

David T. Movius

*Bernstein v. United States Department of State:  
Encryption, Justiciability, and the First Amendment*

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Abstract by Alex M. Johnson

This comment examines the Circuit Court split in *Bernstein v. United States Department of State* (*Bernstein III*) and *Karn v. Department of State* and the effect it has had on the 1976 Arms Export Control Act (AECA) and the United States Munitions List (USML), a provision of the International Traffic in Arms Regulations (ITAR). *Bernstein* retreated from the *Karn* decision that the export proceedings applicable to encryption systems created a nonjusticiable political question by holding unconstitutional certain provisions of the AECA and ITAR because the court determined that computer code is a form of constitutionally protected speech. The author provides a historical background of encryption. Additionally, the author discusses the legislative enactments, including penalties for those who fail to adhere to the licensing requirement of the USML, that have developed to enforce restrictions on encryption exportation effectuated by national security concerns. Further, the author discusses the evolution of the litigation that ultimately found the AECA and ITAR unconstitutional based upon First Amendment precepts favoring administrative agency sponsored restrictions on speech only when they are subjected to judicial review. Finally, the comment concludes by proposing a mechanism that would allow encryption exports to exert the First Amendment rights recognized by *Bernstein III* yet take into account the heightened national security concerns expressed by both the executive and legislative branches.