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Thomas Jefferson, We Have a Problem: The Unconstitutionality Nature of the U.S.'s Aerospace Export Control Regime as Supposed by Bernstein v. U.S. Department of Justice

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THOMAS JEFFERSON, WE HAVE A PROBLEM: THE UNCONSTITUTIONAL NATURE OF THE U.S.'S AEROSPACE EXPORT CONTROL REGIME AS SUPPORTED BY *BERNSTEIN V. U.S. DEPARTMENT OF JUSTICE*

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I. INTRODUCTION 629
II. A BRIEF HISTORY OF AMERICA'S AEROSPACE EXPORT CONTROL REGIME AND ITS PERNICIOUS ECONOMIC AND NATIONAL SECURITY CONSEQUENCES 630
III. THE UNCONSTITUTIONAL NATURE OF THE ITAR 634
A. Bernstein versus the Departments of State and Commerce 634
1. Background 634
2. Ninth Circuit Opinion 636
a. Facial Attack 636
b. Are the Export Control Regulations an Impermissible Prior Restraint? 637
B. Applying Bernstein to ITAR and the Aerospace Field 638
1. General Applicability 638
2. Facial Attack 639
3. Impermissible Prior Restraint on Speech 641
IV. CONSTITUTIONAL RECONSTRUCTION: FIXING THE ITAR 642
V. CONCLUSION: A REVOLUTION THAT MUST TAKE PLACE 643

I. INTRODUCTION

All men are created equal, *except aerospace workers*. This was not how the Declaration of Independence was written, but it is how the U.S. government is currently enforcing its aerospace-related export control restrictions. Specifically,

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under the auspices of the International Traffic in Arms Regulations ("ITAR")[1] those in the aerospace workforce have unwittingly surrendered their First Amendment rights to free speech. This article will describe how the Ninth Circuit case of *Bernstein v. U.S. Department of Justice*[2] clearly demonstrates the unconstitutional nature of the ITAR and will recommend reforms that would bring America's export control regime back into line with the nation's founding principles.

II. A BRIEF HISTORY OF AMERICA'S AEROSPACE EXPORT CONTROL REGIME AND ITS PERNICIOUS ECONOMIC AND NATIONAL SECURITY CONSEQUENCES[3]

In the 1980s, the commercial space field was still in its infancy. Commercial launches were few and infrequent, and revenues were low.[4] During this period, space systems, such as satellites, were controlled by the Department of State and, just as they are now, were under the auspices of the ITAR.[5] However, toward the end of the decade, when the field began to blossom, permission was given to expand launch opportunities overseas.[6] For example, in 1988, the Reagan Administration approved the sale and launch of communications satellites to China to be placed into orbit over the course of nine launches.[7]

By the early 1990s, the export control regime for commercial satellites was further liberalized.[8] Under the first President Bush, dual-use items, including some telecommunication satellites, were removed from the United States Munitions List ("USML").[9] Jurisdiction over these systems was similarly transferred from the Department of State to the Department of Commerce.[10] Although this was certainly a positive change, the U.S. export control regime was already on the verge of obsolescence. Part of the reason the transfer from State to Commerce took place was that the U.S. had become the *only* nation that still treated commercial telecommunication satellites as munitions.[11]

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[1] 22 C.F.R. § 120.11 (2009).

[2] Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999) [hereinafter *Bernstein*].

[3] Much of the history provided below was previously described in Mike N. Gold, *Lost In Space: A Practitioner's First-Hand Perspective on Reforming the U.S.'s Obsolete, Arrogant, and Counterproductive Export Control Regime for Space-Related Systems and Technologies*, 34 J. SPACE L. 163 (2008) (exploring in detail the author's export control experiences on Bigelow Aerospace's Genesis I and II launch campaigns, as well as commonsense ideas for reform).

[4] FAA, Commercial Space Historical Launch Data, http://www.faa.gov/about/office_org/headquarters_offices/ast/launch_data/historical_launch/ (last visited Aug. 23, 2009).

[5] Ryan Zelnio, *A Short History of Export Control Policy*, SPACE REV., Jan. 9, 2006, http://www.thespacereview.com/article/528/1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

By 1996 under President Clinton, after some internal governmental debate, export control jurisdiction for all communication satellites ("commsats") was transferred away from State and placed exclusively under the jurisdiction of the Department of Commerce.[12]

However, Commerce's purview over commsats was soon undone by events that had occurred even before Commerce had assumed regulatory control. In 1995 and 1996, China suffered two Long March rocket failures.[13] The ill-fated Long March rockets carried, respectively, commsats produced by Hughes and Loral.[14] Subsequently, both Hughes and Loral produced launch failure analyses that were required for insurance purposes. The Department of Commerce approved the full transfer of this information to the Chinese and the insurers under the auspices of a previous license granted in 1994.[15] This move created a great deal of controversy and resulted in the following situation, best described below in an excerpt from *The Space Review*:

> This analysis created a major controversy, as it was unclear whether Commerce had the authority to approve such an export. A congressional review determined that these launch failure reviews were conducted without required Department of State export licenses, and communicated technical information to the PRC in violation of ITAR. This investigation led to the inclusion of a provision in the Strom Thurmond National Defense Authorization Act in 1998 in that [it] returned control of all satellites and related technologies to the Department of State. This was accomplished by the removal of said items from the Commerce list of dual-use items in the Export Administration Regulations and placing them on the State Department's United States Munitions List, controlled under section 38 of the Arms Export Control Act. In addition, a provision was added that the President must certify to Congress 15 days in advance that any transfer of satellite technology to China would not harm US launch companies and/or help Chinese missile technology.[16]

Under pressure from the then GOP-controlled Congress,[17] the Clinton Administration was essentially forced to accept a Department of State regime that placed *all* space-related equipment and hardware on the USML, bringing space technology exclusively under the auspices of the ITAR.

Not only was this overly broad implementation of the ITAR unconstitutional, but it has done substantial damage to the nation's economy and, counter-intuitively, to national security.

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Taylor Dinerman, *Fixing ITAR: The Saga Continues*, SPACE REV., May 16, 2005, http://www.thespacereview.com/article/374/1.

In regard to economics, America was once the world's only commercial space launch provider. However, over the span of several decades, America has gone from being number one to conducting only one commercial space launch in 2006.[18] Domestic launch companies have become so lazy and bloated that only the U.S. government can afford their services. If the government were to stop purchasing U.S. rockets, or open their contracts up to foreign competition, the American launch industry as we know it would most likely cease to exist.[19]

In stark contrast, the foreign aerospace sector is booming. For example, Russian rockets accounted for twelve commercial launches in 2007, more than half of all commercial launches in the year, and double that of their closest competitor, the European Ariane system, which was responsible for six commercial launches in 2007.[20]

How much America's backward export control regime has influenced the U.S.'s downward spiral in commercial space launch is arguable, although it would be impossible to contend that it has not been a contributing factor to today's dismal situation.[21] However, where the harm done by ITAR is probably most keenly felt is in the U.S. satellite manufacturing industry. Since all space hardware was moved to ITAR/the USML in 1999, the once dominant American commsat manufacturing sector has seen its share of the global market drop from a strong 83% to a soft 50%.[22] European competitors such as Alcatel Alenia (which explicitly advertises an 'ITAR-Free' satellite) have doubled their market share[23] while U.S. entities, particularly small and medium sized businesses, are withdrawing from international contracts.[24] In the meantime, China, one of the primary countries that ITAR was intended to keep advanced space technology away from, has of course continued to purchase state-of-the art hardware from European, Russian, and Israeli suppliers, costing U.S. companies as much as $6 billion since 1999 in Chinese-related business alone.[25]

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[18] FAA, *supra* note 4.

[19] CTR. FOR STRATEGIC AND INT'L STUDIES, BRIEFING OF THE WORKING GROUP ON THE HEALTH OF THE U.S. SPACE INDUSTRY BASE AND THE IMPACT OF EXPORT CONTROLS 7 (2008), http://csis.org/files/media/csis/pubs/021908_csis_spaceindustryitar_final.pdf ("The U.S. space industrial base is largely dependent on the U.S. defense/national security budget.").

[20] Futron, Monthly Launch Report January 2008, http://www.futron.com/pdf/friends_of_futron_reports/launch_reports/FutronLR2008-01.pdf (last visited Aug. 24, 2009).

[21] Dinerman, *supra* note 17.

[22] Ryan Zelnio, *The Effects of Export Control on the Space Industry*, SPACE REV., Jan. 16, 2006, http://www.thespacereview.com/article/533/1 [hereinafter Zelnio, *Effects of Export Control*].

[23] *Id.* ("By far the greatest benefactor to US export policies has been Alcatel Alenia Space, a joint venture formed in 2005 by combining the space businesses of Alcatel and Finmeccanica. In the early 2000s, Alcatel announced that they would create an 'ITAR-free' spacecraft. By 2004, Alcatel had been able to double their market share from around 10% in 1998 to over 20% in 2004.").

[24] CTR. FOR STRATEGIC AND INT'L STUDIES, *supra* note 19, at 10.

[25] Zelnio, *Effects of Export Control*, *supra* note 22.

Under both the Bush and Clinton Administrations, over 700,000 scientific and technical aerospace jobs have been lost.[26] By further aggravating an already deplorable situation, America's economically nonsensical export control regime has become the equivalent of committing industrial suicide. However, what is arguably even worse than shipping jobs and industries overseas is the threat that the ITAR poses to our own national security.

Specifically, not only does the ITAR as it is currently being implemented fail to achieve its primary goal[27] of preserving critical U.S. military technological advantages, [28] but it is actually weakening our domestic defense capabilities. For example, by emasculating America's domestic satellite manufacturing market, thereby sending billions of dollars and thousand of jobs overseas, even the Department of Defense is becoming increasingly dependent on foreign components. In the same vein, domestic aerospace companies are now nearly entirely dependent on government support[29]—an untenable and dangerous situation. Companies that have the government as their primary or exclusive customer ultimately become bloated, prohibitively expensive leviathans, unable to innovate or tackle real competition. Most innovation comes from smaller commercial second and third tier suppliers, and these are the entities that suffer the most under the ITAR.[30] Finally, by encouraging, and in some instances forcing, other nations to develop native capabilities, the ITAR is fueling proliferation.[31] For all of these reasons, many

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[26] COMMISSION ON THE FUTURE OF THE U.S. AEROSPACE INDUSTRY, FINAL REPORT, xv, 4-5 (Nov. 2002), http://trade.gov/static/aero_rpt_aero_commission.pdf.

[27] For a brief description of the theoretical purpose of the U.S. ITAR regime, see the explanation given on the Defense Technology Security Administration ("DTSA") homepage at http://www.defenselink.mil/policy/sections/policy_offices/dtsa/ (last visited Sept. 1, 2009).

[28] "There are rapidly emerging foreign space capabilities and the U.S. does not control their proliferation." CTR. FOR STRATEGIC AND INT'L STUDIES, *supra* note 19, at 8. "The current export control policy has not prevented the rise of foreign space capabilities and in some cases has encouraged it (ITAR-free space products)." *Id.*

[29] "The U.S. space industrial base is largely dependent on the U.S. defense/national security budget." *Id.* at 7.

[30] "The results also indicated that smaller respondent companies are more likely to feel adverse effects from ITAR than large companies. This is a matter of some concern, as lower-tier contractors are a significant source of the new technology and innovation that enables the United States to remain a world leader in space. By continuing to operate an export control regime designed during the Cold War, the United States reduces the competitiveness of its space industry in the global market and potentially harms the domestic innovation processes that enable U.S. space leadership." SPACE FOUNDATION, ITAR AND THE U.S. SPACE INDUSTRY 1 (Sept. 2008).

[31] "You may think that [export control] is the price of security but Lon Rains, the editor of Space News, says that ITAR has 'sped up the inevitable proliferation of advanced technology, by forcing countries to find other means of obtaining satellite components that had previously been manufactured only in the United States.'" *Earthbound; Space Technology*, ECONOMIST, August 23, 2008, at 66.

national security experts are now advocating ITAR reform.[32] The traditional policy debate in Washington is "liberty" versus "security." The ITAR presents no such dilemma since it damages both.

III. THE UNCONSTITUTIONAL NATURE OF THE ITAR

A. Bernstein versus the Departments of State and Commerce

1. Background

Unfortunately, statutes cannot be struck down because they are obsolete or nonsensical.[33] The Constitution never promised competent government; but, recognizing the fallibility of mortal leadership, the Founding Fathers wisely established fundamental liberties as ensconced in the Bill of Rights. It is the first and arguably most cherished right[34]—our freedom of expression—that the ITAR so blatantly violates.

This fact was demonstrated in the landmark case of *Bernstein v. U.S. Department of Justice*.[35] Like most good technology stories, the *Bernstein* case begins with a graduate student. Daniel J. Bernstein was working as a doctoral candidate at the University of California, Berkeley, where he developed an encryption method.

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[32] *See, e.g.*, Colin Clark, *U.S. Eyes Removing Some Satellite Components from Munitions List*, SPACE NEWS, Apr. 7, 2008, http://www.space.com/businesstechnology/080407-busmon-satellite-remove.html.

[33] For example, it is still illegal in Minnesota to cross the state line with a duck on top of one's head. Dumblaws.com, Dumb Laws in Minnesota, http://www.dumblaws.com/laws/united-states/minnesota (last visited Aug. 26, 2009). Although this law may sound ridiculous, it should be noted that it has done much less damage to the American economy and national security than the ITAR, and I understand the ducks are quite happy with it.

[34] The First Amendment was actually almost the third Amendment:

> Some people say the rights protected by the First Amendment are the most important in the entire Bill of Rights, because they are listed before the other nine amendments. However, in the original version of the Bill of Rights, what is now the First Amendment came third—after proposed amendments on reapportionment and congressional pay raises. The states failed to ratify these amendments, moving the third amendment into first place. Whatever its order in the original Bill of Rights, the First Amendment includes the rights many Americans hold most dear, and it forms the foundation of American democratic government. The five freedoms listed in the First Amendment—religion, speech, press, assembly, and petition—enable citizens to participate in the process of self-government. Together, these five rights are sometimes referred to as freedom of expression. Because the First Amendment protects the expression of deep convictions, it can also expose deep differences among the American people. Thus, the First Amendment is often at the center of the nation's most contentious debates. Without the freedoms in the First Amendment, it would be impossible for Americans to assert any other rights they have, thus making it the most important amendment in the Bill of Rights.

National Constitution Center, Interactive Constitution http://72.32.50.200/constitution/details_explanation.php?link=120&const=08_amd_01. (quoting LINDA R. MONK, THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION 127 (2003)).

[35] *Bernstein*, 176 F.3d 1132.

Specifically, Bernstein created "a zero-delay private-key stream encryptor based upon a one-way hash function."[36] Despite how easily this description rolls off of the tongue, Bernstein dubbed his creation "Snuffle."[37]

Bernstein was quite proud of Snuffle and sought to present his work to relevant academics and scientists.[38] Before doing so, Bernstein queried the State Department to determine if he would need a license to publish Snuffle.[39] To Bernstein's surprise, he was informed by the Department of State that Snuffle was a "munition" and that under the ITAR[40] a license would most definitely be required in order to "export" Snuffle.[41] From this point followed what the Ninth Circuit Court described as an "unproductive" series of communications between Bernstein and the Department of State, wherein "Bernstein unsuccessfully attempted to determine the scope and application of the export regulations to Snuffle."[42] Fellow export control practitioners know all too well what such "unproductive" conversations can be like. After experiencing the full force of the State's bureaucracy, Bernstein filed legal action challenging the constitutionality of the ITAR.[43]

Bernstein's desire to seek refuge from the Department of State in the judiciary proved fruitful, and in 1996, the district court granted summary judgment in his favor and found that the ITAR was facially invalid as a prior restraint on speech and therefore violated Bernstein's First Amendment rights.[44] However, as described previously, in 1996 President Clinton shifted the relevant regulatory authority to the Department of Commerce,[45] and this move included both commercial satellites and cryptography. Bernstein then found himself under the Export Administration Regulations ("EAR") as administered by the Bureau of Export Administration ("BXA").[46] Unlike most of us in the aerospace industry who would be ecstatic to see control of commsats and related technology shifted back to Commerce, Bernstein continued to assert his constitutional freedoms, and despite the relative advantages of working with Commerce in lieu of the State, amended his complaint to include Commerce and its constituent entities. Following the rationale of the previous decision, the district court again granted Bernstein summary judgment finding the EAR facially invalid as a prior restraint on speech.[47] The district court subsequently

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[36] *Id.* at 1135.

[37] *Id* at 1136.

[38] *Id.*

[39] *Id.*

[40] International Traffic in Arms Regulations, 22 C.F.R. §§ 120.1-130.17 (2009).

[41] *Bernstein*, 176 F.3d at 1136.

[42] *Id.*

[43] *Id.*

[44] Bernstein v. U.S. Dep't of Justice, 945 F. Supp. 1279, 1289-90 (N.D. Cal. 1996).

[45] Administration of Export Controls on Encryption Products, Exec. Order No. 13,026, 61 Fed. Reg. 58,767 (Nov. 15, 1996).

[46] Bernstein v. U.S. Dep't of Justice, 974 F. Supp. 1288, 1293-94 (N.D. Cal. 1997).

[47] *Id.* at 1310.

issued an injunction against enforcement of the invalidated EAR provisions.[48] The Government appealed the decision of the district court, and the case went before the Ninth Circuit for review.[49]

2. Ninth Circuit Opinion

In its ruling, the Ninth Circuit focused exclusively on the issue of prior restraint. Specifically, the issue was whether the EAR restrictions constituted prior restraint in violation of the First Amendment.[50] The court began by noting the critical nature of prior restraint on speech: "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights."[51] Due to the paramount importance of this right, the court stated that the export control regulations faced a difficult burden, explaining that "[a]ny prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity."[52]

In terms of its analysis, the court followed the model set by the Supreme Court by addressing the issue in two parts: first, the threshold question of Bernstein's ability to bring a facial attack against the export control regulations; and second, whether the regulations constituted an impermissible prior restraint on speech.[53]

a. Facial Attack

In regard to the first issue, the court began by reiterating the precedent that a licensing regime is always subject to facial challenges as a prior restraint where it (1) "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers," and, (2) has "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of . . . censorship risks."[54]

The court found that the first part of this test was easily satisfied, citing the fact that BXA administrators were "empowered to deny licenses whenever export might be inconsistent with 'U.S. national security and foreign policy interests.'"[55] Such vague guidance was found by the court to be "little better than no constraint at all."[56] The court upheld the contention that export control regulations that simply allow Government officials to rule in favor of the general public interest are "illusory" and "renders the guarantee against censorship little more than a high-sounding ideal."[57]

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[48] *Id.* at 1310-11.

[49] *Bernstein*, 176 F.3d at 1132.

[50] *Id.* at 1138.

[51] *Id.* (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

[52] *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

[53] *Id.* at 1139.

[54] *Id.* (quoting Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988)).

[55] *Id.* (citing to 15 C.F.R. § 742.15(b) (1999)).

[56] *Id.*

[57] *Id.* (citing *Lakewood*, 486 U.S. at 769-70).

Moreover, the court dismissed the Government's argument that BXA Administrators would not discriminate on the basis of content as being "beside the point,"[58] citing the fact that the concept that officials will act in good faith "is the very presumption that the doctrine forbidding unbridled discretion disallows,"[59] and that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[60] For all of these reasons, the court found that the EAR gave BXA officials substantial power to discriminate, easily satisfying the first requirement for making a facial attack.[61]

The second requirement was a more difficult issue for the Ninth Circuit since it was forced to determine if Snuffle source code represented free speech.[62] However, after a great deal of discussion and analysis, the court held that it did. The opinion stated that cryptographers use source code to express their ideas "in much the same way that mathematicians use equations or economists use graphs" and therefore encryption software, and even its source code, "must be viewed as expressive for First Amendment purposes and thus is entitled to the protection of the prior restraint doctrine."[63]

b. Are the Export Control Regulations an Impermissible Prior Restraint?

With Bernstein's ability to bring a facial attack against the relevant export control regulations firmly established, the court went on to examine the issue of whether the regulations created an impermissible prior restraint. The court began its analysis by again referencing the "heavy presumption" against prior restraints but described how even such a strong presumption can be overcome where official discretion is bounded by stringent procedural safeguards.[64] More specifically, the court laid out three criteria for evaluating the validity of export control licensing schemes: "(1) any restraint must be for a specified brief period of time; (2) there must be expeditious judicial review; and (3) the censor must bear the burden of going to court to suppress the speech in question and must bear the burden of proof."[65]

In regard to the first criteria—timing—the court found that the EAR's requirement that any license application be resolved or referred to the President within 90 days was essentially meaningless since, once a license was referred to the President, no time limit applies.[66] Next, the court noted that the EAR denied licensing applicants the opportunity for judicial review[67] and therefore failed to meet

[58] *Id.*

[59] *Id.* (quoting *Lakewood*, 486 U.S. at 770).

[60] *Id.* (quoting *Lakewood*, 486 U.S. at 757).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1141.

[64] *Id.* at 1143-44 (citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990)).

[65] *Id.* at 1144.

[66] *Id.*

[67] 15 C.F.R. § 756.2(c)(2) (2009).

the second criteria for a valid licensing regime. Because the EAR failed the first two criteria, the court did not see the need to address the third part of the analysis, and therefore, concluded that the EAR represented an impermissible prior restraint.[68]

Having established Bernstein's ability to make a facial attack against the EAR, and that the EAR clearly created an impermissible prior restraint, the court held that:

> [T]he challenged regulations allow the government to restrain speech indefinitely with no clear criteria for review. As a result, Bernstein and other scientists have been effectively chilled from engaging in valuable scientific expression. Bernstein's experience itself demonstrates the enormous uncertainty that exists over the scope of the regulations and the potential for the chilling of scientific expression. In short, because the challenged regulations grant boundless discretion to government officials, and because they lack the required procedural protections set forth in the *Freedman*, we find that they operate as an unconstitutional prior restraint on speech.[69]

B. Applying Bernstein to ITAR and the Aerospace Field

1. General Applicability

In the aerospace industry, the EAR is unanimously viewed as a much less pernicious regime than that of the ITAR.[70] The *Bernstein* precedent is particularly relevant to the aerospace field because the ITAR actually represents a more egregious violation of First Amendment rights than the EAR. For the purpose of analysis, we will use a relatively simple hypothetical example of a private Japanese citizen wishing to become a passenger aboard a commercial space launch system. Whether the space launch system is orbital or suborbital, since it is a "spacecraft" and literally all spacecraft fall under Category XV of the ITAR, a license must be procured from the Department of State's Directorate of Defense Trade Controls ("DDTC") prior to a foreign national, such as our hypothetical Japanese customer, from receiving any written or verbal instructions in regard to being a spaceflight passenger, being allowed inside the space launch vehicle, or, for that matter, even seeing the outside of the rocket and/or capsule. Like Bernstein in the early 1990s, aerospace employees today may not be allowed to express even superficial aspects of their work, ideas, and technologies, until they receive permission from the U.S.

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[68] *Bernstein*, 176 F.3d at 1144-45.

[69] *Id.* at 1145.

[70] The GOP-controlled Congress brought intense pressure to bear on the Clinton Administration to tighten up export controls, and forced the shift of final authority for space products from the Commerce Department to the State Department. Almost immediately the US industry felt the effects. Exporters soon discovered that there was a new sheriff in town and that he had a mean streak. Foreign governments and companies which had long-established relationships with American companies faced new, and unexpected, sets of obstacles to doing business with America. Unlike the days of the COCOM, where the rules were well understood and there was a sense, however tenuous, of solidarity, allies such as Britain and Canada found themselves being treated in the same way as Russia and China.

Dinerman, *supra* note 17.

Department of State. The ITAR represents a blatant example of unconstitutional prior restraint, a fact easily born out when the legal analysis utilized by the Ninth Circuit in the *Bernstein* case is applied to our hypothetical Japanese astronaut.

As in *Bernstein*, there are two threshold issues: (1) the ability of the offended aerospace officials to make a facial attack against the ITAR; and (2) if the ITAR represents an impermissible prior restraint on speech.[71]

2. Facial Attack

Per *Bernstein*, there are, again, two criteria for being able to make a facial attack against the ITAR: (1) does the government have substantial power to discriminate based on content or dislike of the speaker; and (2) is there a sufficient nexus to expression creating a censorship risk.[72] The answer to both is a resounding yes. The court ruled in favor of Bernstein on this point since the BXA officials enforcing the EAR were empowered to deny licenses whenever export might be inconsistent with "U.S. national security and foreign policy interests."[73] Similarly, after listing out several "rogue" nations that are prohibited from receiving USML exports entirely (e.g., Cuba, Iran, North Korea, etc.), the ITAR simply states that the DDTC may reject a license "whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States."[74] As in the *Bernstein* case, the ITAR provides a level of specificity usually only reserved for beauty pageant Q&As. There can be no question that the ITAR's vague references to "world peace" and the U.S.'s "foreign policy interests" are entirely insufficient to prevent potential discrimination and/or abuse.

As was the case in *Bernstein*, the second part of the test—establishing a nexus to expression—is more difficult to determine, but still easily answered in the affirmative. Simply put, if a cryptographic code could be seen as expressive for purposes of the First Amendment, it is difficult to imagine that instructions related to being a passenger on board a private sector space launch system would not be viewed similarly. Specifically, the Ninth Circuit found that the Snuffle source code represented a way to express Bernstein's scientific ideas. Similarly, instructions about being a passenger aboard a rocket and exposure to the space travel experience is a means of aerospace engineers and entrepreneurs expressing their ideas.

Additionally, even if the instructions and superficial exposure of hardware by aerospace companies to international customers are viewed as purely commercial speech, such speech still demands protection under the First Amendment.[75] To determine the ability of the Government to regulate commercial speech, a four pronged test is generally utilized: (1) the speech must not be misleading or related to unlawful activity; (2) the government must have a substantial interest in regulating

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[71] *Bernstein*, 176 F.3d at 1144.

[72] *Id.* at 1139 (quoting Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759 (1988)).

[73] 15 C.F.R. § 742.15 (2009).

[74] 22 C.F.R. § 126.1(a) (2009).

[75] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that the First Amendment protects the right of a company to disseminate information and the public to receive it, so long as such information is truthful and not misleading).

the speech; (3) the regulation must directly serve that substantial interest; and (4) the regulation must be no more extensive than necessary.[76] In the case of our hopeful Japanese space tourist and the ITAR, all of these criteria are met.

First, the instructions the tourist will receive will be both truthful and lawful; therefore, the aerospace company meets its part of the test. In contrast, the Government fails to achieve any of its three criteria. Specifically, the Government does not have a substantial interest in regulating the speech and the regulation does not directly serve a substantial governmental interest. Preventing the Japanese tourist from being exposed to the inside and outside of a rocket and capsule does not serve a substantial governmental interest. As a matter of fact, just the opposite is true; the Government has a substantial interest in seeing commercial space develop[77] and these regulations are an anathema to the birth and health of such an industry.

Moreover, the regulations do not directly serve a substantial governmental interest, since sending the jobs and revenue created by the commercial spaceflight industry overseas is, again, counter to the Government's overriding interests.

Finally, the regulations are far more extensive than necessary. The over-breadth of the ITAR is what has created such a problematic situation in the first place. No one would argue, particularly in the aerospace industry, that there are not technologies worth protecting. There are numerous examples of ballistic missile components that should not be shared with foreign nationals without first undergoing a rigorous review process. However, the all-encompassing ITAR takes this too far and creates a prior restraint against virtually all aerospace related information and hardware, no matter how benign. Our hypothetical (and by now, very frustrated) Japanese space tourist who is covered by the ITAR is an example of its overly broad nature. Assuming the Japanese tourist is neither going to fly nor operate the rocket, it is difficult to imagine what possible national security interest is served by not allowing the customer on board. I have flown on more Southwest Airline flights than I can count; however, I still can't build a 737. There is no substantive technical data transferred by being a passenger inside a space launch vehicle, and no substantial governmental interest is served in this case by the ITAR's overly broad prior restraint, directly or otherwise. Therefore, the ITAR fails all of the relevant criteria, and even if the information provided to the Japanese space tourist is viewed as purely commercial speech, it is still most definitely a form of expression protected by the First Amendment.

Also, in the *Bernstein* case, the Ninth Circuit sought to defend scientific expression and progress,[78] and this is certainly relevant to our hypothetical situation. Space travel itself is inherently scientific in nature.[79] Adding to our hypothetical, let

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[76] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

[77] For example, "[t]he Congress declares that the general welfare of the United States requires that the National Aeronautics and Space Administration (as established by subchapter II of this chapter) seek and encourage, to the maximum extent possible, the fullest commercial use of space." 42 U.S.C.A. § 2451(c) (West 2005).

[78] *Bernstein*, 176 F.3d at 1145-47.

[79] A new manned spaceflight program would do a lot to restore public enthusiasm for space and for science generally. Robotic missions are much cheaper and may provide more scientific information, but they don't catch the public imagination in the same

us say that the Japanese traveler is a scientist wishing to conduct a microgravity experiment that he built for his university project researching new cancer drugs. In this situation, we see where the very purpose of the speech by the aerospace company—exposure to the space launch vehicle and instructions on how to safely act as a passenger—are key aspects in pursuit of scientific knowledge. If the aerospace information described in our hypothetical is placed under the prior restraint of the ITAR, it will most certainly prevent the expression of scientific concepts and lead to the self-censorship feared by the *Bernstein* court.[80]

3. Impermissible Prior Restraint on Speech

Since the ITAR's vague guidelines create substantial opportunities for abuse, and since providing instructions and information to our hypothetical Japanese space passenger represents protected commercial and/or scientific speech, the next question at issue is whether the ITAR represents an impermissible prior restraint. Per *Bernstein*, to survive, the ITAR must address the following criteria: (1) any restraint must be for a specified brief period of time; (2) there must be expeditious judicial review; and (3) the censor must bear the burden of going to court to suppress the speech in question and must bear the burden of proof.[81]

The ITAR easily fails the first point since there are no mandatory deadlines for any activity. Theoretically, the DDTC can take an infinite amount of time to act on a license or commodity jurisdiction request without repercussion.[82]

Additionally, the ITAR also fails the second criteria, since no judicial review is available, expeditious or otherwise, due to the ITAR's exemption from the Administrative Procedures Act ("APA").[83]

As in *Bernstein*,[84] because the ITAR fails the first two parts of the analysis, there is no need to address the third point. Therefore, the ITAR clearly represents an impermissible prior restraint.

> way, and they don't spread the human race into space, which I argue should be our long-term strategy. A goal of a base on the Moon by 2020 and of a man landing on Mars by 2025 would reignite a space program and give it a sense of purpose in the same way that President Kennedy's Moon target did in the 1960s. A new interest in space would also increase the public standing of science generally. The low esteem in which science and scientists are held is having serious consequences. We live in a society that is increasingly governed by science and technology, yet fewer and fewer young people long to go into science.

Stephen Hawking, *The Final Frontier*, COSMOS, Sept. 24, 2008, http://www.cosmosmagazine.com /node/2209/full.

[80] *Bernstein*, 176 F.3d at 1139. As a matter of fact, self-censorship has already become a common part of everyday life in the aerospace field.

[81] *Id.* at 1144.

[82] One of the lessons the author has learned as a new father is that the gestation period for a human being is far less than that of a Commodity Jurisdiction ("CJ") request. Specifically, Bigelow Aerospace filed a CJ request in December of 2007 and still has not received a response from the DDTC.

[83] "Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedures Act." Exclusion of functions from the Administrative Procedures Act, 22 C.F.R. § 128.1 (2009).

IV. CONSTITUTIONAL RECONSTRUCTION: FIXING THE ITAR

As described above, since the ITAR is vulnerable to facial attack and represents an impermissible prior restraint of free expression, like the relevant EAR provisions in *Bernstein*,[85] the regulations can and likely would be struck down if an appropriate suit were filed. However, bringing the ITAR into line with the First Amendment—while taking some effort—would not be extraordinarily difficult to accomplish. The judicial analysis in *Bernstein* itself provides a roadmap for the necessary reforms.

First and foremost, hard deadlines must be established for license applications, commodity jurisdiction requests, and other relevant activities. This would not only provide substantial relief to companies who need to plan schedules, but would address the first part of the impermissible prior restraint analysis. National Security Presidential Directive 56[86] was touted as the first step toward providing the DDTC with the personnel and resources necessary to support timely action. Assuming this occurs, the next logical step will be to establish desperately needed hard deadlines.

Additionally, the ITAR's exemption to the APA should be removed or substantially revised. Expeditious judicial review must become a part of the ITAR in order for it to pass Constitutional muster. If the ITAR were revised to provide for such judicial review, the second part of the impermissible prior restraint analysis would also be resolved.

Finally, the United States Munitions List ("USML") must be reviewed and revised. Currently, there are numerous systems and technologies that should not be on the USML (and, conversely, some that are on the Commerce Control List and should instead be on the USML). A rapid yet comprehensive review should be conducted to ensure that we are protecting systems that need it and are not burdening industry with superfluous protections for technologies that are either obsolete or widely available in the international marketplace. If this were done and the ITAR's shockingly vague "world peace" language were removed, the ITAR might no longer be open to facial attacks. Moreover, such a commonsense export control regime would also protect the U.S. from physical attacks, since, if the USML were revised, the Government could apply its limited resources exclusively to militarily sensitive technologies that warrant enhanced scrutiny and stop wasting time with items that are either obsolete or commonly available in the international marketplace. At a Center for Strategic and International Studies conference on export control, one former industry executive summed the situation up quite well by reminding the

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[84] *Bernstein*, 176 F.3d at 1144.

[85] *Id*. at 1147.

[86] On January 22, 2008, the President signed Nation Security Presidential Directive (NSPD) – 56. The directive mandated a series of reforms in the way defense trade is executed by the executive branch to enhance transparency, timeliness and predictability for industry. These reforms included the process and management improvements, as well as a requirement that DDTC be fully resourced to perform its mission. It also mandated that DDTC's mission be 75 percent "self-funded."

Directorate of Defense Trade Controls ("DDTC"), U.S. Department of State, http://pmddtc.state.gov/registration/faqs.html (last visited Aug. 24, 2009).

audience that, "if you protect your toothbrushes as much as your diamonds, you're going to lose a lot more diamonds than toothbrushes."[87]

V. CONCLUSION: A REVOLUTION THAT MUST TAKE PLACE

It is ironic that one of the primary goals of aerospace is to defend American freedom, yet, the industry seems unaware and unwilling to defend its own constitutional rights. The fixes described above would not only serve a strong constitutional interest but would help both American commerce and U.S. national security. It is rare that such a trifecta of positive outcomes exist and demonstrates just how counterproductive the ITAR is in a variety of contexts.

The ITAR seems strong and threatening, but, like a common school yard bully, all it will take is for one person to stand up against it to render the regulations impotent. If anything, the *Bernstein* analysis demonstrates that the ITAR is even more vulnerable to constitutional scrutiny than the EAR, and such vulnerability begs to be exploited.

The ITAR is threatening our national security and destroying American commerce and competitiveness, yet the industry does nothing. We have collectively paid billions of dollars in fines and fees, wasted a decade on unwarranted bureaucracy, and yet we are too afraid to take action. The architect of American liberty, Thomas Paine, once said, "the strength and power of despotism consists wholly in the fear of resistance." The *Bernstein* case shows that not only is resistance against the ITAR the moral path forward, but, as is always the case, liberty and victory will walk that path together.

[87] This statement was made at the conference, information about which is available at CSIS, Toward a 21st Century Export and Technology Control Regime, (May 15, 2008), http://tinyurl.com/my55bv.