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Landmark Ruling on Encryption [Declan McCullagh](#)

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Privacy-preserving encryption software is protected by the First Amendment and can be freely shipped overseas, a federal appeals court ruled in a landmark decision Thursday that dealt a bitter setback to the Clinton administration.

Saying President Clinton's executive order limiting the export of data-scrambling software for national security reasons strikes "deep into the heartland of the First Amendment," a 9th US Circuit Court of Appeals panel ruled 2 to 1 that the regulation was unconstitutional. The decision applies only to human-readable "source code" instructions, not off-the-shelf executable programs.

The long-awaited decision -- which came 18 months after the panel heard arguments in the case brought by math professor Daniel Bernstein -- is likely to spur the development of encryption software, which can shield confidential email and other information from prying eyes. US firms have been generally reluctant to build these capabilities into products because under Clinton's order they can't readily sell them overseas.

"Government efforts to control encryption thus may well implicate not only the First Amendment rights of cryptographers intent on pushing the boundaries of their science, but also the constitutional rights of each of us as potential recipients of encryption's bounty," the court said.

Unless the Justice Department successfully asks the court to hold off on its ruling, individuals -- and perhaps companies -- in the 9th Circuit can now export source code.

"Assuming it's not stayed and you live in California, Washington, or Oregon, you can post source code on the Internet without fear," said Michael Fromkin, a law professor at the University of Miami School of Law.

"If this is upheld, we're going to see a lot more cryptographic use domestically. People are going to start building it into products," Fromkin said.

In an opinion written by Circuit Judge Betty Fletcher and joined by Circuit Judge Myron Bright, the court compared encryption algorithms to mathematical notation used by academics: "Cryptographers use source code to express their scientific ideas in much the same way that mathematicians use equations or economists use graphs."

The court said that Clinton's executive order requiring companies or individuals hoping to export encryption software to petition the government for permission amounted to a rule that required Americans to ask for a license to speak -- just the sort of restriction the First Amendment was designed to prohibit.

A dissent by Circuit Judge Thomas G. Nelson said that encryption source code was more like a set of instructions and not very similar to conventional concepts of free speech. "This functional aspect of encryption source code contains no expression; it is merely the tool used to build the encryption machine," he wrote. Nelson also objected on procedural grounds.

With the help of the [Electronic Frontier Foundation](#), Daniel Bernstein filed suit against the US government in June 1995 when he was a graduate student at the University of California at Berkeley. Now a math professor at the University of Illinois at Chicago, Bernstein wanted to freely publish a four-page "Snuffle" program he developed.

The district court ruled that Snuffle source code was speech protected by the First Amendment.

"I am almost speechless," said Tara Lemmey, executive director of the EFF. "It is a giant step forward in bringing down export controls and it goes further than any of the legislation that has been talked about so far because none [of those bills] address the First Amendment issues." A handful of bills have been introduced in Congress to relax export controls, but in hopes of crafting politically viable legislation, the sponsors have not tried to get rid of the government licensing scheme entirely.

The Department of Justice can choose to appeal the decision to the full circuit court, or directly to the Supreme Court. A spokesman said late Thursday that the department was "reviewing" the opinion and may decide by tomorrow.

Two other challenges to the White House encryption regulations -- one in Washington DC and one in Ohio -- are wending their way through the federal court system, though neither is as far along as the Bernstein case.

The Clinton administration -- and the Bush administration before it -- claims that export controls are necessary to keep encryption software out of the hands of international drug smugglers, child pornographers, terrorists, or other undesirables.

FBI director Louis Freeh has told Congress that "unbreakable encryption" will "seriously and fundamentally threaten" public safety. "The potential use of such robust encryption products by a vast array of criminals and terrorists to conceal their criminal communications and information poses an extremely serious and, in my view, unacceptable threat to public safety," he testified before Congress.

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