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# IRAN, SOCIAL MEDIA, AND U.S. TRADE SANCTIONS: THE FIRST AMENDMENT IMPLICATIONS OF U.S. FOREIGN POLICY

*Nadia L. Luhr\**

## INTRODUCTION

A significant unfolding of events took place recently: an oppressive regime brazenly rigged an election;<sup>1</sup> the country underwent an extraordinary civil rights movement; and somehow, despite the government's best efforts to control information leaving the country, we in the United States received first-hand accounts of the turmoil, complete with photographs, video, and commentary. Critics hailed the use of social media to broadcast the historic events in Iran, and the phrase "Twitter Revolution"<sup>2</sup> became cliché within days.

And yet, this powerful tool that we have witnessed in its new capacity, this seemingly censorship-proof, dictator-proof communication tool, faced serious challenges from an unexpected source: the government of the United States. American Web 2.0<sup>3</sup> companies were correctly interpreting U.S. trade sanctions against countries like Iran, Sudan, and Cuba to mean that they must not allow users in those countries to access the companies' websites, and an alarming number of blockages took place.

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1. For a discussion and critique of the recent Iranian elections, see *infra* text accompanying notes 13-21.

2. See, e.g., PROJECT FOR EXCELLENCE IN JOURNALISM, PEW RESEARCH CTR., 140 CHARACTERS OF PROTEST (2009), <http://pewresearch.org/pubs/1267/iran-twitter-revolution> (referring to the "Twitter Revolution").

3. Web 2.0 sites are those that enable an end-user to interact with and contribute to the website. See Core Characteristics of Web 2.0 Services, <http://www.techpluto.com/web-20-services> (Nov. 28, 2008). Examples include blog hosting websites, photo and video sharing websites, and social networking websites. *Id.*

By including these communication tools in the sanctions, the Office of Foreign Assets Control (OFAC), which administers America's sanctions regime, ignored a well-established constitutional principle: the First Amendment guarantees a right to unhindered communication, and the receipt of communications from abroad is no exception. Prohibiting American Web 2.0 companies from providing access to users in sanctioned countries restricted Americans' ability to receive communications from these users, and such a prohibition constituted unconstitutional prior restraint.

While OFAC chose not to pursue any legal action to enforce this aspect of its sanctions, it only recently came to recognize formally the informational value of these Internet-based services. In the summer of 2009, the State Department encouraged Twitter's role in the aftermath of the Iranian elections,<sup>4</sup> and in December 2009, the State Department requested a general license that would allow the export of Web 2.0 tools to users in Iran.<sup>5</sup> Three months later, OFAC complied with this request and even extended the amendment to its sanctions against Cuba and Sudan, creating general licenses that allow for the exportation of Web 2.0 tools to "ensure that individuals in these countries can exercise their universal right to free speech and information to the greatest extent possible."<sup>6</sup> Though, as this Note argues, these revisions were constitutionally mandated, officials attributed them solely to a well-placed concern for the welfare of citizens in sanctioned countries. Such a move is promising, but the fragility of a general license is problematic and fails to offer a permanent solution to the sanctions.

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4. See Sue Fleming, *U.S. State Department Speaks to Twitter over Iran*, REUTERS, June 16, 2009, <http://www.reuters.com/article/rbssTechMedia/TelecomNews/idUSWBT01137420090616>.

5. See Letter and Report from Richard R. Verma, United States Department of State, to Carl Levin, Chairman, Committee on Armed Services, United States Senate (Dec. 15, 2009), [hereinafter Verma Letter] available at <http://levin.senate.gov/newsroom/supporting/2009/SASC.Iran.Report.121509.pdf>.

6. Press Release, U.S. Dep't of the Treasury, Treasury Dep't Issues New Gen. License to Boost Internet-Based Commc'n, Free Flow of Info. in Iran, Sudan and Cuba (Mar. 8, 2010), <http://www.ustreas.gov/press/releases/tg577.htm>.

This Note will analyze the status of the law prior to the recent amendments to the sanctions. Using Iran as a case study, this Note sheds light on a problem that has not been wholly eliminated by the issuance of a general license. After discussing the events surrounding the Iranian elections, the subsequent role of social media, and the trade sanctions at issue, this Note will highlight the First Amendment violations posed by the previous sanctions and analyze the constitutionality of the prior restraint they imposed. This Note illustrates the need to provide those in repressive regimes with some semblance of informational freedom, while clarifying that the revision of the sanctions was not only desirable, but constitutionally compelled.

## I. CASE STUDY: THE IRANIAN ELECTIONS AND THEIR AFTERMATH

### A. *The Elections*

On June 12, 2009, the Islamic Republic of Iran held its tenth presidential election.<sup>7</sup> The atmosphere in Iran prior to the election was heavy with excitement and energy. A reform movement was taking place and it appeared that conservative incumbent President Mahmoud Ahmadinejad would be defeated.<sup>8</sup> Of his three rivals, reformist Mir Hossein Mousavi had the most support and was widely expected to win the election.<sup>9</sup> Reformist Mehdi Karroubi also had a strong following,<sup>10</sup> with conservative Mohsen Rezai

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7. Alan Taylor, *Iran's Presidential Election: The Big Picture*, BOSTON GLOBE, June 12, 2009, [http://www.boston.com/bigpicture/2009/06/irans\\_presidential\\_election.html](http://www.boston.com/bigpicture/2009/06/irans_presidential_election.html).

8. See Posting of Laura Secor to News Desk, <http://www.newyorker.com/online/blogs/newsdesk/2009/06/laura-secor-irans-stolen-election.html> (June 13, 2009).

9. See *id.* Government polls taken before the election allegedly showed Mousavi leading by ten to twenty points one week before the election. *Id.*

10. *Id.*

fading into the background.<sup>11</sup> The turnout on election day was incredibly high, with Ministry of the Interior estimates of eighty-five percent of the eligible population voting.<sup>12</sup>

One hour after the polls closed, results began pouring in, and less than twenty-four hours later, Ahmadinejad was declared the winner of a landslide election with a reported 62.6% of the vote.<sup>13</sup> The credibility of the results was immediately scrutinized, both in Iran and abroad, as the reformist candidates and their supporters cried foul.<sup>14</sup> Skeptics of Ahmadinejad's purported victory point to several anomalies in doubting its legitimacy: a large discrepancy between pre-election polls and the election results;<sup>15</sup> a startling homogeneity of support for Ahmadinejad across the entire country, when past experience, polls, and common sense dictate that candidates should vary in popularity in different regions;<sup>16</sup> and trends in Iranian elections establishing that a "high turnout favors

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11. See *Times Topics: Mohsen Rezai*, N.Y. TIMES, June 24, 2009, [http://topics.nytimes.com/topics/reference/timestopics/people/r/mohsen\\_rezai/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/r/mohsen_rezai/index.html).

12. *Ahmadinejad Hails Elections as Protests Grow*, CNN, June 13, 2009, <http://www.cnn.com/2009/WORLD/meast/06/13/iran.election/index.html>.

13. Robert F. Worth & Nazila Fathi, *Protests Flare in Tehran as Opposition Disputes Vote*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/14/world/middleeast/14iran.html>.

14. See, e.g., *Landslide or Fraud? The Debate Online Over Iran's Election Results*, The Lede, <http://thelede.blogs.nytimes.com/2009/06/13/landslide-or-fraud-the-debate-online-over-irans-election-results> (June 13, 2009, 11:16 EST) (describing reactions to the election results both in Iran and internationally).

15. See Secor, *supra* note 8.

16. See Simon Robinson, *Five Reasons to Suspect Iran's Election Results: Are Any of the Vote Totals Suspicious?*, TIME, June 15, 2009, [http://www.time.com/time/specials/packages/article/0,28804,1904645\\_1904644\\_1904639,00.html](http://www.time.com/time/specials/packages/article/0,28804,1904645_1904644_1904639,00.html). This was particularly blatant in Mousavi's hometown, Tabriz, where Ahmadinejad garnered fifty-seven percent of the vote despite Mousavi's overwhelming popularity in the area and a historical trend of voters in that region supporting home-grown candidates. Julian Borger, *The Iranian Election Controversy: What Happens Now*, THE GUARDIAN (U.K.), June 14, 2009, <http://www.guardian.co.uk/world/2009/jun/14/iran-elections-ahmadinejad-mousavi-questions>.

reformers.”<sup>17</sup> In support of these claims, several statistical studies suggest that the numbers reported by the Ministry of the Interior were manipulated.<sup>18</sup>

A look at the political structure in Iran does little to dispel the accusations. Elections in Iran are administered by the Ministry of the Interior and ultimately overseen by the Guardian Council.<sup>19</sup> In other words, Ahmadinejad had considerable influence over the vote count,<sup>20</sup> which was supervised only by a conservative governmental body.<sup>21</sup> There was no independent oversight,<sup>22</sup> making the conditions ripe for state-sponsored fraud. The claims of fraud are compelling and render it difficult to believe in the veracity of Ahmadinejad’s landslide victory. Regardless, whether a fraudulent election took place is not determinative to the analysis at hand. The subsequent events, however, are at the heart of the issue.

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17. See Secor, *supra* note 8. With a reported turnout of 85% of eligible voters, the results should have been in the reformists’ favor.

18. See, e.g., Julie Rehmeyer, *Statistical Tests Suggestive of Fraud in Iran’s Election*, SCIENCE NEWS, July 10, 2009, [http://www.sciencenews.org/view/generic/id/45480/title/Statistical\\_tests\\_suggestive\\_of\\_fraud\\_in\\_Iran%E2%80%99s\\_election](http://www.sciencenews.org/view/generic/id/45480/title/Statistical_tests_suggestive_of_fraud_in_Iran%E2%80%99s_election) (describing a study performed by statistician Walter Mebane). One such study posits that the probability that numbers were not manipulated is less than .005. Bernd Beber & Alexandra Scacco, *The Devil is in the Digits*, WASH. POST, June 20, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/20/AR2009062000004.html>.

19. Q&A: *Iran’s Presidential Election*, BBC NEWS, June 15, 2009, <http://news.bbc.co.uk/2/hi/8081440.stm>.

20. The Ministry of the Interior is headed by Sadeq Mahsouli, “a general of the Islamic Revolutionary Guards and a senior aide to Mr. Ahmadinejad.” Amir Taheri, *Iran’s Clarifying Election*, WALL ST. J., June 15, 2009, at A15.

21. The Guardian Council is “the most influential body in Iran and is currently controlled by conservatives. It consists of six theologians appointed by the Supreme Leader and six jurists nominated by the judiciary and approved by parliament.” *Guide: How Iran is Ruled*, BBC NEWS, June 9, 2009, <http://news.bbc.co.uk/2/hi/8051750.stm>.

22. See Taheri, *supra* note 20.

### B. A Civil Rights Movement

In the aftermath of the election, Iran underwent an extraordinary civil rights movement<sup>23</sup> in what is being called the country's "worst unrest . . . since the 1979 revolution."<sup>24</sup> The opposition movement ignored demonstration bans and government threats,<sup>25</sup> and the weeks that followed were a mix of protests, violence, and arrests as reformists took to the streets en masse.

Protesters were met daily with escalating violence and arrests<sup>26</sup> as they clashed with police and the Basij,<sup>27</sup> a state-sponsored paramilitary militia. These conflicts sparked global shock and outcry, with eyewitness accounts, photographs, and videos documenting the violence.<sup>28</sup> As the days passed and tens of thousands of protesters continued to defy the government, the

23. Although the events surrounding the election have been called a revolution, they have been viewed more critically as a civil rights movement. The events are reminiscent of the Revolution in 1979, but the protesters are fighting for their rights rather than for a regime change. See Posting of John Roberts to amFIX, <http://amfix.blogs.cnn.com/2009/06/22/expert-protestors-want-civil-rights-not-revolution> (June 22, 2009, 10:02 EST).

24. *Iran Recount Gives Ahmadinejad Win*, AL JAZEERA, June 29, 2009, <http://english.aljazeera.net/news/middleeast/2009/06/2009629151258105455.html>.

25. *Post-Election Clampdown in Iran*, BBC NEWS, June 15, 2009, <http://news.bbc.co.uk/2/hi/8100310.stm>. See also Martin Fletcher, *Leading Demonstrators Must be Executed, Ayatollah Khatami Demands*, TIMES (London), June 27, 2009, at 3, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article6583797.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article6583797.ece).

26. See *Ban Urges End to Arrests, Use of Force Amid Post-Election Violence in Iran*, UN NEWS CENTRE, June 22, 2009, <http://www.un.org/apps/news/story.asp?NewsID=31232&Cr=iran&Cr1>.

27. The Basij was created by Ayatollah Khomeini in 1979 and served as a "civilian auxiliary force subordinate to the Revolutionary Guards." Posting of Jon Lee Anderson to News Desk, <http://www.newyorker.com/online/blogs/newsdesk/2009/06/jon-lee-anderson-understanding-the-basij.html> (June 19, 2009). Ahmadinejad himself was a member of the Basij. *Id.*

28. See *Iran: Halt the Crackdown*, HUMAN RIGHTS WATCH, June 19, 2009, <http://www.hrw.org/en/news/2009/06/19/iran-halt-crackdown>. Influential cleric Ayatollah Khatami denounced the protesters in a sermon, accusing them of waging a war against God and calling for leading rioters to be punished "firmly and without showing any mercy to teach everyone a lesson." Fletcher, *supra* note 25.

police continued meeting protest with aggression and attacks by the Basiji became more violent and resolute.<sup>29</sup>

The protests continued well into late July, morphing from overt street rallies into more stealthy affairs.<sup>30</sup> Eventually, however, Ahmadinejad was inaugurated for his second term as president.<sup>31</sup> The Iranian government estimated the deaths of twenty-five to thirty people during the protests while others reported the death toll to be approximately seventy-two.<sup>32</sup> And in October 2009, Iran issued the first three death sentences in its “post-election mass opposition trial,” with more such sentences expected to follow.<sup>33</sup>

It was through non-traditional social media that Iranians were able to communicate these events to the rest of the world, and through which we were able to piece together an understanding of this historic civil rights movement. In repressive regimes such as Iran’s, where the government will not hesitate to block the

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29. One journalist blogger described the violence of the Basiji:

In the mass demonstrations that have taken place this week, the modus operandi of the Basijis has been brutal and predatory. . . . [T]hey have continued to attack surreptitiously and in terrifying ways, jumping demonstrators as they return home on darkened streets at night. On Wednesday, there were reports that men who appeared to be Basijis had come onto the Tehran University campus and had stabbed students with knives.

Anderson, *supra* note 27.

30. See Robin Wright, *Iran’s Protesters: Phase 2 of Their Feisty Campaign*, TIME, July 27, 2009, <http://www.time.com/time/world/article/0,8599,1912941,00.html> (describing how individuals boycotted goods and turned on all their appliances when the state sponsored news aired in an attempt to overload the power grid); *Arrests at New Iranian Protests*, BBC NEWS, July 21, 2009, [http://news.bbc.co.uk/2/hi/middle\\_east/8161824.stm](http://news.bbc.co.uk/2/hi/middle_east/8161824.stm).

31. Robert F. Worth & Nazila Fathi, *Iran Leader Takes Oath Of Office*, N.Y. TIMES, Aug. 6, 2009, at A6.

32. Samira Simone, *Iran Reformist Web Site Names Post-Election Victims*, CNN, Sept. 4, 2009, <http://www.cnn.com/2009/WORLD/meast/09/04/iran.election.protests/index.html>.

33. See Ali Akbar Dareini, *Iran Sentences Three to Death in Post-Election Mass Opposition Trial*, HUFFINGTON POST, Oct. 10, 2009, [http://www.huffingtonpost.com/2009/10/10/iran-sentences-3-to-death\\_0\\_n\\_316454.html](http://www.huffingtonpost.com/2009/10/10/iran-sentences-3-to-death_0_n_316454.html).



communications of its citizens, these channels of communication are vital.

### *C. Censorship*

Information normally leaves Iran freely, and prior to the post-election turmoil, foreign journalists were given visas to cover the elections from inside the country.<sup>34</sup> In the aftermath of the elections, however, the Iranian government clamped down on the flow of information. It attempted not only to hinder communications within the country, but also to eliminate non-state-sponsored reporting of the election aftermath to the outside world.<sup>35</sup>

Foreign journalists' reporting rights were revoked at the commencement of the unauthorized protests and subsequent violence.<sup>36</sup> Confined to their hotels and offices and prohibited from reporting on the streets,<sup>37</sup> foreign journalists were left only with permission to monitor official state media—independent visual documentation of the demonstrations was strictly prohibited.<sup>38</sup> One correspondent reported to the BBC that the restrictions were “the most sweeping . . . he has ever encountered reporting anywhere.”<sup>39</sup> In a matter of days, most foreign journalists were ordered to leave

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34. David Blair, *Iran Struggles to Censor News of Protests*, TELEGRAPH (U.K.), June 15, 2009, <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/5543145/Iran-struggles-to-censor-news-of-protests.html>.

35. See *id.* Rafsanjani, chair of Iran's Assembly of Experts, accused the foreign media of using “psychological warfare” to create turmoil in Iran, and stressed the necessity of blocking their “plots.” *Foreign Media Sowing Discord in Iran, Says Cleric*, RADIO FREE EUROPE, Sept. 22, 2009, [http://www.rferl.org/content/Foreign\\_Media\\_Sowing\\_Discord\\_In\\_Iran\\_Says\\_Cleric/1828269.html](http://www.rferl.org/content/Foreign_Media_Sowing_Discord_In_Iran_Says_Cleric/1828269.html).

36. See *Iran Clamps Down on Foreign Media*, BBC NEWS, June 16, 2009, <http://news.bbc.co.uk/2/hi/8103269.stm>.

37. See *Iran Bans International Journalists from Covering Rallies*, CNN, June 16, 2009, <http://www.cnn.com/2009/WORLD/meast/06/16/iran.journalists.banned/index.html>.

38. Christopher Rhoads, Geoffrey A. Fowler & Chip Cummins, *Iran Cracks Down on Internet Use, Foreign Media*, WALL ST. J., June 17, 2009, at A9.

39. *Iran Clamps Down*, *supra* note 36.

the country and numerous domestic and foreign journalists were detained.<sup>40</sup>

The Iranian government paid special attention to Internet use in its information crackdown. Its information-control tactics, however, deviated from those employed recently by regimes such as Myanmar and China. Myanmar, for example, completely severed Internet access during its 2007 uprising, while China allows high-speed access while retaining “extensive censorship of Web sites deemed harmful by the government.”<sup>41</sup>

Choosing not to follow either of these models, the Iranian government instead slowed the Internet to a speed that was “almost unusable,” and blocked access to specific websites,<sup>42</sup> including news websites belonging to *The Guardian* and the BBC, and social media websites such as Facebook and Twitter.<sup>43</sup> Iranians, however, are sophisticated internet users,<sup>44</sup> and were able to access the communication tools they needed.<sup>45</sup>

#### *D. Role of Web 2.0 Communication*

Anyone attempting to follow the unfolding events could attest to the frustration that accompanied his or her search for information—it seemed that the mainstream media simply had little to offer. People turned instead to blogs and Web 2.0 services to follow the barrage of events. Iranians were able to circumvent some of the Internet-blocking tactics of their government and post

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40. Martin Fletcher, *Foreign Journalists Arrested as Iran Restricts Reports on Opposition*, TIMES (London), Nov. 6, 2009, [http://www.timesonline.co.uk/toll/news/world/middle\\_east/article6906209.ece](http://www.timesonline.co.uk/toll/news/world/middle_east/article6906209.ece).

41. Rhoads, *supra* note 38.

42. *Id.*

43. Posting of Christian Christensen to Le Monde Diplomatique, <http://mondediplo.com/blogs/iran-networked-dissent> (July 2009).

44. Twenty-eight percent of the population uses the Internet, “with an estimated 60,000 to 100,000 active blogs.” Rhoads, *supra* note 38.

45. Users in Iran used proxy servers, gaining access to these websites through intermediaries rather than having to request access from the site itself, which would be blocked. See Christensen, *supra* note 43.

a seemingly endless stream of photos, videos, and commentary on websites such as Twitter,<sup>46</sup> Facebook, and YouTube.<sup>47</sup>

Twitter was inundated with posts used both as communication between protesters and communication with the outside world:<sup>48</sup> “Tens of thousands of protesters are chanting ‘No fear, no fear’ . . . . There is panic in streets. People going ino [sic] houses to hide . . . . Bassej [sic] shooting in Azadi sq—army standing by and watching for now.”<sup>49</sup> Twitter users also posted links to Flickr accounts with photographs of the protests. Of the multitude of amateur videos uploaded to YouTube, several became viral<sup>50</sup> immediately—most notably a cell phone video of a young woman named Neda dying on the street after being shot in the chest.<sup>51</sup> Other videos showed protests, Basij attacks, and violent clashes between opposition members and the police.

Several key media outlets, including CNN, the New York Times, and the Huffington Post chose to report the information coming in from these sources,<sup>52</sup> in stark contrast to the remaining

46. Twitter is a “real time information network” that allows users to post messages of 140 characters or fewer. See Twitter: About, <http://twitter.com/about> (last visited Mar. 4, 2010).

47. Brian Stelter, *Journalism Rules are Bent in News Coverage from Iran*, N.Y. TIMES, June 29, 2009, at B1.

48. Mary Kate Cary, *The Iran Election Twitters In a Revolution—In the Media*, July 1, 2009, U.S. NEWS & WORLD REPORT, July 1, 2009, <http://www.usnews.com/articles/opinion/2009/07/01/the-iran-election-twiters-in-a-revolution--in-the-media.html>.

49. Andrew Sullivan, *Twitter Ripped the Veil off ‘The Other’—and We Saw Ourselves*, TIMES (London), June 21, 2009, [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/the\\_web/article6544276.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6544276.ece) (internal quotations omitted).

50. A viral video is one that becomes popular through media sharing websites.

51. See Robert Tait & Matthew Weaver, *The Accidental Martyr: How Neda Soltani Became the Face of Iran’s Struggle*, GUARDIAN (U.K.), June 23, 2009, at 1.

52. Stelter, *supra* note 47. For example, the *New York Times* solicited eyewitness accounts in the following manner: “The New York Times would like readers in Iran to help us document the post-election unrest in Iran. Please upload your photographs using the form below, letting us know when and where the photographs were taken and whether you wish to remain

news companies, which offered either minimal coverage or relied on what they could glean from Iran's state-sponsored media.<sup>53</sup> Those media outlets using eyewitness accounts were careful to warn that their reports came from unverified sources. CNN, while soliciting eyewitness accounts for its iReport feature,<sup>54</sup> told its viewers that CNN reporters had been pulled out of Iran and that these eyewitness photos and videos were being deployed to tell the story.<sup>55</sup>

The Huffington Post acclimated quickly to this new form of journalism, accepting eyewitness journalism the day after the election and continuously updating its coverage.<sup>56</sup> And its readers responded. In the two weeks directly following the election, its Iran coverage received more than five million page views.<sup>57</sup> In choosing between state-sponsored information and eyewitness accounts, the rules of journalism were relaxed. "‘Check the source’ may be the first rule of journalism. But in the coverage of the protests in Iran this month, some news organizations have adopted a different stance: publish first, ask questions later. If you still don't know the answer, ask your readers."<sup>58</sup> The media outlets that chose eyewitness accounts understood one thing: whether the outside world received the information first-hand on Twitter or YouTube, or from news networks relating those same reports, these Web 2.0 services were the *sole* means of staying meaningfully informed.

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anonymous." Iran's Presidential Elections, <http://submit.nytimes.com/iranian-readers-share-your-election-experience> (last visited Mar. 26, 2010).

53. Cary, *supra* note 48.

54. "iReport is the way people like you report the news. The stories in this section are not edited, fact-checked or screened before they post. Only ones marked 'CNN iReport' have been vetted by CNN." About CNN iReport, <http://www.ireport.com/about.jspa> (last visited Mar. 4, 2010).

55. Stelter, *supra* note 47.

56. *Id.*

57. *Id.*

58. *Id.*

*E. What is at Stake*

Prior to the March 2010 revisions,<sup>59</sup> U.S. trade sanctions forbade American Web 2.0 companies from allowing users in Iran to access their websites. Attorneys were advising their clients to block users in countries such as Iran, Cuba, and Sudan, and many companies complied, including Google, AOL, Yahoo, Microsoft, LinkedIn, and BlueHost.<sup>60</sup>

Had Twitter, Facebook, and YouTube acted similarly, the coverage of the events in Iran would have been very different. Because of these tools, news consumers were able to learn of the events taking place from sources other than heavily censored or state-sponsored media and were able to engage in open communication with those undertaking a massive civil rights movement against a repressive regime.

The revision of the trade sanctions through the issuance of a general license allows for these Web 2.0 tools to continue to provide access in sanctioned countries.<sup>61</sup> Otherwise, not only would our First Amendment right to receive communications be significantly hindered, but there would be a serious risk that the next uprising in a repressive regime would be held behind closed doors. The U.S. State Department seemed to realize this in its December 2009 report,<sup>62</sup> and OFAC conceded as much through its issuance of a general license in March 2010; yet such a revision lacks the permanence needed to assure that these tools will not be at risk in the future.

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59. See *supra* note 6 and accompanying text.

60. See Jessica Dheere, *Google Blocks Chrome Browser Use in Syria, Iran*, MEDIASHIFT, Oct. 13, 2008, <http://www.pbs.org/mediashift/2008/10/google-blocks-chrome-browser-use-in-syria-iran287.html>; Eric Lai, *Should Facebook, Twitter Follow IM Providers and Block Access to U.S. 'Enemies'?*, COMPUTERWORLD, June 10, 2009, [http://www.computerworld.com/s/article/9134233/Should\\_Facebook\\_Twitter\\_follow\\_IM\\_providers\\_and\\_block\\_access\\_to\\_U.S.\\_enemies\\_](http://www.computerworld.com/s/article/9134233/Should_Facebook_Twitter_follow_IM_providers_and_block_access_to_U.S._enemies_) (quoting Clif Burns, an attorney with Bryan Cave LLP).

61. See Press Release, U.S. Dep't of the Treasury, *supra* note 6.

62. See Verma Letter, *supra* note 5.

## II. THE TRADE SANCTIONS

### A. Generally

OFAC is the administrative agency responsible for, among other things, enforcing trade sanctions against countries, regions, and individuals who threaten the national security, foreign policy, or economic welfare of the United States.<sup>63</sup> Current OFAC regulations include trade sanctions against countries such as Iran, Myanmar, Cuba, and Sudan.<sup>64</sup> Although there are separate regulations for each sanctioned country, each deals with the export of goods and services in the same manner, generally prohibiting trade while recognizing several exceptions.<sup>65</sup>

For example, OFAC regulatory sanctions against Iran provide in relevant part that “the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited.”<sup>66</sup> The corresponding provisions for the other sanctioned countries are written in nearly identical language.<sup>67</sup>

The most prevalent exception in the sanctions, and one that attempts to protect free speech, is the exception for informational materials. According to the sanctions, the export of information and informational materials to these countries is exempted from the prohibitions.<sup>68</sup> Information and informational materials include

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63. Office of Foreign Assets Control, Our Mission, <http://www.treas.gov/offices/enforcement/ofac/mission.shtml> (last visited Mar. 26, 2010).

64. Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#9> (last visited Mar. 26, 2010).

65. *See, e.g.*, Sudanese Sanctions Regulations, 31 C.F.R. § 538 (2009); Iranian Transaction Regulations, 31 C.F.R. § 560 (2009) (enumerating OFAC-imposed rules governing the export of goods and services).

66. 31 C.F.R. § 560.204.

67. *See, e.g.*, 31 C.F.R. § 538.205 (“[T]he exportation or reexportation, directly or indirectly, to Sudan of any goods, technology . . . or services . . . is prohibited.”).

68. 31 C.F.R. § 560.210(c).

“[p]ublications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.”<sup>69</sup> OFAC’s interpretive guidance, however, explicitly maintained prohibition of “the provision of services to . . . assist in the creation of information and informational materials.”<sup>70</sup> OFAC clarified the difference between the provision of basic information and the provision of a service in a 2003 guidance document, comparing the mere uniform listing of information on a website to the “provision of . . . services . . . above and beyond the mere dissemination of information.”<sup>71</sup> This language seems to disqualify Web 2.0 services from the exemption for informational materials, subjecting them to the regulatory sanctions.

The sanctions are based on a licensing scheme whereby American entities and individuals can obtain either general or specific licenses to engage in otherwise prohibited trade with a sanctioned country.<sup>72</sup> General licenses exist for preauthorized categories of transactions, yet until March 2010, OFAC’s general licenses for trade with Iran and other sanctioned countries were inapplicable to Web 2.0 services.<sup>73</sup> Specific licenses, on the other

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69. 31 C.F.R. § 560.315.

70. OFAC Interpretive Guidance, 030915-FACRL-IA-09, 1 (2003), available at <http://www.treas.gov/offices/enforcement/ofac/rulings/ia092303.pdf> (providing an opinion on when and how the informational exemption would apply to a hypothetical website company publishing materials in Farsi and seeking to distribute them in Iran).

71. OFAC Interpretive Guidance, Posting of Information from Iran on Website (Iran), 031211-FACRL-IA-14, 2 (2003), available at [http://www.treas.gov/offices/enforcement/ofac/programs/iran/int\\_guide/ia121603.pdf](http://www.treas.gov/offices/enforcement/ofac/programs/iran/int_guide/ia121603.pdf).

72. Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#60> (last visited Mar. 26, 2010).

73. See Cuban Assets Control: Sudanese Sanctions Regulations; Iranian Transactions Regulations, 175 Fed. Reg. 10,997 (Mar. 10, 2010) (to be codified at 31 C.F.R. pts. 515, 538, and 560) (issuing general licenses for Web 2.0 service use in Cuba, Sudan, and Iran). Currently, OFAC also recognizes general licenses for Iran based on funds transfers aimed at humanitarian relief, and for the transactions of six listed international organizations related to business involving Iran. See 31 C.F.R. § 560.539.

hand, are issued on a case-by-case basis by OFAC,<sup>74</sup> and past denials indicate that Web 2.0 services would not have qualified for specific licensing. Interpretive guidance provided by OFAC in 2003 is representative of its past approach to web-based services: an American company wished to offer, for a fee, “enhanced Internet-based listings” in which Iranian companies could post information about themselves on the website.<sup>75</sup> OFAC was troubled by both “the substantive enhancement of information” by Iranian users and the provision of online customer support.<sup>76</sup> OFAC thereby declared that the provision of such services was prohibited by the sanctions, and that the issuance of a license in that case “would be inconsistent with current licensing policy.”<sup>77</sup>

Web 2.0 companies were likely correct in interpreting these sanctions as prohibiting the use of their websites by persons in Iran. Given that the interactivity and user-based nature of these websites goes far beyond the mere listing of basic information and crosses into the realm of a service, the export of these communication tools violated trade sanctions. “If you ask any lawyer who regularly practices in this area, they would say don’t offer the service [to sanctioned countries].”<sup>78</sup>

### *B. Penalties and Blocks*

Absent an exemption or a license, any person or entity of the United States who participates in prohibited trade activity with a sanctioned country is subject to significant penalties ranging anywhere from \$50,000 to \$10,000,000, in addition to possible

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74. Office of Foreign Assets Control, Statement of Licensing Policy 1, available at [http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/license\\_pol.pdf](http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/license_pol.pdf).

75. OFAC Interpretive Guidance, Substantive Enhancement of Information (Iran), 030708-FACRL-IA-08, 1 (2003), available at [http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/int\\_guide/ia070803.pdf](http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/int_guide/ia070803.pdf).

76. *Id.*

77. *Id.*

78. Lai, *supra* note 60.



imprisonment.<sup>79</sup> Not only are the penalties substantial, but OFAC applies little leniency when it pursues sanctions violations, reasoning that the “ramifications of non-compliance, inadvertent or otherwise, can jeopardize critical foreign policy and national security goals.”<sup>80</sup> With the threat of such hefty penalties, it is understandable that U.S. companies took preemptive measures to ensure their compliance with trade sanctions.

Some of the most prominent Web 2.0 providers were among the first to block users in sanctioned countries. Google blocked users in Syria and Iran from downloading its Chrome browser as well as other downloadable services.<sup>81</sup> Microsoft blocked its Windows Live service from download in Cuba, North Korea, Iran, Sudan, and Syria.<sup>82</sup> Yahoo recently removed “Iran” as an option from its user registration drop-down menu, in what seemed to be a less effective attempt at blocking access.<sup>83</sup> Other blocked services included AOL Instant Messenger, LinkedIn, and BlueHost, a web hosting firm.<sup>84</sup>

Most strikingly, in 2007 Google Earth collaborated with the United States Holocaust Museum to create a project called “Crisis in Darfur,” with the proclaimed goal of enabling “more than 200 million Google Earth mapping service users worldwide to visualize and better understand the genocide currently unfolding in Darfur[, Sudan].”<sup>85</sup> Google then blocked Sudanese users.<sup>86</sup> In doing so,

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79. Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#11> (last visited Mar. 25, 2010). “[C]riminal penalties can include fines ranging from \$50,000 to \$10,000,000 and imprisonment ranging from 10 to 30 years for willful violations. . . . [C]ivil penalties range from \$250,000 or twice the amount of each underlying transaction to \$1,075,000 for each violation.” *Id.*

80. *Id.*

81. Dheere, *supra* note 60.

82. Lai, *supra* note 60.

83. *Id.*

84. *Id.*

85. Press Release, Google, U.S. Holocaust Memorial Museum and Google Join in Online Darfur Mapping Initiative (n.d.), [http://www.google.com/intl/en/press/pressrel/darfur\\_mapping.html](http://www.google.com/intl/en/press/pressrel/darfur_mapping.html).

86. Posting of Clif Burns to Export Law Blog, <http://www.exportlawblog.com/archives/149> (Apr. 23, 2007, 22:31 EST).

Google was simply abiding by U.S. sanctions, and yet the result was an illogical denial of information to Sudanese citizens.<sup>87</sup>

It would seem from the State Department's actions during the Iranian protests, namely its request that Twitter postpone website maintenance so as not to interrupt daytime service in Iran,<sup>88</sup> that the U.S. government, even then, saw the value in these tools and their use by people in repressive regimes. The providers of websites such as Twitter, YouTube, and Facebook never followed suit in blocking users. But given the possible ramifications of violating sanction laws, and prior to alteration, these sanctions posed a continuous threat to communication.

In December of 2009, the State Department realized that it was essential to allow the exportation of these communication tools to users in sanctioned countries. If citizens of these countries were able to circumvent their own governments to access them, it was absurd that U.S. foreign policy presented yet another obstacle to their ability to communicate. The remainder of this Note will discuss the First Amendment right to receive communications from individuals in sanctioned countries and will recognize this right as a mandate for a more meaningful and permanent revision of the trade sanctions.

### III. FIRST AMENDMENT ANALYSIS

#### A. *The First Amendment Right to Receive Information*

The text of the First Amendment grants a succinct list of freedoms: those of religion, speech, the press, assembly, and petition.<sup>89</sup> It has long been recognized, however, that the First Amendment encompasses more than its plain language—it protects those rights necessary for the achievement of the amendment's underlying goals, one of which, as noted by the Supreme Court, is the assurance of the “*unfettered* interchange of ideas for the

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87. *Id.*

88. Fleming, *supra* note 4.

89. U.S. CONST. amend. I.

bringing about of political and social changes desired by the people.”<sup>90</sup>

In *Whitney v. California*,<sup>91</sup> Justice Brandeis spoke of “public discussion [as] a political duty,” and declared it a “fundamental principle of the American government.”<sup>92</sup> Brandeis’s views in *Whitney* echoed a “marketplace of ideas theory,”<sup>93</sup> and the Court in 1943 elaborated on the concept: “The authors of the First Amendment . . . chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.”<sup>94</sup> Later, in 1964, the Supreme Court again emphasized public dialogue as the core of the First Amendment, recognizing the importance of “uninhibited, robust, and wide-open” debate.<sup>95</sup>

Thus, in order to achieve political and social change through the people, the First Amendment grants Americans a right to the exchange of ideas, public discussion, and public debate—essentially the right to communicate. Inherent in and necessary for the process of communication is the receipt of information. Communication does not begin and end with the giving of information—it must also be received in order for a dialogue to occur. If we cannot receive information, we cannot communicate, discuss, or debate, and the objective of the First Amendment is lost. As articulated by Justice Brennan, “I think the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and

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90. *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasis added).

91. 274 U.S. 357 (1927).

92. *Id.* at 375-76 (Brandeis, J., concurring).

93. *Id.* (explaining that America’s founders understood “that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . [and the] power of reason as applied through public discussion”). The marketplace of ideas theory is based on the free market theory and suggests that free public discourse will lead to the truth. The concept was explained as early as 1919 by Justice Holmes, who wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

94. *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

95. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>96</sup>

The significance of the First Amendment right to receive information justifies the Supreme Court’s repeated discussion and protection of this right over the years.<sup>97</sup> For example, in *Martin v. Struthers*,<sup>98</sup> the Court upheld the constitutional right to distribute literature, and at the same time recognized the right to receive it.<sup>99</sup> According to the Court, the freedom of speech and press “embraces the right to distribute literature, and necessarily protects the right to receive it.”<sup>100</sup>

This right to receive information does not disappear when the information being received comes from abroad, nor does it become less vital. The communication that crossed borders during the recent elections in Iran helped to create an understanding and a discussion of the historical events taking place. This is precisely what the First Amendment intended and what the Supreme Court intends to protect: ideas of social importance and the advancement of truth. In *Lamont v. Postmaster General*,<sup>101</sup> the Court recognized that cross-border communication is no less valuable to the marketplace of ideas than communications taking place strictly within the United States.<sup>102</sup> In *Lamont*, a federal statute required the addressee of “communist political propaganda” from abroad to

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96. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

97. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the [First Amendment] right of the viewers and listeners, not the right of the broadcasters, which is paramount.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (“Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.”).

98. 319 U.S. 141 (1943).

99. *Id.* at 143.

100. *Id.* (citation omitted).

101. 381 U.S. 301 (1965).

102. *See id.* The Court’s willingness to protect Americans’ right to receive communications that originate in foreign countries suggests that, in the context of the First Amendment, such communications are no less valuable to the marketplace of ideas than communications that originate within the United States. *See id.* at 306-07.

request its delivery in writing from the Postmaster General.<sup>103</sup> The Court found that the statute constituted an “unconstitutional abridgment” of the First Amendment and upheld the right to receive information from foreign publishers.<sup>104</sup>

The right to receive information, however, like other First Amendment protections, is not absolute. The constitutionality of restrictions on this freedom is considered in light of governmental interests and the manner in which the freedom is being restricted. Part III.B analyzes the constitutionality of the relevant portions of the past U.S. trade sanctions.

### *B. The Past Trade Sanctions Constituted Prior Restraint*

By making illegal the export of tools that allowed us to receive communications from others, the trade sanctions at issue constituted prior restraint. The prior restraint doctrine is concerned with governmental actions (typically administrative actions and judicial orders) that prevent speech from occurring.<sup>105</sup> In *Nebraska Press Ass’n v. Stuart*,<sup>106</sup> the Supreme Court deemed prior restraint to be “the most serious and the least tolerable infringement on First Amendment rights.”<sup>107</sup> Examples of prior restraint include a court order enjoining a newspaper from publishing “any publication . . . containing malicious, scandalous and defamatory matter;”<sup>108</sup> an injunction prohibiting the publication of a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy;”<sup>109</sup> and a city ordinance requiring individuals to obtain permission before distributing literature.<sup>110</sup>

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103. *See id.* at 302.

104. *Id.* at 306-07.

105. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 950 (3d ed. 2006).

106. 427 U.S. 539 (1976).

107. *Id.* at 559.

108. *Near v. Minnesota*, 283 U.S. 697, 705 (1931).

109. *See* *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

110. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

The U.S. trade sanctions prior to March 2010, as applied to the export of Web 2.0 services to users in sanctioned countries, suppressed speech in a manner that amounted to prior restraint. These sanctions mandated that the United States government block channels of communication, thereby preventing our receipt of information before any speech could take place. The prior restraint doctrine is commonly used to protect the First Amendment rights of *speakers* rather than *receivers* of information, given that prior restraint occurs before communication takes place.<sup>111</sup> However, this is a superficial distinction and the Supreme Court has confirmed that receivers of information are entitled to protection from prior restraint.<sup>112</sup> Therefore, the remainder of this Note will utilize prior restraint analysis.

### *C. Prior Restraint Licensing Schemes and the Presumption of Invalidity*

Given the gravity of prior restraint and the severity of its infringement on First Amendment rights, the Court has placed upon such actions a heavy presumption of constitutional invalidity.<sup>113</sup> The Supreme Court in *Near v. Minnesota*<sup>114</sup> recognized prior restraints as unconstitutional except in exceptional circumstances,<sup>115</sup> and forty years later reaffirmed that “showing justification for the imposition of such a restraint” is a heavy

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111. See René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1171-72 (1990) (explaining that the prior restraint doctrine is commonly used to protect the rights of communicators rather than receivers of information).

112. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 29 n.17 (1978) (“[T]he First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published.”) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

113. See *Pentagon Papers*, 403 U.S. at 714.

114. 283 U.S. 697 (1931).

115. *Id.* at 716.

burden.<sup>116</sup> OFAC was likewise required to justify the prior restraint it imposed via its trade sanctions.

When licensing schemes implicate prior restraint, the analysis of their constitutionality will vary greatly according to whether the prior restraint is content-based or content-neutral. Content-based prior restraints are regulations that restrict communications based on their content, and must meet strict scrutiny.<sup>117</sup> A content-neutral prior restraint applies regardless of the message conveyed and is subject to a lower level of scrutiny.<sup>118</sup> These regulations must be narrowly tailored to serve a significant governmental interest, and must “leave open ample alternative channels for communication.”<sup>119</sup>

The Supreme Court has demonstrated that content-neutral licensing schemes are more acceptable than content-based schemes.<sup>120</sup> The Court nevertheless continues to scrutinize content-neutral regulations,<sup>121</sup> reaffirming that any inhibition of communication, whether or not it targets one type of speech, infringes First Amendment rights and must be justified. The trade

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116. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

117. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”); *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (“Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.”)

118. *See Nathan W. Kellum, Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 *DRAKE L. REV.* 381, 406 (2008).

119. *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

120. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (noting that content-based restrictions are held to a higher level of scrutiny).

121. Content-neutral regulations are classified as such if they apply to all speech regardless of the message. *See CHEMERINSKY, supra* note 105, at 936 (citing examples of time, place, and manner regulations on speech such as the prohibition of posting signs on all public utility poles). The OFAC trade sanctions restrict speech based on its delivery through an Internet service, and are therefore manner-based.

sanctions at issue were content-neutral regulations, broadly prohibiting the export of goods and services and hindering all communication taking place in those media, regardless of the message. The following section will analyze OFAC's past trade sanctions in light of these requirements and will determine whether the prior restraint posed was justified.<sup>122</sup>

1. The trade sanctions were based on a significant governmental interest

OFAC trade sanctions against countries such as Iran are imposed in a three-fold effort to protect the United States' economic well-being, foreign policy goals, and national security.<sup>123</sup> To these ends, OFAC economic sanctions attempt to prevent hostile countries from benefiting financially from transactions with the United States; sanctions therefore tend to be created and amended in response to foreign affairs. For example, the 1987 import embargo on goods originating in Iran was issued "[a]s a result of Iran's support for international terrorism and its aggressive actions against non-belligerent shipping in the Persian Gulf."<sup>124</sup> In 1995 the sanctions were tightened due to "Iranian sponsorship of international terrorism and Iran's active pursuit of weapons of mass destruction."<sup>125</sup> Despite much criticism of the secondary effects of these sanctions,<sup>126</sup> all that the Constitution requires is a showing that the purpose furthered is significant.

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122. For a similar analysis of OFAC's licensing scheme dealing with publishing activities between the United States and Iran, see Tracy J. Chin, Note, *An Unfree Trade in Ideas: How OFAC's Regulations Restrain First Amendment Rights*, 83 N.Y.U. L. REV. 1883 (2008).

123. Office of Foreign Assets Control, *Our Mission*, *supra* note 63.

124. OFFICE OF FOREIGN ASSETS CONTROL, AN OVERVIEW OF OFAC REGULATIONS INVOLVING SANCTIONS AGAINST IRAN 1, <http://www.treas.gov/offices/enforcement/ofac/programs/iran/iran.pdf>.

125. *Id.*

126. See, e.g., ROBIN RENWICK, ECONOMIC SANCTIONS 1-3 (Center for International Affairs, Harvard University, 1981) (arguing the alleged failures of sanction programs include the negative impact on citizens of hostile countries rather than the governments the sanctions target and the negative impact on the American economy).



National security and foreign policy objectives are indisputably significant governmental interests, and the government's interest in regulating economic transactions between itself and hostile countries is equally compelling. The Second Circuit in *Teague v. Regional Commissioner of Customs*<sup>127</sup> found that regulations "designed to limit the flow of currency to specified hostile nations" contributed to "the furtherance of a vital interest of the government."<sup>128</sup> Although it is clear that the relevant portions of the sanctions were based on significant governmental interests, the inquiry does not end there. The sanctions must have been narrowly tailored to these interests, and the next section will demonstrate that they were not.

## 2. The sanctions were not narrowly tailored to a governmental interest

A law or regulation is narrowly tailored if it is neither overbroad nor under-inclusive in relation to the purpose it purports to serve.<sup>129</sup> The economic goal of the sanctions and the restriction of financial benefit to hostile countries is difficult to reconcile under the "narrowly tailored" test. The Web 2.0 sites in question—the services that allow users to upload photographs and videos, post discussions, create blogs—do not typically generate fiscal transactions. The broad sanctions, however, required all Web 2.0 sites to be blocked from sanctioned countries, regardless of whether they created economic benefit for the users or their countries. This is precisely what constitutes a law that is not narrowly tailored; the sanctions were so broad that they encompassed a mass of services that were not related to economic transactions.

The national security objective of the sanctions fared no better. Despite varying verbiage in the Supreme Court's decisions, the overall tenor is the same: "The word 'security' . . . should not be invoked to abrogate the fundamental law embodied in the First

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127. 404 F.2d 441 (2d Cir. 1968).

128. *Id.* at 445.

129. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 844 (1997) (striking down an over-inclusive statute that hindered free speech).

Amendment.”<sup>130</sup> The Court has historically been very hostile to arguments that speech harms national security, and in *New York Times Co. v. United States*,<sup>131</sup> Justice Stewart declared in no uncertain terms that there must be a threat of “direct, immediate, and irreparable damage to our Nation or its people” in order for prior restraint to stand.<sup>132</sup> In *Schenck v. United States*,<sup>133</sup> Justice Holmes declared that free speech may only be restricted when the speech is “of such a nature as to create a clear and present danger that [the speech] will bring about the substantive evils” the government seeks to prevent.<sup>134</sup>

Web 2.0 sites essentially create a channel of communication and indicate no connection to a “direct, immediate and irreparable damage” to the United States, or any “clear and present danger.” The sites simply allow for communication despite a repressive government, and allow for information to flow more freely between Iran and the United States. Of course, any line of communication may be used in an “evil” manner, but such a connection is tenuous and broad, and lacks urgency, rendering the sanctions overbroad and not narrowly tailored to their objective of protecting national security.

As to the third objective of protecting foreign policy concerns, blocking Web 2.0 services in Iran arguably created a result which was the opposite of its intended effect. The United States is at odds with the current Iranian regime, yet the blockage of these Web 2.0 tools during an uprising against that regime seemed to hinder, rather than further, the opposition movement. By mandating the blockage of these tools, the United States was effectively helping the Iranian government to censor its citizenry and restrict the flow of information, making the regime more powerful. Because the sanctions were structured in a way which would hinder tools that actually further our foreign policy objectives, they were not narrowly tailored. The sanctions, in

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130. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (*Pentagon Papers*).

131. 403 U.S. 713 (1971).

132. *Id.* at 730 (Stewart, J., concurring).

133. 249 U.S. 47 (1919).

134. *Id.* at 52.

prohibiting vital communication tools, were not narrowly tailored to the government's economic, national security, and foreign policy objectives, and thus infringed on First Amendment freedoms more than the Constitution allows. The next section will examine whether the sanctions allowed alternative means for communication to take place.

### 3. The Sanctions do not leave open ample alternative channels for communication

In justifying content-neutral regulations, the government must show that it is "leav[ing] open ample alternative channels for communication."<sup>135</sup> In *Hill v. Colorado*,<sup>136</sup> the Court upheld a law that prohibited protesters from coming within eight feet of individuals outside a hospital for the purpose of protest, education, or the distribution of literature. The Court reasoned that, in addition to the law being narrowly tailored to a significant governmental interest, there remained other opportunities for speech; specifically, protesters were still able to demonstrate from a distance of eight or more feet.<sup>137</sup> In order to refute that ample channels for communication exist, a plaintiff must show that the remaining avenues are inadequate.<sup>138</sup>

As illustrated by its response to the election protests, the current Iranian regime does not hesitate to block communications and the flow of information when it deems necessary. It is bold in its blocking of non-state-sponsored media, and just as blatant in its attack on Internet services. Without websites like Twitter and YouTube, the outside world would have known distressingly little about the post-election turmoil in Iran. News networks were fed state-sponsored information, and communication did take place by phone and mail, but the mass influx of timely news and images came to the Western world via Web 2.0. The sanctions, if enforced,

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135. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

136. 530 U.S. 703 (2000).

137. *Id.* at 711 ("[T]he 'free zone' created by the statute . . . left open ample alternative means of communication because signs and leaflets may be seen, and speech may be heard, at a distance of eight feet.").

138. *See Ward*, 491 U.S. at 802.

would have left us with a wholly inadequate receipt of communications and information—the remaining avenues were in no sense of the word “ample.” If the State Department thought they were sufficient, it would likely not have encouraged Twitter’s role in facilitating communications,<sup>139</sup> nor would it have created a new general license for these services.

Because the past sanctions failed the third and final test in scrutiny of prior restraints, OFAC’s violation of our right to receive information was without justification and was therefore unconstitutional.

#### *D. Procedural Requirements*

In addition to the above-discussed requirements, prior restraint licensing schemes are also subject to scrutiny based on the procedural safeguards they contain.<sup>140</sup> Although content-neutral licensing schemes are not subject to the rigidity imposed on content-based schemes,<sup>141</sup> remnants of those requirements are still applicable. The Court in *Thomas v. Chicago Park District*<sup>142</sup> recognized that “even content-neutral . . . restrictions can be applied in such a manner as to stifle free expression,” and hence required that (1) such schemes “contain adequate standards to guide the official’s decision” and (2) that these decisions be subject to “effective judicial review.”<sup>143</sup> The OFAC sanctions failed on both counts.

#### 1. OFAC Discretion

In order to prevent content-based discrimination from occurring during the licensing process, courts strike down laws that

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139. See Fleming, *supra* note 4, and accompanying text.

140. See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding that a prior restraint “avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system”).

141. See *id.*

142. 534 U.S. 316 (2002).

143. *Id.* at 323.

provide licensing officials with limitless discretion. For example, in *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>144</sup> the Court found that a law requiring a permit for placing a newspaper vending machine on public property allowed too much discretion in the permit issuer.<sup>145</sup> The Court declared that without clear standards, a licensing scheme allowing such discretion “constitutes a prior restraint and may result in censorship.”<sup>146</sup> This “clear standards” requirement reappeared in *Forsyth County v. Nationalist Movement*,<sup>147</sup> in which the Court struck down a permitting scheme for demonstrations on the grounds that there were “no articulated standards” to guide the officials.<sup>148</sup>

The trade sanctions prior to the revisions left much to be desired in the way of clear standards. As described above, OFAC reserves the right to issue specific licenses on a case-by-case basis for otherwise prohibited activities.<sup>149</sup> In this licensing scheme, OFAC simply states that its licensing determinations are “guided by U.S. foreign policy and national security concerns.”<sup>150</sup> Formal agency appeals are not available to those whose requests are denied, and OFAC revisits license applications at its own discretion.<sup>151</sup> Furthermore, it is difficult for license applicants to evaluate the likelihood of obtaining a license—although OFAC issues interpretive guidance on past decisions, it explicitly states that this guidance should not be relied upon and that OFAC reserves the right to change its interpretations.<sup>152</sup>

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144. 486 U.S. 750 (1988).

145. *Id.* at 757.

146. *Id.*

147. 505 U.S. 123 (1992).

148. *Id.* at 133.

149. See 31 C.F.R. § 501.801(b) (2009).

150. Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#64> (last visited Mar. 25, 2010).

151. See Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#62> (last visited Mar. 25, 2010).

152. See Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#13> (last visited Mar. 25, 2010).

It thus appears that the OFAC licensing officials maintained unfettered discretion. OFAC gave no indication of the standards it applied to its licensing decisions. Instead, it gave a vague recitation of the sanctions' purposes and provided interpretive guidance hedged by a disclaimer. In placing too much discretion on licensing officials, the sanctions failed the first prong of the test.

## 2. Effective Judicial Review

Procedural safeguards are necessary "to obviate the dangers of a censorship system."<sup>153</sup> Without them, license applicants seeking consideration or judicial review would be powerless against the licensing entity, and the speech sought to be performed by the license applicant would be caught in a system with possibly no recourse. Judicial review of OFAC's licensing decisions is for all intents and purposes non-existent. Not only does OFAC claim full discretion for the length of time it takes to respond to a license request,<sup>154</sup> but there is no formal appeals process within the agency.<sup>155</sup> The only means for redress is requesting that OFAC revisit a license application, a determination over which OFAC again retains discretion.<sup>156</sup> Furthermore, the District Court for the District of Columbia held in 2007 that OFAC's specific licensing decisions are not subject to judicial review, rendering the

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153. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

154. "The length of time for determinations to be reached will vary depending on the complexity of the transactions under consideration, the scope and detail of interagency coordination, and the volume of similar applications awaiting consideration." Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.treas.gov/offices/enforcement/ofac/faq/answer.shtml#63> (last visited Mar. 25, 2010).

155. A denial by OFAC of a license application constitutes final agency action. The regulations do not provide for a formal process of appeal. However, OFAC will reconsider its determinations for good cause, for example, "where the applicant can demonstrate changed circumstances or submit additional relevant information not previously made available to OFAC." Office of Foreign Assets Control FAQ & A, *supra* note 152.

156. *Id.*

protections of the Administrative Procedure Act inapplicable.<sup>157</sup> With limitless discretion and an absence of effective judicial review, OFAC's licensing scheme did not contain adequate procedural safeguards.

#### CONCLUSION

As demonstrated in Part I of this Note, there are often limited channels of communication between the United States and sanctioned countries, and these channels can be crucial. The U.S. trade sanctions prior to the March 2010 revision prevented those in sanctioned countries from accessing many Web 2.0 services, and if the penalties for trade violations had their desired effect, more blockages would inevitably have followed. The First Amendment guarantees a right to unhindered communication, whether Americans are the ones providing the communication or receiving it. It recognizes the importance of open debate and unrestricted dialogue, and, as emphasized by the Supreme Court in *Nebraska Press Ass'n. v. Stuart*,<sup>158</sup> “[t]he damage [from preventing that communication] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.”<sup>159</sup>

Communication does not lose its value simply because it crosses borders. In 1988, the trade sanctions were revised to include an exemption for informational materials when the government recognized the inherent wrong in prohibiting information from passing between the U.S. and sanctioned countries.<sup>160</sup> OFAC realized the importance of open communication and allowed informational materials (though it would later exclude Web 2.0 services) to be imported and exported

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157. *Cubaexport v. U.S. Dep't of Treasury*, 516 F. Supp. 2d 43, 59 (D.D.C. 2007) (stating that because OFAC has complete discretion over specific licensing decisions, there is “no justiciable standard for evaluating” them).

158. 427 U.S. 539 (1976).

159. *Id.* at 559.

160. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371.

without regulatory interference.<sup>161</sup> In introducing the proposed information exceptions to Congress, Senator Mathias quoted Ronald Reagan: “Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increase[s] confidence; sealing off one’s people from the rest of the world reduce[s] it.”<sup>162</sup> The distinction that OFAC made between informational materials and services was superficial and served only to weaken our channels of communication. Web 2.0 services serve precisely the same function as informational materials, and OFAC’s failure to recognize this fact was simply an indication of its failure to adapt in a timely manner to a changing world and new technologies.

In December 2009, the U.S. State Department formally recognized that “[I]nternet-based communications are a vital tool for change in Iran,” and admitted that U.S. sanctions “are having an unintended chilling effect on the ability of companies such as Microsoft and Google to continue providing essential communications tools to ordinary Iranians.”<sup>163</sup> The State Department recommended that OFAC issue a general license that would authorize downloads of free mass market software “necessary for the exchange of personal communications and/or sharing of information over the internet such as instant messaging, chat and email, and *social networking*.”<sup>164</sup> Such a waiver of the sanctions must be “essential to the national interest of the United States,” and the State Department thus based this license on the necessity to “foster and support the free flow of information to individual Iranian citizens.”<sup>165</sup> In March of 2010, OFAC followed the State Department’s recommendation, and even extended this

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161. *Id.*

162. 132 CONG. REC. S6381,6550 (daily ed. Mar. 27, 1986) (statement of Sen. Mathias). “Today’s telecommunications media can bring into our living rooms the images and voices of exponents of every political and artistic tendency around the globe. To deny . . . information entry or exit not only injures our freedom but insults the intelligence of the American people.” *Id.* at 6551.

163. Verma Letter, *supra* note 5.

164. *Id.* (emphasis added).

165. *Id.*



general license to Cuba and Sudan.<sup>166</sup> Although the government has failed to recognize the constitutional implications of the sanctions, its recent actions are certainly indicative of its appreciation of the value of Web 2.0 tools, particularly in light of the recent events in Iran.

While this development is promising, a more permanent solution is needed. The general license is a device too fragile to constitute a reliable safeguard against future governmental actions; an administration change, international events, or a shift in foreign relations could result in a revocation of this waiver. For example, in 2008, OFAC revoked U-Turn licenses<sup>167</sup> for transactions between the United States and Iran, restricting funds transfers involving the two countries, in a purported effort “to expose Iranian banks’ involvement in the Iranian regime’s support to terrorist groups and nuclear and missile proliferation.”<sup>168</sup> The current political climate in Iran is tumultuous at best, and future relations between Iran and the United States could lead to major shifts in sanction policy. The U.S. government regards sanctions as a foreign policy tool, and could easily revoke this general license.

As a safeguard to the interests it currently purports to protect, and as a safeguard to the First Amendment right to receive communications, this waiver of the sanctions must take a more solid form. The Berman Amendments of 1988 limited OFAC’s ability to regulate informational materials as a part of its sanctioning program,<sup>169</sup> and Congress should do the same for Web 2.0 services. A Congressional statute would undoubtedly be more difficult to reverse than a general license issued by OFAC. Even more

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166. See 75 Fed. Reg. 10,997 (Mar. 10, 2010) (to be codified at 31 C.F.R. pts. 515, 538, and 560).

167. U-Turn licenses gave American financial institutions the right to conduct funds transfers that were initiated outside Iran and ended outside Iran, but which passed through the Iranian system, providing Iranian banks, persons, or the Iranian Government with an economic benefit, even if indirectly. Press Release, U.S. Dep’t of the Treasury, Treasury Revokes Iran’s U-Turn License (Nov. 6, 2008), available at <http://www.ustreas.gov/press/releases/hp1257.htm>.

168. *Id.*

169. 50 U.S.C. § 1702(b)(3) (2006).

permanent, and therefore more preferable, would be a Court ruling holding that the application of the trade sanctions to Web 2.0 services is unconstitutional. This is an avenue which should be explored in order to safeguard against administration changes and evolving foreign policy.