U.S. Government Restrictions on Scientific Publications

Keywords

Amendment, Assets, atomic, bomb, Department, case, cases, censorship, chemical, classification, classified, co-author, coauthor, collaboration, collaborations, confidential, cooperation, Control, court, deference, destruction, encryption, engineering, espionage, export, exportation, federal, First, freedom, Foreign, IEEE, information, international, law, legal, license, mass, materials, military, nation, nations, nuclear, OFAC, Office, policy, prior, professional, prohibited, publication, publications, published, publishing, regulation, regulations, research, restraint, rogue, scholarly, science, scientific, scientists, secrecy, secret, secrets, service, services, software, speech, States, statute, statutes, technology, Treasury, United, U.S., USA, weapons, war, WMD

Table of Contents

Introduction

This essay discusses the legal basis for the U.S. Government's restrictions on scientific, engineering, and other scholarly publications, specifically:

1. prohibition of publishing government secrets,
2. prohibition on publishing instructions for producing weapons of mass destruction (e.g., chemical, biological, or nuclear weapons),
3. restrictions on distribution of encryption software, and
4. restrictions on U.S. citizens from providing prohibited services to citizens of rogue nations.

Each of these topics include related legal issues involving freedom of speech in the First Amendment of the U.S. Constitution. The third and fourth topics have been the subject of news reports in academic journals, such as *Science,* but without citations to the Code of Federal Regulations (CFR) that are necessary for a legal evaluation.

I often find that people (including research scientists and professors) guess at what they believe the law *should* be, instead of learning what the law really is. The primary purpose of this essay is to make students, scientists, engineers, and professors aware of some of the legal restrictions on either publishing government secrets or cooperation with people in rogue nations. The purpose of this essay is *not* to advocate changes in the law.

As used in this essay, the term *rogue nations* applies to Cuba, Iran, Libya, North Korea, Sudan, and Syria. This is the classification of the U.S. Government, *not* my personal classification.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm . Any citizen of the USA who is contemplating cooperation with citizen(s) of a rogue nation should consult their attorney *before* undertaking any such cooperation and *before* making any contractual commitments.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.*

U.S. Statutes and Regulations

Because quotations from statutes and federal regulations are lengthy (and typically an *un*digestible mass of words, which —if included here — might deter a nonlawyer from reading my essay), I have put the statutes and federal regulations in a separate document at http://www.rbs2.com/OFAC2.pdf , which contains:

1. list of federal statutes on government secrets, with quotations from some of the more important statutes;
2. Executive Order on what subjects may be classified as secret;
3. list of federal regulations on government secrets or export controls, with quotations from some of the regulations current on 11 June 2004 about imports/exports to/from Iran; and
4. bibliography of scholarly legal articles on espionage statutes and export controls, for those who wish to understand the history of these statutes and regulations.

One thing should be clear from reading these complicated statutes and regulations of the U.S. Government: an attorney would need to spend many tens of hours to find all of the relevant sections and analyze them. An attorney would probably find some uncertain passages in the regulations and would want to seek an official interpretation from either the OFAC or the Justice Department. Prohibited "services" is a very broad category, and could conceivably include replying to an e-mail sent from someone in a rogue nation to an American scientist or engineer, that asks a question about science, engineering, or technology. A recent news article in *Science* magazine expressed concern whether a collaboration between an American structural engineer and his Iranian colleagues, who were investigating earthquake damage to buildings in Iran, was a prohibited service.[1]

[1] Yudhijit Bhattacharjee, "U.S. Trade Policy Creates Confusion over Co-Authorship," *Science,* Vol. 304, p. 1422, 4 June 2004.

IEEE publications

This academic community became aware of this problem as a result of an inquiry by the Institute of Electrical and Electronic Engineers (IEEE)[2] to the OFAC in January 2002, regarding providing services to IEEE members in Iran. In a reply dated 30 Sep 2003 to the IEEE, the OFAC interpreted the regulation to require IEEE to obtain a license *before* editing draft articles for publication in scholarly journals, when those articles originated from Iran.[3] In a second letter to the IEEE, this one dated 2 April 2004, the OFAC reversed its previous position.[4] The OFAC's April 2004 position is available at http://www.treasury.gov/offices/eotffc/ofac/rulings/ia040504.pdf . The IEEE has a webpage that gives its account of the history of this controversy at: http://www.ieee.org/hpnews_ofac .

other professional organizations

Various scientific and academic organizations have posted webpages with examples of secrecy or export restrictions. Instead of discussing these examples in this essay, which would detract from the legal focus in this essay, I provide the following links.

American Association for the Advancement of Science,
- colloquium: Secrecy in Science http://www.aaas.org/spp/secrecy/AAASMIT.htm (Mar 1999)
- Science and National Security in the Post-9/11 Environment
  http://www.aaas.org/spp/post911/publishing/

American Association of University Professors, Academic Freedom and National Security in Time of Crisis (i.e., post 11 Sep 2001) http://www.aaup.org/Issues/911/index.htm

Association of American Universities, http://www.aau.edu/research/research.html

Electronic Frontier Foundation, export controls on encryption
http://www.eff.org/Privacy/ITAR_export/

Federation of American Scientists http://www.fas.org/sgp/index.html

---

[2] The IEEE is the largest professional society of electrical engineers in the world. The IEEE publishes dozens of scholarly journals about electrical engineering, electronics, communications technology, software, etc. The IEEE has its headquarters in New York City, but is an international organization.

[3] The 30 Sep 2003 letter is posted at http://www.treasury.gov/offices/eotffc/ofac/rulings/ia100203.pdf . This letter was revised on 2 April 2004.

[4] See the official press release at http://www.treas.gov/press/releases/js1295.htm .

University Export Control Guidelines:

Johns Hopkins University, http://jhuresearch.jhu.edu/compliance/ITAR-2.pdf

Lawrence Berkeley Laboratory, http://www.lbl.gov/ehs/security/01export/doeguide.html

State University of New York at Stony Brook,
http://www.stonybrook.edu/research/spo/export-controls.pdf

University of California at Berkeley, http://www.spo.berkeley.edu/Policy/exportcontrol.html

University of Florida, http://www.generalcounsel.ufl.edu/ExportControl.htm

University of Michigan, http://www.umresearch.umd.edu/ORAA/ecg/control_laws.pdf

Discussion

It is tempting to advocate absolute freedom of speech — a free exchange of ideas amongst citizens of all nations. But such absolute freedom of speech is a dream. In reality, words can be instruments of crimes or torts.[5] Further, most people would probably agree that living in a peaceful and secure world justifies some restrictions on publishing instructions for making weapons of mass destruction, among other kinds of harmful information. Once we recognize that freedom of speech is *not* absolute, then the problem becomes where to draw the boundaries of permitted speech.

Many of the U.S. Supreme Court's opinions on freedom of speech are in the context of regulating or prohibiting obscenity. Back in 1966-1973, the U.S. Supreme Court used "utterly without redeeming social value" as one of three criteria to justify censorship of obscene works.[6] It seems obvious that weapons of mass destruction in the hands of either terrorists or rogue nations is truly without redeeming social value.

---

[5] See, e.g., Ronald B. Standler, *Infotorts,* 1998, http://www.rbs2.com/infotort.htm , which begins with a list of legal restrictions on freedom of speech in the USA.

[6] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 383 U.S. 413, 418 (1966). This criterion had its origin in an opinion of Judge Body in the Federal District Court in *U.S. v. Ginzburg,* 224 F.Supp. 129, 131 (E.D.Penn. 1963)(Findings of Fact Nrs. 9, 13, 19). Judge Body said an obscene book "has not the slightest redeeming social, artistic or literary importance or value" and that there was "no credible evidence" that the book "has the slightest valid scientific importance". This "no redeeming" criterion was abandoned by the U.S. Supreme Court in *Miller v. California,* 413 U.S. 15, 24-25 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

The heroic attempts to restrict access to information on the design of nuclear weapons managed to confine a nuclear arsenal to a few nations (e.g., USA, USSR, UK, France), followed later by communist China, India, and Pakistan, and more recently followed by North Korea. It seems that censorship managed to *delay* the spread of nuclear weapons for fifty years, but not absolutely prevent the proliferation of nuclear weapons.

The problem is that any nation with both competent scientists and adequate money can develop weapons of mass destruction (WMD). Hence it is illusory that censorship can prevent the proliferation of WMD *forever,* but censorship can certainly delay development of WMD and force rogue nations to spend more money to reinvent what is already known to military scientists in nations that already possess WMD. The only way to prevent third-world nations from developing WMD is for *all* developed nations to both:

1. refuse to educate citizens of third-world nations in science or engineering,
2. refuse to permit scientists and engineers in developed nations to travel to third-world nations or to emigrate to third-world nations, *and*
3. absolutely refuse to sell to third-world nations any materials (either nuclear, chemical, or biological) or any equipment that could conceivably be used to develop WMD, even if those materials also have other uses that are beneficial.

Clearly, each of these three policy positions is too draconian to be acceptable, further we would never have such a consensus of *all* developed nations. On the other hand, one can not reject the real value of censorship in delaying the acquisition of WMD by third-world nations and terrorist organizations.

Some attorneys writing to advocate less government classification of scientific research made the point that the real difficulty in building nuclear weapons was *not* acquiring the information to build a weapon. Instead, they said that the real difficulties were:[7]

1. assembling a team of competent scientists to do this work
2. acquiring the "special nuclear material"[8] and other ingredients

This may have been true in the 1950s and 1960s, and even in the 1970s. However, I don't think it is true today. There are plenty of competent scientists in nonindustrialized nations, and many of those scientists were educated in the USA, Western Europe, or other developed nations. There are facilities in many less-developed nations (e.g., China, India, Pakistan, North Korea) that have already managed to produce special nuclear material. Other nations are certainly capable of

---

[7] See, e.g., Mary M. Cheh, "The *Progressive* Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls", 48 George Washington Law Review 163, 199-200, 205, nn. 243-244, 272-275 (Jan 1980); Mary M. Cheh, "Government Control of Private Ideas — Striking a Balance between Scientific Freedom and National Security," 23 Jurimetrics Journal 1, 20, n. 136 ((Fall 1982).

[8] Defined in 42 U.S.C. § 2014(aa) as "plutonium, uranium enriched in the isotope 233 or in the isotope 235, ..."

producing special nuclear material, if they wanted to do it. There is also the possibility of purchasing ingredients from *un*scrupulous people in the former Soviet Union or in other countries, a possibility that is more likely following the disintegration of the USSR in 1990.

Moreover, nuclear weapons is *not* the only threat that we face from terrorists and rogue nations. Chemical and biological weapons are much easier to make than nuclear weapons — chemical and biological weapons are known as the "poor man's atomic bomb". For example, Saddam Hussein's government in Iraq manufactured chemical weapons, some of which were dropped on the Kurds in 1988, killing between 5000 and 10000 people. As another example, a religious cult in Japan manufactured its own sarin nerve gas, which it released on 27 June 1994 in the city of Matsumoto, killing 7 people; and released on 20 March 1995 into a Tokyo subway, killing 12 people. Clearly, the problem of nonproliferation of weapons of mass destruction, which contains the problem of classifying information useful for making WMD, must include all three of: chemical, biological, and nuclear weapons. However, the U.S. Government has been much more conscientious about classifying information on nuclear weapons than information about chemical or biological weapons. Perhaps that policy is a result of the historical fact that, when the Atomic Energy Act was first enacted in 1946, the U.S. Government then controlled most of the technical information in the entire world on making nuclear weapons. In contrast, many nations had developed poison gas in the early 1900s and no nation had a monopoly on chemical weapons.

In the aftermath of the terrorist attacks on 11 Sep 2001, journal editors have recently agreed[9] to refuse to publish articles with content that might be useful to terrorists or rogue nations (e.g., articles containing instructions for how to make weapons of mass destruction). Such agreements amongst corporations, both nonprofit and for-profit publishers, do *not* involve the First Amendment guarantee of freedom of speech, which only restricts censorship by the U.S. Government.

It is important to recognize a distinction between (1) censorship of *ideas,* as expressed in scientific or engineering publications and (2) restrictions on exporting *things,* such as ingredients for weapons of mass destruction or equipment for producing weapons of mass destruction. Censorship of ideas by the U.S. Government involves the First Amendment of the U.S. Constitution. Restrictions on exporting things is easier to justify legally, under the power of the U.S. Government to regulate international commerce. Looking beyond the narrow legal issues, both ideas and things can have *both* harmful and permissible uses. Prohibitions on exporting specific classes of ideas or things can delay the development of weapons by rogue nations, which is a good result, but the same prohibitions may also cause needless harm to innocent people in rogue nations, by denying technological advances to them. For example, some of the chemicals and equipment used to produce nerve gas can also be used to produce herbicides and insecticides that can alleviate starvation and disease.

---

[9] Journal Editors and Authors Group, "Statement on Scientific Publication and Security," *Science,* Vol. 299, p. 1149 (21 Feb 2003).

fiduciary obligation of professionals

Every agent has a legal duty to neither disclose nor use confidential information to the detriment of the principal.[10] This duty continues *after* the end of the principal-agent relationship.[11] Examples of principal-agent relationships are an employer and employee.

One of the hallmarks of professionals is that they keep confidential all nonpublic information that they receive from their clients. In particular, the law recognizes a professional obligation of confidentiality in attorney-client, physician-patient, psychotherapist-patient, clergy-parishioner, and accountant-client relationships. Such confidentiality is automatic, and *not* created by a written contract. Before accepting employment in work on weapons technology, scientist and engineers in the USA are required to sign a written agreement in which the scientist or engineer specifically agree not to disclose secret or confidential information that is learned or discovered during such employment. Such a contract is a written reminder of a legal duty that exists independently of the contract by the common law of agency, which is described in the previous paragraph. Courts have characterized such confidentiality as a "fiduciary duty",[12] which is more than a simple contractual obligation. Seen in this way, the so-called censorship by the government is actually an attempt to force the [former] employee to honor his/her fiduciary duty.

And, in my opinion, it would be arrogant (as well as possibly criminal) for one individual to disclose or publish government secrets that belong to the Nation, thereby decreasing the security of everyone.

While most cases about secrecy arise from secrets learned during employment, it is possible that a scientist, engineer, or computer programmer who works privately[13] could discover information or technology that the government wishes to classify. In such private cases, the government classification (or export prohibitions) is a result of the government's assertion of its military policy or foreign policy on its citizens, not from a written secrecy agreement. The government *may* be constitutionally required to compensate citizens for such "taking" of their private information or private technology.

---

[10] Restatement (Second) of Agency § 395 (1958).

[11] Restatement (Second) of Agency § 396 (1958).

[12] *Snepp v. U.S.,* 444 U.S. 507, 510, 515 (1980) (Former CIA agent had a fiduciary duty to maintain government secrets.).

[13] "Privately" means both without financial support from the government and without access to classified information.

"prior restraint" disfavored in USA

In the USA, the law may punish speech with either criminal sanctions or with tort awards in cases of defamation, etc. But such court cases are always *after* the words have been spoken or published. There is the possibility of getting an injunction to prohibit publication of words that will cause irreparable harm *before* the words are published, something known in legal jargon as "prior restraint". Because of judicial respect for freedom of speech in the First Amendment to the U.S. Constitution, the U.S. Supreme Court has repeatedly declared that

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963);

Carroll v. President and Com'rs of Princess Anne [County], 393 U.S. 175, 181 (1968);

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971);

New York Times Co. v. U.S., 403 U.S. 713, 714 (1971) ("Pentagon papers" case);

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) ("The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.");

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976);

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990);

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992);

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 430 (1992);

CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994).

Prior restraint of publication is normally granted only to prevent irreparable harm from publication of either (1) government secrets or (2) trade secrets. In the famous case involving the Government's request for an injunction prohibiting The Progressive magazine from publishing instructions for how to make a hydrogen bomb, a U.S. District Court judge wrote:

> The Court is faced with the difficult task of weighing and resolving these divergent views.
>
> A mistake in ruling against The Progressive will seriously infringe cherished First Amendment rights. If a preliminary injunction is issued, it will constitute the first instance of prior restraint against a publication in this fashion in the history of this country, to this Court's knowledge. Such notoriety is not to be sought. It will curtail defendants' First Amendment rights in a drastic and substantial fashion. It will infringe upon our right to know and to be informed as well.
>
> A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.

> In the *Near* case,[14] the Supreme Court recognized that publication of troop movements in time of war would threaten national security and could therefore be restrained. Times have changed significantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced.
>
> In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.
>
> Because of this "disparity of risk," because the government has met its heavy burden of showing justification for the imposition of a prior restraint on publication of the objected-to technical portions of the Morland article, and because the Court is unconvinced that suppression of the objected-to technical portions of the Morland article would in any plausible fashion impede the defendants in their laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions, the Court finds that the objected-to portions of the article fall within the narrow area recognized by the Court in *Near v. Minnesota* in which a prior restraint on publication is appropriate.

U.S. v. Progressive, Inc., 467 F.Supp. 990, 996 (W.D.Wis. 1979).

In my opinion, the court was correct to decide that nonproliferation of nuclear weapons was so important, than it could justify suppression of freedom of speech and freedom of the press.

Defendants who violate an injunction forfeit their right to later challenge the constitutionality of the injunction in court. *Walker v. City of Birmingham,* 388 U.S. 307, 319-321 (1967). Such a forfeiture is sometimes given as another reason that prior restraint of speech by injunction is to be avoided, however the forfeiture is really the consequence of violating any injunction (i.e., lack of respect for the law), not something associated only with prior restraint of speech.

Judges, as well as most law professors who are interested in the First Amendment, find prior restraint of publication to be especially horrible. For example, the U.S. Supreme Court has declared that criminal statutes that prohibit speech will "chill" speech, while prior restraints "freeze" speech.[15] However, several law professors have questioned whether prior restraint by injunction is really worse than criminal prosecution after publication.[16] There are several points

---

[14] *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 716 (1931) (Dictum: "No one would question but that [during a war] a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

[15] *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)); quoted with approval in *CBS, Inc. v. Davis,* 510 U.S. 1315, 1317 (1994).

[16] Stephen R. Barnett, "The Puzzle of Prior Restraint," 29 Stanford Law Review 539, 550-551 (Feb 1977); William T. Mayton, "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine," 67 Cornell Law Review 245, 265-278 (Jan 1982); John Calvin Jeffries, Jr., "Rethinking Prior Restraint," 92 Yale Law Journal 409, 426-437 (Jan 1983); L.A. Powe, Jr., "The H-Bomb Injunction," 61 Univ. Colorado Law Review 55, 66-69, 75 (1990).

made by these professors:

1. Prior restraint would prohibit the publication of *one* specific article, while criminal prosecution could result in an author rotting in a prison cell for years — in this view, prior restraint is less severe than punishment for a crime.
2. The threat of criminal prosecution for publishing secrets is clearly intended to deter people from such publishing. Such deterrence may produce self-censorship that is also deters people from publishing permissible speech, which makes self-censorship overly broad. In that way, a precise and narrowly drawn injunction is preferable to broad self-censorship.
3. The cost of legal fees for opposing an injunction is likely to be substantially less expensive than a legal defense for criminal prosecution for publishing secrets.[17]
4. Both the enactment of a statute that prohibits publication and the issuance of an injunction forbidding publication occur *before* the words are published, so, in that sense, both statutes and injunctions are prior restraints of speech.

Conventional legal scholars and judges see a distinction between (1) prior restraint by injunction and (2) criminal prosecution after publication, but, in practice, such a distinction may be illusory for most scientists and engineers. And, after considering the reasons give above, I am convinced that injunctions (i.e., so-called prior restraints) are preferable to prohibitions in criminal statutes.

judicial deference to executive branch

Judges in U.S. Courts routinely defer to the decision of the executive branch in matters of secrecy.[18]

In the case of export restrictions, the Arms Export Control Act, at 22 U.S.C. § 2778(h), explicitly prohibits judicial review of the inclusion of items in the Munitions List. There is a similar prohibition of judicial review in the Export Administration Act, 50 U.S.C. App. § 2412(c)(3). Even without the explicit statutes, it is unlikely that any federal court would hear the merits of a dispute involving the reasonableness of American foreign policy, because the foreign policy of the USA is under the exclusive control of the U.S. Congress and the Executive Branch (i.e., the President and Secretary of State) and because of the separation of

---

[17] Technically, an indigent defendant in a criminal trial is entitled to free legal counsel. However, it is unlikely that a public defender would understand either (1) scientific or engineering content that is at issue in the trial or (2) how to apply First Amendment law to military secrets.

[18] See, e.g., *Snepp v. U.S.,* 444 U.S. 507, 509, n. 3 (1980); *C.I.A. v. Sims,* 471 U.S. 159, 169-170 (1985); *Department of Navy v. Egan,* 484 U.S. 518, 527-530 (1988); James R. Ferguson, "Government Secrecy After the Cold War: The Role of Congress," 34 Boston College Law Review 451, 452 and n. 4 (May 1993) ("Indeed, in the twenty years since the *Pentagon Papers* decision, the Court consistently has deferred to the factual and policy judgments of the executive branch in cases dealing with official secrets.").

powers clause in the U.S. Constitution.[19] Quotations from several U.S. Supreme Court cases show this deference (readers who are not interested in these long quotations can skip to page 14):

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. ....
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty — a refusal the wisdom of which was recognized by the House itself and has never since been doubted. ....
>
> The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.
>
> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action — or, indeed, whether he shall act at all — may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our

---

[19] See, e.g., Harold H. Koh, "Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," 97 Yale Law Journal 1255, 1305-1317 (June 1988); Jonathan L. Entin, "The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate," 47 Case Western Reserve Law Review 1305 (Summer 1997).

> foreign relations. ....

U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319-321 (1936).

In 1948, the U.S. Supreme Court wrote:

> The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman v. Miller,* 307 U.S. 433, 454, 59 S.Ct. 972, 982, 83 L.Ed. 1385, 122 A.L.R. 695; *United States v. Curtiss-Wright Corporation,* 299 U.S. 304, 319-321, 57 S.Ct. 216, 220, 221, 81 L.Ed. 255; *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302, 38 S.Ct. 309, 310, 62 L.Ed. 726. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.

Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111-112 (1948).

One sentence from this case was quoted with approval in *U.S. v. Nixon,* 418 U.S. 683, 710 (1974).

In a 1984 case involving U.S. Government prohibition on travel to Cuba, the Court said:

> In the opinion of the State Department, Cuba, with the political, economic, and military backing of the Soviet Union, has provided widespread support for armed violence and terrorism in the Western Hemisphere. Cuba also maintains close to 40,000 troops in various countries in Africa and the Middle East in support of objectives inimical to United States foreign policy interests. See Frechette Declaration 4, App. 107. Given the traditional deference to executive judgment "[i]n this vast external realm," *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936), we think there is an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba — currency that could then be used in support of Cuban adventurism — by restricting travel. *Zemel v. Rusk,* supra, 381 U.S., at 14-15, 85 S.Ct., at 1279-1280; *Haig v. Agee,* 453 U.S. 280, 306- 307, 101 S.Ct. 2766, 2781-2782, 69 L.Ed.2d 640 (1981).

Regan v. Wald, 468 U.S. 222, 243 (1984).

In June 2000, the U.S. Supreme Court declared unconstitutional a Massachusetts statute that restricted trade with Burma.

> Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character, *ibid.,* we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. We have, after all, not only recognized the limits of our own capacity to "determin[e] precisely when foreign nations will be offended by particular

> acts," *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 194, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), but consistently acknowledged that the "nuances" of "the foreign policy of the United States ... are much more the province of the Executive Branch and Congress than of this Court," *id.,* at 196, 103 S.Ct. 2933; *Barclays, supra,* [512 U.S. 298] at 327, 114 S.Ct. 2268. In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress's diplomatic objectives.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 385-386 (2000).

In July 2003, the U.S. Supreme Court wrote:

> Nor is there any question generally that there is executive authority to decide what that [foreign] policy should be. Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 610-611, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring). While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act. See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 109, 68 S.Ct. 431, 92 L.Ed. 568 (1948) ("The President ... possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *Youngstown, supra,* at 635-636, n. 2, 72 S.Ct. 863 (Jackson, J., concurring in judgment and opinion of Court) (the President can "act in external affairs without congressional authority" (citing *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936))); *First Nat. City Bank v. Banco Nacional de Cuba, supra,* at 767, 92 S.Ct. 1808 (the President has "the lead role ... in foreign policy" (citing *Sabbatino, supra* [376 U.S. 398, 427, n. 25])); *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs").

American Ins. Ass'n v. Garamendi, 123 S.Ct. 2374, 2386 (2003).

It is interesting that U.S. Government statutes and regulations often consider secrets justified for *either* reasons of “foreign policy” *or* reasons of “national defense” (i.e., military policy), and this connection is reflected in some of the above quotations from opinions of the U.S. Supreme Court. In this way, judicial deference to the executive branch on appropriateness of military secrets is related to judicial deference to the executive branch on matters of foreign policy. This makes sense when one realizes that military policy protects us from foreign nations, or — as the German military strategist, Clausewitz, said — “War is the continuation of politics (diplomacy) by other means.”

The judicial deference to the executive branch in matters of security classification and export controls means that criminal prosecution for violations is merely a matter of proving that the defendant did it, without judicial review of whether the security classification or Federal Regulation was reasonable or appropriate.

In my opinion, it is a reasonable[20] foreign policy to ostracize rogue nations, in an attempt to encourage them to abandon their sponsorship of terrorism or to abandon their quest for weapons of mass destruction.

financial support of scientific research

As a general rule, scientists in the USA are free to publish any of their work, provided that they did not accept financial support of their work from the U.S. Government. Two broad exceptions to this general rule are: (1) *any* work on nuclear energy, even if privately funded and done without access to government secrets, comes under the restrictions of the Atomic Energy Act (i.e., "born classified"), and (2) there are restrictions on exports of some kinds of technical information. One law professor wrote:

> For those institutions and scientists who insist upon free publication of their research results, the safest alternative is not to accept government funding that imposes such restraints.[21]

That quotation reminds me of the remark that "The law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread."[22]

Because scientific research benefits *everyone,* and particularly because results from scientific research are the basis for modern industrial economies, the U.S. Government *should* generously give financial support to scientific and engineering research. I still believe what I wrote in 1999 in the context of academic freedom:

> What universities and professors really need is *not* meaningless words about the importance of "academic freedom" from judges, but adequate financial support for professors' salaries, and adequate financial support for scientific equipment and research expenses, libraries, buildings, etc. Academic freedom means nothing if professors can not afford to do the research that they are supposedly free to do.[23]

I suggest that inadequate financial support for scientific and engineering research is a much more significant problem for scientists and engineers than restrictions on publishing information about weapons of mass destruction. Adequate financial support for research is *not* charity that is given to scientists with the expectation of nothing in return. Instead, adequate financial support for scientific research allows for an efficient development of the U.S. economy, as well as maintains

---

[20] Whether it is a wise policy or the best policy might be disputed (depending on one's political opinions), but there does exist a rational basis for such policy of ostracism.

[21] Harold P. Green, "Constitutional Implications of Federal Restrictions on Scientific Research and Communication," 60 Univ. Missouri at Kansas City Law Review 619, 639 (Summer 1992).

[22] Anatole France, quoted in *Griffin v. Illinois,* 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring); *Maher v. Roe,* 432 U.S. 464, 483 (1977) (Brennan, J., dissenting).

[23] Ronald B. Standler, *Academic Freedom in the USA,* http://www.rbs2.com/afree.htm (Oct 1999).

military technology to keep America safe.

Allen Shinn[24] noticed that the U.S. Government can not require surrendering a constitutional right (e.g., freedom of speech) as a condition of receiving a benefit from the Government. Shinn quotes Oliver Wendell Holmes's remark from an old case in which a policeman's employment was terminated because he, while off-duty, solicited money for a political purpose:

> ... there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.

McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-518 (Mass. 1892).

The harsh rule in *McAuliffe* was rejected by the U.S. Supreme Court in the following cases.

In 1967, the U.S. Supreme Court wrote:

> We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. .... Assertion of a First Amendment right is still another. [citing four cases]");

Garrity v. State of N. J., 385 U.S. 493, 499-500 (1967).

In 1972, the U.S. Supreme Court wrote:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

In 1983, the U.S. Supreme Court wrote:

> For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment — including those which restricted the exercise of constitutional rights. The classic formulation of this position was Justice Holmes', who, when sitting on the Supreme Judicial Court of Massachusetts,

---

[24] Allen M. Shinn, Jr., Note, "The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters," 58 George Washington Law Review 368, 398 (Jan 1990).

observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. [five citations omitted]

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated. [discussion of ten cases omitted]

.... Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* [458 U.S. 886, 913], 102 S.Ct. 3409, 3425, 73 L.Ed.2d 1215 (1982); *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980).

Connick v. Myers, 461 U.S. 138, 143-145 (1983).

In June 1996, the U.S. Supreme Court wrote:

But either type of relationship provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, "are often in the best position to know what ails the agencies for which they work," *Waters v. Churchill,* 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994) (plurality opinion). Because of these similarities, we turn initially to our government employment precedents for guidance.

Those precedents have long since rejected Justice Holmes' famous dictum, that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892). Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum,* 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech" even if he has no entitlement to that benefit, *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). We have held that government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, see, *e.g., Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); *Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), for publicly or privately criticizing their employer's policies, see *Perry, supra; Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), for expressing hostility to prominent political figures, see *Rankin v. McPherson,* 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party, see, *e.g., Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). See also *United States v. Treasury Employees,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (Government employees are protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria); *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977) (government employment cannot be conditioned on making or not making financial contributions to particular political causes).

Board of County Commissioners, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674-675

(1996).

On the same day in June 1996 that the U.S. Supreme Court wrote the above-quoted paragraph in *Umbehr,* the Court wrote the following in a separate case:

> The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics ... he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892). A State may not condition public employment on an employee's exercise of his or her First Amendment rights. See, *e. g., Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). See also *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S., at 674-675, 116 S.Ct., at 2347 (collecting cases). As we have said: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry v. Sindermann, supra,* at 597, 92 S.Ct., at 2697, quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958). Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression.

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 716-717 (1996).

And, in June 2003, Justice Stevens wrote:

> A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate that Amendment. Cf. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). I think it equally clear that the First Amendment protects libraries from being denied funds for refusing to comply with an identical rule. An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty.
>
> Our cases holding that government employment may not be conditioned on the surrender of rights protected by the First Amendment illustrate the point. It has long been settled that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " *Wieman v. Updegraff,* 344 U.S. 183, 191-192, 73 S.Ct. 215, 97 L.Ed. 216 (1952). Neither discharges, as in *Elrod v. Burns,* 427 U.S. 347, 350- 351, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), nor refusals to hire or promote, as in *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 66-67, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), are immune from First Amendment scrutiny. Our precedents firmly rejecting "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,' " *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), draw no distinction between the penalty of discharge from one's job and the withholding of the benefit of a new job. The abridgment of First Amendment rights is equally unconstitutional in either context. See *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine

.... It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 226-227 (2003) (Stevens, J., dissenting).

The problem with Shinn's argument[25] is that the cases that reject *McAuliffe* involve political speech, which is distinctly different from applying "freedom of speech" to situations involving classified government information. There may be a *few* situations in which open publication of classified government information (e.g., the so-called "Pentagon Papers") would aid political discussions. However, classified information about how to make weapons of mass destruction is *not* political speech. There are several decisions of the U.S. Supreme Court, and additional decisions of the U.S. Courts of Appeals, that uphold the fiduciary duty of a former employee of the CIA to submit draft articles for prepublication review. Shinn cites two of these cases in his Note, and a more complete list of cases is given below.

Legal Cases

Statutes and federal regulations cited in my companion document at http://www.rbs2.com/OFAC2.pdf make it unlawful to disclose U.S. Government secrets to unauthorized persons. Further, the U.S. Supreme Court has repeatedly held that national security is a "compelling state interest" that makes restrictions on freedom of speech/press constitutionally acceptable.[26] Therefore, there can be no doubt that some restrictions on freedom of speech/press are legally justified by national security.

First, I present a list of federal court cases involving publication of government secrets or violations of export controls, which cases are relevant to denying weapons technology to rogue nations and to terrorists. Second, I present a list of cases involving recent attempts by the U.S. Government to suppress distribution of encryption technology.

---

[25] Allen M. Shinn, Jr., Note, "The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters," 58 George Washington Law Review 368, 398-399 (Jan 1990).

[26] *Snepp v. U.S.,* 444 U.S. 507, 509, n. 3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *Haig v. Agee,* 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."); *Wayte v. U.S.,* 470 U.S. 598, 611 (1985) ("Few interests can be more compelling than a nation's need to ensure its own security."); *C.I.A. v. Sims,* 471 U.S. 159, 175 (1985) (quoting *Snepp*); *Department of Navy v. Egan,* 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."); *Hamdi v. Rumsfeld,* --- S.Ct. --- (28 June 2004) (quoting *Haig v. Agee*).

U.S. Supreme Court

There are a surprisingly large number of relevant decisions of the U.S. Supreme Court concerning government secrets:

- *Totten v. U.S.,* 92 U.S. 105, 107 (1875) (In a contract case involving payment for services of a spy, the Court concluded: " It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. .... Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.").

- *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 716 (1931) (Dictum about prohibition on publishing location of troops during wartime.).

- *Gorin v. U.S.,* 312 U.S. 19, 28 (1941) (Citizen of USSR convicted of espionage in the USA, after he acquired Naval Intelligence reports about Japanese activities. Requirement of scienter in the statute makes it not vague.)

- *U.S. v. Reynolds,* 345 U.S. 1, 6-11 (1953) (In a tort claim against the U.S. Air Force, the Government could refuse to produce secret documents.).

- *Rosenberg v. U.S.,* 346 U.S. 273 (1953) (Refusing to grant stay of execution for persons convicted of espionage about nuclear weapons.). The merits of the case are discussed in *United States v. Rosenberg,* 195 F.2d 583 (2nd Cir. 1952), *cert. den.,* 344 U.S. 838 (1952).

- *New York Times Co. v. U.S.,* 403 U.S. 713 (1971) (By 6 to 3 vote, Court permits newspapers to publish a secret historical study of Vietnam War, the so-called "Pentagon Papers".). Earlier in this case, there was a brief prior restraint on publication. *U.S. v. New York Times Co.,* 444 F.2d 544 (2nd Cir. 1971).

- *Gravel v. U. S.,* 408 U.S. 606 (1972) (U.S. Senator unsuccessfully sought to quash subpoena to member of his aide. Aide required to testify before grand jury that was investigating distribution of Pentagon Papers.).

- *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1973) (Members of Congress denied secret documents concerning underground test of nuclear weapon.). Congress later amended the Freedom of Information Act to overrule *Mink.*

- *Snepp v. U.S.,* 444 U.S. 507 (1980) (As a condition of employment by the CIA, a person must submit to the CIA for security review, prior to publication, all future writings related to the CIA.). See also *U.S. v. Snepp,* 897 F.2d 138 (4th Cir. 1990) (Injunction *not* modified.).

- *Haig v. Agee,* 453 U.S. 280 (1981) (Government permitted to revoke a passport when the passport holder is causing, or likely to cause, "serious damage" to national security or foreign policy of the USA. Agee was a former CIA employee who threatened to expose current CIA agents.).

- *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project,* 454 U.S. 139 (1981) (Noting that information about storage of nuclear weapons was exempt from the Freedom of Information Act.).

- *Department of Navy v. Egan,* 484 U.S. 518 (1988) (Civilian employee of shipyard that retrofitted U.S. Navy nuclear-powered submarines had his security clearance revoked and subsequently had his employment terminated, because all employees were required to have a security clearance.).

U.S. Courts of Appeal

The following reported decisions of the U.S. Courts of Appeal are also relevant to this essay.

- *United States v. Heine,* 151 F.2d 813 (2dCir. 1945) (U.S. citizen who sent reports on American automotive industry to Volkswagenwerke was convicted of espionage. Opinion by Judge Learned Hand.).

- *U.S. v. Drummond,* 354 F.2d 132 (2nd Cir. 1965) (Conviction under 18 U.S.C. § 794.), *cert. den.,* 384 U.S. 1013 (1966).

- *U.S. v. Marchetti,* 466 F.2d 1309 (4th Cir. 1972) (Affirming injunction prohibiting former CIA employee from publishing a book about his secret work. "... the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure."), *cert. den. ,* 409 U.S. 1063 (1972).

- *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362, 1370 (4th Cir. 1975) (Classified information is released into the public domain only if there is official disclosure of it.), *cert. den.,* 421 U.S. 908, 992 (1975).

- *U.S. v. Van Hee,* 531 F.2d 352 (6th Cir. 1976) (Defendants convicted of *un*licensed export to Portugal of "technical data" (i.e., blueprints) concerning items on the United States Munitions List in the Code of Federal Regulations. The specific item was an armored amphibious vehicle.).

- *U.S. v. Edler Industries, Inc.,* 579 F.2d 516 (9th Cir. 1978) (Defendants convicted of *un*licensed export to France of "technical data" concerning items on the United States Munitions List in the Code of Federal Regulations. The specific item was a carbon-fiber rocket exhaust nozzle.).

- *Radioptics, Inc. v. U. S.,* 621 F.2d 1113, 1126-27 (Ct.Cl. 1980) (Unsolicited research proposal to Atomic Energy Commission was classified as Restricted Data. AEC employees disclosed proprietary information in proposal to AEC contractors, who allegedly used that information. Court held no taking of property by classification of privately developed information.).

- *U.S. v. Spawr Optical Research, Inc.,* 685 F.2d 1076 (9th Cir. 1982) (Defendants convicted of *un*licensed export of laser mirrors to the Soviet Union.), *cert. den.,* 461 U.S. 905 (1983).

- *McGehee v. Casey,* 718 F.2d 1137 (D.C.Cir. 1983) (CIA could prohibit publication of secret information in article by former agent.).

- *U.S. v. Wilson,* 721 F.2d 967 (4th Cir. 1983) (export of firearms without a license).

- *Fitzgerald v. Penthouse Intern., Ltd.,* 776 F.2d 1236 (4th Cir. 1985) (Fitzgerald, a scientist, alleged that Penthouse magazine had libelously accused him of espionage. The court decided that the libel litigation must be dismissed, because government secrets would be revealed during the public trial.).

- *U.S. v. Morison,* 844 F.2d 1057 (4th Cir. 1988) (Criminal conviction of U.S. Navy civilian employee for selling secret photograph taken by reconnaissance satellite.), *cert. den.,* 488 U.S. 908 (1988).

- *U.S. v. Posey,* 864 F.2d 1487 (9th Cir. 1989) (Criminal conviction of person for sending *un*classified technical information to South Africa, in violation of Arms Export Control Act.).

- *Pfeiffer v. C.I.A.,* 60 F.3d 861 (D.C.Cir. 1995) (CIA could refuse to review for open publication a classified report that a historian wrote during his employment by the CIA.).

- *Weaver v. U.S. Information Agency,* 87 F.3d 1429 (D.C.Cir. 1996) (Prepublication review requirement did not violate First Amendment.), *cert. den.,* 520 U.S. 1251 (1997).

- *U.S. v. Wen Ho Lee,* 79 F.Supp.2d 1280 (D.N.M. Dec 30, 1999), *aff'd,* 2000 WL 228263 (10th Cir. 2000). See also *Trulock v. Lee,* 66 Fed.Appx. 472, 2003 WL 21267827 (4th Cir. 2003).

- *Burgess v. Lowery,* 201 F.3d 942, 947 (7th Cir. 2000) (Dictum: "People who work for the CIA accept that they will have less freedom of speech than if they worked for McDonald's, but since the condition is a reasonable one the restriction on their freedom of speech is not considered unconstitutional. See, e.g., *Snepp v. United States,* 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam).").

- *U.S. v. Hsu,* 364 F.3d 192 (4th Cir. 2004) (sale of encryption device to communist China).

Progressive case

The seminal federal case on the publication of secrets about weapons of mass destruction is the *Progressive* case that was quoted above, beginning at page 9:

- *U.S. v. The Progressive, Inc.,* 467 F.Supp. 990 (W.D.Wis. 1979) (Granting preliminary injunction to prevent publication in magazine of method of manufacturing nuclear weapon.),
- *reconsideration denied,* 486 F.Supp. 5 (W.D.Wis. 1979),
- *leave to file petition for writ of mandamus to expedite appeal denied, sub nom. Morland v. Sprecher,*[27] 443 U.S. 709 (1979),
- *appeal dismissed without opinion,* 610 F.2d 819 (7th Cir. 1979).

Judge Robert Warren wrote in the *Progressive* case:

> Defendants have stated that publication of the article will alert the people of this country to the false illusion of security created by the government's futile efforts at secrecy. They believe publication will provide the people with needed information to make informed decisions on an urgent issue of public concern.
>
> However, this Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue. Furthermore, the Court believes that the defendants' position in favor of nuclear non-proliferation would be harmed, not aided, by the publication of this article.

U.S. v. Progressive, Inc., 467 F.Supp. 990, 994 (W.D.Wis. 1979).

Normally, it would be anathema for a judge in the USA to declare what the "public needs to know" and censor what the public does not need to know — the whole purpose of freedom of speech in the First Amendment is that neither government bureaucrats, legislators, nor judges should be censoring printed publications. However, freedom of speech is *not* absolute: many kinds of speech get little or nor legal protection in the USA. Military secrets, such as how to build an H-bomb, are *not* protected speech, while the U.S. Supreme Court has repeatedly held that

---

[27] Howard L. Morland was the author of the article about the H-Bomb. Robert A. Sprecher was the Judge of the United States Court of Appeals who was scheduled to hear the appeal of the *U.S. v. Progressive* case.

political speech gets the highest legal protection in the USA. Therefore, it was necessary for Judge Warren to evaluate the content of the draft article and decide whether it was a military secret or political speech.

Only six months after the *Progressive* case began, the U.S. Government abandoned this case, allegedly because similar information had been recently published elsewhere,[28] although such other publications did not necessarily put the information in the public domain.[29] Looking back 16 years later, the publication of the secret information in The Progressive had none of the benefits claimed by its supporters, but did cause the UK and French governments to break off "useful consultations we had been holding ... on preventing critical information on thermonuclear weapons from falling into the hands of threshold states."[30] The editor of The Progressive magazine, the Defendant in this case, wrote two terse articles about the experience that were published in law reviews.[31]

None of the above-cited law review articles on the *Progressive* case mentions why The Progressive was not prosecuted for violation of the Atomic Energy Act *after* The Progressive published the article in November 1979. The legal action against The Progressive apparently motivated some people[32] to publish similar H-Bomb information elsewhere, in a problem that was evolving in the style of the Sorcerer's Apprentice. Therefore, the way to stop such *un*authorized publications by others was for the government to stop its legal action against The Progressive. I emphasize that this explanation is only my conjecture, not a statement of fact.

---

[28] Mary M. Cheh, "The *Progressive* Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls", 48 George Washington Law Review 163, 165, n. 11 (Jan 1980); Jonathan L. Entin, Note, "*United States v. Progressive, Inc.:* The Faustian Bargain and the First Amendment," 75 Northwestern Univ. Law Review 538, 541, n. 11 (Oct 1980); L.A. Powe, Jr., "The H-Bomb Injunction," 61 Univ. Colorado Law Review 55, 70 (1990).

[29] *U.S. v. Progressive, Inc.,* 486 F.Supp. 5 (W.D.Wis. 1979). See also *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362, 1369-1371 (4th Cir. 1975), *cert. den.,* 421 U.S. 908, 992 (1975).

[30] Richard L. Williamson, Jr. "Law and the H-Bomb: Strengthening the Nonproliferation Regime To Impede Advanced Proliferation," 28 Cornell International Law Journal 71, 135, n. 243 (Winter 1995). Williamson says the publication by the Progressive was "the most serious release of information to the public which could aid advanced proliferations ...."

[31] Erwin Knoll, "National Security: The Ultimate Threat to the First Amendment," 66 Minnesota Law Review 161 (November 1981); Erwin Knoll, "The H-Bomb and the First Amendment," 3 William and Mary Bill of Rights Journal 705 (Winter 1994).

[32] These people might be characterized as either: (1) protesters against government censorship, who defied the government, or (2) criminals who played games with dangerous technical information on nuclear weapons. Which characterization is correct depends upon your political opinions.

other federal trial court opinions

Other notable federal trial court opinions on the subject of this essay include:

- *U.S. v. Donas-Botto,* 363 F.Supp. 191, 194 (E.D.Mich. 1973) (In a case involving unauthorized export of a military vehicle to Portugal, the trial court tersely rejected Defendants' First Amendment argument: "Although First Amendment rights are to be closely guarded, when matters of foreign policy are involved the government has the constitutional authority to prohibit individuals from divulging 'technical data' related to implements of war to foreign governments. *United States v. Rosen,* 195 F.2d 583 (2d Cir. 1952), *cert. denied,* 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 652 (1952); *Gorin v. United States,* 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941). For the foregoing reasons, defendants' motion to dismiss is denied."), *aff'd, sub nom. U.S. v. Van Hee,* 531 F.2d 352 (6th Cir. 1976) (Defendants did not raise First Amendment issues during their appeal.).

- *Aspin v. U.S. Dept. of Defense,* 453 F.Supp. 520, 524 (E.D.Wis. 1978) ("... past release of confidential information should not bind the executive branch if at a later point in time it is determined that further release would jeopardize national security.").

- *Maxwell v. First Nat. Bank of Maryland,* 143 F.R.D. 590, 597 (D.Md. 1992) ("Accidental disclosure cannot be viewed as an affirmative waiver by the government. If there is accidental disclosure to unauthorized persons, the government must retain its ability to minimize the damage by asserting its privilege to refuse to confirm or deny the existence of the secret information.").

encryption software

Encryption software converts plain text to encrypted text, which can not be read by humans, and back to plain text. Use of good encryption software by foreign countries would frustrate the ability of military intelligence to monitor foreign communications. Accordingly, the U.S. Government would prefer to keep good encryption methods out of the hands of rogue nations and terrorists. The U.S. Government imposed export controls not only on encryption software (which is arguably a thing) but also on academic papers on cryptography (which are speech). In addition to military and diplomatic uses of encryption, there are also many civilian uses of encryption, such as protecting financial transactions between banks. Encryption algorithms are included in modern webbrowser software, to protect transmission of credit card numbers and other sensitive personal information.

The U.S. Government placed few legal restrictions on the ability of people inside the USA to purchase or to use encryption software. Still, there was public expressions of unhappiness of some law enforcement officials in the USA during the 1990s that criminals could use encryption software to frustrate law enforcement investigations, particularly to defeat wiretaps by law enforcement. The domestic use of encryption software was put into a terse perspective by a quotation from a law professor at Columbia University:

> The right to speak PGP is like the right to speak Navajo. The Government has no particular right to prevent you from speaking in a technical manner[,] even if it is inconvenient for them to understand.

Prof. Eben Moglen, quoted by John Markoff, "Federal Inquiry on Software Examines Privacy Programs," The New York Times, page D1, 21 Sep 1993.[33]

Philip Zimmermann, the author of the Pretty Good Privacy (PGP) program, was investigated by the U.S. Government from February 1993 until 11 January 1996, as a result of a copy of PGP being placed on the Internet for distribution. Because all encryption software was then considered by the U.S. Government to be a munition, the international distribution of PGP via the Internet, without an export license, was an apparent violation of the Arms Export Control Act and the International Traffic in Arms Regulations.[34] Mr. Zimmermann was never charged with any crime. From the viewpoint of history, this investigation of Mr. Zimmermann is probably mostly intimidation of him (and the cryptographic community) by the U.S. Government, although the opposition to this intimidation eventually resulted in reform of the export controls on encryption software.

An early case challenging the Government's export controls on encryption software resulted in an initial win for the Government. *Karn v. U.S. Dept. of State,* 925 F.Supp. 1 (D.D.C. 22 Mar 1996), *remanded,* 1997 WL 71750, 323 U.S.App.D.C. 290 (D.C.Cir. 21 Jan 1997). There is no further opinion for this case in the Westlaw database. The trial court in *Karn* agreed with the government's ridiculous position that it was acceptable to export a book that contained a printed copy of source code for an encryption program, but not acceptable to export a floppy diskette that contained a copy of the identical source code. However, the government eventually allowed the export of such publicly available, machine-readable encryption software. As Karn himself said:

> In January 14, 2000, new US crypto export regulations went into effect. Publicly available encryption source code, such as that at issue in my lawsuit, is now effectively freely exportable. Therefore, we decided to allow our case to be dismissed as moot. While this was admittedly not as satisfying as actually winning in court, for all practical purposes I got everything I wanted.[35]

---

[33] Elizabeth Lauzon, "The Philip Zimmermann Investigation: The Start of the Fall of Export Restrictions on Encryption Software Under First Amendment Free Speech Issues," 48 Syracuse Law Review 1307, 1311, n. 1 (1998). See also Prof. Moglen, "So Much for Savages: Navajo 1, Government 0 in Final Moments of Play," http://emoglen.law.columbia.edu/my_pubs/yu-encrypt.html (March 1999).

[34] Elizabeth Lauzon, "The Philip Zimmermann Investigation: The Start of the Fall of Export Restrictions on Encryption Software Under First Amendment Free Speech Issues," 48 Syracuse Law Review 1307, 1326-28 (1998).

[35] Philip Karn, *The Applied Cryptography Case: Only Americans Can Type!* http://people.qualcomm.com/karn/export/ (21 June 2000).

In a complicated series of cases, Prof. Daniel J. Bernstein of the University of Illinois at Chicago filed suit against the U.S. Government, seeking to enjoin the Government from applying export controls to his scientific papers on encryption. He began his litigation when he was a Ph.D. candidate in mathematics at University of California at Berkeley, which explains the venue.

- *Bernstein v. U.S. Dept. of State,* 922 F.Supp. 1426 (N.D.Cal. 15 Apr 1996) (Held that computer source code is protected speech.).

- *Bernstein v. U.S. Dept. of State,* 945 F.Supp. 1279 (N.D.Cal. 9 Dec 1996) (Export licensing requirements were unconstitutional prior restraint of speech.).

- *Bernstein v. U.S. Dept. of State,* 974 F.Supp. 1288 (N.D.Cal. 25 Aug 1997) (Amended Complaint after Government transferred licensing from State Department to Commerce Department. Held new regulations were unconstitutional prior restraint on speech.), *aff'd sub nom. Bernstein v. U.S. Dept. of Justice,* 176 F.3d 1132 (9th Cir. 6 May 1999).

Then, on 30 Sep 1999, the U.S. Court of Appeals for the Ninth Circuit granted the Government's motion for a rehearing *en banc,* and withdrew[36] the opinion that was previously published at 176 F.3d 1132. The rehearing was scuttled by the Government's change to the export licensing requirement that made this case moot.

> ... before the rehearing could take place, defendants announced plans to make additional changes to the EAR. In January 2000, defendants added 14 C.F.R. section 740.13(e) to the Federal Register, which allows the DOC to exempt "publicly available" encryption source code from license requirements. Plaintiff amended his complaint in January 2002, alleging that the changed regulations still amounted to a prior restraint under the First Amendment. The defendants brought a motion for summary judgment on the amended complaint on the grounds that he lacked the requisite standing, which this court granted on July 28, 2003.

Bernstein v. U.S. Dept. of Commerce, 2004 WL 838163 (N.D.Cal. 19 Apr 2004).

While the victories of Bernstein in 1996-97 are still valid (i.e., *not* withdrawn), they apply to now superseded regulations. Further, decisions of a federal trial court, which are reported in F.Supp., are *not* precedent that is binding on other federal courts. Nonetheless, the *Bernstein* decisions contain important recognition that encryption software is protected by freedom of speech.

A collection of legal documents in this case has been posted on the Internet.[37]

---

[36] *Bernstein v. U.S. Dept. of Justice,* 192 F.3d 1308 (9th Cir. 30 Sep 1999).

[37] Prof. Bernstein's personal website at: http://cr.yp.to/export.html . Electronic Freedom Foundation's webpage at: http://www.eff.org/legal/cases/Bernstein_v_DoJ/ (13 March 2003). Old copy posted at: http://www2.cddc.vt.edu/eff/bernstein/Legal/index.html (3 March 2000).

In a different case, brought by a professor at the Case Western University School of Law who wished to distribute encryption software from his website, the U.S. Court of Appeals in Ohio also held that the First Amendment protects computer source code. *Junger v. Daley,* 209 F.3d 481 (6th Cir. 2000). Prof. Junger has a collection of documents in his case at his website.[38]

Bernstein and *Junger* show that there is hope for scientists and professors who wish to have unrestricted, international distribution of their work. However, the U.S. Supreme Court has not yet expressed an opinion on the validity of such export controls. With the security hysteria subsequent to 11 Sep 2001, the Government may find it easier to justify such export restrictions.

Perhaps the best reason for the government to allow export of encryption software is that there is no practical way to prevent unauthorized export of encryption software via a tiny floppy disk or compact disk in postal mail, or via an attachment in e-mail. A law professor has written an eloquent article that starts with the "ancient maxim that neither law nor equity will act in vain" and he then proceeds to apply what he calls "the futility principle" to First Amendment cases.[39]

Because I do not anticipate having a client in the area of encryption software, I have not undertaken an analysis of the above-cited cases on export restrictions on encryption software, nor have I read the many law review articles on government export controls on encryption software. Therefore, this section of this essay is incomplete.

---

[38] http://samsara.LAW.CWRU.Edu/comp_law/jvd/ .

[39] Eric B. Easton, "Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a 'Futility Principle' in First Amendment Jurisprudence," 45 De Paul Law Review 1, 7 (Fall 1995).

Conclusion

While I am generally enthusiastic about freedom of speech, I think there are good reasons *not* to publish information that is useful to terrorists and rogue nations who want to develop weapons of mass destruction. So, unlike the typical law review article that extols unlimited freedom of speech, I take the position that secrecy can be a good thing when it comes to military technology. We live in an increasingly dangerous world, in which rogue nations and terrorists can use published scientific information to design weapons of mass destruction. Such a serious threat may justify restrictions on freedom to publish such information in open literature. This is an extraordinarily difficult issue of law and public policy, which balances (1) "freedom of speech" of scientists and engineers against (2) proliferation of weapons of mass destruction.

Scientists and engineers who have, or had, access to classified information about military weapons technology must be very careful not to improperly disclose such information. Maintaining military secrets is a lifelong obligation, until the U.S. Government declassifies such information. *Un*authorized disclosure of military secrets is *not* protected by "freedom of speech".

Prohibiting *all* collaborations between Americans and citizens of rogue nations may be overly broad, and *may* be unconstitutional for the following reasons:

1. prior restraint of speech, possibly violative of First Amendment of the U.S. Constitution
2. regulation is vague (e.g., the U.S. Government has been *in*consistent in its own interpretation of this regulation), violative of Fifth Amendment of the U.S. Constitution

Any citizen of the USA who is contemplating cooperation with citizen(s) of a rogue nation should consult their attorney *before* undertaking any such cooperation and *before* making any contractual commitments.

In cases where privately developed (i.e., *neither* financial support from the government *nor* having past or current access to government secrets) ideas or technology is either classified or denied export licenses, the government *may* be constitutionally required to compensate citizens for such "taking" of their private information or private technology.

This document is at **www.rbs2.com/OFAC.pdf**
I made a quick search of statutes, C.F.R., and federal cases in June 2004.

This essay was last revised 6 Jul 2004.

return to my homepage at http://www.rbs2.com/