

3D-Printed Guns: An Overview of Recent Legal Developments

September 11, 2018

As has been widely [reported](#), a company called Defense Distributed has been embroiled in a multi-year legal battle related to its online dissemination of computer files for 3D printing of non-metallic firearms. These files contain code that ostensibly allows for the [automatic generation](#) of plastic firearms and components by anyone with access to a 3D printer. On August 27, 2018, a federal court in Seattle granted a [preliminary order](#) or injunction that blocks the government from allowing Defense Distributed to disseminate the files on the Internet for the foreseeable future. Nevertheless, shortly after entry of the order, the company expressed its [intention](#) to sell the blueprints online and ship them to individual purchasers, which it views as permissible under the court’s ruling. In light of these developments, this Sidebar addresses the various legal questions that have arisen with respect to the recent litigation over 3D-printed guns by providing an overview of the issues and developments that have culminated in the injunction.

An Overview of the AECA and ITAR: Central to the dispute over dissemination of Defense Distributed’s files is a statute called the Arms Export Control Act ([AECA](#)) and implementing International Traffic in Arms Regulations ([ITAR](#)). The AECA authorizes the President of the United States to “control the import and the export of defense articles and defense services” by designating such articles and services on a “United States Munitions List” (USML) and “promulgat[ing] regulations for the[ir] import and export.” Pursuant to delegated authority from the President, the Secretary of State has promulgated ITAR, which the Department of State’s Directorate of Defense Trade Controls (DDTC) [administers](#).

Defense articles on the USML may not be exported—[defined](#) as transferring abroad or to foreign persons—without a [license](#) issued by the DDTC. ITAR [specifies](#) that defense articles include “technical data recorded or stored in any physical form, models, mockups, or other items that reveal technical data directly relating to items” on the USML. If a potential exporter is uncertain whether a particular item is a defense article covered by the USML, it may file a “[commodity jurisdiction](#)” request with the DDTC, which will render a determination as to whether the item is within the scope of ITAR. A person who violates the provisions of the AECA or ITAR—such as by exporting a defense article without the requisite authorization—is subject to both civil and criminal [penalties](#), including monetary fines and imprisonment.

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Pocket Constitution



The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address



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The Texas Lawsuit: In December 2012, Defense Distributed—a non-profit “private defense firm” and federally licensed firearms manufacturer—began posting technical information on its website for 3D printing of gun-related items such as a trigger guard, grips, and receivers. Then, in early May 2013, the company publicly released on the Internet the files for a .380 caliber pistol referred to as the “Liberator,” billed as “the world’s first entirely 3D-printable handgun.” Media coverage drew the attention of legislators and the Obama Administration: within a few days of the files’ release, the DDTC sent a letter notifying Defense Distributed that its actions appeared to be in violation of the AECA and ITAR.

Specifically, the DDTC’s letter indicated that the company’s Internet-posted files could be technical data relating to items on the USML, raising the possibility that their availability on the Internet constituted an “export” of defense articles without prior authorization, in violation of ITAR. The DDTC requested that Defense Distributed submit commodity jurisdiction requests for the files and, pending final determinations of such requests, remove the files from their website. As the DDTC later made clear, the letter necessarily was limited to the presence of the data on the Internet, where it could be accessed by foreign persons and thus fall within ITAR’s technical definition of “export.” The DDTC did not purport to bar Defense Distributed from disseminating the information domestically to American citizens by other means (and indeed could not have done so under the authority of ITAR).

Defense Distributed (along with the Second Amendment Foundation, a gun ownership advocacy group) subsequently filed a lawsuit against the Department of State, the DDTC, and various officials in the United States District Court for the Western District of Texas. The suit principally alleged that ITAR’s imposition of a “prepublication approval requirement” for technical data related to defense articles constituted a violation of Defense Distributed’s rights to free speech, to keep and bear arms, and to due process of law under the First, Second, and Fifth Amendments to the Constitution. The First and Second Amendment claims, in particular, presented novel questions of law for the court to consider: among other things, the company’s free speech argument depended on the contentions that the computer code in the files is “speech” within the meaning of the First Amendment and is protected despite the potential that it could be used to violate the law, propositions that courts and commentators have debated. Likewise, Defense Distributed’s Second Amendment argument relied on the theory that the provision protects the right to make arms as a necessary precursor to keeping and bearing them, a notion that appears to have gone largely unaddressed by the courts.

Shortly after filing suit, Defense Distributed gave the court an opportunity to weigh in on these and other issues, as it sought a preliminary order barring the enforcement of any ITAR approval requirement as it related to the files at issue. The motion required the court to address whether Defense Distributed had shown a “substantial likelihood of success” on the merits of its claims, and in a 2015 order, the court concluded that the company had not. With respect to the First Amendment, the court “consider[ed]” the files protected speech, but determined that the government’s “substantial” interest in controlling the dissemination of military information rendered the sufficiently tailored regulatory scheme permissible. Similarly, the court expressed “reluctan[ce]” to conclude that the Second Amendment protects arms manufacture but held that, even assuming a Second Amendment right were implicated, the government’s interest and means to effectuate it were sufficient to survive scrutiny. The court accordingly denied the company’s motion for a preliminary injunction. This result was affirmed on appeal (though the appellate court did not reach the merits of Defense Distributed’s constitutional claims), and the Supreme Court subsequently denied the company’s petition for a writ of certiorari.

The Washington Lawsuit: In April 2018, two years after the ruling from the court in the Texas lawsuit, the DDTC changed its position on ITAR’s applicability to Defense Distributed’s files, reaching a tentative settlement with the company that called for a revision of the USML to exclude the technical data that was the subject of the suit such that the company’s files could be uploaded to the Internet without issue. The stated reason for the change in position was an underlying export control reform effort that sought to transition certain firearms and ammunition on the USML from the Department of State’s to the

Department of Commerce's jurisdiction. The DDTC agreed in its settlement with Defense Distributed to announce a "temporary modification" to the USML that would allow the company's files to be uploaded immediately (i.e., prior to publication of the final rule revising the USML). The settlement prompted a flurry of lawsuits and countersuits in state and federal court, including suits in New Jersey and Pennsylvania that led Defense Distributed to agree to temporarily prevent access to its files in those states. The burst of filings culminated in a lawsuit by a number of states and the District of Columbia in the United States District Court for the Western District of Washington against the State Department, the DDTC, various government officials, and Defense Distributed and the Second Amendment Foundation. The suit alleges (among other things) that the DDTC's regulatory reversal violates the Administrative Procedure Act (APA), which requires a court to set aside agency action that is "arbitrary and capricious" or in excess of statutory authority. The states claim that the government's temporary modification decision exceeded its authority because the DDTC failed to follow certain regulatory requirements for changing the USML, including providing Congress with 30 days' notice of the proposed change. The states also claim that the decision was "arbitrary and capricious" because the government failed to articulate a satisfactory and reasoned explanation for its reversal and failed to consider the national security and public safety implications of the action.

On August 27, 2018, the Washington court granted a preliminary injunction barring the government from implementing or enforcing the temporary modification to the USML for the duration of the lawsuit. In its order, the court found merit in the states' APA claims and discounted Defense Distributed's argument that the underlying regulations amount to an unconstitutional restriction of the company's protected speech. The court viewed this argument as irrelevant to the merits of the suit, noting that whether the First Amendment precludes the federal government from regulating the data at issue under the AECA with respect to Defense Distributed has no bearing on the states' claims that the temporary modification of the USML runs afoul of the APA. The court did, however, assume that Defense Distributed has a First Amendment right to distribute its files for purposes of balancing the hardships an injunction would impose (a separate factor in the preliminary injunction analysis) and acknowledged that the grant of a preliminary injunction would "abridge[]" that right. Nevertheless, the court regarded such a First Amendment burden as being far outweighed by the harms the states would suffer from the restrictions' withdrawal and the public interest in maintaining the status quo. And in any event, the court recognized that regulation under the AECA means *only* that "the files cannot be uploaded to the [I]nternet." Thus, according to the court, Defense Distributed's First Amendment rights are not fully "abrogated" because it can email, securely transmit, or otherwise publish the files within the United States.

Implications and Congressional Developments: The August 27 order in the Washington litigation prevents Defense Distributed from making its disputed files indiscriminately available on the Internet for the duration of the litigation. However, because the underlying regulatory decision centers only on the "export" of technical information pursuant to the AECA and ITAR, it appears that Defense Distributed remains free in light of the order to provide its files to U.S. persons within the country (which it reportedly has begun to do). Furthermore, because the substance of the Washington lawsuit primarily concerns the legitimacy of the government's ITAR reversal under the APA, it seems unlikely that the constitutional issues raised in Defense Distributed's Texas lawsuit—including the extent of First Amendment protection for distribution of the files at issue—will be definitively resolved in the forum. As the Washington court made clear in its preliminary injunction order, it does not view the First Amendment as relevant to the substance of the states' APA claims, and the narrow nature of the disputed AECA "export" decision renders limited any theoretical speech abridgement. That said, Defense Distributed's constitutional arguments may still be addressed in other fora where litigation is ongoing.

Separate from the litigation involving Defense Distributed, some Members of Congress have shown interest in addressing the publication of 3D-printed gun information with the introduction of a bill in each chamber (S. 3304/H.R. 6649) that would make it unlawful for any person to "intentionally publish, over the Internet or by means of the World Wide Web, digital instructions . . . or other code that can

automatically program” a 3D printer or similar device to produce or complete a firearm. Perhaps with First Amendment concerns in mind, the bills’ “Findings” section states that the intention of the bill is not “to regulate the rights of computer programmers,” but is instead “to curb the pernicious effects of untraceable—and potentially undetectable—firearms.” It appears that this provision is [intended](#) to establish that the bills do not aim to regulate the content of particular speech, which would [subject](#) the legislation to less stringent scrutiny were its constitutionality ever to come before a court. However, it is open to debate whether or to what extent a court would view the finding as [determinative](#). To date, no further action has been taken on either bill.

For more information on 3D-printed firearms and recent legislative efforts to address them, see these [CRS Insights](#).

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