AMERICAN CONSTITUTIONALISM

VOLUME II: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Defense Distributed v. United States Department of State, No. 15-50759** (5th Cir., 2016)

*The Arms Export Control Act authorizes the president to control the import and export of “defense articles and defense services,” and the president in turn delegated that authority to the Secretary of State. The nonprofit organization Defense Distributed seeks to facilitate global access to “the 3D printing of arms.” The organization created computer files that allowed the user to easily produce their own weapons and weapon parts. Such files could be legally possessed and used by American citizens, but the State Department determined that posting such files on the Internet for free download to anyone in the world constituted the export of defense articles. As a regulated defense article for export, the files would be illegal unless Defense Distributed received prior approval from the State Department.*

*Defense Distributed filed suit in federal district court seeking to enjoin the State Department from applying the Arms Export Control Act to its activities on the grounds that the regulations violated its First and Second Amendment constitutional rights. The district court declined to issue a preliminary injunction, and Defense Distributed appealed to circuit court. A divided circuit court affirmed that ruling, and the U.S. Supreme Court declined to hear an appeal. The case returned to the district court for a trial on the merits.*

JUDGE DAVIS

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The crux of the district court’s decision is essentially its finding that the government’s exceptionally strong interest in national defense and national security outweighs Plaintiffs-Appellants’ very strong constitutional rights under these circumstances. Before the district court, as on appeal, Plaintiffs-Appellants failed to give any weight to the public interest in national defense and national security, as the district court noted. . . .

Ordinarily, of course, the protection of constitutional rights

*would* be the highest public interest at issue in a case. That is not necessarily true here, however, because the State Department has asserted a very strong public interest in national defense and national security. Indeed, the State Department’s stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest.

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Because both public interests asserted here are strong, we find it most helpful to focus on the balance of harm requirement, which looks to the relative harm to both parties if the injunction is granted or denied. If we affirm the district court’s denial, but Plaintiffs-Appellants eventually prove they are entitled to a permanent injunction, their constitutional rights will have been violated in the meantime, but only temporarily. . . .

If we reverse . . . . [e]ven if Plaintiffs-Appellants eventually fail to obtain a permanent injunction, the files posted in the interim would remain online essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide. . . . Because those files would never go away, a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim. Thus, the national defense and national security might be permanently harmed while Plaintiff-Appellants’ constitutional rights might be temporarily harmed strongly supports our conclusion that the district court did not abuse its discretion in weighing the balance in favor of national defense and national security.

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JUDGE JONES, dissenting.

This case poses starkly the question of the national government’s power to impose a prior restraint on the publication of lawful, unclassified, not-otherwise-restricted technical data to the Internet under the guise of regulating the “export” of “defense articles.” I dissent from this court’s failure to treat the issues raised before us with the seriousness that direct abridgements of free speech demand.

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. . . . Undoubtedly, the denial of a temporary injunction in this case will encourage the State Department to threaten and harass publishers of similar non-classified information. There is also little certainty that the government will confine its censorship to Internet publication. Yet my colleagues in the majority seem deaf to this imminent threat to protected speech. More precisely, they are willing to overlook it with a rote incantation of national security, an incantation belied by the facts here and nearly forty years of contrary Executive Branch pronouncements.

. . . . Interference with First Amendment rights for any period of time, even for short periods, constitutes irreparable injury. *Elrod v. Burns* (1976). Defense Distributed has been denied publication rights for over three years. The district court, moreover, clearly erred in gauging the level of constitutional protection to which this speech is entitled: intermediate scrutiny is inappropriate for the content-based restriction at issue here. . . .

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. . . . [A]t the time that [Directorate of Defense Trade Controls] stifled Defense Distributed’s online posting, there were no publicly known enforcement actions in which the State Department purported to require export licenses or prior approval for the domestic posting of lawful, unclassified, not-otherwise-restricted information on the Internet.

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“Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert* (2015). . . .

The prepublication review scheme at issue here would require government approval and/or licensing of any domestic publication on the Internet of lawful, non-classified “technical information” related to “firearms” solely because a foreign national might view the posting. As applied to the publication of Defense Distributed’s files, this process is a content-based restriction on the petitioners’ domestic speech “because of the topic discussed.” . . .

The State Department barely disputes that computer-related files and other technical data are speech protected by the First Amendment. . . .

The Government’s argument that its regulatory scheme is content-neutral because it is focused on curbing harmful secondary effects rather than Defense Distributed’s primary speech is unpersuasive. The Supreme Court explained this distinction in *Boos v. Barry* (1988), which overturned an ordinance restricting criticism of foreign governments near their embassies because it “focus[es] on the direct impact of speech on its audience.” Secondary effectsof speech, as the Court understood, include “congestion, [] interference with ingress or egress, [] visual clutter, or [] the need to protect the security of embassies”, which are the kind of regulations that underlie *Renton v. Playtime Theaters* (1986). Similarly, the regulation of speech here is focused on the “direct impact of speech on its audience” because the government seeks to prevent certain listeners – foreign nationals – from using the speech about firearms to create guns.

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. . . . I would not dispute that the government has a compelling interest in enforcing the AECA to regulate the export of arms and technical data governed by the USML. The critical issue is instead whether the government’s prepublication approval scheme is narrowly tailored to achieve that end.

. . . . To prevent foreign nationals from accessing technical data relating to USML-covered firearms, the government seeks to require all domestic posting on the Internet of “technical data” to be preapproved or licensed by the DDTC. No matter that citizens have no intention of assisting foreign enemies directly, communications about firearms on webpages or blogs must be subject to prior approval on the theory that a foreign national *might* come across the speech. This flies in the face of *Humanitarian Law Project v. Holder* (2010). Although a statute prohibiting the provision of “material support and resources” to designated terrorist groups did not violate First Amendment rights where plaintiffs intended to *directly* assist specific terrorist organizations, the Court “in no way suggest[ed] that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations . . . [or] that Congress could extend the same prohibition on material support at issue here to domestic organizations.” The State Department’s ITAR regulations, as sought to be applied here, plainly sweep in and would control a vast amount of perfectly lawful speech.

. . . . Underscoring this problem, at oral argument the government would not definitely answer whether the State Department would purport to regulate the posting of such unclassified technical data [as to how to construct a firearm] that appeared in library books or magazines like *Popular Mechanics*.

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. . . . The classic description of a prior restraint is an “administrative [or] judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur.” *Catholic Leadership Coalition of Texas v. Reisman* (5th Cir., 2014). The State Department’s prepublication review scheme easily fits the mold.

Though not unconstitutional *per se*, any system of prior restraint bears a heavy presumption of unconstitutionality. *FW/PBS, Inc. v. City of Dallas* (1990). Generally, speech licensing schemes must avoid two pitfalls. First, the licensors must not exercise excessive discretion. . . .

Second, content-based prior restraints must contain adequate procedural protections. The Supreme Court has required three procedural safeguards against suppression of protected speech by a censorship board: (1) any restraint before judicial review occurs can be imposed for only a specified brief period of time during which the status quo is maintained; (2) prompt judicial review of a decision must be available; and (3) the censor must bear the burdens of going to court and providing the basis to suppress the speech. *N.W. Enters v. City of Houston* (5th Cir., 2003). . . .

To the extent it embraces publication of non-classified, non-transactional, lawful technical data on the Internet, the Government’s scheme vests broad, unbridled discretion to make licensing decisions and lacks the requisite procedural protections. . . .

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Without any evidence to the contrary, the court should have held that the domestic Internet publication of CAD files and other technical data for a 3D printer-enabled making of gun parts and the Liberator pistol presents no immediate danger to national security, especially in light of the fact that many of these files are now widely available over the Internet and that the world is awash with small arms.

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Today’s target is unclassified, lawful technical data about guns, which will impair discussion about a large swath of unclassified information about firearms and inhibit amateur gunsmiths as well as journalists. Tomorrow’s targets may be drones, cybersecurity, or robotic devices, technical data for all of which may be implicated on the USML. This abdication of our decisionmaking responsibility toward the First Freedom is highly regrettable. I earnestly hope that the district court, on remand, will take the foregoing discussion to heart and relieve Defense Distributed of this censorship.