



## Have We The First Amendment Right To A 3-D Printed Gun?

Trevor Burrus and Megan DeWitt

September 8, 2017

In 2013, Defense Distributed uploaded computer aided design (CAD) files and made them freely available to the public.

With the proper equipment and knowledge, someone could use the CAD files to create a 3D-printed gun.

The government quickly ordered the files removed (under threat of severe penalties) because it determined that the files ran afoul of the International Traffic in Arms Regulations (ITAR), which prevent people from communicating to foreign persons “technical data” about constructing certain arms.

In other words, ITAR is one of the laws that makes it illegal to tell the foreign persons how to make things like an Apache helicopter.

Not all arms are listed, and ITAR doesn't restrict technical data that is merely “general scientific, mathematical, or engineering principles commonly taught in school.”

There are many manuals and documents out there that tell people how to make dangerous things. *The Anarchist Cookbook* is perhaps the most famous. Many people are surprised that the government lets *The Anarchist Cookbook* exist, but it is not the government that lets it exist—they'd probably rather it didn't—it's the First Amendment.

The First Amendment protects communication about making dangerous things, from bombs to napalm, and it certainly protects communication on how to fix guns or even construct them from scratch.

If the government is going to restrict such information it must do so narrowly and with good reason, while understanding that there is a difference between instructions for a plutonium trigger for a hydrogen bomb and CAD files for a plastic, one-shot pistol.

And if the government goes too far, people should be allowed to challenge it.

ITAR's regulation of communicating technical data is clearly a content-based prior restraint of speech—it restrains speech before it is published based on the content of the communication—which is one of the most egregious ways to violate the First Amendment.

While it is certainly proper for the government to prohibit telling the North Koreans how to make a nuclear bomb, Defense Distributed believes that the government went too far in extending ITAR to cover CAD files for small, 3D-printed guns.

Moreover, by uploading the files to the internet—which, yes, foreign persons can access—Defense Distributed believed it wasn't communicating them to foreigners in the manner contemplated by the statute.

In such situations, when a plaintiff believes a law has reached too far and is impinging on their freedom of speech, it is usually proper to seek a preliminary injunction that keeps the government from shutting the speech down until a court has determined the merits of the ultimate issue.

But the district court improperly denied the request based on an incorrect approach to preliminary injunction analysis and a wholly inappropriate assessment of the relevant interests at stake.

The Fifth Circuit upheld the lower court's decision and denied a request for rehearing *en banc*, which is when all the judges on a circuit hear a case rather than the usual three-judge panel.

Defense Distributed has now filed a petition for a writ of certiorari asking the Supreme Court to take up their case and protect their First Amendment rights.

Cato has filed a supporting brief urging the Court to accept and summarily reverse the decision below. We argue that such disposition is required when a facially content-based prior restraint escapes review just because the government says "national security."

In essence, the lower courts refused to look at one of the most important considerations in the preliminary injunction analysis—likelihood of success on the merits—because the government intoned the words "national security," to which the judges said "okay, that clearly outweighs any interests Defense Distributed has."

Defense Distributed certainly has an interest—the rights protected by the First Amendment of the U.S. Constitution—and it was frankly ridiculous that the lower courts so casually let the government's interests trump the First Amendment.

In a First Amendment case, in order to determine whether an injunction is in the public interest, the merits of a plaintiff's claim *must* be evaluated before proceeding to weigh the equities. This is not like an injunction to prevent your neighbor from spilling pollutants on your lawn.

In such a case the court would weigh the various interests involved in deciding whether to issue an injunction, but no one's constitutional rights would be part of the consideration. Constitutional rights get special weight if it is likely they're being violated.

That's why they're in the Constitution. Nevertheless, the lower courts said that Defense Distributed failed to show how granting an injunction to enjoin an unlawful restriction of speech was in the public interest.

But enforcing the Constitution is *always* in the public interest, and the government cannot be harmed if its own unconstitutional activity is enjoined.

If it seems likely the government is violating the First Amendment, then that strongly indicates that the plaintiff's equities outweigh the government's *because the First Amendment is being violated*.

By concluding that the district court had not abused its discretion by failing to consider the merits of a First Amendment plaintiff's claims, the Fifth Circuit fundamentally altered the preliminary injunction standard, laid out by the Supreme Court, which should be applied to the most egregious abridgments of speech.

Dissenting from denial of rehearing *en banc*, Judge Elrod put it succinctly: "The panel opinion's flawed preliminary injunction analysis permits perhaps the most egregious deprivation of First Amendment rights possible: a content-based prior restraint."

While some people are frightened by the prospect of 3D-printed guns—including, perhaps, some of the judges in the lower courts here—that is no reason to allow the government to shut down speech about such guns without ensuring that the restrictions comport with the strictures of the First Amendment.

Even if you don't like guns, this case should concern you because the government should not be allowed to say "national security" in order to shut down speech it doesn't like—"first they came for the guns, and I didn't speak up because I didn't own guns; then they came for the..."

The implications for free speech rights could be catastrophic. Defense Distributed fails to prevail in this case.

*Trevor Burrus is a research fellow in the Cato Institute's Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.*

*Meggan DeWitt is a legal associate in the Cato Institute's Center for Constitutional Studies. During law school, she clerked for the Institute for Justice in Arlington, Virginia, and for the Department of Forensic Sciences in Washington, D.C. and was a member of the Supreme Court Clinic, where she worked on research and drafting for Supreme Court amicus and merits briefs.*