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The Internet, Human Rights, and U.S. Foreign Policy: The Global Online Freedom Act of 2012

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Introduction

On March 27, 2012, the Subcommittee on Africa, Global Health, and Human Rights of the U.S. House of Representatives approved the Global Online Freedom Act of 2012 (“GOFA”).^[1] This proposed legislation seeks to prevent U.S. businesses from cooperating with governments that use the Internet for

ensorship and repression, to strengthen U.S. promotion of freedom of expression on the Internet, and to improve corporate responsibility concerning human rights and the Internet.^[2] GOFA represents a development in the prominent controversy concerning human rights in cyberspace. This *Insight* describes the context in which GOFA arose in Congress, the content of the proposed bill, and implications of this congressional activity for the relationships between the Internet, human rights, and U.S. foreign policy.

Internet Freedom as a Global Human Rights Issue

The Internet’s emergence as a global communications technology has intersected with efforts to promote and protect many human rights. The Internet’s importance to human rights is such that some experts have debated whether access to the Internet itself represents a human right.^[3] An important aspect of this debate has involved the Internet’s growing significance in the enjoyment of the freedoms of opinion, expression, and association protected by the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and regional human rights treaties.^[4] Controversies involving governments restricting Internet access, censoring Internet content, using information obtained from Internet communications to intimidate and punish individuals, and engaging in cyber attacks against Web sites and email accounts of political opponents have raised the Internet’s global human rights profile.

In response, many governments, international organizations, and non-governmental organizations (“NGOs”) have increased their attention on “Internet freedom”—the freedom

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to access and use the Internet as a means of exercising the freedoms of opinion, expression, and association. In 2011, the Obama administration heightened the importance of Internet freedom in U.S. foreign policy.^[5] The Group of Eight's 2011 Declaration on Renewed Commitment for Freedom and Democracy highlighted the Internet's importance for "political liberty and emancipation[.]"^[6] The UN Special Rapporteur on the Right to Freedom of Opinion and Expression asserted in 2011 that the Internet has "become a key means by which individuals can exercise their right to freedom of opinion and expression[.]"^[7] Various NGOs have documented governmental efforts to turn the Internet into a tool of political repression, including Freedom House's 2011 assessment of Internet freedom in thirty-seven countries around the world.^[8]

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The Global Online Freedom Act

a. *Background*

Representative Christopher Smith (R-New Jersey) introduced the first version of GOFA in February 2006 in response to controversies related to U.S. information technology companies cooperating with the Chinese government in what critics called Internet censorship and repression of dissidents.^[9] In introducing the bill, Smith argued that these companies "have aided and abetted the Chinese regime . . . [by] propagating the message of the dictatorship unabated and supporting the secret police in a myriad of ways . . . in order to effectuate a massive crackdown on its citizens."^[10] Smith subsequently introduced versions of GOFA in January 2007, May 2009, April 2011, and December 2011.^[11] Controversies involving governmental efforts to restrict Internet access during the Arab Spring in 2011 played a role in Smith's introduction of two versions of the bill in that year.

The versions of GOFA generated questions, concerns, and opposition from information technology companies (e.g., in connection with proposals for criminal penalties on companies^[12]) and NGOs monitoring Internet freedom (e.g., concerns that aspects of the proposed legislation might not help the cause of Internet freedom^[13]). To date, the 2007 version advanced the farthest, with an amended text being approved by three committees and sent to the House of Representatives for consideration.^[14] However, the House has not voted on any version of GOFA, nor has a companion bill been introduced in the Senate.

The importance of GOFA arises in how Smith and his supporters have adapted strategies used in legislative efforts and non-governmental activities to advance human rights to the emerging, complex, and contentious agenda of Internet freedom. These strategies aim to create requirements for U.S. government policy concerning Internet freedom and to increase corporate transparency and accountability with respect to the Internet and human rights.

b. *Requirements for the U.S. Government on Internet Freedom*

The version of GOFA adopted by the House Subcommittee on Africa, Global Health, and Human Rights in March 2012 contains three requirements for U.S. government action.

(1) Internet Freedom and Government Reports

GOFA would mandate the Executive Branch to include "an assessment of freedom of expression with respect to electronic information in each foreign country" in reports required by the Foreign Assistance Act concerning the human rights practices of countries receiving U.S. economic assistance and countries proposed to receive U.S. security assistance.^[15]

The State Department meets these requirements through its annual country reports on human rights practices. Federal law already requires these reports to include assessments on the status of the freedom of the press.[16] and the State Department has included Internet freedom in its annual country reports on human rights for years.[17] However, GOFA would make Internet freedom more prominent in these reports by requiring them to address specific issues, including assessments of the extent to which governments have attempted to filter, censor, or otherwise block or remove nonviolent expression of political or religious opinion through the Internet.[18]

GOFA would also require the U.S. Trade Representative to report on “trade-related issues or disputes that arise due to government censorship or disruption of the Internet among United States trade partners” and how the U.S. government has addressed these matters.[19] This provision seeks to ensure that U.S. trade policies support the global free flow of information on the Internet.

(2) Requirement to Designate Internet-Restricting Countries

GOFA would also require the Secretary of State to designate annually “Internet-restricting countries,”[20] defined as countries in which the government “is directly or indirectly responsible for a systematic pattern of substantial restrictions on Internet freedom during any part of the preceding 1-year period.”[21] GOFA defines “substantial restrictions on Internet freedom” as “actions that restrict or punish the free availability of information via the Internet for reasons other than legitimate foreign law enforcement purposes[.]”[22] Such purposes do not include “control, suppression, or punishment of peaceful expression of political, religious, or ideological opinion or belief” or “expression protected by article 19 of the International Covenant on Civil and Political Rights.”[23] For each Internet-restricting country designated, GOFA would require the Secretary of State to report to Congress on U.S. efforts and programs to counter substantial restrictions on Internet freedom.[24] In addition, GOFA’s provisions on export controls and corporate accountability (see below) use these designations. These aspects of GOFA echo other U.S. statutory schemes, such as the placement of countries on a Special Watch List concerning human trafficking[25] or designation of countries as state sponsors of terrorism.[26]

(3) Export Controls

GOFA proposes amending U.S. export control laws to require the Secretary of Commerce to develop and maintain “a list of goods and technology that would serve the primary purpose of assisting . . . a foreign government in acquiring the capability to carry out censorship, surveillance, or any other similar or related activity through means of telecommunications, including the Internet[.]”[27] GOFA would also require prohibiting the exports of such goods and technology to government end-users in any Internet-restricting country so designated by the Secretary of State.[28] GOFA grants the President the ability to waive such prohibitions if the President determines that such a waiver is in the U.S. national interest.[29] These aspects of GOFA resemble other prohibitions on exports of certain items to governments that violate internationally recognized human rights.[30]

c. Corporate Transparency and Accountability Regarding Internet Freedom

Controversies concerning Internet freedom have involved information technology corporations providing information or selling products to repressive governments.[31] GOFA attempts to address corporate behavior beyond application of export controls by requiring certain disclosures from Internet communications service companies subject to the

Securities Exchange Act of 1934 that operate in any Internet-restricting country.[32] GOFA would require such companies to disclose in their annual reports to the Securities and Exchange Commission (“SEC”) their policies on (1) human rights due diligence, (2) disclosure of personally identifiable information, and (3) if companies provide Internet search engine or content hosting services, providing users with notice when an Internet-restricting country requests removal or blocking of specific content.[33] This aspect of GOFA follows in the footsteps of disclosure requirements Congress imposed in 2010 on companies subject to the Securities Exchange Act on their use of “conflict minerals” originating in the Democratic Republic of the Congo or adjoining countries.[34]

GOFA would exempt from this disclosure requirement any Internet communications service company that can provide a certification from the Global Network Initiative (“GNI”) or other multi-stakeholder initiative that the company is in good standing with such initiative.[35] GNI is a multi-stakeholder effort involving companies, investors, NGOs, and academics to help companies in the information and communication technology sector advance freedom of expression and privacy, particularly in the face of pressure from governments to act in ways that conflict with international human rights protections for freedom of expression and privacy.[36] Companies that participate in GNI agree to have their policies and activities independently reviewed for compliance with GNI’s principles.[37] This approach resembles the use of independent auditing and certification of companies’ compliance with human rights and labor standards.[38]

Implications of the Global Online Freedom Act

GOFA’s attempt to advance human rights in cyberspace by deepening the importance of Internet freedom in U.S. foreign policy and in corporate behavior has not yet produced sufficient political support for legislative passage and presidential signature to be assured. Key aspects of GOFA continue to face questions and problems. The State Department’s long-standing practice of including Internet freedom in its annual human rights country reports means that GOFA’s provisions on this issue are not dramatic innovations. Concerns have been raised that the requirement to designate Internet-restricting countries will be politicized unless non-governmental actors also participate in the designation process.[39] GOFA’s use of export controls has generated worries that trade sanctions might harm people in foreign countries who need access to more and better information technologies in the face of repressive government policies on Internet freedom.[40] The controversies that have flared with respect to implementation of SEC disclosure requirements on conflict minerals[41] perhaps provide a taste of problems that might arise if GOFA in its present form moves forward.

More broadly, some experts believe that other legislative activity in Congress addressing cybersecurity undercuts U.S. credibility on Internet freedom. Civil liberties groups have raised concerns that cybersecurity legislative proposals under consideration by Congress (e.g., the Cyber Intelligence Sharing and Protection Act[42]) increase governmental surveillance powers and undermine privacy rights—outcomes these groups argue damage Internet freedom at home while the United States champions Internet freedom abroad.[43] Further, U.S. government interest in better Internet surveillance capabilities helps drive private-sector efforts to develop new technologies, which also become export products for companies.[44] These issues suggest that reconciling the Internet freedom agenda with mounting cybersecurity worries and needs remains a work in progress in the United States, let alone other countries around the world.

In this general election year, the prospects for GOFA in Congress are even more uncertain. However, GOFA has become part of the policy discourse on Internet freedom and U.S. foreign policy, and it has helped stimulate debates about the most effective ways to reshape U.S. and corporate approaches to human rights in cyberspace. These debates have not reached consensus, leaving open the question whether promoting and protecting human rights on the Internet requires different strategies from those used in U.S. legislation on human rights policy in the past. GOFA might never become law, but the issues it addresses and objectives it attempts to advance will only increase in importance and controversy as the world becomes ever more dependent on the Internet and cyberspace.

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Endnotes:

[1] Global Online Freedom Act of 2012 (Amendment in the Nature of a Substitute), H.R. 3605, 112th Cong. (2012), *available at* http://chrissmith.house.gov/UploadedFiles/HR_3605_ANS.pdf [hereinafter GOFA 2012].

[2] *Id.* § 101.

[3] See, e.g., Nathan Olivarez-Giles, *United Nations Report: Internet Access is a Human Right*, L.A. Times, June 3, 2011, *available at* <http://latimesblogs.latimes.com/technology/2011/06/united-nations-report-internet-access-is-a-human-right.html>; and Vinton G. Cerf, *Internet Access is Not a Human Right*, N.Y. Times, Jan. 4, 2012, at A25

[4] Universal Declaration of Human Rights arts. 19-20, Dec. 10, 1948, G.A. Res. 217 A (III); International Covenant on Civil and Political Rights arts. 19 & 22, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights and Fundamental Freedoms arts. 10-11, Nov. 4, 1950, 213 U.N.T.S. 221, Council of Europe Treaty Series No. 5; American Convention of Human Rights arts. 13 & 16, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (1969); and African Charter on Human and Peoples' Rights arts. 9-10, June 17, 1981, 1520 U.N.T.S. 217, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[5] See, e.g., Hillary Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010), *available at* <http://www.state.gov/secretary/rm/2010/01/135519.htm>; and White House, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World 5, 23-24 (May 2011).

[6] Group of Eight [G8], Declaration on Renewed Commitment for Freedom and Democracy § II, ¶ 11 (May 27, 2011), *available at* <http://www.g20-g8.com/g8-g20/g8/english/live/news/renewed-commitment-for-freedom-and-democracy.1314.html>.

[7] Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 20, U.N. Doc. A/HRC/17/27 (May 16, 2011).

[8] Freedom House, Freedom on the Net 2011: A Global Assessment of Internet and Digital Media (Apr. 2011), *available at* <http://www.freedomhouse.org/report/freedom-net/freedom-net-2011>.

[9] Global Online Freedom Act of 2006, H.R. 4780, 109th Cong., 2d sess., Feb. 16, 2006.

[10] Christopher H. Smith, *The Internet in China*, Cong. Rec., Feb. 28, 2006, at E206 (speech/extension of remarks).

[11] Global Online Freedom Act of 2007, H.R. 275, 110th Cong., 1st sess., Jan. 5, 2007 [hereinafter GOFA 2007]; Global Online Freedom Act of 2009, H.R. 2271, 111th Cong., 1st sess., May 6, 2009 [hereinafter GOFA 2009]; Global Online Freedom Act of 2011, H.R. 1389, 112th Cong., 1st sess.,

Apr. 6, 2011; and Global Online Freedom Act of 2011, H.R. 3605, 112th Cong., 1st sess., Dec. 8, 2011.

[12] Early versions of the GOFA included criminal penalties on corporations for violating requirements in the proposed act. *See, e.g.*, GOFA 2007, *supra* note 11, § 206(b); GOFA 2009, *supra* note 11, § 206(c).

[13] Erica Newland, Ctr. for Democracy & Tech., Internet Bill: The Internet is Not “Magic Freedom Juice” (2012), *available at* <https://www.cdt.org/blogs/erica-newland/2903internet-bill-internet-not-magic-freedom-juice> (asking whether export controls can be used in this context “without diminishing the ability of dissidents to connect and communicate”).

[14] Global Online Freedom Act of 2007, H.R. 275 RH, 110th Cong., 2d sess., Feb. 22, 2008 (reported in House).

[15] GOFA 2012, *supra* note 1, § 103.

[16] 22 U.S.C. § 2151N(d)(12) & 22 U.S.C. § 2304(i).

[17] *See, e.g.*, U.S. Dept. of State, Country Human Rights Report: China (2000), *available at* <http://www.state.gov/j/drl/rls/hrrpt/2000/eap/684.htm> (discussing Chinese government regulation of the Internet as a concern for freedom of speech and press).

[18] GOFA 2012, *supra* note 1, § 103

[19] *Id.* § 105.

[20] *Id.* § 104(a)(1).

[21] *Id.* § 104(a)(2).

[22] *Id.* § 3(6).

[23] *Id.* § 3(5)(B).

[24] *Id.* § 104(b).

[25] 22 U.S.C. § 7107(b)(3).

[26] U.S. Dept. of State, State Sponsors of Terrorism, <http://www.state.gov/j/ct/c14151.htm> (describing Secretary of State’s designation of state sponsors of terrorism pursuant to federal law).

[27] GOFA 2012, *supra* note 1, § 301(a).

[28] *Id.*

[29] *Id.*

[30] U.S. Dept. of Commerce, 2012 Report on Foreign-Policy Based Export Controls 13-23 (2012) (describing export control program that regulates exports of crime control and detection items for human rights purposes).

[31] *See, e.g.*, Cindy Cohn, Trevor Timm & Jillian C. York, Elec. Frontier Found., Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes (2012).

[32] GOFA 2012, *supra* note 1, § 201(a). GOFA defines “Internet communication service company” as an issuer subject to the Securities Exchange Act of 1934 that (1) provides electronic communication services or remote computing services or (2) is a domain name registrar, registry, or registration authority. *Id.*

[33] *Id.*

[34] 15 U.S.C. § 78m(p).

[35] GOFA 2012, *supra* note 1, § 201(a).

[36] Global Network Initiative, <http://www.globalnetworkinitiative.org/>.

[37] Global Network Initiative, Governance, Accountability, and Learning Framework, <http://globalnetworkinitiative.org/governanceframework/index.php>.

[38] See, e.g., Soc. Accountability Int'l, Social Accountability 8000 (2008), *available at* http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf (containing “an auditable standard for a third-party verification system” for corporate compliance with workers’ rights).

[39] Letter Dated Mar. 27, 2012 from Access to Representative Christopher Smith Concerning the Global Online Freedom Act of 2011 (H.R. 3605) (warning that the “sanctions process in the United States has historically been prone to politicization, often placing certain countries in the ‘bad’ list, while turning a blind eye to other countries, which should be treated with equal suspicion.”).

[40] Cindy Cohn, Trevor Timm & Jillian C. York, Elec. Frontier Found., Global Online Freedom Act 2012 is an Important Step Forward (2012), *available at* <https://www.eff.org/deeplinks/2012/04/global-online-freedom-act> (noting concerns about export controls hindering activists in foreign countries from getting access to technologies).

[41] See, e.g., Edward Wyatt, *Use of “Conflict Minerals” Gets More Scrutiny from U.S.*, N.Y. Times, Mar. 19, 2012, at B1 (describing efforts by businesses subject to the conflict-minerals reporting requirement to push “aggressively to put wiggle room in the restrictions, calling for lengthy phase-in periods, exemptions for minimal use of the minerals and loose definitions of what types of uses are covered.”).

[42] Cyber Intelligence Sharing and Protection Act, H.R. 3523, 112th Cong., 2d sess. (passed by the House of Representatives on Apr. 26, 2012); see also Cybersecurity Act of 2012, S. 2105, 112th Cong., 2d sess., Feb. 14, 2012; and the Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology (SECURE IT) Act of 2012, S. 2151, 112th Cong., 2d sess., Mar. 1, 2012.

[43] See, e.g., Michelle Richardson, Am. Civil Liberties Union [ACLU], *Cyber Protection Act Too Broad, Infringes Our Privacy Rights* (2012), *available at* <https://www.aclu.org/blog/national-security-technology-and-liberty/cyber-protection-act-too-broad-infringes-our-privacy>.

[44] Rebecca MacKinnon, *A Clunky Cyberstrategy*, Foreign Aff., Apr. 26, 2012, *available at* <http://www.foreignaffairs.com/articles/137607/rebecca-mackinnon/a-clunky-cyberstrategy?page=show>.