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## The Doctrine of Prior Restraint Since the Pentagon Papers

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## THE DOCTRINE OF PRIOR RESTRAINT SINCE THE PENTAGON PAPERS\*

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James L. Oakes†

“The generalization that prior restraint is particularly obnoxious in civil cases must yield to more particularistic analysis.” Paul Freund.\*\*

I am extremely honored to have been asked to deliver the first Kenneth Murray Lecture. The late Mr. Murray, I understand, was a distinguished Detroit attorney who represented the Detroit Free Press and other media clients for forty years, and who lectured regularly here at the Department of Communication. I hope he would approve of what I have to say.

The purpose of this speech is to examine how the doctrine against prior restraint has evolved since the Pentagon Papers case. I intend to demonstrate that while traditional antipathy to prior restraint has for the most part remained strong, several recent cases foreshadow a dangerous expansion of well-established exceptions to the doctrine. To understand fully the significance of these recent cases, I will begin this lecture with a general discussion of the historical origins of the doctrine against prior restraint. I will then proceed with a critical overview of the landmark Pentagon Papers case, more formally called *New York Times Co. v. United States*.<sup>1</sup> The remainder of the discussion will focus on five Supreme Court cases decided since the Pentagon Papers decision — *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>2</sup> *Southeastern Promotions, Ltd. v. Conrad*,<sup>3</sup> *Young v. American Mini Theatres*,<sup>4</sup> *Nebraska Press*

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\* Delivered as the first Kenneth J. Murray Lecture at the Department of Communication, University of Michigan, Ann Arbor, Michigan, March 18, 1982. This lecture is reproduced without substantial change, except for the addition of footnotes. The reader is asked to bear in mind that this address was written for the ear, and not the eye.

† Circuit Judge, United States Court of Appeals, Second Circuit.

\*\* Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951).

1. 403 U.S. 713 (1971) (per curiam).
2. 413 U.S. 376 (1972).
3. 420 U.S. 546 (1976).
4. 427 U.S. 50 (1976).

*Association v. Stuart*,<sup>5</sup> and *Snepp v. United States*<sup>6</sup> — as well as three recent lower court decisions involving national security considerations: *United States v. Marchetti*,<sup>7</sup> *Alfred A. Knopf, Inc. v. Colby*,<sup>8</sup> and *United States v. The Progressive*.<sup>9</sup>

## I. THE ORIGINS OF PRIOR RESTRAINT

A prior restraint is an official restriction upon a communication before it is published. The restriction may be enacted by the executive, legislative, or judicial branch of the federal, state, or local government. Our modern doctrine against prior restraint derives from our English forebears' antipathy toward licensing procedures that required approval of publications in advance by state or church authorities. That antipathy found perhaps its highest expression in the poet Milton's *Areopagitica*, and its most quoted legal affirmation in Blackstone, who wrote:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own timenty [sic].<sup>10</sup>

Traditional English antipathy to prior restraints was well in the minds of our Founding Fathers at the time of the adoption of the first amendment, for the colonists had lived with the continual fear of the Sedition Act of 1798;<sup>11</sup> Peter Zenger's case<sup>12</sup> was

5. 427 U.S. 539 (1976).

6. 444 U.S. 507 (1980).

7. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

8. 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

9. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed mem.*, 610 F.2d 819 (7th Cir. 1979).

10. 4 W. BLACKSTONE, COMMENTARIES 151-52 (Oxford 1765).

11. The Sedition Act of 1798 was passed by a Federalist Congress to silence derogatory criticism of public officials and strengthen the government's position in an impending war with France. When Jefferson became President in 1801, he denounced the Act as contrary to the first amendment and pardoned all persons who had been convicted or fined under the Act. See generally J. SMITH, FREEDOM'S FETTERS (1956).

12. John Peter Zenger, the colonial printer and publisher of the New York Weekly

not readily forgotten.

Yet it was not until 1931 that the Supreme Court invoked the doctrine against prior restraint. In the landmark case of *Near v. Minnesota*<sup>13</sup> the Court held that it was unconstitutional for Minnesota to enjoin the publication of newspapers deemed "malicious, scandalous, and defamatory" solely because they constituted a nuisance.<sup>14</sup> The Court did not say, however, that all prior restraints on speech and press were incompatible with the first amendment. Rather, Chief Justice Hughes's majority opinion pointed out that in certain exceptional cases — obscenity, incitement to violence, and opposition to the conduct of war — the government could enjoin speech or press.<sup>15</sup> He stressed that these exceptions were narrow, however, and that "immunity from previous restraints or censorship" had historically been the principal value of the first amendment.<sup>16</sup>

Since *Near*, the doctrine of prior restraint has promoted responsibility in government by ensuring that the Government does not suppress exposure of its errors, deceptions, or embarrassments. The doctrine has also worked to ensure that speech is not readily subjected to the biases of the censor.<sup>17</sup> A system that imposes prior restraints chills public communication. As Justice Lewis Powell said in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>18</sup> "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination [has been made] that it is unprotected by the First Amendment."<sup>19</sup> Of course, in this respect, subsequent punishment may be no better than prior restraint; it too can chill speech and cause self-censorship, as *New York Times Co. v.*

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Journal, was tried on August 4, 1735 for seditious libel. Zenger ultimately won a verdict of "not guilty," and the case was immediately hailed as a landmark victory for the freedom of the press. Today the Zenger case is invoked frequently to demonstrate the importance of guarding against judicial tyranny in libel suits. See generally THE TRIAL OF PETER ZENGER (V. Buranelli ed. 1957).

13. 283 U.S. 697 (1931).

14. *Id.* at 701-02, 723.

15. *Id.* at 716.

16. *Id.*

17. See 4 W. BLACKSTONE, COMMENTARIES 152 (Oxford 1765):

To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

18. 413 U.S. at 376 (1972).

19. *Id.* at 390.

*Sullivan*<sup>20</sup> and its progeny recognized when they set constitutional limits on state libel laws. But as the late Alexander Bickel put it: "[a] criminal statute chills, prior restraint freezes."<sup>21</sup>

## II. THE PENTAGON PAPERS CASE

The Pentagon Papers case, *New York Times Co. v. United States*,<sup>22</sup> was the first case on which I sat after coming to the Second Circuit Court of Appeals from district court. Along with Judges Irving Kaufman and Wilfred Feinberg, I voted in favor of the New York Times to uphold the late Judge Murray Gurfein's ruling that the United States should be denied an injunction against the publication of the Pentagon Papers. While our position was held by only a minority of the judges on the circuit,<sup>23</sup> the Supreme Court ultimately sided with us. I will draw a little from my own recollections in discussing that case, as well as from a paper I wrote after Judge Gurfein's death about his participation in the case as *his* first decision on the United States District Court for the Southern District of New York.<sup>24</sup>

The Pentagon Papers case left the courts little time to debate where the outer limits of the doctrine of prior restraints lay. The Supreme Court was about to take the final adjournment of its term in June 1971, when the New York Times and the Washington Post published their stories. Daniel Ellsberg had revealed to the press the Government's own secret historical analysis of American involvement in the undeclared, and by then unpopular, war in Vietnam. After waiting more than two days from the

20. 376 U.S. 254 (1964).

21. A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

Professor Vincent Blasi of the University of Michigan Law School contends that injunctions against speech are analogous to the historically disfavored practice of licensing speech. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 93 (1981). He argues that both are based on the undemocratic premise that "speech is an abnormally dangerous social force" that needs to be regulated. *Near v. Minnesota*, 283 U.S. 697, 714 (1931). He finds, as I do, that such a premise cannot be squared with our constitutional commitments to individual autonomy and limited government. Indeed, he and I would agree with Professor Freund that freedom of expression may be "the fundamental end, reflecting the nature of man." Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 548 (1951).

22. 444 F.2d 544 (2d Cir.), *rev'g per curiam*, 328 F. Supp. 324 (S.D.N.Y.), *rev'd per curiam*, 403 U.S. 713 (1971).

23. The Second Circuit Court of Appeals voted five to three in favor of granting the injunction. *Id.*

24. See Oakes, *Judge Gurfein and the Pentagon Papers*, 2 CARDOZO L. REV. 5 (1980).

time the first editions of the Times hit the streets,<sup>25</sup> the United States sought to enjoin further publication. The Government also sought an injunction in federal court in the District of Columbia to prevent the Washington Post from publishing the Papers. In both cases the Government argued that publication would violate the espionage statutes, reveal top-secret information, and cause irreparable injury to United States security interests.<sup>26</sup>

With each passing day of judicial consideration the significance and impact of the temporary restraining order that halted publication of the Papers increased. Within the week, though, Judge Gurfein had come down for the Times. Yet, given the Supreme Court's pending adjournment, our court could take only seventy-two hours to consider the case on appeal. On first glance, it appeared we would have insufficient time to evaluate a record which included forty-seven volumes totaling 7,000 pages. Nevertheless, contrary to Justice Blackmun's later statement that the judges in New York "had not yet examined the basic material" when the case reached the Supreme Court,<sup>27</sup> we did have the opportunity, even in that brief time, to examine the documents and the testimony that the Government thought most important.

The Government sought to justify the prior restraint by fitting it within what it conceded was a narrow military security exception suggested by Justice Hughes in *Near*: "[when a nation is at war], no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."<sup>28</sup> The Government also argued that because the documents were "stolen," they were subject to special inhibitory treatment; thus the courts could restrain publication both under the espionage statutes and by virtue of their inherent powers. The Government further contended that the executive branch had properly classified the documents top secret, that only the

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25. The Government took no judicial action from the release of the first Sunday edition late Saturday night, June 12, until the third publication for Tuesday, June 15, had gone to press on Tuesday, June 15. Perhaps the Government itself debated whether the documents were important enough in light of press freedoms to justify seeking a restraining order. *But see* *New York Times Co. v. United States*, 403 U.S. at 760 (Blackmun, J., dissenting).

26. This marked the first time that the executive branch had ever sought to impose a prior restraint on — or even suggest application of the espionage statutes to — a major newspaper.

27. 403 U.S. at 760 (Blackmun, J., dissenting).

28. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

executive, not the court, could declassify the documents,<sup>29</sup> and that the executive would need forty-five days to carry out the declassification.

This last argument was considerably weakened by the Government's concession that there had been over-classification of some material that was no longer "top secret." The Government also acknowledged that the Court was not bound by the classification, even though it also said that there was a substantial executive privilege pertaining to military and foreign affairs documents.

I approached the case with a few basic principles in mind: (1) that even in contexts other than prior restraint, the exercise of first amendment rights may generally be limited only where there is a "clear and present danger"<sup>30</sup> or a "grav[e] . . . evil"<sup>31</sup> to be avoided; (2) that it is a "chief purpose of the guaranty [of freedom of the press] to prevent previous restraints on publication" by either the legislative or the executive branches;<sup>32</sup> (3) that if the press is to fulfill its function of checking the government<sup>33</sup> by ensuring freedom of political discussion<sup>34</sup> it must be free from "such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots toward enlightening their fellow subjects upon their rights and the duties of rulers";<sup>35</sup> (4) that any prior restraint comes to court "bearing a heavy presumption against its constitutional validity"<sup>36</sup> so that the Government "carries a heavy burden of showing justification for the imposition of such a restraint";<sup>37</sup> and (5) that even the war powers exercised by the commander-in-chief, however broad they may be, are subject to "applicable constitutional limitations."<sup>38</sup>

29. The Government argued that under the existing case law, the court's function in reviewing government classification was limited to determining whether it was arbitrary or capricious. See *United States v. Reynolds*, 345 U.S. 1 (1953); *Epstein v. Resor*, 421 F.2d 930 (9th Cir. 1970).

30. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

31. *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

32. *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931).

33. See Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FDT. RESEARCH J. 521, 580-83 (1977).

34. See Oakes, *Proof of Actual Malice in Defamation Acts: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655, 695 (1979) ("[A] representative government is functionally dependent upon freedom of political discussion". *Id.* at 695).

35. *Commonwealth v. Blanding*, 3 Pick. 304, 313 (1825) (quoted in *Near v. Minnesota*, 283 U.S. 697, 717 (1931)).

36. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1968).

37. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

38. See *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (quoting *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156 (1919)). See

It seemed to me, in light of these principles, that Judge Gurfein had refused quite correctly to enjoin the New York Times's publication of the Pentagon Papers. Judge Gurfein, himself a former OSS officer, concluded that while he could restrain a newspaper if it were "about to publish information or documents absolutely vital to current national security,"<sup>39</sup> the Government — despite the *in camera* testimony of representatives of the Department of State, the Department of Defense, and the Joint Chiefs of Staff — had not shown "that the publication of these historical documents would seriously breach the national security."<sup>40</sup>

I admit I had some doubts about one cable proposed for publication, and about certain material relating to our involvement in Thailand. I also recognized that the documents might have a serious impact on foreign policy decisions; indeed, while we heard argument, the Senate voted to require withdrawal of our armed forces from Vietnam within nine months after release of the prisoners of war.<sup>41</sup>

Nevertheless, the Government failed to demonstrate that publication would vitally endanger the nation's security. The documents did not discuss matters after 1968. Thus any danger they might have posed to national security had been lessened by the passage of more than two years. Classification of the documents did not automatically mean they were related to national defense.<sup>42</sup> If anything, the Government's indiscriminate over-classification of documents<sup>43</sup> cast serious doubt on just how vital the material was to our military interests. Of the 7,000 pages involved, most of it was truly water over the dam. The Government maintained that publication would result in irreparable damage to diplomatic relations with Saigon, Sweden, Australia, and other countries. Moreover, the Government feared that publication would disclose our military command apparatus or "decision-making processes," and therefore rupture the worldwide

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also *Ex Parte Milligan*, 71 U.S. 2 (1866); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Kent v. Dulles*, 357 U.S. 116 (1957).

39. *New York Times Co.*, 328 F. Supp. at 330.

40. *Id.* See *Oakes*, *supra* note 24, at 12-13.

41. S.J. Res. 89, 92d Cong., 1st Sess. (1971).

42. See *United States v. Drummond*, 353 F.2d 132 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966).

43. This over-classification was contrary to Executive Order 10501, 3 C.F.R. § 7 at 288-89, which requires that "proper control of dissemination of classified defense information shall be maintained at all times, including . . . severe limitation in the number of such documents originated . . ." The present administration has proposed a relaxation of the standards for classification so that it will be easier to classify documents as "secret." *N.Y. Times*, Feb. 6, 1982, at 1, col. 3.



military balance.<sup>44</sup> It was, of course, difficult to determine whether these dire predictions would prove correct. Yet, in my view, Judge Gurfein was right to conclude that the Government had not shown with reasonable certainty that publication posed grave and immediate danger to our conduct of the undeclared war.

Conversely, permitting publication of the Pentagon Papers furthered the democratic ideal of free and open debate on issues of public concern. The subject of the debate in this case was of particular importance, for it concerned the origins of our involvement in a war that nearly everyone — including, perhaps, even the President — wanted ended. At stake, in short, were the very first amendment protections that made it possible for the press to alert the public to the “duties of rulers.”<sup>45</sup> By allowing publication the courts safeguarded these protections without necessarily condoning the way the newspapers obtained their material and without passing on the potential for post-publication criminal sanctions under the espionage laws.<sup>46</sup>

The ultimate result of the Pentagon Papers case, a six to three victory for the Times and the Post in the Supreme Court,<sup>47</sup> was properly hailed by the press and much of the legal world. Clearly, publication of the Papers played an important role in enlightening the public and bringing the Vietnam conflict to an end some four years later. Perhaps, as Floyd Abrams has indicated, it “may also have paved the way for the public’s reaction to the Watergate transgressions” and “had direct, if utterly unpredictable, effects on the Nixon White House.”<sup>48</sup> Doubtless it has also led to a change in the relationship between press and government — a change which, while largely for the good, may also have resulted in greater hostility on the part of the press and greater secrecy on the part of the Government.

It should be remembered, however, that the haste with which the case was reviewed and the deep concern for national security prompted three dissents in the Supreme Court. Yet those justices who voted with the majority also recognized the impor-

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44. 328 F. Supp. at 327.

45. *Commonwealth v. Blanding*, 3 Pick. at 313 (quoted in *Near v. Minnesota*, 283 U.S. 697, 717 (1931)).

46. The Government had contended that the anti-espionage statutes, in particular 18 U.S.C. § 793(e) (Supp. IV 1980), gave the courts power to enjoin publication. Because this statute punishes espionage as a crime, it is difficult to see how injunctive powers could have been implied from it.

47. 403 U.S. at 714.

48. See Abrams, *The Pentagon Papers, A Decade Later*, N.Y. Times, June 7, 1981, § 6 (Magazine), at 76.

tance of national security. As Justice Brennan pointed out, the issue at bar was not whether national security could ever justify a prior restraint, but whether in this case the Government had proved that publication would "inevitably, directly and immediately cause the occurrence of an event kindred to imperilling the safety of a transport already at sea."<sup>49</sup> Similarly, Justices Stewart and White observed that the Government had failed to prove that the disclosures would, in this particular instance, "surely result in direct, immediate, and irreparable damage to our Nation or its people."<sup>50</sup> These three swing votes, therefore, leave open the question of whether the Court would permit a prior restraint if indeed it was clear that publication would result in "direct, immediate, and irreparable damage"<sup>51</sup> to national security. Thus, while the Pentagon Papers case upheld the doctrine against prior restraint, it also preserved the national security exception. It remains the key first amendment case of the decade.

One of the witnesses who originally appeared for the Government before Judge Gurfein has provided an interesting epilogue. William B. Macomber, Undersecretary of State for Administration, cited the embarrassment of the Prime Minister of Australia over revelations in the Papers concerning Australian troops sent to fight in Vietnam: "I just don't see how we can conduct diplomacy with this kind of business going on." Today Mr. Macomber has another career as president of the Metropolitan Museum of Art in New York, though I suspect this new career also involves diplomacy. Recently, Mr. Macomber admitted that the case was decided properly:

I think that, even though I have been a diplomat all my life and nothing is more important to me than the security of the United States, the First Amendment is, in another way, the security of the United States. You can't save something and take the heart out of it.<sup>52</sup>

I must say I agree.

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49. *Near v. Minnesota*, 283 U.S. 697, 726-27 (1931) (Brennan, J., concurring).

50. *Id.* at 730 (Stewart, J., joined by White, J., concurring).

51. *Id.*

52. *Abrams*, *supra* note 48, at 72. See also Lewis, *Freedom of the Press*, N.Y. Times, June 7, 1981, at E21, col. 1.

III. PRESERVING THE DOCTRINE AGAINST PRIOR RESTRAINT:  
*Pittsburgh Press, Southeastern Promotions, American Mini  
 Theatres, AND Nebraska Press*

Since the Pentagon Papers decision the Court has addressed the issue of prior restraint in other contexts. Four cases merit special attention; in two the Supreme Court struck down prior restraints, and in two the Court upheld speech restrictions. Despite the mixed outcome, I think that in all of these decisions "the barriers to prior restraint remain[ed] high and the presumption against its use continue[d] intact."<sup>53</sup>

*Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>54</sup> the first of the two cases in which the Court upheld speech restrictions, involved the constitutionality of a city ordinance prohibiting the Pittsburgh Press from carrying help-wanted advertising columns classified "Male," "Female," and "Male-Female." The Pittsburgh Commission on Human Relations argued that the advertisements indicated and "aided" sex discrimination in employment.<sup>55</sup> The Commission ordered the newspaper to classify its help-wanted advertisements without reference to sex.<sup>56</sup> The Pittsburgh Press, in turn, argued that the Commission's order violated the first amendment by restricting the paper's editorial judgment.<sup>57</sup>

The Supreme Court rejected the Press's argument and upheld the order by a vote of five to four. The majority<sup>58</sup> viewed the placement of want ads in a newspaper as commercial speech,<sup>59</sup> which at the time was considered unprotected under the first amendment.<sup>60</sup> The *Pittsburgh Press* Court distinguished the Pentagon Papers case by noting that the latter involved "speculat[ion] as to the effect of publication" whereas *Pittsburgh Press*

53. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 570 (1976).

54. 413 U.S. 376 (1972).

55. *Id.* at 380.

56. *Id.* at 379-80.

57. *Id.* at 381.

58. The majority consisted of the unusual combination of Justices Brennan, White, Marshall, Powell and Rehnquist.

59. 413 U.S. at 388.

60. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942). *See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). *But see Pittsburgh Press*, 413 U.S. at 398 (Douglas, J., dissenting).

Regardless of whether the speech was protected, the Court held that the order was not an unconstitutional prior restraint because it would not go into effect before the Supreme Court's final determination that the Pittsburgh Press's sex-designated advertising was unprotected by the first amendment. 413 U.S. at 390.

involved no speculation but rather "a continuing course of repetitive conduct."<sup>61</sup> While the distinction is technically correct, I think that the language used by the Court is dangerously broad, for the simple reason that it seems to invite restraint of, for example, later articles in a series because the effects of earlier ones are no longer speculative.<sup>62</sup> Yet, as will be seen,<sup>63</sup> this "continuing" language has not been read as broadly as it might be. Thus, I do not think that in the final analysis the Court significantly weakened the doctrine against prior restraint. Needless to say, the press's function of checking government was not at stake in *Pittsburgh Press*.

The second of the two cases, *Young v. American Mini Theatres*,<sup>64</sup> upheld Detroit's "Anti-Skid-Row" zoning ordinances, which prohibited adult theatres from locating within 1,000 feet of two other adult establishments or within 500 feet of a residential area. "Adult" theatres were defined as those showing "specified sexual activities" or "specified anatomical areas."<sup>65</sup> Justice Stevens's opinion for a plurality of four Justices rejected the idea that these zoning ordinances, which merely regulated the "place where [adult] films may be exhibited,"<sup>66</sup> could be prior restraints of expression. Instead, Justice Stevens concluded that this place regulation was reasonable despite its differing treatment of "adult" and other kinds of content.

In contrast, Justice Stewart's dissent argued that Detroit could not constitutionally prohibit speech on the basis of its adult content.<sup>67</sup> Justice Stewart took issue with the plurality's contention that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."<sup>68</sup> I agree with Justice Stewart on this point; the plurality's willingness to accord lesser protection to speech that few of us would take up

61. 413 U.S. at 390.

62. As it turned out, the suppressed material in this instance remained unchanged throughout the course of "repetitive conduct."

63. See *infra* notes 71-73 and accompanying text.

64. 427 U.S. 50 (1976).

65. *Id.* at 53. The Sixth Circuit Court of Appeals had found that the ordinances imposed a prior restraint on constitutionally protected communication. *Young v. American Mini Theatres*, 518 F.2d 1014, 1019-20 (6th Cir. 1975), *rev'd*, 427 U.S. 50 (1976).

66. 427 U.S. at 63.

67. *Id.* at 84 (Stewart, J., dissenting):

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films.

68. *Id.* at 70. *But see id.* at 73 n.1 (Powell, J., concurring).

arms to defend is contrary to the values of individual autonomy and freedom of choice implicit in the first amendment. Protection of unpopular speech lies at the core of the Bill of Rights. Our Constitution values expression as an end in itself. Protection surely does not extend only to expression for which the nation would go to war.

Despite shortcomings in the majority's opinion, *American Mini Theatres* did not weaken the doctrine against prior restraint. As in *Pittsburgh Press*, the issue of prior restraint was never directly addressed. By classifying the disputed ordinance as a "time, place and manner restriction," the Court avoided a substantive discussion of the limits of the doctrine.

*Southeastern Promotions Ltd. v. Conrad*,<sup>69</sup> the first of the two cases in which the Court struck down prior restraints, did little more than reiterate the well-established principle that in the area of marginal speech prior restraints are not acceptable unless a court can quickly determine whether or not the restrained speech is actually unprotected. In *Southeastern*, the Court held five to four that the board of the Chattanooga Municipal Theater could not bar presentation of the musical "Hair" without providing "procedural safeguards designed to obviate the dangers of a censorship system."<sup>70</sup> Insofar as the Chattanooga Board failed to provide an adequate procedure for prompt judicial review, the Court held that its actions constituted an unconstitutional prior restraint.<sup>71</sup>

69. 420 U.S. 546 (1976).

70. *Id.* at 559 (citing *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

71. While under *Near* the doctrine against prior restraint would not apply to obscene speech, *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the censors here had to prove obscenity. For over a decade since *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court had held that the censor must bear the burden of proving that the material was unprotected; a restraint could be imposed only temporarily while a judicial determination was being made. *Id.* at 58. See also Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 522-24 (1970); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 656-59 (1955). These procedural safeguards were applied even in cases involving arguably unprotected speech because, as the Court said in *Southeastern Promotions*:

The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law; a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

420 U.S. at 558-59. Justice White and Chief Justice Burger dissented not out of disagreement with this basic principle, but because they thought the district court's finding that "Hair" violated the Chattanooga obscenity laws was sufficient to conclude the material

*Southeastern* is interesting for what it did *not* do or say. Neither the majority nor the dissenters alluded to the *Pittsburgh Press* Court's broad "continuous course of repetitive conduct" language. Yet surely the musical "Hair," with a set script, libretto, production notes, and stage instructions, varied little from one performance to another, even though the performers had some discretion in the lines they delivered. Applying the *Pittsburgh Press* standard, the Board's action would not have constituted a prior restraint because there was no real speculation about what each successive show would contain. The Court's failure to confront *Pittsburgh Press* may be an indication that the broad "repetitive conduct" language will pose less of a threat to the doctrine against prior restraint than originally thought.

*Nebraska Press Association v. Stuart*<sup>72</sup> was the only one of the four cases discussed so far to involve a newspaper in its capacity as news-gatherer. In this widely hailed free press/fair trial case, the Court unanimously struck down a state court injunction prohibiting pretrial publication of confessions which clearly suggested that the defendant had murdered six members of a family.<sup>73</sup> Speaking for the majority, Chief Justice Burger observed that "prior restraints on speech and publication are the most serious and the least tolerable infringement on first amendment rights,"<sup>74</sup> particularly when applied to the reporting of criminal proceedings, because "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>75</sup> Moreover, the opinion recognized that "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."<sup>76</sup> As in the Pentagon Pa-

was unprotected speech. *Id.* at 565.

72. 427 U.S. 539 (1976).

73. Both the prosecution and defense counsel based their request for a protective order on a 1966 Supreme Court ruling that overturned the conviction of an Ohio husband for the murder of his wife because of excessive publicity:

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court . . . . Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused

. . . .

*Sheppard v. Maxwell*, 384 U.S. 333, 358, 362 (1966).

74. 427 U.S. at 559.

75. *Id.* at 559-60 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

76. *Nebraska Press*, 427 U.S. at 561.

pers case, the Court emphasized that even if pretrial publicity threatened the defendant's sixth amendment right to a fair trial, the danger posed was only speculative.

*Nebraska Press* did raise the question whether the presumption against prior restraint might give way to a weaker test that would merely balance the intrinsic value of the speech against its potential for harm. The Chief Justice, however, surprisingly employed Learned Hand's *Dennis* test. In *United States v. Dennis*,<sup>77</sup> it will be recalled, the Second Circuit held that the Smith Act did not unconstitutionally abridge the freedom of speech by making it a crime to advocate the overthrow of the Government. Judge Learned Hand, writing for the majority, looked back to the "clear and present danger" test set forth by Justice Holmes in 1919 in *Schenck v. United States*.<sup>78</sup> Judge Hand reformulated that test in *Dennis*, writing that courts must consider whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>79</sup> In *Nebraska Press*, the Chief Justice reasoned that even though no doubt existed about "the gravity of the evil pretrial publicity can work," there was no demonstration of its probability "with the degree of certainty our cases on prior restraint require."<sup>80</sup> Thus, to the extent that the order prohibited publication of judicial proceedings held in public, it was clearly invalid; but where it prohibited publication based on information from outside sources, the "heavy burden imposed as a condition to securing a prior restraint was not met . . . ."<sup>81</sup>

Justice Brennan, joined by the concurring Justices Stewart and Marshall, concluded that trial gag orders were per se impermissible prior restraints. The Brennan opinion viewed the "heavy burden" language of earlier prior restraint cases to mean that the party seeking to impose the restraint must first show that its purpose fits within one of the narrowly defined exceptions set forth in *Near*: military security, obscenity, or incitement to violence.<sup>82</sup> If restraint of alleged obscenity or incitement is sought, procedural safeguards should be required for a prompt judicial determination that the speech is not protected. Similarly, if restraint of an alleged danger to military security is sought, it must be clear that disclosure "will surely result in di-

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77. 183 F.2d 201 (2d Cir. 1950), *aff'd on opinion below*, 341 U.S. 494 (1951).

78. 249 U.S. 47, 52 (1919).

79. 183 F.2d at 212.

80. *Nebraska Press*, 427 U.S. at 568.

81. *Id.* at 570.

82. *Id.* (quoting *Southeastern Promotions*, 420 U.S. 546, 559 (1976)).

rect, immediate, and irreparable damage to our Nation or its people . . . .”<sup>83</sup> Justices Brennan, Stewart, and Marshall recognized that if the test for imposing prior restraints was based on a subjective assessment of the harm which would accrue to criminal defendants, judges would “inevitably [be] interject[ed] . . . at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment.”<sup>84</sup>

While *Nebraska Press* was widely hailed as the most important victory for freedom of the press since the Pentagon Papers, the difference between the Chief Justice’s opinion and Justice Brennan’s opinion is well worth noting. The most notable feature of the Burger opinion is that it does not state a general rule, but instead applies an ad hoc balancing test to decide first amendment cases, even in the prior restraint area. The use of the Hand test is problematic for several reasons. First, *Dennis* did not involve a prior restraint.<sup>85</sup> Second, the Hand standard is “notoriously amorphous.”<sup>86</sup> As Benno Schmidt noted in a Stanford Law Review symposium, the test has “not enjoyed good repute as First Amendment doctrine,”<sup>87</sup> and, as my mentor Paul Freund pointed out, the Hand test has been “subject to loose construction” and has “countenanc[ed] speculation in historical futures, the most dangerous form of gambling with the liberty of speech.”<sup>88</sup>

Thus, it seems to me that this feature of the case is a lurking danger, despite the immediate outcome of the case in favor of the press. Like Professor Blasi, I take a “pathological” view when it comes to “tinkering” with first amendment freedoms; I worry about what some future court will do with the tinkering language. One’s fears are to some extent allayed insofar as *Nebraska Press* was handed down in a frantic final week of one of the most crowded terms in the Court’s history. Professor Schmidt has aptly noted that it was one of fifty-six cases decided with full-dress opinions in the final month of a term of court that was almost “capsized” by the complicated case of

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83. *Id.* at 593 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (per curiam) (Stewart, J., concurring)).

84. *Id.* at 594-95.

85. In *Dennis* the issue was the punishment of the petitioner under the Smith Act after the alleged unprotected speech had been communicated to the public.

86. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 460 (1977).

87. *Id.* at 460.

88. Freund, *The Great Disorder of Speech*, 44 AM. SCHOLAR 541, 545 (1975), quoted in Schmidt, *supra* note 86, at 460 n.133.



*Buckley v. Valeo*.<sup>89</sup> Clearly then, it remains an open question whether ad hoc balancing or a per se rule apply to the doctrine against prior restraint in fields such as free press and fair trial. As Alexander Bickel warned after the Pentagon Papers decision, we should beware lest the appearance of extending freedom "endanger[s] an assumed freedom, which appeared limitless because its limits were untried."<sup>90</sup>

#### IV. PRIOR RESTRAINT AND THE NATIONAL SECURITY EXCEPTION

##### A. Former Agents Marchetti and Snepp

Turning back to national security as a ground for prior restraint, I will now examine several recent cases that, to a limited extent, pose a serious challenge to the doctrine against prior restraint. All involve attempts by the Central Intelligence Agency to impose pre-publication restrictions on its former employees.

In *United States v. Marchetti*<sup>91</sup> the CIA sought to enjoin its former agent, Victor Marchetti, from publishing a book based on his experiences in the Agency. Part of the material Marchetti used for his book was drawn from classified documents. A preliminary injunction was issued by the lower court, and the Fourth Circuit affirmed on appeal.<sup>92</sup> Each of the seven publishers to whom Marchetti had submitted his uncensored manuscript were ordered to halt publication. The court agreed with Marchetti that the first amendment and the doctrine against prior restraints "limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship."<sup>93</sup> Nonetheless, in this instance the court concluded that "we are . . . concerned with secret information touching upon the national defense and the conduct of foreign affairs . . . ."<sup>94</sup> The risk of harm from exposure "is so great and maintenance of the confidentiality of the information so necessary" that ordinary criminal sanctions might not suffice.<sup>95</sup> The court

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89. 424 U.S. 1 (1976). See Schmidt, *supra* note 86, at 475.

90. Bickel, *The Uninhibited, Robust and Wide-Open First Amendment*, 54 *COMMENTARIES* 60, 61 (1972), quoted in Schmidt, *supra* note 86, at 476 n.205.

91. 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

92. 466 F.2d 1309 (4th Cir. 1972).

93. *Id.* at 1313.

94. *Id.*

95. *Id.* at 1317.

reasoned further that secrecy agreements with employees provided a reasonable means for government agencies to protect internal secrets. The court limited its holding to the disclosure of classified information and required the CIA to act promptly to approve or disapprove any material submitted to it by Marchetti.<sup>96</sup> The court declined, however, to review the system of classification of documents and information, finding it a matter of "the executive function [which was] beyond the scope of judicial review."<sup>97</sup>

*Alfred A. Knopf, Inc. v. Colby*<sup>98</sup> was Marchetti's case on remand to the district court. The CIA initially claimed that 339 items contained classified information; gradually the number was reduced to 168.<sup>99</sup> The court of appeals in *Knopf* candidly admitted: "[w]hen writing . . . *Marchetti*, we did not foresee the problems as they developed in the district court. We had not envisioned any problem of identifying classified information embodied in a document produced from the files of such an agency as the CIA and marked 'Top Secret' or 'Confidential.'"<sup>100</sup> The court remanded the case again, stating that for the Government to meet its burden of proof it need only show that the information was "classifiable"<sup>101</sup> — the meaning of which is unclear, at best. Meanwhile, Knopf published the book with the 168 disputed items omitted.

The *Knopf* decision is significant because the court did not apply the national security standard of "direct, immediate, and irreparable damage to our Nation or its people" that the Stewart, White, and Brennan opinions in the Pentagon Papers case<sup>102</sup> would have required. In the court's view, the secrecy agreements Marchetti signed with the CIA — requiring him to submit his

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96. *Id.* at 1318.

97. *Id.* at 1317. Nevertheless, the court did give Marchetti the right to judicial review of any action disapproving publication. *Id.*

98. 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

99. In the district court, four deputy directors of the CIA testified that the information contained in 168 of the items was classified. This testimony, however, was too general and undocumented to satisfy the district judge. Only after the United States offered what the court of appeals called "a batch of documents" did the district judge find that the information embodied in 26 of the 168 items sought to be deleted had actually been classified while Marchetti was an agent. 509 F.2d at 1365-66.

100. *Id.* at 1367. The court was rather apologetic for having "perhaps misled" the district judge into imposing an "unreasonable and improper burden of proof of classification," *id.*, when in fact "the government was required to show no more than that each deletion disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp." *Id.* at 1368.

101. *Id.* at 1370.

102. *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (per curiam) (White, J., concurring).

manuscript to the CIA for authorization and allowing the CIA to withhold authorization for classified information — “effectively relinquished his First Amendment rights,”<sup>103</sup> and made the issue of national security irrelevant.

This reliance on secrecy agreements is troubling for several reasons. First, under the agreement it is exceedingly easy for the CIA to establish that a disputed document is classified; if the Agency can produce a classified document containing references to the information in question, the dispute will be resolved in its favor. Second, requirements found in secrecy agreements, such as loyalty oaths, are frequently overbroad. As a result, these agreements prohibit publication of information that in no way endangers government security interests. Third, secrecy agreements can make a mockery of the reasonableness standards which are generally applied to government employment contracts.<sup>104</sup> Regardless of the facts of a particular case, it is a simple matter for any court to conclude, as the Fourth Circuit did here, that the contract was reasonable because “information highly sensitive to the conduct of foreign affairs and the national defense was involved,”<sup>105</sup> even though no showing had been made that the specific danger was of sufficient gravity and imminence to warrant prior restraint.<sup>106</sup>

In short, the application of first amendment law in *Marchetti* and *Knopf* is highly questionable; classification was accorded too great a presumption of regularity, and secrecy agreements were not held to a standard of reasonableness that required a showing of harm to national interests from disclosure.

In a related case, *Snepp v. United States*,<sup>107</sup> CIA agent Frank Snepp, like Marchetti, signed secrecy agreements. Although the material in Snepp’s book on CIA activity in Vietnam was not classified, the CIA brought an action against him for violating an agreement not to “publish or participate in the publication of any information or material relating to the Agency . . . without

103. *Knopf*, 509 F.2d at 1370.

104. See *United States Public Workers v. Mitchell*, 330 U.S. 74, 101 (1947).

105. *Marchetti*, 466 F.2d at 1316.

106. In conspiracy cases involving an alleged disclosure of secret documents, the standard has long been that the Government must show more than that a classified document was simply disclosed; it must also show that disclosure resulted in damage to national security. See *United States v. Soblen*, 301 F.2d 236, 239 n.2 (2d Cir. 1962), cert. denied, 370 U.S. 944 (1962); *United States v. Drummond*, 354 F.2d 132 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966); see also *Goren v. United States*, 312 U.S. 19, 31 (1941).

107. 444 U.S. 507 (1980).

specific prior approval by the Agency.”<sup>108</sup> Snepp’s book, *Decent Interval*, concerned the fall of Vietnam. The Government conceded that the book did not divulge classified intelligence, and consequently publication was not restrained. Snepp had failed, however, to submit his book for pre-publication review, as his secrecy agreement required. The Supreme Court agreed with the district court that Snepp had both deliberately breached the agreement and his position of trust with the CIA and misled CIA officials into believing that he would submit the book for pre-publication review. The Court reasoned that because the Government has “a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service,”<sup>109</sup> it could require all information obtained through CIA employment to pass pre-publication clearance. In the Court’s view this “licensing system” was needed to filter out material that even *risks* exposure of “classified information and confidential sources.”<sup>110</sup>

The remedy designed by the *Snepp* Court was to enjoin Snepp from future violations and place all his profits in a constructive trust. Yet the Court was less concerned with imposing a punishment after the fact than with enforcing a system of prior restraint that would “ensure in advance . . . that information detrimental to [the] national interest is not published.”<sup>111</sup> By relying on Snepp’s secrecy agreement the Court managed to circumvent the doctrine against prior restraint entirely; both the doctrine and its established exceptions, the majority concluded, were simply “inapplicable.”<sup>112</sup>

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108. *Snepp*, 444 U.S. at 508.

109. *Id.* at 509 n.3. This was a consideration that Justice Harlan had alluded to in the Pentagon Papers case. *New York Times Co. v. United States*, 403 U.S. 713, 752, 754 (1971) (per curiam) (Harlan, J., dissenting).

110. 444 U.S. at 512.

111. *Id.* at 513 n.8.

112. *Id.* at 509 n.3. The Court did suggest that without the agreement, the CIA “would have borne the burden of seeking an injunction against publication,” *id.* at 513 n.8, but unlike the Pentagon Papers Court, the *Snepp* Court did not discuss the nature of that burden.

In dissent, Justice Stevens, joined by Justices Brennan and Marshall, characterized the CIA secrecy covenant as a prior restraint on free speech. *Id.* at 526 (Stevens, J., dissenting). Justice Stevens argued that there should be “an especially heavy burden on the censor” to justify such a drastic remedy as a constructive trust. *Id.* The majority’s suggestion that even unclassified information might be “identified as harmful” did not properly set forth this burden. *Id.* at 522. Citing the Pentagon Papers case and *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), Justice Stevens noted that

The mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have

Thus, the cases of former agents Marchetti and Snepp reveal a profound conflict between national security interests and the first amendment.<sup>113</sup> One may readily agree with the need for secrecy in intelligence-gathering activities without necessarily believing that all publications by former employees discussing intelligence operations should be subject to censorship. The Fourth Circuit cases suggest that all "classifiable" information, however defined, may be withheld from public consideration. The *Snepp* case, in particular, appears to establish that even secrecy contracts are unnecessary for the Government to secure an injunction; a Government determination of mere probable harm may suffice to disapprove publication. Read in that light, *Snepp* reminds one that all liberty hangs by very precious threads; "national security" is an expandible, not a fixed, concept.

### B. *The Progressive*

I end with *United States v. The Progressive, Inc.*,<sup>114</sup> a case that is in some ways a mirror image of the Pentagon Papers decision. The Progressive proposed to publish an article by Howard Morland, an investigative reporter, entitled "The H-Bomb Secret: How We Got It, Why We're Telling It."<sup>115</sup> Much of the significant information in the article was gleaned from Dr. Edward Teller's Encyclopedia Americana article on the hydrogen bomb.<sup>116</sup> While the Government was well aware that a Progres-

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an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts.

*Id.* at 526 n.17. Finally, Justice Stevens's dissent conceded that the "national interest in maintaining an effective intelligence service" might justify an exception to the doctrine against prior restraint, but stressed that the boundaries of such an exception must be carefully defined:

In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.

*Id.*

113. See generally Kalijarvi and Wallace, *Executive Authority to Impose Prior Restraint*, 9 CAL. W.L. REV. 468, 492 (1973) (defining eight substantive fields in which it is generally agreed that some measure of secrecy is essential). See also THE FEDERALIST, No. 70 (A. Hamilton).

114. 467 F. Supp. 990 (W.D. Wis. 1979), *appeal dismissed mem.*, 610 F.2d 819 (7th Cir. 1979).

115. The article was later published under the title: *The H-Bomb Secret: To Know How Is to Ask Why*, THE PROGRESSIVE, Dec. 1978, at 60.

116. Teller, *Hydrogen Bomb*, 14 ENCYCLOPEDIA AMERICANA 654 (1978). See affidavit of Thomas Postel quoted in Note, *United States v. Progressive, Inc.: The Faustian Bargain*

sive editor, Samuel Day, Jr., had visited three government production facilities with the consent of the Department of Energy,<sup>117</sup> it nevertheless sought a district court injunction on the grounds that the article constituted "Restricted Data" under the Atomic Energy Act.<sup>118</sup>

The district court<sup>119</sup> issued a preliminary injunction entirely on the basis of affidavits and *in camera* documents presented by the Government. Noting that first amendment rights are not absolute,<sup>120</sup> the court held that the material proposed for publication fell within *Near's* national security exception to the doctrine against prior restraint: "I want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin. It appears to me that is what we're doing here."<sup>121</sup> The court concluded that the concepts in the article were neither in the public domain<sup>122</sup> nor declassified,<sup>123</sup> and that "no plausible reason [exists] why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."<sup>124</sup>

The district court went on to distinguish the Pentagon Papers case from the one at bar by pointing out that in the former, historical events did not impose a threat of future harm. Unlike the Pentagon Papers, the Progressive article threatened "direct, immediate, and irreparable" damage to the country and thus fell within the national security exception to the doctrine against prior restraint.<sup>125</sup> The court's findings of fact, however, were not consistent with its conclusion; the testimony suggested only that the article "could possibly" provide information allowing a medium-sized nation to develop a bomb more quickly and "could" increase the number of nations with the bomb.<sup>126</sup> Using speculative harm to justify prior restraint, I submit, cannot be squared

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*and the First Amendment*, 75 Nw. U.L. REV. 538, 557-58 n.118 (1980).

117. In addition to these visits by Day, Morland continued to conduct interviews with plant officials, as well as photograph weapons on display in the National Atomic Museum. Note, *A Journalist's View of The Progressive Case: A Look at the Press, Prior Restraint, and the First Amendment from the Pentagon Papers to the Future*, 42 OHIO ST. L.J. 1165, 1166-67 (1980).

118. 42 U.S.C. § 2014(y). See also 42 U.S.C. § 2274 (making it a crime to disclose restricted data with the intent to harm the United States or "with reason to believe" the data will be used to injure the United States or further a foreign nation).

119. The case was heard in the United States Federal District Court for the Western District of Wisconsin.

120. 467 F. Supp. at 992.

121. Note, *supra* note 117, at 1166.

122. 467 F. Supp. at 993.

123. *Id.* at 998.

124. *Id.* at 994.

125. *Id.* at 994.

126. *Id.* at 990, 993, 999.

with the Pentagon Papers case. While it is logically consistent with the language of the *Dennis* test — although neither *Dennis* nor the balancing language in *Nebraska Press* were mentioned in the *Progressive* opinion — it has the undesirable consequence of permitting publication to be enjoined even when there is only a minimal chance that harm will result. Where the cost of a potential disaster is high, as with nuclear war, courts using the *Progressive* test will invariably err on the side of restraining publication.<sup>127</sup>

It is difficult even at this stage to judge the wisdom of the *Progressive's* initial decision to publish the article. After Three Mile Island and reports of missing uranium, however, it may be well for journalists to fight the tendency to use the Atomic Energy Act or its equivalent to stifle policy debate. My view is that the court should not have granted an injunction simply on the basis of affidavits and documentation. What the Supreme Court would do with such a case, or with a restraint against an article on recombinant DNA, bacteriological warfare, or any other nascent technology with a potential for abuse, remains to be seen.

### CONCLUSION

I leave you with Chief Justice Warren's opinion for the Court in *United States v. Robel*,<sup>128</sup> a case upholding the right of a Communist to work in a defense plant. Justice Warren wrote:

Implicit in the term "national defense" is the notion of defending those values and ideas which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.<sup>129</sup>

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127. In this particular instance, however, the disputed material was eventually published. When another Wisconsin paper printed similar information obtained by a different author on September 26, 1979, *Press Connection*, Sept. 26, 1979, at 1, col. 1, the Government dropped its case against the *Progressive*. Most of the *in camera* documents submitted by the Government were released by stipulation, although some "classified" and some "sensitive" material remained under seal. See Note, *supra* note 17, at 1174.

128. 389 U.S. 258 (1967).

129. *Id.* at 264.

In my opinion the press should not be regarded only as a check on inefficient or dishonest government. It is important that it also be viewed as a powerful vehicle for the effective functioning of a government that by definition is democratic in nature. The doctrine against prior restraints preserves the "robust, wide-open" debate that is essential to freedom.<sup>130</sup> I am concerned, however, that as Thomas Emerson reminded us in 1955, "unless the doctrine of prior restraint is given a more rational and comprehensive form, it is likely to be whittled away in future decisions."<sup>131</sup>

Given the cycle of contraction and expansion that has marked other doctrines of similar constitutional magnitude, it is pointless to predict how the Court will decide future prior restraint cases. Invariably the tensions between the doctrine against prior restraint and its *Near* exceptions will continue to result in line-drawing which, as Justice Holmes said in another context, "is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other."<sup>132</sup> Fortunately, the first amendment is protected by alert defenders, some of whom have powerful voices and deep pockets; there is still good reason to hope — and expect — that its values will be carefully preserved.

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130. *New York Times Co. v. Sullivan*, 376 U.S. 255, 270 (1964).

131. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROB.* 648, 671 (1955).

132. Holmes, *The Theory of Torts*, 7 *AM. L. REV.* 652, 654 (1873).





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