COMMENTS

The Broadening Of The *Pentagon Papers* Standard: An Impermissible Misapplication Of The National Security Exception To The Prior Restraint Doctrine

In the 1971 case of *New York Times Co. v. United States,*[1] the United States government sought to restrain the *Washington Post* and the *New York Times* from printing classified information pertaining to the government's decision-making process during the Vietnam conflict. In deciding the case [hereinafter referred to as *Pentagon Papers*], the Supreme Court enunciated a new first amendment[2] test for the validity of prior restraint[3]—suppression of news prior to publication—in cases involving national security. Although the *per curiam* opinion gave no indication of the appropriate standard to apply, Justices Brennan, White, and Stewart clearly delineated the test in their concurring opinions. The three Justices held that, to restrain the press from publishing any article affecting national security, the government must prove at a minimum that dissemination of the article will directly and immediately cause inevitable, grave, and irreparable injury.[4] The Justices found such a strict standard necessary to protect the American people's constitutional right to know about government activities and to avoid a detrimental

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1. 403 U.S. 713 (1971). The Supreme Court consolidated two cases, United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971), and United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971). The Court issued a *per curiam* opinion, five concurring opinions, and three dissenting opinions. *See* text accompanying notes 27-35 *infra.*

2. "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

3. The Supreme Court has never specified exactly what constitutes a prior restraint. The traditional definition is that such restraint is "a formal prohibition on speech, imposed in advance of utterance or publication." Litwack, *The Doctrine of Prior Restraint,* 12 HARV. C.R.-C.L. REV. 519, 520 (1977). For a thorough analysis of the several forms prior restraint may take, see Emerson, *The Doctrine of Prior Restraint,* 20 L. & CONTEMP. PROB. 648, 655-56 (1955).

4. 403 U.S. at 724-40 (Brennan, J., Stewart, J., and White, J., separate concurring opinions). For a comparison of these holdings, see text accompanying notes 31-33 *infra.*

chilling effect upon political speech.[5] Despite these compelling reasons, some lower courts trying subsequent media cases[6] have nevertheless allowed the government to prevail upon a lesser showing of injury. One such court is the Fourth Circuit Court of Appeals, which in 1972 misinterpreted the relatively new *Pentagon Papers* test in *United States v. Marchetti*,[7] a case involving release of Central Intelligence Agency (CIA) secrets.[8] The misuse of the test continues and threatens gradually to dissolve the press's immunity from prior restraint. Recently, the District Court for the Western District of Wisconsin followed similar reasoning in *United States v. Progressive, Inc.*,[9] where it enjoined a magazine from publishing the formula for the hydrogen bomb. By failing to demand proof of inevitable rather than merely speculative injury, both courts contradicted the traditional rule against prior restraint: that only in the rarest situations should courts allow restrictions on the press prior to publication.[10] Such broadening of the high *Pentagon Papers* standard has chilled the quantity and quality of political speech and endangered press freedom in future national security cases.

This comment examines the history of the national security exception[11] to the prior restraint rule and discusses the elements

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5. *Id.* at 725 (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture . . . ."); *id.* at 728 (Stewart, J., joined by White, J., concurring) ("[T]he only effective restraint upon executive policy and power . . . may lie in . . . an informed and critical public opinion . . . ."); *id.* at 730 (White, J., joined by Stewart, J., concurring) ("[E]xtraordinary protection against prior restraints [is] enjoyed by the press under our constitutional system . . . .").

6. The scope of this comment is limited to print media and does not extend to broadcast media because of the special considerations in cases involving radio and television broadcasting. The primary difference is the special responsibility placed upon broadcast media because of the limited number of available frequencies. *See* Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975). For a comparison of the different first amendment standards the Supreme Court has applied, compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1941), with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

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

8. A related case was Alfred A. Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1974), *cert. denied*, 421 U.S. 992, *reh. denied*, 422 U.S. 1049 (1975). The court decided *Knopf* consistently with *Marchetti; see* note 36 *infra*.

9. 467 F. Supp. 990 (W.D. Wis. 1979) (temporary restraining order); No. 79-C-98 (W.D. Wis. Feb. 8, 1980) (preliminary injunction).

10. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) ("only in exceptional cases"); *see* text accompanying notes 15-18 *infra*. These exceptional situations usually arise where remedies subsequent to publication would be inadequate.

11. The national security exception allows suppression of government secrets in peacetime. The related exception for obstruction of military operations is limited to peri-

of the *Pentagon Papers* standard in the context of the *Marchetti* and *Progressive* opinions. Application of those elements to the reasoning of the cases demonstrates the failure of these lower courts to follow the Supreme Court's strict view of when restraint is justified. Examining the theoretical basis underlying the first amendment, the comment concludes that strict application of the *Pentagon Papers* standard is essential to continuing protection of the American people's right to be informed of government activities.[12]

I. The Evolution of the *Pentagon Papers* Standard

Based on the rationale that every person has the right to form and espouse his individual opinion, the prior restraint doctrine states that there will be time after publication to punish the very few persons who publish material not protected by the first amendment.[13] The doctrine also rests on the premises that everyone has the right to read published material[14] and that

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ods of declared war and thus is not a significant threat to free speech. *See* note 20 *infra*.

12. *See* note 14 *infra*.

13. Blackstone's famous statement against prior restraint summarizes the traditional English rationale for the doctrine:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiment 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 consequences of his own temerity.

4 W. Blackstone, Commentaries 151-52 (1765).

14. The American people's right to know—to be informed in order to participate meaningfully in a democratic society—is an important factor in any press-government analysis. *See generally* Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U.L.Q. 1; Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959); Horton, *The Public's Right to Know*, 77 Case & Com. 3 (1972); Ivester, *The Constitutional Right to Know*, 4 Hastings Const. L.Q. 109 (1977); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 Geo. Wash. L. Rev. 1 (1957); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 Ind. L.J. 209 (1952); Comment, *The First Amendment and the Public Right to Information*, 35 U. Pitt. L. Rev. 93 (1973).

The American press is a conduit in informing the American public of government activities. Justice Stewart said in his *Pentagon Papers* concurring opinion:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is

society generally benefits from this exchange of information.[15] Originating in the struggle against licensing and censorship in 16th and 17th century England,[16] the prior restraint doctrine was a response to licensing systems in which the government required printers to submit all their copy for official approval prior to publication.[17] The history of the doctrine demonstrates that one of the primary purposes of the first amendment was to prevent prior government restraint on publication.[18]

> perhaps here that a press is alert, aware and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

403 U.S. 713, 728 (1971) (Stewart, J., concurring).

That such was the Founding Fathers' concept of the press is evident from this statement by Thomas Jefferson:

> The basis of our governments being the opinion of the people, the very first object should be to keep that right [of free expression].
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> The way to prevent [errors of] the people, is to give them full information of their affairs and to contrive that those papers should penetrate the whole mass of the people.

H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 63 (1950).

Congressional recognition of the importance of access to governmental information is embodied in the Freedom of Information Act, 5 U.S.C. § 552 (1976), passed in 1966 to ensure public access to the information in the custody of all federal agencies. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951 (1975); Comment, *National Security Information Under the Amended Freedom of Information Act: Historical Perspectives and Analysis*, 4 HOFSTRA L. REV. 759 (1976); Comment, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1974); Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438 (1975); Comment, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401 (1976).

15. There are times when the press does not act responsibly and society is harmed more than helped. *See* SWAIN, REPORTERS' ETHICS (1978); Christians, *Fifty Years of Scholarship in Media Ethics*, 27 J. COM. 19 (1977); Oakes, *The Price of Freedom of the Press: Responsibility*, 50 N.Y. ST. BAR J. 466 (1978).

16. Emerson, *supra* note 3, at 650-52; Note, *Prior Restraint and the Press Following the* Pentagon Papers *Cases—Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927, 932-33 (1972).

17. One argument for broadening the exceptions to the prior restraint rule is that the licensing and censorship atmosphere in which the prior restraint doctrine originated does not exist in modern society. This may be a rationale for the apparent gradual dissolution of the prior restraint immunity. *See* Note, *supra* note 16, at 933.

18. "In the first place, the main purpose of [the first amendment provisions] is 'to prevent all such *previous restraints* upon publication as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson v. Colorado, 205 U.S. 454, 462 (1907).

Despite the venerability of the prior restraint doctrine, the United States Supreme Court did not employ the rule until 1931, in *Near v. Minnesota* ex rel. *Olson.*[19] Although recognizing the historical guarantee against prior restraint on publication, Chief Justice Hughes, in dictum, delineated three exceptions. The first exception, obstruction of wartime military operations,[20]

See Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the [first amendment's] guaranty to prevent previous restraints upon publication.").

Adequately defining prior restraint and establishing a workable distinction between prior and subsequent restraints have been major tasks in the evolution of the prior restraint doctrine. The Supreme Court explained the rationale behind the distinction in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975):

> [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 free-wheeling censorship are formidable.

Id. at 559.

First amendment theoreticians, in distinguishing prior from subsequent restraints, traditionally have emphasized the form which the restraint takes. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970); Note, *supra* note 16, at 931-32. Others have contended that the substance of the restraint is more important than its form. Modern commentators urge that the resultant chilling effect on press freedom is the most important consideration in determining whether a restraint is prior or subsequent. *See generally* Litwack, *supra* note 3; Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976); Note, *Gagging the Press Through Participant and Closure Orders: The Aftermath of* Nebraska Press Association v. Stuart, 2 U. PUGET SD. L. REV. 317 (1979). For an eclectic analysis combining the traditional and modern views, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 724-28 (1978).

Commentators have articulated many reasons for the traditional abhorrence of prior, as opposed to subsequent, restraints. These include the following: (1) the decision to restrain often rests with a single government official; (2) the range of expression likely to be brought under government control with prior restraint is far wider than with subsequent restraint; (3) the communication terminates before it even takes place; (4) the opportunity for public appraisal and criticism is minimal; and (5) the governmental restraint encourages abuse of the judicial system. *See* T. EMERSON, *supra* note 18, at 506; Note, *supra* note 16, at 931-32.

19. 283 U.S. 697 (1931). The case involved a Minnesota statute which provided that any person regularly publishing a "malicious, scandalous and defamatory newspaper, magazine or other periodical" was guilty of a nuisance and could be enjoined from publishing and fined $1,000 or imprisoned up to 12 months. MASON'S MINN. STAT. §§ 10,123-1 to 10,123-3 (1927) (deleted by official committee, 1941).

20. "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." 283 U.S. at 716. This exception involves security information during wartime maneuvers and is thus distinguishable from the national security exception applicable to peacetime information. The Court quoted from Schenck v. United States, 249 U.S. 47, 52 (1919): "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be

suspends the rule in wartime for matters of military strategy and troop placement that are vital to national security. The second exception, obscene publication,[21] allows the prior restraint of obscene communications that are utterly without redeeming social importance. The third exception, "incitements to acts of violence and the overthrow by force of orderly government,"[22]

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endured so long as men fight and that no Court could regard them as protected by any constitutional right." 283 U.S. at 716.

Quoting the *Schenck* passage in *Nebraska Press Ass'n*, Justice Brennan reviewed the legal development of the three *Near* prior restraint exceptions subsequent to that decision and found that the courts had come to interpret both the obscenity and sedition exceptions as involving speech not protected under the first amendment. 427 U.S. at 590 (Brennan, J., concurring). Yet, despite the strong language in *Schenck*, Justice Brennan then pointed out that the military operations exception "contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest . . . ." *Id.* at 591. His statement supports the conclusion that constitutional protection, being applicable in wartime, should extend also to use of the national security exception in peacetime.

21. Justice Hughes cited no authority when he included obscenity as an exception to the prior restraint rule. As Justice Douglas observed in *The Press and First Amendment Rights*, 7 IDAHO L. REV. 1, 5 (1970), even though commentators many times urged that the first amendment protected obscenity, the Supreme Court did not squarely decide the issue until Roth v. United States, 354 U.S. 476 (1957). *Roth* held that the rejection of obscenity as "utterly without redeeming social importance" was implicit in the history of the first amendment and that obscenity was therefore not within the area of constitutionally protected speech. *Id.* at 484-85. In the later case of Freedman v. Maryland, 380 U.S. 51 (1965), the Supreme Court set procedural standards to alleviate the dangers inherent in a prior restraint system. The *Freedman* Court held that a prompt judicial determination is necessary to impose a prior restraint and that any restraint prior to judicial hearing must be brief and aimed solely at preserving the status quo. *Id.* at 58-59; *see, e.g.*, Comment, *Prior Restraint of Free Speech in Movies*, 34 TEMP. L.Q. 331 (1961). The prior restraint issue has ceased to dominate current obscenity decisions because courts now focus on the definition of obscenity and simply assume they can restrain material they find obscene.

22. 283 U.S. at 716. In support of this exception, Chief Justice Hughes cited Schenck v. United States, 249 U.S. 47 (1919). *Schenck*, however, did not involve prior restraint; the defendant already had published the pamphlets alleged to be seditious. Chief Justice Hughes also cited Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), which did involve prior restraint. Sedition and syndicalism cases seldom turn on questions of prior restraint, because speech is generally more difficult to restrain prior to its occurrence than is printed material. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919). Courts have applied the "clear and present danger" test for inflammatory publications principally in political radicalism cases, where prior restraint is not generally a primary issue. *See generally*, Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 302 (P. Kurland ed. 1975); Linde, *Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

limits the rule in sedition and syndicalism cases. These exceptions all involve circumstances where a particularly strong prepublication showing of harm minimizes the effects of the loss of press freedom.[23] All three exceptions remain a part of modern prior restraint analysis. Until 1971, however, the *Near* dictum on wartime military operations was the only Supreme Court authority supporting prior restraint in cases involving national security. Whether a similar national security exception could be made in peacetime remained unclear.

After forty years of silence on the matter, the *Pentagon Papers* case provided an occasion for the Supreme Court to formulate the peacetime national security exception. In June, 1971, the *New York Times* and the *Washington Post* published portions of a classified study on the decision-making process that guided American actions in Vietnam. After conflicting lower court decisions,[24] those courts issued temporary restraining orders allowing the goverment to appeal prior to publication. The Supreme Court, taking the cases on certiorari, resolved the conflict[25] in favor of the newspapers. The decision built on Chief Justice Hughes's first exception to find a fourth exception cover-

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23. Professor Tribe, searching for a distinguishing factor present in all exceptions to the prior restraint rule, rejected the relative importance of the government's interests and the issue of whether the speech was constitutionally protected. He concluded:

> A more satisfactory resolution may be reached by abstracting the general characteristics of constitutionally permissible prior restraints from the list of exceptions the Court has approved officially or in dictum. The generalization which emerges from this analysis is a narrow set of circumstances in which the presumption against prior restraints may be overcome—where the expected loss from impeding speech in advance is minimized by the unusual clarity of the prepublication showing of harm.

L. TRIBE, *supra* note 18, at 729.

24. United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971); United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971). The two courts disagreed primarily on the degree of harm to the United States which might occur if the *New York Times* and *Washington Post* published the material. In *New York Times*, the court affirmed the stay pending *in camera* examination to see if the materials posed "such grave and immediate danger to the security of the United States." 444 F.2d at 544. The *Washington Post* court held the government had not met its burden of showing irreparable harm to the United States and grave prejudice to defense interests. 446 F.2d at 1328.

25. The Supreme Court heard and decided the cases with exceptional speed due to the unprecedented nature and political impact of the restraint. A prompt judicial determination is necessary when a court imposes prior restraint, because of the transient value of the journalistic product. Yet many felt more time was necessary to consider the issue fully. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 748-63 (Burger, C.J., Harlan, J., and Blackmun, J., separate dissenting opinions). *See also* Kalven, *The Supreme Court: 1970 Term—Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 27-28 (1970).

ing all information essential to national security,[26] whether the country is at war or not, but at the same time indicated that the new exception required a high evidentiary standard.

In a 6-to-3 *per curiam* opinion,[27] the Court held that the government had not met the burden to overcome the heavy presumption that prior restraint is unjustified,[28] and vacated the restraining orders. Of six Justices concurring[29] with the *per curiam* decision, Justices Black and Douglas took the absolutist view never to permit prior restraint on publication.[30] Justice Brennan stated that for a court to issue even an interim restraining order, the government must prove that publication "must inevitably, directly, and immediately cause"[31] an event similar to the endangering of troops or transports mentioned in *Near*.[32] Similarly, Justice Stewart and Justice White found prior restraint appropriate only where publication would "surely result in direct, immediate, and irreparable damage" to the United States or the American people.[33] Justice Marshall, concurring, did not discuss the standard of proof that should apply.[34] Thus, while the *per curiam* opinion of the Court did not

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26. *See* note 32 *infra*.

27. 403 U.S. at 714.

28. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity . . . . The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *Id.*

29. The dissenting opinions of Justices Burger, Harlan, and Blackmun emphasized the haste with which the Court decided the case. *See* note 25 *supra*. Chief Justice Burger indicated that the two newspapers had a duty to return stolen government documents, but withheld an opinion on the merits because of the speed with which the case came before the Court and was decided. 403 U.S. at 748-52. Justice Harlan criticized the "frenzied train of events" of the three-week litigation and asserted that, after an executive determination, the judiciary cannot redetermine for itself the probable impact of disclosure on national security. *Id.* at 753, 757-58. Justice Blackmun also indicated that the Court decided the case too swiftly and without proper analysis of the facts. *Id.* at 759-63.

30. *Id.* at 714-24 (Black and Douglas, JJ., concurring). Justice Black was one of the most eloquent advocates of the absolutist position. For an elaboration of his absolutist viewpoint, see Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). *See also* Cahn, *Justice Black and First Amendment 'Absolutes': A Public Interview*, 37 N.Y.U.L. REV. 549 (1962). For additional literature on the "absolutes" versus "balancing" dispute, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). *See also* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966).

31. 403 U.S. at 726-27 (Brennan, J., concurring).

32. *See* note 20 *supra*. It was in this manner that the Supreme Court expanded on the *Near* military operations exception to find an additional exception for all information essential to national security even when the country is not at war.

33. 403 U.S. at 730 (Stewart and White, JJ., concurring).

34. *Id.* at 740-48 (Marshall, J., concurring).

establish a standard of proof to apply in subsequent national security cases, five of the six concurring Justices advocated a standard that requires, at a minimum, a showing of direct, immediate, irreparable, and certain damage in order to restrain publication.[35]

Accordingly, when seeking prior restraint of the press on national security grounds, the government bears a rigorous standard of proof. First, it must show that publication will "surely" or "inevitably" cause public harm. The Supreme Court's use of this language ensures that mere speculation of harm is not enough. Second, the government also must prove that the resultant harm will be direct and immediate; this guarantees that publication cannot be restrained merely because of possible repercussions that are uncertain or collateral. Third, the government bears the burden of proving that the resultant injury is "grave and irreparable," thus ensuring that it cannot restrain publication except in cases of actual necessity.

II. THE *Marchetti* CASE

Despite the five Justices' language calling for strict interpretation of the national security exception, the Fourth Circuit Court of Appeals, in the subsequent case of *United States v. Marchetti*,[36] unnecessarily broadened the *Pentagon Papers* standard to include situations where the causal link was only speculative. In *Marchetti*, the circuit court affirmed a lower court's injunction prohibiting a former CIA agent from violating

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35. Justice Brennan, in *Nebraska Press Ass'n*, interpreted the *Pentagon Papers* standard as follows:

> Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure "will *surely result in direct, immediate, and irreparable damage* to our Nation or its people" or when there is "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" . . . . It is thus clear that even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials, the obstacles to issuance of such an injunction are formidable.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 593-94 (1976) (Brennan, J., concurring) (footnotes omitted).

36. 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). The *Knopf* case involved the same set of facts and similar issues. Only the *Marchetti* reasoning is discussed herein because the Fourth Circuit in *Knopf* used the same approach to the national security exception, with *Marchetti* as precedent. *See* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1974) (Haynsworth, C.J.).

a secrecy agreement by publishing information he obtained during his employment in the CIA.[37] Chief Judge Haynsworth, relying on three factors, concluded that the government had overcome the heavy presumption against prior restraint. The chief judge reasoned, first, that the government has a right to internal security about governmental affairs where "disclosure *may reasonably* be thought to be inconsistent with the national interest."[38] Second, he stated that although ordinary criminal sanctions might deter unauthorized disclosure of the information, the risk of harm was so great and maintenance of confidentiality so vital that "greater and more positive assurance" was warranted.[39] Finally, Chief Judge Haynsworth held that Marchetti should betray the position of trust in which the government had placed him.[40]

In finding that disclosure "may" be inconsistent with the national interest, the *Marchetti* court used an *ad hoc* balancing approach, balancing the specific governmental security interests against specific press interests. The court thus came down on the side of those first amendment analysts who prefer to balance the interests represented in the specific case; at the opposite extreme are those, like Justice Black, who believe prior restraint of protected speech is never proper.[41] The middle ground between these two extremes, in the Supreme Court majority's view of the prior restraint doctrine, is "definitional balancing,"[42]

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37. 466 F.2d at 1311.

38. *Id.* at 1315 (emphasis added).

39. *Id.* at 1317. *See* Note, *Constitutional Law—Prior Restraint Enforced Against Publication of Classified Material by CIA Employee*, 51 N.C. L. REV. 865 (1973).

40. 466 F.2d at 1313. Marchetti had signed an employment contract with the CIA which contained a nondisclosure clause. *Id.* at 1312. Recently the Supreme Court reaffirmed the importance of such contractual limitations in Snepp v. United States, 444 U.S. 507 (1980). The Court found that an agreement, signed by CIA employee Snepp when he accepted employment, promising that he would not publish any information or material relating to the agency without specific prior approval of the agency, was a fiduciary obligation. Therefore, the Court found that, when Snepp published a book based on his experiences as a CIA agent in South Vietnam without first submitting it to the agency for prepublication review, he breached the fiduciary obligation and the Court impressed the proceeds of his breach with a constructive trust for the government's benefit. The Court also said that whether the employee violated his trust did not depend on whether his book actually contained classified information but rather on whether he allowed the CIA to have prepublication review. *Id.* at 511.

41. *See* note 30 *supra*.

42. *See* Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 329 (1974). For a discussion of the use of definitional balancing in the libel and privacy areas, see Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to*

distinguishable from *ad hoc* balancing in that the court balances the broad societal interest in free speech against the broad societal interest in national security, rather than balancing the specific interests involved in the case. Definitional balancing restrains otherwise protected speech only when necessary to prevent serious damage. Only the gravest and most irreparable of harms justify such prior restraint. In balancing governmental interests against press freedom, it is therefore essential to apply a weighty evidentiary burden, as the *Marchetti* court did not do, to overcome the presumed constitutional invalidity of any prior restraint. By failing to require the government to prove specifically that publication would cause harm, the court misapplied the first element of the *Pentagon Papers* standard (publication must *inevitably* and *surely* result in harm), lowering the government's burden of proof and making future restraint more likely.

The *Marchetti* court's *ad hoc* balancing approach contradicts Justice Brennan's commentary on the *Pentagon Papers* standard in *Nebraska Press Association v. Stuart.*[43] Referring to the *Pentagon Papers* "heavy presumption"[44] language, Justice Brennan wrote:

> This does not mean . . . that prior restraints can be justified on an *ad hoc* balancing approach that concludes that the "presumption" must be overcome in light of some perceived "justification." Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints, will be extremely difficult to justify . . . .[45]

To assume, as the *Marchetti* court did, that courts should give as much weight to governmental interests as to press free-

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Privacy, 56 CALIF. L. REV. 935 (1968). For a discussion of the use of definitional balancing in the copyright area, see Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?,* 17 UCLA L. REV. 1180 (1970).

43. 427 U.S. 539 (1976).

44. *See* note 28 *supra.*

45. 427 U.S. at 592 (Brennan, J., concurring). In a footnote, Justice Brennan said:

> Our language concerning the "presumption" against prior restraints could have been misinterpreted to condone an *ad hoc* balancing approach rather than merely to state the test for assessing the adequacy of procedural safeguards and for determining whether the high burden of proof had been met in a case falling within one of the categories that constitute the exceptions to the rule against prior restraints.

Id. at 594-95 n.21.

dom in the balancing process is contrary to this interpretation.[46] By making the evidentiary burden against prior restraint so difficult to overcome, the Supreme Court intended to ensure that chilling of press rights would occur only where proof of great harm was exceptionally clear. *Ad hoc* balancing, on the other hand, dilutes the prior restraint rule because a court can then restrain publication whenever it decides the justifications for suppression outweigh the justifications for publication.[47] Proper application of the evidentiary burden against prior restraint requires instead that courts presume that injunctions restraining publication are improper except where absolutely necessary to prevent harm so substantial as to compare with the results of disclosing troop placement in wartime. Only a strict interpretation of the *Pentagon Papers* standard, requiring proof that publication will cause inevitable, immediate, and irreparable damage to the United States, can ensure that this presumption against prior restraint is upheld.

In addition to its use of *ad hoc* balancing, the *Marchetti* court's failure to look at the reasons behind the government's classification of the information[48] or to analyze the underlying security risks[49] further encourages the suppression of material the government considers embarrassing or publicity-sensitive,

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46. The balancing method employed by the *Marchetti* and *Progressive* courts, equally weighing the government's interest against the public's right to be informed, opposes the Supreme Court's express policy against balancing core constitutional rights against governmental interests in some specific instances. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967), where, faced with a conflict between a governmental interest in national security and first amendment rights, the Court declined to "label one as being more important or more substantial than the other." *Id.* at 268 n.20.

47. An *ad hoc* balancing test within the context of a national security situation gives the court no hard core of doctrine to guide it in reaching a decision, makes factual determinations extremely difficult and time consuming, allows the judicial institution no real independent judgment, and does not afford adequate notice of the rights essential to be protected. *See* Emerson, *supra* note 30, at 912-14; Litwack, *supra* note 3, at 548. *See also* text accompanying note 37 *supra*.

48. The court said:

> The national interest requires that the government withhold or delete unrelated items of sensitive information, as it did, in the absence of compelling necessity. It is enough, as we have said, that the particular item of information is classifiable and is shown to have been embodied in a classified document.

509 F.2d at 1369.

49. Court analysis of the underlying security risks presents procedural problems which are not easily solved. Specifically, courts may not have the expertise to make sensitive national security determinations, because of the lack of adequate documentation in the classification process and lack of technical knowledge. *See* notes 51 & 52 *infra*.

whether or not it is really essential to national security.[50] Classification systems are admittedly essential to national security because the government must protect sensitive defense information from disclosure to unfriendly foreign powers.[51] Officials, however, sometimes mechanically refuse to disclose information simply on the grounds that the government has classified it "secret" or "top secret." A good argument for this practice is that one must presume the importance of a particular piece of classified information because it is difficult, if not impossible, to determine its sensitivity without knowledge of related classified information.[52] But agencies sometimes classify information

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50. In *Pentagon Papers*, Justice Douglas specified that restraint of publication would not be tolerated to suppress material that was only embarrassing, as opposed to material that might adversely affect national security. 403 U.S. at 723-24 (Douglas, J., concurring).

51. The necessity of some type of classification system is obvious in a world where highly developed technological warfare has become a reality. *See generally*, Parks, *Secrecy and the Public Interest in Military Affairs*, 26 GEO. WASH. L. REV. 23 (1957). Classification of sensitive information prevents leaks about military plans in wartime; protects contingent war plans in peacetime; provides a certain amount of bargaining power with other nations, thereby helping diplomatic relations; ensures the flow of intelligence because friendly nations are more apt to share confidential information which they know can be protected; and encourages frank discussion among bureaucrats in the decision-making process. *See* Comment, *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1190-92 (1972).

The Supreme Court in *Pentagon Papers* did not denigrate classification as a necessary governmental activity. Justice Stewart aptly reasoned:

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

403 U.S. at 728 (Stewart, J., concurring).

Even so, commentators as early as the 1950's urged that the "[m]ere mention of the magic phrase 'national security' should not automatically close all avenues of public enlightenment regarding the conduct of government." Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209, 229 (1951). While Chairman of the Atomic Energy Commission at the height of the cold war, David Lilienthal warned: "We should stop this senseless business of choking ourselves by some of the extremes of secrecy to which we have been driven, extremes of secrecy that impede our own technical progress and our own defense." *Id.* at 229 n.85.

52. As the Fourth Circuit Court of Appeals pointed out in the *Marchetti* case, "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." 466 F.2d at 1318.

about defense, foreign policy, or internal affairs merely because it is embarrassing or potentially harmful to specific government officials, not to the national security, as in the *Pentagon Papers* case.[53] Strict judicial interpretation of the *Pentagon Papers* requirement of proof of a substantial rather than speculative link between the publication and the harm to be prevented ensures that such arbitrary classification cannot be used to impair press freedom. Yet, where a risk of grave and irreparable injury to the United States *does* exist, the government by appropriate proof can restrain publication and thereby protect the American people.

Even where harm is evident, the prior restraint doctrine requires the application of reasonable alternatives first;[54] thus, the *Marchetti* court erred further in not considering subsequent criminal sanctions, which if strictly applied might adequately restrain future disclosure of harmful information. The Supreme Court, as early as 1907,[55] held that the first amendment's main purpose was the prevention of prior restraint, particularly where means of subsequent punishment are available and appropriate.[56] Otherwise, prior restraint on publication may chill both the quantity and quality of protected political speech.[57] Thus,

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53. Procedural improvements in adjudicating the national security exception may lessen potential embarassment to officials and thus make overclassification unnecessary. Because the nature of the restraint on publication requires as swift a determination as possible, courts should take particular care to ensure a full adversarial hearing. While the efforts of both press and government to stack experts on each side are probably unavoidable, experience indicates that courts should limit these expert opinions to true authorities on the subject and should exclude those government officials who are not technical experts but whose prestige and popularity might prejudice press defendants. Additionally, the lack of a trial by jury commits evaluation of the facts to the impressions of a single judge. As one commentator succinctly noted, "[c]ertainly the opinions of one judge on difficult or novel questions of constitutional law or complex issues of fact are subject to error." Litwack, *supra* note 3, at 539. The alternative to trial by judge—trial by jury—presents serious problems in light of the confidential nature of classified information and the difficulty of obtaining the necessary security clearances.

54. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976) (discussion of the necessity of pursuing all alternatives to pretrial closure restraint of press coverage).

55. Patterson v. Colorado, 205 U.S. 454 (1907).

56. *Id.* at 462. The *Patterson* Court stated: "In the first place, the main purpose of such constitutional provisions [of the first amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Id.*

57. Political speech traditionally has held a high position in the hierarchy of protected speech because of its importance to a democratic society. Professor Meiklejohn expressed the rationale behind this policy when he wrote:

[H]ow inadequate, to the degree of nonexistence, are our public provisions for

the *Marchetti* court's insistence on restraint of publication as the sole remedy restricts first amendment rights and impairs effective and intelligent participation in the democractic process.[58]

III. THE *Progressive* CASE

Following the trend toward expansive interpretation of the prior restraint doctrine, a United States District Court again misapplied the *Pentagon Papers* standard in 1979 in *United States v. Progressive, Inc.*[59] In the *Progressive* case, the Justice Department first obtained a temporary restraining order and then a preliminary injunction, on national security grounds, to stop publication of an article in *The Progressive* magazine. The article examined the secrecy surrounding nuclear bomb production and included classified information on hydrogen bomb manufacture.[60] It contained otherwise protected political speech because *The Progressive* professedly attempted to publish it

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> active discussion among the members of our self-governing society. As we try to create and enlarge freedom, such universal discussion is imperative . . . . I am thinking of a self-governing body politic, whose freedom of individual expression should be cultivated, not merely because it serves to prevent outbursts of violence which would result from suppression, but for the positive purpose of bringing every citizen into active and intelligent sharing in the government of his country.

A. Meiklejohn, *The First Amendment Is an Absolute*, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 1, 16-17 (P. Kurland ed. 1975).

58. Governmental restraint of political speech even for a few days can chill press freedom, and only a showing of irreparable damage to the American people should justify such a restraint. L. TRIBE, *supra* note 18, at 731 (quoting Carroll v. Commissioner of Princess Anne, 393 U.S. 175, 182 (1968)).

59. 467 F. Supp. 990 (W.D. Wis. 1979) (temporary restraining order); No. 79-C-98 (W.D. Wis. Feb. 8, 1980) (preliminary injunction).

60. On the magazine's reasons for publishing the article, editor Erwin Knoll explained:

> It was our feeling, last summer, that the Government had invoked secrecy for thirty years to keep Americans from questioning the nuclear arms race. How much justification was there for the secrecy, we wondered, and what kind of information was being withheld that might help people formulate informed judgments in such vital questions as environmental risks, occupational health and safety threats, nuclear proliferation and the continuing arms arms race, and the astronomical costs of the nuclear weapons program?

Knoll, *"Born Secret": The Story Behind the H-Bomb Article We're Not Allowed to Print*, THE PROGRESSIVE, May 1979, at 13.

Prior to the *Progressive* case, self-censorship kept the issue out of court. For instance, in March 1950, *Scientific American* magazine altered an article on the hydrogen bomb to remove potentially sensitive information. Klement, *Nuclear Security Laws Get First Test in Suit Over Article*, NAT'L L.J. March 26, 1979, at 26, col. 3.

only to show the ease of obtaining nuclear information.[61] The Justice Department gained temporary injunctive relief on the assertion that publication would endanger national security[62] and began marshaling its case for permanent restraint. Before the national security issue[63] in *Progressive* could reach a higher

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61. The *Progressive* court, in its decision on the temporary restraining order, was quick to point out an obvious flaw in the magazine's logic:

> Defendants have stated that publication of the article will alert the people of this country to the false illusion of security created by the government's futile efforts at secrecy. They believe publication will provide the people with needed information to make informed decisions on an urgent issue of public concern.
>
> However, this Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue. Furthermore, the Court believes that the defendants' position in favor of favor of nuclear non-proliferation would be harmed, not aided, by the publication of this article. 467 F. Supp. at 994.

62. *Id.* at 991.

63. The *Progressive* case was an unprecedented courtroom test of the injunctive powers allocated the government in the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2281 (1976). Regarding publication, the Act provides:

> Whoever, lawfully or unlawfully, having possession of, [or] access to . . . Restricted Data — communicates, transmits, or discloses the same to any . . . person . . . with *intent to injure* the United States . . . upon conviction thereof, shall be punished by imprisonment for life, or by for any term of years or a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

42 U.S.C. § 2274 (1976) (emphasis added).

The injunctive power is provided in 42 U.S.C. § 2280 (1976):

> Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter . . . the Attorney General . . . may make application to the appropriate court for an order enjoining such acts or practices . . . .

Under this Act, the Attorney General has authority to enjoin dissemination of restricted data on nuclear weapons that "injure the United States or secure an advantage to any foreign nation." 42 U.S.C. § 2274 (1976).

The legislative history of the Act reveals that its purposes included encouragement of dissemination of atomic information to American allies, S. REP. No. 1699, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3456, 3458, and increased participation by the private sector in nuclear development, *id.* at 3458, 3459. The Act therefore encourages the "dissemination of scientific and technical information relating to atomic energy." 42 U.S.C. § 2162(b) (1976). However, the sections of the Act dealing with dissemination of this information specify that communication of restricted data concerning the design or fabrication of atomic weapons is strictly forbidden. 42 U.S.C. § 2164 (1976). Thus, Congress emphasized the security-sensitive nature of nuclear design and fabrication information from the birth of the Act, which assigned injunctive powers to the government to restrain dissemination of such information.

The congressional mandate of the Atomic Energy Act is difficult to counter. In the *Progressive* case, however, it is doubtful that *The Progressive* and its writers had the requisite intent, under 42 U.S.C. § 2274 (1976), to injure the United States. In fact, *The*

court, however, the intervening publication of the same information in a small Wisconsin newspaper[64] mooted the case and forced the Justice Department to drop its suit. Nevertheless, the government's preliminary success in enjoining *The Progressive's* publication on national security grounds is an unwarranted dilution of the *Pentagon Papers* standard.[65]

The reasoning of *Progressive*, like that of *Marchetti*, follows a trend toward relaxing the burden of proof in national security cases. Judge Robert Warren's *in camera* opinion,[66] believed to be the only *in camera* opinion ever published,[67] was unsealed February 8, 1980, after a prolonged controversy between *The Progressive* and the Justice Department.[68] Unfortunately it deals primarily with preliminary issues[69] and treats the *Pentagon Papers* standard only in conclusory fashion.[70] The court's

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Progressive argued that because it did not believe the material to be harmful to national security, it could not have intended to harm the United States.

64. A letter on hydrogen bomb production, with a rough diagram showing a cross-section of a hydrogen bomb, was published in the Sunday, Sept. 16, 1979, issue of the *Madison Press Connection*, a Madison, Wisconsin tabloid with a circulation of 11,000. NEWSWEEK, Oct. 1, 1979, at 45.

65. *See* note 17 *supra*.

66. United States v. Progressive, Inc., No. 79-C-98 (W.D. Wis. Feb. 8, 1980). *See Progressive Magazine's 'Bombshell' Opinion: Is It Really a Dud?*, NAT'L L.J., Feb. 25, 1980, at 17, col. 1.

67. A court may require government sources to produce documents and may conduct its own examination of them *in camera* to determine whether they are confidential and whether disclosure would be detrimental to the best interests of the state. Matthews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952). But disclosure, even to the judge in closed proceedings, is not automatically required in the case of material which the government alleges contains military secrets. The Freedom of Information Act, 5 U.S.C. § 552 (1976), exempts from mandatory disclosures matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." *Id.* § 552(b)(1). Section 552(b)(1) exempts those matters that are "classifiable" under the executive order governing the classification of executive branch documents in the interest of national defense or foreign policy, and that have actually been classified under that executive order, as occurred in *Marchetti* and *Knopf*. Classifiable information stamped "secret" or "top secret" is, in the absence of clear evidence to the contrary, presumed to have been classified pursuant to the applicable executive order. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1368 (4th Cir. 1974) (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14 (1926)); Annot., 29 A.L.R. FED. 606 (1976).

68. The dispute was over the classification of certain information in the opinion.

69. These issues include whether the documents cited in the article were in the public domain and whether prior release of classified information should be binding on the government if it is later determined that further release would jeopardize national security. *See Progressive Magazine's 'Bombshell' Opinion: Is It Really a Dud?*, *supra* note 66.

70. The opinion states only that "the Court finds that publication or other disclosure of the restricted data contained in the . . . article . . . would likely cause a direct,

previous opinion[71] granting the temporary restraining order, however, provides insight into the court's method of applying the standard.[72] It indicates that the court failed to hold the government to the necessary burden of proof: in rejecting the government's proposed finding that publication "would" cause harm,[73] the court should have rejected prior restraint because the government necessarily failed to prove that publication would *surely* or *inevitably* cause harm. In addition, because the link between publication and nuclear proliferation in *Progressive* appears far weaker than the connection between publication and harm found insufficient in *Pentagon Papers*, the government also failed to prove that harm would follow *directly* and *immediately* upon publication. To conclude that harm would occur directly and immediately, the court had to assume that foreign powers already having fission capability had largely not acquired the article's fusion concepts and would then use the concepts to develop thermonuclear weapons.[74] The court also had to assume that such a foreign power would have the enormous resources required to apply the information and that the

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immediate and irreparable injury to this nation."

71. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

72. That opinion is, in fact, the only record of the court's reasoning in applying the *Pentagon Papers* standard.

73. The government's contention appears in Stipulation for Supplemental Record II, paras. 17-18, *reprinted in* Brief of Appellant at 40, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

The *Progressive* court said: "[T]he article *could possibly* provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon. It *could* provide a ticket to by-pass blind alleys. [It] *could* accelerate the membership of a candidate nation in the thermonuclear club." 467 F. Supp. at 993-94 (emphasis added).

74. The *Progressive* court's conclusion that publication would cause direct, immediate, and irreparable injury also fails to consider that *capability* to produce nuclear weaponry does not necessarily result in actual nuclear proliferation. In a statement to Congress, Secretary of State Cyrus Vance distinguished the concepts, explaining that the "former concept should not be considered to define proliferation. . . . [I]t is likely that many countries have the capability but not the intent to manufacture or otherwise acquire an explosive device." S. REP. No. 467, 95th Cong., 1st Sess. 43 (1977) (executive branch comments on S. 897, Nuclear Non-Proliferation Act of 1978). The government asserted that only *The Progressive*'s publication of the article could increase the risk of capability, not the risk of proliferation. 467 F. Supp. at 993-94. There is, no doubt, some correlation between production capability and actual nuclear arms proliferation, since a nation cannot proliferate nuclear weaponry without the capability to produce it. Using that reasoning, however, the court arguably could restrain publication forever because there always will be some chance, however slight, that publication *might* encourage proliferation. This is precisely the type of unreasonable restraint on publication that the *Pentagon Papers* "direct and immediate" element was designed to prevent.

reduction in developmental time would be material.[75] If the court found any of these factors absent, it would have had no grounds to conclude that public harm would result directly and immediately from the article's publication in *The Progressive.*

The weakest link in this chain of assumptions is the hypothesis that a foreign power acquiring the fusion concepts would use them to develop thermonuclear weapons. The court found only that the article "could possibly" provide sufficient information to allow a foreign nation to move faster in developing a hydrogen weapon.[76] Such speculative evidence does not support the court's finding that publication would cause direct and immediate harm.

The Correct Application of the *Pentagon Papers* Standard

Correct application of the *Pentagon Papers* standard would require different results in both *Marchetti* and *Progressive.* Because the *Marchetti* court did not examine the processes underlying the government's classification of the documents,[77] it is unclear whether the court would have ruled otherwise even had it required the government to prove that publication would surely result in direct, immediate, and irreparable injury. Government witnesses testified that their decisions on the classification of particular information were based on their own recollections, institutional history, staff reports, and specified classified reports.[78] Had the court held *in camera* proceedings to hear further evidence on the decisional process underlying government classification of the documents, it quite probably could have

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75. *The Progressive* specifically argued this point in its brief:

> To reach its decision, the district court had to assume that countries with fission capability have not already acquired the fusion concepts in [*The Progressive*'s] article, that countries acquiring a fusion capability by virtue of the . . . article would actually develop thermonuclear weapons, that countries with the knowledge of the fusion concepts have the immense resources required to apply them, and that the alleged difference in weapons development time would be material.

Brief of Appellant at 42-43, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

Of course there are situations where additional information may cut developmental time. For example, information about the American atom bomb given to Soviet intelligence by Klaus Fuchs is estimated to have accelerated Soviet developmental time from three years to 18 months. L. LAMONT, DAY OF TRINITY 282 (1965).

76. 467 F. Supp. at 993-94.

77. *See* text accompanying notes 47-52 *supra.*

78. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1366 (4th Cir. 1974).

found that at least some of the information did not in fact endanger national security. If the court made this finding, it would not be able to support prior restraint as to that portion of the information. Similarly, in *Progressive,* the government's evidence showed a speculative rather than certain causal connection.[79] Thus, a stronger court emphasis on the causal link between publication and resultant harm would have resulted in the government's failure to meet its heavy burden of proof.

The precedential effect of these decisions may lead to future suppression of information not sufficiently security-sensitive to warrant it. To avoid such a chilling effect on the quantity and quality of political speech concerning the government's activities, courts in future prior restraint cases involving national security must strictly apply the *Pentagon Papers* standard formulated by Justices Brennan and Stewart. Prior restraint is constitutional only in the rarest cases: where a particularly strong prepublication showing of harm to the United States minimizes the loss of press freedom. Requiring the government to prove each element of the *Pentagon Papers* standard ensures preservation of precious press rights, whereas an *ad hoc* analytical approach overemphasizes governmental interests in specific cases. Without strict judicial interpretation of the *Pentagon Papers* standard, the government will be able to suppress political speech; with proper application, however, the courts can preserve both press and governmental interests. The government will still be able to restrain publication where it can prove direct and immediate harm to the United States, but courts can protect press freedom against unnecessary chilling. The American public then can benefit from the free exchange of political speech that the first amendment guarantees.

Sherrie L. Bennett

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79. *See* notes 72-74 *supra.*