THE EXPORT ADMINISTRATION ACT'S TECHNICAL DATA REGULATIONS: DO THEY VIOLATE THE FIRST AMENDMENT?*

I. INTRODUCTION

Under authority granted in the Export Administration Act of 1979,¹ the United States Department of Commerce promulgates regulations² to control the export of unclassified technical data. These restrictions upon the dissemination of technological information are deemed necessary to protect United States national security and to promote foreign policy interests. However, the technical data controls entail significant first amendment issues, especially in areas relating to the exchange of scientific and technical information. Recently, the Department of Commerce determined that the regulations are applicable to United States scientists attending technological conferences in the United States and abroad. It is unclear whether these restrictions pass constitutional muster. This Note focuses upon the constitutional questions presented by the Export Administration technical data regulations both in general and as specifically applied to scientific meetings.³ A recent scientific conference held in California,⁴ upon which the Department of Commerce imposed the regulations, provides the context within which the issues are presented.

II. EXPORT CONTROLS ON TECHNICAL DATA

A. The Export Administration Act

A new Export Administration Act was passed by Congress in 1979.⁵ A number of Congressional findings are set out in the statute, one of which addresses technical data controls: "Export of goods or technology without regard to whether they make a sig-

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³ As of this writing, there have been no cases involving challenges on first amendment grounds of the validity of these regulations.

⁴ The First International Conference on Bubble Memory Materials and Process Technology, sponsored by the American Vacuum Society, was held in Santa Barbara, California on February 20-22, 1980. See note 26 and accompanying text infra.

mificant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.\textsuperscript{6} The Congressional declaration of policy is more explicit. Export controls are to be used:

(1) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;
(2) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and,
(3) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.\textsuperscript{7}

Thus, although a stated purpose of the Act is to encourage trade,\textsuperscript{8} Congress has made it clear that exports are to be restricted whenever United States national security or foreign policy interests will be adversely affected.

One of the major changes in the 1979 Export Administration Act is an emphasis on regulating the export of technology as well as regulating the export of goods. In the section on Congressional findings, the Act refers to the necessity of "special emphasis" on controlling "exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country ... which would be detrimental to the national security of the United States."\textsuperscript{9} However, as demonstrated by the following passage from the House Report, the decision to regulate exports of technology was not without a recognition of potential constitutional hazards:

Knowhow can be transferred in many ways, not all of which are subject to export controls. Two potentially important ways of transferring knowhow are through technical cooperation agreements between United States firms and agencies in controlled countries, and through scientific interchange. The latter method,
of course, carries First Amendment implications which make controls difficult, if not impossible.10

The Secretary of Commerce is authorized by the Export Administration Act to require any of the following types of export licenses: (1) a validated license, (2) a qualified general license, and (3) a general license. A validated license may be obtained only after an exporter has filed a formal application with the Department of Commerce. This license authorizes the export of certain goods or technical data to a specific importer in a particular country. The decision of whether to issue a validated export license is left to the agency. A qualified general license authorizes multiple exports and also is issued pursuant to an application by the exporter. Under a general license, exports of some commodities and technologies are possible without filing an application. As explained by Berman and Garson, "a general license is not a license in the sense of a document that has been issued; it is, rather, a regulation granting permission to make the export without a specially issued document specifically authorizing it."11 The penalties for violations of the Act or any regulation, order, or license issued thereunder, are strict.12

B. The Export Administration Technical Data Regulations

As may be expected, the purposes stated in the regulations for export controls parallel those in the Export Administration Act.13 The transfer of technical data raises national security concerns within the Department of Commerce when it may promote the

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12 50 U.S.C. app. § 2410 (Supp. III 1979). For knowing violations, the penalty is a fine of $50,000 or not more than five times the value of the exports involved, whichever is greater, or five years imprisonment, or both. Willful violations can result in a fine of $100,000, or ten years in prison, or both. Civil penalties are not to exceed $10,000 for each violation. Id. In addition, an administrative penalty may result in the denial of export privileges. 45 Fed. Reg. 84,020-22 (1980)(to be codified at 15 C.F.R. § 387 1(b)).
13 Export Administration Regulation, 15 C.F.R. § 370.1 (1980) provides:
Export controls administered by the Department of Commerce under the Export Administration Act, are used to the extent necessary: (1) to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand; (2) to further significantly the foreign policy of the United States and to fulfill its international responsibilities; and (3) to exercise the necessary vigilance over exports from the standpoint of their significance to the national security of the United States.

Id.
military potential of another country. The agency views foreign policy interests as at stake when exported technology "would enhance another nation's capabilities in a manner inconsistent with our foreign policies. . . ."

The Department of Commerce defines "technical data" in the regulations as

information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical services.

Technical data can be exported in various ways, including (1) an actual shipment or transmission out of the United States; (2) any release of technical data in the United States with the knowledge or intent that it will be shipped or transmitted to another country; and (3) the release of such data in a foreign country. Thus, the regulations apply to the dissemination of technological information by United States citizens both in the United States and abroad. Technical data may be "released" for export in oral, visual, or written form.

Under a General License GTDA, unclassified technical data may be exported to all destinations without restriction if it is "generally available to the public in any form." This non-proprietary technical data (technical information that is in the public domain) includes "(1) data released orally or visually at open conferences, lectures, trade shows, or other media open to the public, and (2) publications that may be purchased without restriction at a nominal cost or obtained without costs or are available at libraries open to the public." These general license
provisions of the regulations also apply to scientific or educational data if they are "not directly and significantly related to the design, production, or utilization in industrial processes. . . ."\textsuperscript{21}

To control restricted technical data, the regulations establish a General License GTDR, under which exports are permissible only to certain non-communist countries and only if the importer signs a written assurance that the technical data will not be re-exported.\textsuperscript{22} Of course, this pledge requirement is effective only if the importing country also has a system of export controls and is willing to use those controls to further United States interests. Thus, as one commentator has noted, whether a foreign government "is willing and able to exercise export controls is a significant factor in the decision to be made in the United States whether a particular export should be permitted."\textsuperscript{23}

Except for these limited general license provisions, technical data may not be exported from the United States without a validated export license.\textsuperscript{24} The only other exception to this requirement relates to technological and scientific information exportable to Canada.\textsuperscript{25}

III. CASE STUDY: EXPORT ADMINISTRATION TECHNICAL DATA REGULATIONS APPLIED TO SCIENTIFIC CONFERENCES

As noted above, the Department of Commerce recently applied the regulations on technical data to the First International Conference on Bubble Memory Materials and Process Technology (hereinafter referred to as the Bubble Memory Conference), sponsored by the American Vacuum Society (AVS). The conference was attended primarily by representatives of companies making bubble memories, a technology with vast potential for the computer industry. As the industry is on the verge of moving from the bubble memory prototype to the mass production stage, the purpose of the conference was to reach agreements on such matters as standards, specifications, and reliability of supply.\textsuperscript{26}

On February 11, 1980, conference organizers were contacted by the Compliance Division in the Office of Export Administration of

\begin{footnotes}
\item[21] Id. § 379.3(b) (1).
\item[22] Id. § 379.4(f).
\item[25] Id.
\item[26] Science Meetings Catch the U.S.-Soviet Chill, SCIENCE 1058 (Mar. 7. 1980).
\end{footnotes}
the Department of Commerce, and it was suggested at that time that the technical data regulations might be applicable to the meeting.\footnote{Government Bans Soviets from A.V.S. and O.S.A. Meetings, \textit{Physics Today} 81-83 (Apr. 1980).} In a letter received on February 19 by Dr. John L. Vossen, President of the American Vacuum Society, the Commerce Department again suggested that the conference might be within the coverage of the Act, in which case any oral exchanges of information with foreign nationals at the conference could constitute the export of technical data.\footnote{Letter from Kent N. Knowles, Director of the Office of Export Administration to John L. Vossen, President of the American Vacuum Society (February 14, 1980), \textit{excerpted in Physics Today}, Apr. 1980, at 81-83.} If the regulations were applicable, a validated license from the Office of Export Administration and written assurances from foreign attendees would be required before the technical data could be "exported."\footnote{\textit{Id.}} The letter also requested that copies of the proposed presentations be submitted to the Office of Export Administration so that it could "make a definitive determination as to what restrictions govern the subject matter of the conference."\footnote{\textit{Id.}} Through subsequent telephone conversations with the Commerce Department, conference organizers were informed that the scientific and technological information to be disseminated at the meeting constituted data not available publicly, and therefore was subject to licensing restrictions under the Export Administration regulations.\footnote{Feds Defend Bubble Meddle, \textit{Science} 577 (May 9, 1980).}

The Department of State also became involved in these preconference proceedings, informing Dr. Vossen that it was concerned about Commerce Department instructions that foreign invitees sign written assurances. Further pressure from the State Department resulted in the American Vacuum Society disinviting the Polish, Hungarian, and Soviet scientists who had planned to attend the Bubble Memory Conference. Although the State Department had no objection to three scientists from the People's Republic of China attending the meeting,\footnote{Government Bans Soviets from A.V.S. and O.S.A. Meetings, \textit{Physics Today} at 81 (Apr. 1980).} on February 19, one day prior to the opening session of the conference, the Department of Commerce notified the Vacuum Society and Dr. Vossen that the Chinese could not attend. Furthermore, all foreign par-
Participants would be required to sign written assurances regarding transfers to other countries before they could be admitted to the conference. Commerce Department officials reminded Dr. Vossen and the AVS of the penalties for violation of the Export Administration Act and its accompanying regulations.

At the conference registration, approximately thirty foreign invitees signed the required written assurance. On February 21, the second day of the conference, the Department of Commerce relented and permitted the Chinese scientists to attend upon the condition that they too sign a written assurance. This pledge was similar to that required of the other foreign participants, although, not surprisingly, the list of countries to which re-exports were prohibited did not include the People's Republic of China.

In summary, the Department of Commerce determined that the technical data regulations applied to the Bubble Memory Conference for the following reasons: (1) the information to be disseminated was "technical data" as defined in section 379.1(a) of the Act; (2) the technical data would be "exported" since foreign nationals were participating in the meeting; (3) the meeting was not an "open conference"; and (4) licensing and written assurance provisions applied because the technical data were not generally available to the public and the technical information was scientific data directly and significantly related to design, production, or utilization in industrial processes.

During and after the conference, organizers of the meeting and interested scientists argued that many of these conclusions were incorrect. Herman Feshbach, President of the American Physical Society, pointed out that discussions at the conference dealt solely with "scientific information that is either published, or about to be

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33 The written assurance read as follows:
The undersigned assures the American Vacuum Society that information obtained at the First International Conference on Bubble Memory Materials and Process Technology will not be divulged to Nationals of the following countries, unless prior authorization is obtained from the Office of Export Administration: Rumania, Poland, Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic (including East Berlin), Hungary, Laos, Latvia, The Mongolian People's Republic, People's Republic of China (excluding Republic of China), U.S.S.R., Lithuania, North Korea, Vietnam, Cambodia, and Cuba.

Id. at 82.

34 See note 12 supra.

35 Government Bans Soviets from A.V.S. and O.S.A. Meetings, supra note 27, at 81-83.

36 Letter from John L. Vossen, President of the American Vacuum Society, to Li Jia-Xiang, of the Permanent Mission to the United Nations (Feb. 29, 1980).
published, in the open literature." Dr. Vossen argued that the information disseminated at the meeting was not in any way sensitive or proprietary, but in the public domain. He noted that "industry, in its own self-interest, proscribes release of proprietary information in any form, far more stringently than the bureaucracy ever could." Other conference organizers and numerous scientists agreed that none of the representatives of the competing firms at the conference would have divulged anything the others did not already know. The government's position was that the meeting discussed manufacturing procedures and unpublished data concerning high technology on the embargoed list for export.

Conference organizers also objected strenuously to the determination that the Bubble Memory Conference was not "open." It was pointed out that the meeting was advertised widely and that there were no restrictions as to applications for admission. The Commerce Department focused on the fact that only one hundred persons were invited.

Aside from the controversy as to which particular provisions of the regulations were applicable, organizers of the meeting and other interested scientists voiced concern regarding the impact of the export restraints upon scientific freedom and achievement. Feshbach stated that the Commerce Department's actions would discourage scientific efforts in the United States, and would deter Western European and Japanese scientists from attending conferences in the United States. Dr. Vossen went further, concluding that the Commerce Department had jeopardized the future of international technical meetings in the United States, and had endangered the existence of most technical societies.

37 Letter from Herman Feshbach, President of the American Physical Society, to Cyrus Vance, Secretary of State (Mar. 11, 1980).
38 Letter from John L. Vossen to Philip M. Klutznick, Secretary of Commerce (Mar. 11, 1980).
39 Feds Defend Bubble Meddle, supra note 31, at 577.
40 The embargoed list referred to is the Commerce Department Commodity Control List, incorporated by reference into the Export Administration Regulations at 5 C.F.R. § 399.1 (1980).
41 Government Bans Soviets from A.V.S. and O.S.A. Meetings, supra note 27, at 82.
42 The regulations do not define the term "open conference."
43 Letter from John L. Vossen to Philip M. Klutznick, Secretary of Commerce (Mar. 17, 1980).
44 Government Bans Soviets from A.V.S. and O.S.A. Meetings, supra note 27, at 81.
45 Letter from Herman Feshbach, President of the American Physical Society, to Philip M. Klutznick, Secretary of Commerce (March 11, 1980).
46 Letter from John L. Vossen, to Philip M. Klutznick, Secretary of Commerce (Mar. 17, 1980).
The foregoing examination of the application of the Export Administration Technical Data Regulations provides an indication of the potential constitutional problems inherent in the regulations. Restraints were imposed on activities that consisted primarily of lecturing and presenting scientific papers. A government agency intervened in what was described as merely "a forum for scientists to talk to scientists." The free flow of scientific information was restricted by licensing procedures that could be characterized as arbitrary; the regulations, which facilitated the censorship of expression, contain no procedures for judicial review. Furthermore, questions of overbroad application are presented. The validity of such a system of export controls is indeed questionable. The balance of this discussion focuses on these first amendment issues.

IV. **FIRST AMENDMENT ISSUES**

A. **The Degree of Protection for “Technical Data Speech”**

In any analysis of first amendment issues, a threshold question is whether first amendment protections are applicable to a particular situation. In the context discussed herein, it must be determined whether speech pertaining to technical data should be afforded such protection. If the first amendment does reach this type of speech, the question then becomes whether it should receive full or only limited protection. In other words, where does scientific speech fit on what has been characterized as a spectrum of first amendment protection?

The general rule is that "governmental bodies may not prescribe the form or content of individual expression." Nonetheless, a number of exceptions have developed over the years. Obscenity is not protected by the first amendment. Fighting words also fall within the category of unprotected speech. Defamation has never received first amendment protection, and speech that incites others to engage in unlawful action has also been denied protection by the Supreme Court of the United States. In view of the fact that the dissemination of

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47 Government Bans Soviets from A.V.S. and O.S.A. Meetings, supra note 27, at 82.
technical data does not come within any of these exceptions, one may conclude that such expression is entitled to some degree of first amendment protection.

Under traditional analysis, all speech, other than those categories deemed to be unprotected, is entitled to full first amendment protection. When government does attempt to suppress speech, the strict scrutiny test is applied, and a presumption of unconstitutionality attaches. Only a compelling state interest is sufficient to overcome the presumption and sustain restraints. The Supreme Court, however, recently has departed from such analysis in its treatment of commercial speech. Indeed, only an intermediate degree of protection has been afforded commercial speech. Therefore, additional issues that must be addressed are whether scientific and technological information is to be considered commercial speech, and if not, whether such speech should receive a similar degree of protection.

In Bigelow v. Virginia, the Supreme Court first suggested that commercial speech was entitled to constitutional protection. Bigelow published an advertisement in his newspaper concerning the availability of abortions in New York. He was convicted under a Virginia statute, which made it unlawful to encourage the procuring of an abortion by the circulation of any publication. In reversing the conviction, the Court stated that “the fact that the particular advertisement in appellant's newspaper had commercial interests did not negate all first amendment guarantees.” One year later, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court unequivocally held for the first time that the first amendment protects commercial speech. In Virginia Board of Pharmacy, a Virginia law that prohibited licensed pharmacists from advertising prescription drug prices was invalidated. In announcing an intermediate degree of protection for commercial speech, the Court balanced asserted state interests and the first amendment speech interest. Although the consumer's interest in the free flow of commercial information was addressed (i.e., the Court recognized the first amendment's applicability to the recipient of communication as well as to its source), the Court specified that some forms of commercial speech regulation would be permissible.

53 Tribe, American Constitutional Law, § 12-8, at 602-04.
54 421 U.S. 809 (1975).
55 Id. at 818.
In *Bates v. State Bar of Arizona*, the Court struck down a ban on advertising by attorneys. It was emphasized, however, that government can regulate truthfulness in commercial speech. Advertising of routine services was permissible, but not advertising as to the quality of those services. Thus, although attorney advertising can be regulated, it may not be suppressed totally. In *Ohralick v. Ohio State Bar Association*, the Court held that a state may discipline a lawyer for soliciting clients in person. This decision reaffirmed the position that commercial speech is entitled to a limited degree of first amendment protection and that it is subject to regulation in furtherance of important governmental interests. The Court stressed the fact that commercial speech occupies a "subordinate position in the scale of first amendment values...." 

In a recent commercial speech decision, *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, the Supreme Court held unconstitutional the New York Public Service Commission's ban on promotional advertising by electric utilities. Justice Powell, writing for the Court, noted that although commercial speech receives less protection than other constitutionally guaranteed expression, "[we] have rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech." 

It should be pointed out that the Supreme Court has not specifically defined commercial speech in any of its decisions. In *Central Hudson*, Justice Powell referred to "expression related solely to the economic interests of the speaker and its audience," and "speech proposing a commercial transaction." However, the

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59 Id. at 456.
60 447 U.S. 557 (1980).
61 Id. at 563. Powell enunciated a four-part test for commercial speech cases: (1) determine whether the commercial speech is misleading or concerns unlawful activity (if so, then no first amendment protection); (2) decide whether the asserted governmental interest is substantial; (3) if the interest is substantial, determine whether the regulation directly advances that governmental interest; and (4) ascertain whether the regulation is more extensive than is necessary to serve that interest. The Court noted that the speech was not misleading and that it did not relate to unlawful activity. The state interest in conserving energy was held to be substantial, and the Court determined that the Public Service Commission order did directly advance that interest. The Court invalidated the regulation under part four of the announced test, since it was more extensive than was necessary to serve the governmental interest.
63 Id.
Court did not expressly adopt either phrase as a definition of commercial speech. Thus, because all of the commercial speech cases to date have dealt with advertising in some context, the only definitive conclusion that can be drawn is that advertising is commercial speech. A determination as to whether the category is more inclusive must await further word from the Supreme Court.

Speech relating to scientific and technological information obviously is not merely a form of advertising. Such communication, however, does go to a limited scientific group and cannot be categorized as speech that is political in nature, which has always received a preferred status. On the other hand, using the Bubble Memory Conference as an example, dissemination of the technical data occurred only through discussion. There was no advertising nor was there any immediate connection to a commercial transaction. Such factors lead one to question whether technical data speech should be characterized as commercial speech.

Even if scientific speech in such a context is not classified as commercial speech, one might argue that it should be afforded a similar degree of intermediate protection. If so, then presumably a test similar to the one announced in Central Hudson would control. Government restriction would be permissible if there is a substantial state interest in regulating the communication, the regulation directly advanced that interest, and the restraints were no more extensive than necessary to serve the governmental interest. The technical data regulations might survive a facial challenge under such a test, but application of the regulations to specific situations, such as scientific conferences, raises more difficult questions. In particular, application of the regulations to the Bubble Memory Conference may violate the last part of the Central Hudson test.

It is arguable that information of a scientific or technological nature should be afforded full first amendment protection, or at least a higher degree of protection than that afforded commercial speech. Ferguson, who has recently written on the subject of science and the first amendment, favors the latter suggestion. He focuses on the following language in Miller v. California: "The First Amendment protects works which, taken as a whole, have . . . scientific value. . . ." Ferguson suggests that the Supreme Court

\*\*\* Id. at 644 n.19 (quoting Miller v. California, 413 U.S. 15 (1973)).
is now "moving toward a hierarchial view of the first amendment, a view that assigns different levels of constitutional protection to different kinds of expression." Commercial speech is cited as an example of this trend. Ferguson, however, argues that scientific speech should receive more protection than commercial speech. Among the reasons offered for this position are that scientists have strong individual interests in the free exchange of scientific data and ideas; the interests are more intellectual than economic (commercial speech being purely economic); that the public has strong interests in the free flow of scientific information; and that scientific expression is essential to intelligent public decisionmaking.

Regardless of whether speech relating to technical data is given protection similar to that of commercial speech, more than commercial speech but less than full protection, or full first amendment protection, the governmental interests in imposing restraints obviously must be considered. The state interest will have to be at least substantial, and possibly even compelling. As to the facial validity of the Export Administration Act's technical data regulations, the issue is whether the asserted national security and foreign policy interests meet such a standard. The fact that technical data may provide the technology to develop or improve the military capabilities of other nations may be sufficient justification to sustain the regulations. When applied to specific situations, however, such as the discussion of technological issues and techniques at scientific conferences, the validity of the regulations is more questionable. In such a context, imposition of restraints on national security or foreign policy grounds may often be neither compelling nor substantial.

B. Potential First Amendment Challenges to Technical Data Regulations

1. The Exporting of Technical Data as "Conduct"

In United States v. O'Brien, the Supreme Court held that the
The First Amendment does not protect all modes of communication of ideas by conduct. The general rule for symbolic speech cases was stated as follows: "[A] government regulation is sufficiently justified if it ... furthers an important or substantial government interest, if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."69

In O'Brien, the Court noted that a statute designed to suppress communication could not be sustained as a regulation of noncommunicative conduct. Three years later, in Cohen v. California,70 the Court ruled that a conviction resting solely on speech and not upon separately identifiable conduct could not stand. From these decisions, it is difficult to assert that a scientist who speaks to a conference on a technological subject is engaged in the "conduct" of exporting technical data. Clearly, there is a substantial speech interest in such a case. Furthermore, although there are legitimate non-speech interests (national security and foreign policy), the impact upon speech is too great to be incidental and thus appears invalid.

Apart from the application of the technical data regulations to scientific meetings, restrictions that control the conduct of exporting technical information would seem to be permissible under the O'Brien rationale. United States v. Edler Industries, Inc.71 illustrates such a valid restraint.72 In Edler, an aerospace manufacturing and engineering firm applied to the Office of Munitions Control for licenses to export specific technical knowledge to two French firms. This technology, which dealt with tape wrapping and carbon/carbon composites, had direct application to the production of missiles. Although the licenses were denied, Edler proceeded to export the technology. The district court convicted the defendants, and although the court of appeals reversed and remanded for a new trial, it agreed that the government has the power to preclude United States firms from entering into having no connection with speech. While noting that it saw nothing particularly expressive about O'Brien's conduct, the Court emphasized that draft registration certificate burning could be regulated because a substantial governmental interest would be furthered, i.e., the efficient functioning of the Selective Service system.

69 Id. at 377.
70 403 U.S. 15 (1971).
71 579 F.2d 516 (9th Cir. 1978).
72 Note that this case dealt with regulations on technical data under the Mutual Security Act of 1954 and not the Export Administration Act.
agreements with foreign corporations or governments for the purpose of aiding in the production of arms, ammunition, and other implements of war. However, the court suggested that in some contexts the dissemination of certain technical information might be protected by the first amendment. Thus, although holding that the defendants had engaged in unprotected conduct, the court recognized that there could be instances in which the dissemination of technical data would constitute protected speech.

2. The Overbreadth Doctrine

The Export Administration regulations on technical data may also be susceptible to challenge on overbreadth grounds. The Supreme Court has applied the overbreadth doctrine to statutes in which there is an overlap into an area of constitutional protections. The doctrine was developed because an overbroad law tends to deter constitutionally protected speech or activity. To avoid this chilling effect, the court invalidates the statute on its face. A litigant may raise an overbreadth claim, even though the speech or conduct of the particular plaintiff may not itself be protected by the first amendment. The litigant in this position argues that the statute must be struck down because it could be applied to restrict speech that cannot be constitutionally burdened. Exceptions to the overbreadth doctrine have been noted for symbolic speech,73 speech of military personnel,74 and commercial speech.

73 See Shaman, The First Amendment Rule Against Overbreadth, 52 Temp. L. Q. 259 (1979). The limitation of the application of the rule against overbreadth in symbolic speech cases occurred in Broadrick v. Oklahoma, 413 U.S. 601 (1973). In that case, three employees of the Oklahoma Corporation Commission challenged a section of Oklahoma's Merit System of Personnel Administration Act. Appellants conceded that the section, which restricts the political activities of the State's classified civil servants, covered their own activities. However, they claimed that it also applied "to such allegedly protected political expression as the wearing of political buttons or the displaying of bumper stickers." Id. at 609-10. The Supreme Court determined that the overbreadth doctrine was not applicable and upheld the statute. The reasoning for the decision was that: "Where conduct and not merely speech is involved . . . overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Thus, the statute was admitted to be overbroad since it prohibited protected activities such as the wearing of political buttons and displaying of bumper stickers. However, because the overbreadth was not substantial, the Court refused to strike down the statute on its face.

74 Overbreadth doctrine as applied to speech by military personnel has also been limited by the Supreme Court. In Parker v. Levy, 417 U.S. 733 (1974), the Court rejected a challenge on overbreadth grounds of articles 133 and 134 of the Uniform Code of Military Justice. Noting the difference between military and civilian society, the Court determined that a statute that might marginally infringe upon first amendment values should not be invalidated on its face when the "remainder of the statute covers a whole range of easily iden-
As to the last category, in *Bates v. State Bar of Arizona*, the Court indicated that invalidation on overbreadth grounds will occur only if it is shown that the commercial speech at issue is entitled to first amendment protection. The test announced in *Central Hudson* expanded this limitation of the rule against overbreadth in the commercial speech context—substantial governmental interest will justify regulation of constitutionally protected commercial speech as long as the restriction is no more extensive than is necessary to serve the asserted state interest. In the Court's view, such a limitation is acceptable because commercial speech "is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"

In regard to the technical data regulations, overbreadth analysis should be applicable due to the fact that arguably protected speech is affected. If the scientific and technological information controlled by the regulations is held to be commercial speech, conventional overbreadth rules would not apply. If, however, a greater degree of first amendment protection is afforded such speech, the overbreadth doctrine in its traditional form would appear to govern. A determination of overbreadth would then result in holding the regulations facially unconstitutional. Such a conclusion could be justified because the overbroad licensing scheme under the regulations deters speech; it could have a chilling effect upon the exercise of first amendment freedoms. On the other hand, in considering a facial challenge, the Supreme Court has noted that "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." A determination of facial invalidity would undoubtedly impede and create havoc in the existing system of export controls. It thus appears unlikely that a court would strike down the technical data regulations on overbreadth grounds.

3. Standards in Permit and License Cases

The Supreme Court has rendered numerous decisions in cases...
in which restrictions were imposed upon the exercise of first amendment freedoms through the use of licensing schemes and permit requirements. The rules established in these cases may be applicable by analogy to the technical data regulations of the Export Administration Act. As the Court stated in *Staub v. City of Baxley*,

It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

An example of an impermissible permit or license requirement is illustrated by *Shuttlesworth v. City of Birmingham*. The defendant was convicted under a Birmingham ordinance, which made it unlawful to participate in any parade, procession, or other public demonstration without first obtaining a permit from the City Commission. In striking down the ordinance, the Court noted that “a law subjecting the exercise of first amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.”

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79 In Lovell v. City of Griffin, 303 U.S. 444 (1938), an ordinance requiring a permit from the City Manager before advertising or other types of literature could be distributed was held to be invalid on its face. The Court found the permit requirement impermissible because “it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.” *Id.* at 451. Similarly, a municipal ordinance that prohibited solicitation, and distribution of circulars by canvassing from house to house unless licensed by the police, was struck down in Schneider v. State. 308 U.S. 147 (1939). Particularly troublesome to the Court was the fact that the ordinance gave police total discretion in granting licenses. In Cox v. New Hampshire, 312 U.S. 569 (1941), the defendants were convicted under a New Hampshire statute for participating in a parade upon a public street without a license. In affirming the convictions, the Supreme Court noted that the licensing board did not have unfettered discretion to deny the right to march or speak, but could only regulate the time, place, and manner of the parade for reasons of safety and convenience. In a Jehovah's Witness case, Kunz v. New York, 340 U.S. 290 (1951), appellants were convicted for violating a New York City ordinance that made it unlawful to hold public worship meetings on the streets without having first obtained a permit from the City Police Commissioner. The convictions were overturned by the Supreme Court because the Commissioner had discretionary power to control in advance the exercise of first amendment rights. Writing for the Court, Chief Justice Vinson stated that “we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.” *Id.* at 294.


82 *Id.* at 150-51 (emphasis added).
The only standard in the ordinance upon which the commission was to base permit issuance decisions was phrased in terms of "public welfare, peace, safety, health, decency, good order, morals or convenience." Such guidance, according to the Court, provided members of the City Commission with impermissible discretion.

The case law indicates that for the government to require a license or permit before first amendment rights may be exercised, the licensing authority must have no discretion to discriminate on the basis of content. License denial is permissible only as a reasonable time, place, and manner regulation. If the dissemination of technical data is held to be entitled to some degree of protection under the first amendment, then these principles would appear to be applicable. In its capacity as the licensing authority, the Department of Commerce is guided only by the general standards of national security and foreign policy. A degree of arbitrariness inheres in the administration of the export controls and the Commerce Department has broad discretion in deciding whether a license is to be required in a particular situation. Furthermore, such individual determinations are obviously content based. Thus, the application of the license and written assurance requirements to situations relating to the dissemination of technological and scientific information infringes upon a protected speech element and may be unconstitutional. An example is the mere discussion of technological issues and techniques at scientific meetings such as the Bubble Memory Conference.

4. Lack of Judicial Review

The validity of the Export Administration Act's technical data regulations may also be questioned due to a statutory provision precluding judicial review of Commerce Department licensing decisions. In *Freedman v. Maryland*, a Maryland statute requiring submission of films to the State Board of Censors for licensing prior to exhibition at theatres was challenged. The Supreme Court held the statute unconstitutional because no system of procedural safeguards existed. The Court ruled that the following safeguards are required when allegedly unprotected speech is

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50 U.S.C. app. § 2412 (Supp. III 1979). Most functions exercised under the Export Administration Act are also exempted from Administrative Procedure Act review. Id.

84 380 U.S. 51 (1965).

5 In this particular case, the Board made determinations as to whether films were obscene.
subjected to licensing schemes and censorship: (1) prior submission of the movie can be required, but the burden of proof on the issue of obscenity is on the censor, (2) the administrative review board must make its determination within a specified and brief period, and (3) a prompt final judicial determination as to the correctness of a finding of obscenity must be assured.86

In National Socialist Party of America v. Village of Skokie,87 the Supreme Court added the requirement of prompt appellate review to the Freedman list of procedural safeguards. In Skokie, an injunction was entered against the National Socialist Party by the Circuit Court of Cook County.88 In reversing the Illinois Supreme Court’s denial of a stay, the United States Supreme Court held that “if a state seeks to impose a restraint of this kind, it must provide strict procedural safeguards . . . including immediate appellate review. . . .”89

In the cases considered above, licensing or censorship schemes imposed upon allegedly protected speech were held to be impermissible because specific procedural safeguards were not available. Under the Export Administration Regulations on technical data, a similar system of licensing is involved and potentially protected speech is affected. The Act exempts licensing decisions from judicial review under the Administrative Procedure Act, thus allowing for possible arbitrary decisions by the

86 380 U.S. 51 (1965). In Blount v. Rizzi, 400 U.S. 410 (1971), an administrative censorship scheme was struck down as a violation of the Freedman standards. The Court emphasized that the rules announced in Freedman are necessary because of the danger that a censor or licensing authority will be less responsive than a court in protecting first amendment interests. In another censorship case, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), the Court reiterated that whenever there is content based review, the procedural guarantees of Freedman come into play. In Conrad, petitioners sought to produce the play Hair in a privately-owned Chattanooga theatre under lease to the city. The rejection of their application was held to be unconstitutional since no procedure for prompt judicial review was available.


88 The order prohibited the Party from marching, walking or parading in the uniform of the National Socialist Party of America; marching, walking or parading or otherwise displaying the swastika on or off their person; distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.

89 Id. at 43.

90 Id. at 44. The validity of a Texas nuisance statute as applied to obscenity was at issue in Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980). The statute authorized restraints of indefinite duration on the exhibition of films that had not been finally adjudicated as obscene. The Court, in a per curiam opinion, held the statute unconstitutional because it was procedurally deficient under Freedman.
Department of Commerce as to whether licenses are required. Nor has the burden of proof been allocated. Whether the Department of Commerce or the "exporter" must prove that the technological information is detrimental to United States national security and foreign policy interests is unclear. Similar uncertainties exist as to the burden of proof on issues such as public availability of the technical data, "open" conferences, and whether the data have military application.

There is also no provision for judicial review in the export Administration technical data regulations. If the agency determines that the regulations are applicable, or if a license is denied, then general federal question jurisdiction under 28 U.S.C. § 1331 is the only available judicial remedy. For instances such as the Bubble Memory Conference, the need for expeditious judicial review appears to be at least as significant as in the censorship and licensing cases considered above. Of primary concern is that promotion of United States national security may be the sole concern, and that protection of possible first amendment rights may not even be considered. Thus, the technical data regulations as applied in certain contexts may be unconstitutional due to the lack of Freedman and Skokie procedural safeguards.

5. Prior Restraint

A court order enjoining one from speaking or publishing because of what is to be said or written is the classic example of a prior restraint. The Supreme Court has taken a dim view of such restrictions, noting that "prior restraints on speech and publication are the most serious and the least tolerable infringement on first amendment rights." The Court has established a strong presumption against the validity of such restraints, and a heavy burden of showing justification for the prior restraint has been imposed upon the government. Prior restraints, however, are not unconstitutional per se. The Court has continually refused to hold that prior restraints may never be imposed, holding instead that prior restraints are permissible only in certain limited and exceptional cases.

90 The only review available under the regulations is an appeal to the Assistant Secretary for "reconsideration." See 45 Fed. Reg. 85,447, 85,448 (1980)(to be codified in 15 C.F.R. § 389.2(a)).
93 In dicta, in Near v. Minnesota, 283 U.S. 697 (1931), the Court suggested that an exception to the general rule against prior restraints may exist when the nation is at war.
Although the Supreme Court has addressed the issue of prior restraint on numerous occasions, its applicability in the national security realm is especially relevant for present purposes. In *New York Times Co. v. United States*, the government sought to enjoin publication of the Pentagon Papers by the *New York Times* and *Washington Post*, ostensibly for national security reasons. In a per curiam opinion, the Supreme Court ruled that the government had not met its heavy burden of justifying the restraint. Justices Black and Douglas, in concurring opinions, stated that even limited exceptions to the prior restraint doctrine should not be allowed. Justice Brennan indicated that he would permit a very narrow class of exceptions, but only upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea..." Justices Stewart and White agreed that prior restraints would be permissible only in a single, extremely narrow class of cases. It was emphasized by Justice White that even a showing that "revelation of these documents will do substantial damage to public interest" would be insufficient to overcome the strong presumption against prior restraints.

It appears that the Court in *New York Times* applied a variant of the clear and present danger test. The determination focused upon whether publication of the material was a danger to international relations and United States national security. Four factors were considered by the Court: (1) the immediacy of the danger; (2) whether the information was otherwise available; (3) whether the injunction would be effective; and (4) the seriousness of the danger. Even though the information at issue was classified top-secret and national security interests could have been damaged, the Court refused to sanction the prior restraint.

In a district court opinion relating to national security, a prior restraint was upheld. In *United States v. Progressive, Inc.*, the government sought to enjoin defendants from publishing an article entitled "The H-Bomb Secret; How We Got It, Why We're Telling It." It was claimed that publication would lead to prolifera-

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95 403 U.S. 713 (1971).
96 Id. at 726-27 (Brennan, J., concurring).
97 Id. at 730-31 (White, J., joined by Stewart, J., concurring).
tion of nuclear weapons capability. Judge Warren agreed, concluding 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.”99 Citing New York Times, Judge Warren determined that the possibility of direct, immediate, and irreparable harm to the United States had been demonstrated sufficiently by the government.

While on appeal to the Seventh Circuit, two government documents containing the same information as that of the Progressive article were discovered on the open shelves of the Los Alamos Scientific Laboratory. After a letter containing similar information from a computer programmer to Senator Percy was published by the Madison Press Connection, the government dropped its case. The Seventh Circuit vacated Judge Warren's preliminary injunction and The Progressive published the article.100 Thus, since the article did not contain secret information, but only data already in the public domain, the prior restraint was unjustifiably imposed. It has been suggested that Judge Warren applied a less stringent standard than New York Times requires, i.e., “a standard that required a showing that unusually serious harm might result from publication....”101 Due to these circumstances, The Progressive case deserves only limited precedential value.

Two recent Supreme Court cases upholding prior restraints are Brown v. Glines102 and United States v. Snepp.103 However, their applicability and sway in the context of restrictions on the dissemination of technical data is attenuated. In Brown v. Glines, the Supreme Court sustained Air Force regulations requiring members of the Service to obtain approval from their commanders before circulating petitions on Air Force bases. Recognizing that the military is a “specialized society separate from civilian society,”104 the Court has repeatedly tolerated restrictions upon

99 Id. at 996.
101 Tribe & Remes, supra note 100, at 24.
103 444 U.S. 507 (1980).
104 444 U.S. at 354.
first amendment rights of military personnel, which would be un-
constitutional in a nonmilitary context.

In Snepp, the Court also upheld a prior restraint, but in a set-
ting even more narrow than Brown v. Glines. Snepp, a former
Central Intelligence Agency (CIA) agent, published a book on CIA
activities in Vietnam without submitting it to the Agency for pre-
publishation review. As an express condition of his employment,
Snepp agreed not to publish any information concerning CIA ac-
tivities without prior approval from the Agency. The government
sued to enforce the agreement. In a per curiam opinion, the
Supreme Court enjoined future breaches of the contract and im-
posed a constructive trust on Snepp's profits. The Court held that
the prior restraint was necessary to protect the safety of CIA
agents and to ensure the effective operation of the foreign in-
telligence service.

Snepp seems to represent only a limited holding in respect to
the prior restraint doctrine. A narrow reading of the case is
necessary due to at least two factors: (1) the Court is less reluc-
tant to uphold restraints upon first amendment rights of govern-
ment employees, and (2) Snepp signed a contract promising not to
publish any material dealing with CIA activities without prepub-
lication clearance from the Agency.

In conclusion, the prior restraint doctrine appears to be ap-
plicable to the restrictions imposed by the Department of Com-
merce upon the dissemination of technical data.\textsuperscript{105} Although licens-
ing and written assurance requirements do not amount to an in-
junction against speech or publication, the restraints are
analogous. At issue is whether the asserted national security and
foreign policy interests are sufficient reasons to suppress first
amendment rights. Under the \textit{New York Times} test, it seems that
the Commerce Department would have to demonstrate clearly
that the dissemination of technological information would enable
other nations to develop their military capabilities. In a case such
as Edler,\textsuperscript{106} it would not be troublesome to meet such a burden.
However, to justify restrictions upon first amendment rights
sought to be exercised at a scientific conference is considerably

\textsuperscript{105} Note that prior restraint principles may not apply if the technical information con-
trolled by the Export Administration regulations is afforded protection similar to commer-
cial speech. In \textit{Virginia Bd. of Pharmacy}, 425 U.S. at 771 n.24, and in \textit{Central Hudson}, 447
U.S. at 571 n.13, the Court indicated that commercial speech may be an exception to the
general rule against prior restraints.

\textsuperscript{106} 579 F.2d 516 (9th Cir. 1978).
more difficult. Information to be discussed rarely will be secret (the regulations under consideration do not even control classified information), and it is doubtful that any immediate or grave danger will result. Thus, application of export controls to the dissemination of technical data may, in some contexts, amount to an unconstitutional prior restraint.

V. CONCLUSION

The Export Administration regulations on technical data affect first amendment speech interests and may therefore be susceptible to challenge both facially and as applied to specific situations. Restrictions have been imposed upon the dissemination of technological information in order to protect United States national security. Undoubtedly, this is an important reason for the imposition of such restraints. In fact, in a recent case, the Supreme Court made it clear that “the Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . . .”107 However, the Court also has emphasized that first amendment inquiry is not foreclosed whenever the term “national security” is invoked as justification for suppression of speech or press. It is in this context—first amendment freedoms versus national security interests—that the issue of the validity of the technical data regulations must be reviewed.108

Technological information is not merely advertising and would not appear to be confined solely to the realm of commercial speech. Thus, scientific speech may be afforded full first amendment protection. If not, then under a sliding-scale analysis, speech relating to technical data would presumably receive a greater degree of protection than commercial speech and the asserted national security and foreign policy interests would have to be

108 In another context, i.e. passport revocation, the Supreme Court recently came down on the side of national security. Haig, Secretary of State v. Agee, 69 L. Ed. 2d 640 (1981). In reversing the Court of Appeals for the District of Columbia Circuit, Justice Burger wrote: Assuming, arguendo, that First Amendment protections reach beyond our national boundaries, Agee’s First Amendment claim has no foundation. The revocation of Agee’s passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel . . . . To the extent the revocation of his passport operates to inhibit Agee, ‘it is an inhibition of action rather than of speech.

Id. (emphasis in original). Unlike the material or data considered in this Note, the information divulged by Mr. Agee was highly classified.
substantial or even compelling. When the regulations are applied to oral exchanges of information at scientific meetings, such as the Bubble Memory Conference, such a standard would be difficult to meet.

Under the O'Brien rationale, regulation of the conduct of exporting technical data seems to be permissible. The same conclusion, however, cannot be reached when discussion at scientific conferences is restricted because substantial speech interests are involved. Although promotion of United States national security and foreign policy are clearly legitimate non-speech interests, the incidental impact upon protected speech would appear to be intolerable. The regulations may also be questioned on overbreadth grounds. However, it is unclear whether such a facial challenge would be successful. If the technical data controlled by the regulations are held to be entitled to only a limited degree of first amendment protection, traditional overbreadth rules would not apply. The rules established by the Court in permit and license cases provide a further means of challenging the technical data regulations. The Department of Commerce has considerable discretion in determining whether licenses and written assurances are to be required before technological information can be disseminated. There is also no provision in the regulations for prompt judicial or appellate review of administrative licensing decisions. Neither is there any allocation of burden of proof in regard to crucial issues. Since Freedman and Skokie require such procedural safeguards, it would seem that the technical data regulations as applied in certain circumstances would be unconstitutional. Furthermore, in some contexts, application of the regulations may amount to an impermissible prior restraint.

In conclusion, it is suggested that the regulations be revised substantially to take into account the first amendment issues discussed in this Note. As presently written and applied, the regulations are susceptible to first amendment challenge on numerous grounds.

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