 515.565(c)(1).

TWEA.¹⁵ This amendment provides that the President's authority under section 5 of the TWEA no longer includes "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"¹⁶

In February 1989, the Regulations were amended to comply with the Berman Amendment.¹⁷ The new Regulations state that all transactions relating to "informational materials"¹⁸ are authorized by general license.¹⁹ The definition of "informational materials," however, excludes "intangible items such as telecommunications transmissions."²⁰ Transactions related to informational materials not fully created and in existence at the time of the transaction are also prohibited unless a specific license is issued.²¹ Furthermore, the Regulations forbid the "remittance of royalties or other payments relating to works not yet in being"²²

The Pan American Games ("Games") are a multidiscipline sports competition among thirty-nine member nations.²³ The Games are held in a different member nation every four years.²⁴ The Pan American Sports Organization ("PASO"), an international organization headquartered in Mexico, organizes the Games.²⁵

In 1986, PASO decided to hold the 1991 Games in Havana, Cuba.²⁶ Subsequently, the American Broadcast Corporation (ABC) and PASO

¹⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502(a)(1), 1988 U.S. Code Cong. & Admin. News (102 Stat.) 1107, 1371 (codified at 50 U.S.C.A. app. § 5(b)(4)(West 1990)).

¹⁶ 50 U.S.C.A. app. § 5(b)(4) (1990). The Export Administration Act of 1979 allows the President to prohibit or curtail the export of goods or technology to protect United States national security. 50 U.S.C.A. app. § 2404 (1991).

¹⁷ 54 Fed. Reg. 5229, 5231 (1989).

¹⁸ Informational materials means information recorded in tangible form, i.e., "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, and other tangible informational articles" 31 C.F.R. § 515.332(a).

¹⁹ ABC v. Brady, 740 F. Supp. at 1009; 31 C.F.R. § 515.206(a); § 515.545(b).

²⁰ 31 C.F.R. § 515.332(b)(2).

²¹ *Id.* at § 515.206(c).

²² *Id.* at § 515.545(b).

²³ ABC v. Brady, 740 F. Supp. at 1009.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

reached an agreement whereby ABC would pay PASO \$8.7 million for the exclusive live broadcast rights to the Games.²⁷ ABC and PASO expressly agreed that \$6.5 million, 75% of the contract price, would be given to Cimesports, S.A., a Cuban entity and host organizer of the Games.²⁸

The OFAC notified ABC that its agreement with PASO required a specific license.²⁹ Negotiations between the OFAC and ABC commenced.³⁰ ABC asserted that the transaction did not require a license.³¹ Alternatively, ABC contended that the live broadcast coverage of the Games was authorized by the general licenses that provide for "travel and importation in connection with news gathering and similar activities."³²

The OFAC offered to grant ABC a license if ABC placed the royalty payments in a blocked account³³ and kept travel expenses to a minimum.³⁴ The OFAC informed ABC that the news gathering general license would apply only if no royalty payments were made and ABC complied with several conditions.³⁵ Alternatively, the OFAC informed ABC that videotapes of the Games could be imported if ABC did not "fund, or provide or contract for services in connection with the production of the tapes."³⁶ The OFAC justified these requirements on the ground that the "transaction would result in a very substantial payment to Cuba [and was therefore] contrary to the current foreign policy of the United States."³⁷

Negotiations between ABC and the OFAC fell through. ABC brought suit in the Southern District of New York seeking a declaratory judgment that the Berman Amendment and/or the Constitution authorizes the transaction proposed by ABC, and that the Government should be permanently prevented from regulating ABC's broadcast

²⁷ *Id.*

²⁸ *Id.* at 1009-10.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; 31 C.F.R. § 515.560 (a)(1)(ii).

³³ Blocked assets cannot be distributed, withdrawn, or transferred without a specific license. 31 C.F.R. § 515.319.

³⁴ *Id.* at § 515.508(a).

³⁵ The OFAC stated that the general license would only be issued if ABC's activities "essentially consist[ed] of reports or documentaries of, or information about, the Games and related events accessible to the press on a non-exclusive basis." *ABC v. Brady*, 740 F. Supp. at 1010.

³⁶ *Id.*

³⁷ *Id.*

of the Games.³⁸ In passing upon cross motions for summary judgment, the court addressed three principle issues: (1) whether the Regulations are consistent with the terms of the Berman Amendment; (2) presuming that the language of the Berman Amendment is ambiguous, whether the court must defer to the OFAC's interpretation of that legislation; and (3) whether the OFAC's interpretation violates the First Amendment.³⁹

The court then *held*, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.⁴⁰ Because the language of the Berman Amendment is ambiguous and the Congressional record does not express a clear intent on this subject, the OFAC's decision is entitled to deference by the court.⁴¹ The Regulations as construed by the OFAC are not so arbitrary and irrational as to violate substantive due process.⁴² Furthermore, such deference is not precluded by the First Amendment.⁴³ *Capital Cities/ABC, Inc. v. Nicholas Brady and R. Richard Newcomb*, 740 F. Supp. at 1007 (S.D.N.Y. June 29, 1990).

ABC appealed the District Court's decision and settlement discussions began shortly thereafter.⁴⁴ In December 1990, ABC and the government reached an agreement that allows ABC to make limited payments to Cuba for goods and services provided to Cuban nationals during the broadcast of the Games.⁴⁵ The terms of the settlement are subject to a strict non-disclosure clause⁴⁶ although the government asserts that the terms are similar to those offered to ABC initially.⁴⁷ The settlement leaves unresolved by an appellate court the difficult issues raised by ABC's application.

II. LAW

The United States Constitution entrusts the field of foreign affairs to the President and the Congress.⁴⁸ When the President acts within

³⁸ *Id.*

³⁹ *Id.* at 1010-11.

⁴⁰ *Id.* at 1015.

⁴¹ *Id.* at 1012.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Webster, *Treasury, ABC Sports Settle Suit*, Proprietary to the United Press International, Dec. 13, 1990, Washington News Section.

⁴⁵ *Id.*

⁴⁶ *ABC Works Out Its Pan Am Deal*, N.Y. Times, Dec. 4, 1990, § D, at 25, col. 5.

⁴⁷ Webster, *supra* note 44.

⁴⁸ *Zschernig v. Miller*, 389 U.S. 429 (1968) (the Court barred the application of

the field of foreign affairs pursuant to his implied constitutional authority and also pursuant to an express congressional authorization, he "commands all the political authority of the United States."⁴⁹ In such circumstances, the activities of the executive branch are "largely immune from judicial inquiry or interference."⁵⁰ Congress, through the TWEA, has vested the Executive with broad authority⁵¹ to impose economic sanctions against an unfriendly nation.⁵² The validity of this congressional delegation of authority to the President and the ensuing delegations of authority to the Director of Foreign Assets Control have been repeatedly affirmed.⁵³

The TWEA was designed to limit the flow of currency to hostile nations because "hard currency is a weapon in the struggle between

a state alien inheritance law which required inquiry into the type of government existing in particular foreign countries on the ground that it invaded the field of foreign affairs).

⁴⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (A joint resolution of Congress authorized the President to ban the sale of arms to countries engaged in the Chaco. The Court emphasized the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . ." The need for negotiations, in addition to the President's special access to sources of information, required "a degree of discretion and freedom . . . which would not be admissible were domestic affairs alone involved." The Court explicitly held that broader delegation of lawmaking power by Congress to the President would be tolerated in the area of international affairs than in the domestic arena); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (During the Korean War, President Truman seized the steel mills to avert a strike. The Court struck down the seizure order because it was an unconstitutional exercise of Congress' lawmaking authority. Justice Jackson's concurrence stated that where the President acts pursuant to the express or implied authorization of Congress, his authority is at its maximum).

⁵⁰ *Miranda v. Secretary of Treasury*, 766 F.2d 1, 4 (1985) [hereinafter *Miranda*], quoting *Regan v. Wald*, 368 U.S. 222, quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

⁵¹ See e.g., *Miranda*, 766 F.2d at 3.

⁵² The TWEA has survived numerous attacks on its constitutionality. See e.g., *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972) [hereinafter *Veterans and Recruits for Peace in Vietnam*] (literature detained under the Foreign Assets Control Regulations); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969) [hereinafter *Teague*] (publications detained under the Foreign Assets Control Regulations); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898 (1968) [hereinafter *Sardino*] (bank account blocked under the Cuban Assets Control Regulations).

⁵³ The founders of the Constitution could not have intended to impose upon the President burdens that would make it humanly impossible to conduct his office as the nation grew. See e.g., *Sardino*, 361 F.2d 106, cert. denied, 385 U.S. 898 (1966); *Teague*, 404 F.2d 441; *Regan v. Wald*, 468 U.S. 222; *DeCuellar v. Brady*, 881 F.2d. 1561 (11th Cir. 1989).

free and communist worlds.”⁵⁴ The Regulations advance the legislative purpose and intent of the TWEA by (1) depriving Cuba and its nationals of funds that might be used to promote interests inimical to the United States; (2) maintaining funds for use in the settlement of claims of United States citizens against Cuba; and (3) retaining funds as leverage in negotiations with the Cuban Government.⁵⁵

Congress is presumed to have concurred in the executive department’s foreign affairs policy unless Congress clearly indicates otherwise.⁵⁶ An intrusion on presidential authority in the field of foreign affairs cannot be inferred, particularly when the policy is known and established at the time the legislation is enacted.⁵⁷ Where the language and legislative history of a statute do not indicate a clear congressional intent, the question for the court is whether the agency’s decisions are based on a permissible construction of the statute.⁵⁸ If the agency’s decision represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by statute, the court should not disturb that decision.⁵⁹

In *Walsh v. Brady*,⁶⁰ the court deferred to the decision of the OFAC to resolve an apparent clash between the Regulations and the Berman Amendment. The plaintiff, an importer of political posters, sought to import Cuban posters to the United States.⁶¹ The OFAC denied his application for a license to incur travel-related expenses in Cuba.⁶² The plaintiff challenged the denial, contending that it violated the Berman Amendment’s prohibition on “regulating or prohibiting, directly or indirectly, the importation from any country . . . of posters . . . or other informational materials.”⁶³

⁵⁴ *Teague*, 404 F.2d at 445, quoting *Sardino*, 361 F.2d at 112.

⁵⁵ *Regan v. Wald*, 468 U.S. 222, quoting *Harisiades v. Shaughnessy*, 342 U.S. 580.

⁵⁶ *Walsh v. Brady*, 729 F. Supp. 118, 120 (D.C. 1989) (*construing* *Regan v. Wald*, 468 U.S. 222, 236).

⁵⁷ *Walsh v. Brady*, 729 F. Supp. at 120.

⁵⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). The court need not conclude that the agency construction was the only one it permissibly could have adopted, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding, but only that it did not contradict the statute. *Id.*; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

⁵⁹ *United States v. Shimer*, 367 U.S. 374, 383 (1961).

⁶⁰ *Walsh v. Brady*, 729 F. Supp. at 118.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 50 U.S.C.A. app. § 5(b)(4) (1990).

The court, however, rejected the plaintiff's argument. The court emphasized that the statute authorized the importation of posters but was ambiguous as to authorizing payments for activities undertaken to effectuate such importation. Thus, refusal of a license was found not to be an arbitrary or irrational method of implementing the government's policy even though, as a practical matter, Walsh was precluded from obtaining the posters from Cuba.⁶⁴

In *Walsh*, the court also rejected the plaintiff's argument that the denial of the license to incur travel expenses infringed on his first amendment rights.⁶⁵ The court relied on *United States v. O'Brien*, in which the Supreme Court held that:

A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.⁶⁶

The court in *Walsh* found this test satisfied. The Berman Amendment was enacted to liberalize regulation of imports of posters and other "informational materials" generally, but Congress had not indicated that it intended to affect existing hard currency controls developed for other reasons of national policy governing United States relations with particular countries.⁶⁷ The court pointed out that the OFAC's decision was not intended to deny any first amendment rights inherent in the Berman Amendment.⁶⁸ Any first amendment infringement was not only merely an incidental effect of the enforcement of foreign

⁶⁴ Specific licenses are issued in four categories of cases. First, all publications and films are licensed, without regard to content, for communications importation if the importer deposits all funds due to Cuba for the publications into blocked accounts in domestic accounts. Second, publications and films are licensed without regard to method of payment under programs approved by the Library of Congress or the National Science Foundation. Third, publications and films are licensed when the OFAC is satisfied they are bona fide gifts from importers without any direct or indirect financial benefit to Cuba or its nationals. *American Films*, 344 F. Supp. at 708.

⁶⁵ *Walsh v. Brady*, 729 F. Supp. at 118.

⁶⁶ *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (Draft card burning case in which the Court held that conduct combining "speech" and "nonspeech" elements can be regulated if the aforementioned requirements are met).

⁶⁷ *Walsh v. Brady*, 729 F. Supp. at 118.

⁶⁸ *Id.*

affairs policy, but also essential to the furtherance of vital government interests.⁶⁹

Not all OFAC license decisions, however, have survived first amendment attack. Less than two months before the United States District Court for the District of Columbia decided *Walsh v. Brady*, the United States District Court for the Southern District of Florida invalidated the OFAC's decision to deny a license to an importer of Cuban art as a violation of his first amendment rights. In *Cernuda v. Heavey*,⁷⁰ an importer, Cernuda, sought permission to display controversial political paintings that had been imported from Cuba by others in violation of the TWEA's license requirements.⁷¹ Cernuda's dealings in Cuban art were domestic transactions. He did not himself trade with the enemy. The government never responded to Cernuda's request. Instead, government agents seized the collection "in order to prevent a domestic market from developing which is likely to fuel illicit importation and stymie efforts"⁷² to enforce the TWEA. No other art dealer was subjected to seizure of that dealer's collection.⁷³

The court stressed that the American Bar Association House of Delegate's approval of the "principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment."⁷⁴

The court distinguished pre-Berman Amendment cases that upheld incidental curtailments of first amendment freedoms on the ground that the purpose of the Berman Amendment was to eliminate the sort of constitutional questions that arose in those cases by totally exempting ideas and information protected by the first amendment from regulation.

⁶⁹ The OFAC's stated policy is to "avoid any element of censorship in the administration of what are essentially economic measures." *American Films*, 344 F. Supp. at 708. The OFAC issues licenses for the importation of publications and films from Cuba without regard to their contents if the Office is satisfied that they are bona fide gifts to the importers and that there is [no] benefit to designated countries or nationals thereof from the importations." 31 C.F.R. § 500.204 app. item 108. Although this policy specifically relates to publications and films from China, North Korea and North Vietnam, it is the policy followed under the Cuban Assets Control Regulations. *American Films*, 344 F. Supp at 708 n.3.

⁷⁰ 720 F. Supp. 1544 (1989).

⁷¹ *Id.*

⁷² *Id.* at 1546.

⁷³ *Id.*

⁷⁴ H.R. Rep. No. 40, 100th Cong. 1st. Sess., pt.3, at 113 (1987).

The OFAC exclusion of artwork as a class from the Berman Amendment was held to be unreasonable in *Cernuda*. In support of this holding the court cited various examples, provided by the OFAC, of transactions permissible under the new Regulations. These examples include an arrangement whereby a Cuban party exports the single master copy of a Cuban motion picture to the United States and thereafter sets up a licensing arrangement under which the United States party distributes, duplicates, and generally exploits the films, and a United States recording company that contracts to buy and import preexisting recordings by a Cuban musician or to copy the recordings in the United States and pay royalties.⁷⁵ The court found no difference between these examples and the artwork at issue in *Cernuda*. In its conclusion the court admonished the government for attempting to prohibit the expression of an idea because society finds the idea itself offensive or disagreeable.

III. ANALYSIS

In *ABC v. Brady*, the United States District Court for the Southern District of New York deferred to the OFAC's decision to impose strict conditions on the issuance of a license to ABC authorizing ABC's agreement with PASO for the exclusive live broadcasting rights for the 1991 Pan American Games in Cuba. The court held that the OFAC's decision to reject ABC's application for a license on the basis suggested by ABC was consistent with the purposes of the TWEA, and did not violate ABC's first amendment rights.⁷⁶

The court improperly deferred to the OFAC's decision in this case. The central reasoning of the court in *ABC v. Brady* was that the phrase "other informational materials" in the Berman Amendment is "susceptible to more than one reasonable interpretation."⁷⁷ Although the purpose of the TWEA is to limit the amount of hard United States currency transferred to hostile nations,⁷⁸ the purpose of the later-enacted Berman Amendment is to facilitate the free exchange of ideas between nations. The court's decision in *ABC v. Brady* to uphold the OFAC's determination that "informational materials" as used in the Berman Amendment does not include intan-

⁷⁵ Cuban Asset Control Regulations, 54 Fed. Reg. 5229, 5233 (1989) (codified at 31 C.F.R. § 515).

⁷⁶ *ABC v. Brady*, 740 F. Supp. at 1012.

⁷⁷ *Id.* at 1011.

⁷⁸ *Teague*, 404 F.2d at 441.

gibles such as telecommunications transmissions conflicts directly with this basic purpose of the Berman Amendment. In particular, a live television broadcast of the Games in Havana would be functionally indistinguishable from a film of the same Games in the United States. Yet, under OFAC's strained reading of the Berman Amendment, ABC could obtain a license for the latter and not the former.

The legislative history of the Berman Amendment also indicates that the OFAC's refusal to classify telecommunications transmissions as "informational materials" was incorrect. The American Bar Association's statement that "no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment,"⁷⁹ was incorporated into the legislative history of the Berman Amendment. Television broadcasts are constitutionally protected by the First Amendment.⁸⁰ The Regulations provide examples of permissible transactions. These examples are "merely exemplary and not exclusionary."⁸¹ Telecommunications transmissions are not, therefore, excluded from the scope of the Berman Amendment by these examples.

The President and executive agencies have extensive authority when acting pursuant to the TWEA, but this authority is explicitly limited by the Berman Amendment. *ABC v. Brady* reflects the court's reluctance to create a potential loophole in the President's ability to control assets of nationals under emergency declarations. However, the Berman Amendment itself restricts the President's powers by authorizing transactions involving "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials"⁸² by general license. Such transactions cannot be directly limited by the OFAC. Even in the course of exercising its authority to regulate the flow of hard currency to hostile governments or their nationals, the OFAC can no longer directly limit the "free exchange of ideas across national borders."⁸³

The OFAC's decision to disallow ABC's license application also violated ABC's first amendment rights. Infringements on first amendment rights by the TWEA and the Foreign Assets Control Regulations

⁷⁹ H.R. Rep. No. 40, 100th Cong., 1st Sess., § 3, at 113 (1987).

⁸⁰ See e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

⁸¹ *Cernuda v. Heavey*, 720 F. Supp. at 1551.

⁸² 50 U.S.C.A. app. § 5(b)(3) (West Supp. 1990).

⁸³ 132 CONG. REC. 6551 (1986) (statement of Sen. Mathias).

have been held to be constitutional under the *O'Brien* test⁸⁴ as incidental to the proper, important and substantial general purpose of the Regulations: restricting the flow of United States currency to hostile nations.⁸⁵ Such cases, however, were decided before the Berman Amendment was enacted. Furthermore, those infringements, as in *Walsh*, were in fact *incidental* to the enforcement of the TWEA. In *ABC v. Brady*, ABC's first amendment rights were *directly* infringed upon by the OFAC's refusal to issue a specific license for the broadcast of the Games. Unlike in *Walsh*, the OFAC in *ABC v. Brady* regulated the importation of the broadcast itself, not just activities necessary to bring about the broadcast.

The first amendment guarantee prohibits the government from justifying restrictions on free expression by reference to the adverse consequences of allowing certain information to be made available.⁸⁶ Although the OFAC did not prohibit information based on the viewpoint expressed therein, it did constrict the flow of information by limiting an activity, broadcasting, through which information is transmitted. While the foreign policy consideration behind the OFAC's decision is legitimate, the adverse effects on communicative opportunity that arise out of the OFAC's distinction between live and non-live communication are at odds with the first amendment.

The OFAC, the court asserted in *ABC v. Brady*, sought to impose carefully tailored conditions on ABC so that the \$6.5 million payment would not be given to the Cuban entity, Cimesports, and did not attempt to regulate the substance of the broadcast.⁸⁷ Even assuming content neutrality and the legitimacy of the government's interest, however, the OFAC's interpretation of the Berman Amendment violates first amendment and equal protection principles by creating an illogical distinction between importable and non-importable ma-

⁸⁴ *United States v. O'Brien*, 391 U.S. at 377.

⁸⁵ *Teague*, 404 F.2d at 441; *American Films*, 344 F. Supp. at 703. The United States Supreme Court has also validated other statutes regulating activities although such regulation incidentally curtailed first amendment rights. For instance, the Court has upheld an anti-littering law directed against advertising handbills even though the handbills also contained materials protected by the first amendment. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). A statute making it unlawful to solicit the sale of eyeglasses by use of advertising media has been upheld. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). An anti-picketing statute was held valid since it did not prohibit picketing unless it obstructed or unreasonably interfered with ingress or egress to or from the courthouse. *Cameron v. Johnson*, 390 U.S. 611 (1968).

⁸⁶ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789-91 (1988).

⁸⁷ *ABC v. Brady*, 740 F. Supp. at 1013.

terials. The law, as interpreted, has the anomalous result of permitting only the transmission of pre-recorded, stale news while precluding ABC from obtaining newsworthy information in the form of broadcasts of live events. Moreover, the OFAC's refusal to apply the Berman Amendment to telecommunication transmissions creates an excessive burden on important communication. In light of the OFAC's willingness to permit other forms of communication, the potentially harmful consequences of permitting the broadcast are outweighed by the need to avoid suppressing information.

The subsequent conduct of the parties has weakened the impact of the court's decision in *ABC v. Brady*. The government and ABC settled out of court before the case reached the appellate court. The inclusion of a strict non-disclosure clause in the settlement agreement makes impossible the discovery of whether the government allowed ABC and PASO to complete the transaction as originally planned despite the court's decision in favor of the government, or whether ABC has accepted the government's conditions in order to receive the license.

Reportedly, the terms of the settlement allow ABC to make limited payments to Cuba for goods and services provided by Cuban nationals during the broadcast of the 1991 Games.⁸⁸ Whether this agreement means that the government is going to permit ABC to submit all or part of the royalty payment to Cimesport through PASO is uncertain. If the government is allowing ABC to pay a rights fee as ABC had originally intended, the government may be breaching the law that prompted it to block the deal initially. The government's statement that the settlement agreement is "similar" to the terms offered originally to ABC last summer suggests some modicum of compromise by both ABC and the government.

IV. CONCLUSION

The court incorrectly decided *ABC v. Brady* because the OFAC's interpretation of the Berman Amendment conflicts with the basic purpose of that legislation. The language and legislative history of the Berman Amendment indicate Congress' intent to permit the free exchange of ideas between nations even though these exchanges could conflict with the goals of the TWEA. Congress determined that the first amendment rights at stake outweigh the governmental interest

⁸⁸ Webster, *supra* note 44.

in restricting the flow of currency to Cuba. The enactment of the Berman Amendment indicates Congress' recognition of the importance of free expression and Congress' willingness to subordinate the requirements of the TWEA to the first amendment right of free speech.

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