

**STRIKING THE OPTIMAL BALANCE POINT BETWEEN
NATIONAL SECURITY AND A FREE PRESS:
A MODEL STATUTE AND A CALL TO CONGRESS**
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I. INTRODUCTION

“They’re actually stopping it,” Justice Black told his clerks.¹ “In his view, that was an obvious violation of the First Amendment. The press was free; it could not be stopped from publishing material the government thought damaging to national security. That was prior restraint; it was an absurd notion.”² On June 13, 1971, the *New York Times* published its first installment of a series of articles based upon a massive study commissioned by former Defense Secretary Robert S. McNamara, detailing United States involvement in Vietnam from 1945–1967.³ Supreme Court Justice “Black was pleased to see the press expose what he regarded as a long, sordid story.”⁴ On June 15, 1971, the U.S. government obtained an order from a federal New York district court enjoining the *Times* from further publishing a top-secret history of American involvement in Vietnam, titled the *History of United States Decision Making Process on Vietnam Policy*.⁵ *The Washington Post* also published its first installment covering the secret Vietnam study on June 18th⁶ before it too was enjoined in federal court.⁷ In Justice Black’s opinion, “Each day’s delay . . . was a defeat for the press and for the First Amendment.”⁸

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¹ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 139 (1979).

² *Id.*

³ Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at A1.

⁴ WOODWARD, *supra* note 1, at 139.

⁵ *United States v. N.Y. Times Co.*, 328 F. Supp 324, 325 (S.D.N.Y. 1971), *rev’d*, 444 F.2d 544 (2d Cir. 1971), *rev’d*, 403 U.S. 713 (1971).

⁶ Chalmers Roberts, *Documents Reveal U.S. Effort in '54 to Delay Viet Election*, WASH. POST, June 18, 1971, at A1.

⁷ *United States v. Wash. Post Co.*, 446 F.2d 1322, 1324–25 (D.C. Cir. 1971).

⁸ WOODWARD, *supra* note 1, at 140.

By June 26, 1971, the *Times* and the *Post* were presenting their cases to the United States Supreme Court.⁹ In a per curiam opinion, the Court affirmed its precedent regarding prior restraints: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”¹⁰ The Court also held that the Government bears a heavy burden to justify its need for such a restraint.¹¹ In this instance, the United States could not overcome this heavy burden.¹² Justice Black opined in his concurrence that “every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”¹³ Black elaborated, “Both the history and language of the *First Amendment* support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”¹⁴

What if the press undermines the ability of the government to perform what is arguably its highest duty—to serve and protect the American people? Undoubtedly, the press should be free, but how free? What if the press published information that might weaken the national defense, thereby jeopardizing American lives? Where does one draw this line between freedom of the press and national security?

In 1810, Thomas Jefferson wrote that he is “certainly not an advocate for frequent and untried changes in laws and constitutions.”¹⁵ However, he recognized “that laws and institutions must go hand in hand with the progress of the human mind. As . . . new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”¹⁶ On Tuesday, September 11, 2001, America discovered a new truth—innocent American lives are centered in the crosshairs of a tidal wave of radical Islamic terrorists.¹⁷ This truth should be fresh in the minds

⁹ *N.Y. Times Co. v. United States*, 403 U.S. 713, 713 (1971).

¹⁰ *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹¹ *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

¹² *Id.*

¹³ *Id.* at 715 (Black, J., concurring).

¹⁴ *Id.* at 717.

¹⁵ Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 3–4 *THE WRITINGS OF THOMAS JEFFERSON* 32, 40–41 (Andrew Adgate Lipscomb & Albert Ellery Bergh eds., 1907).

¹⁶ Letter from Thomas Jefferson to Samuel Kercheval, in 3–4 *id.* at 41.

¹⁷ David P. Barash & Charles P. Webel, *PEACE AND CONFLICT STUDIES* 44 (2d ed. 2008).

of the journalists and editors of the *Times* and the *Post*, who watched terrorists fly commercial airliners into the World Trade Center in New York and the Pentagon in Washington, D.C.¹⁸

Nevertheless, in 2005 and 2006, and as recently as January 2009, the *Times*¹⁹ released controversial stories potentially devastating to U.S. national security. In December 2005, the *Times* published an article detailing a classified National Security Agency (NSA) program under which the intelligence agency monitored the international telephone calls and e-mails of suspected terrorists.²⁰

In June 2006, the *Times* published an article detailing the Society for Worldwide Interbank Financial Telecommunication (SWIFT) program, a classified program operated by the Central Intelligence Agency (CIA) and Treasury Department to track the banking activity of suspected terrorists around the world.²¹ In response to the June 2006 articles, White House Press Secretary Tony Snow asserted the legality and effectiveness of the SWIFT program by detailing its role in apprehending the mastermind behind a 2002 bombing in Bali and locating a Brooklyn man who “contributed \$200,000 in terror financing.”²² Speaking on behalf of the White House, Snow noted that “nobody is going to deny First Amendment rights.”²³ However, media outlets “ought to think long and hard about whether a public’s right to know, in some cases, might overwrite somebody’s right to live, and whether, in fact, the publications of these could place in jeopardy the safety of fellow Americans.”²⁴

More recently, the *Times* published an article detailing the former Bush administration’s covert plans to delay Iran’s ability to develop nuclear

¹⁸ See *id.* at 57.

¹⁹ The *Washington Post*, *Los Angeles Times*, and *Wall Street Journal* published similar stories, but this comment will focus on the *New York Times* because it was the first to break each story. See, e.g., Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. TIMES, June 23, 2006, at A1.

²⁰ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

²¹ Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1; Meyer & Miller, *supra* note 19, at A1.

²² Press Briefing, Tony Snow, White House Press Sec’y (June 26, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/print/20060626-3.html> (last visited Feb. 4, 2010).

²³ *Id.*

²⁴ *Id.*

weapons.²⁵ On January 11, 2009, the *Times* released a story detailing how President Bush refused Israel's secret request for bunker-busting bombs needed to destroy Iran's primary nuclear complex, but instead, "told the Israelis that he authorized [a] covert action intended to sabotage Iran's suspected effort to develop nuclear weapons" by infiltrating its electrical systems, computer systems, and other networks on which Iran relied to develop weapons-grade uranium.²⁶

Although the First Amendment and its bar against prior restraints undoubtedly protect the press, this bar cannot be absolute. As Thomas Jefferson stated, "[M]oderate imperfections [in laws and constitutions] had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects."²⁷ In changing times, Congress must act to meet new challenges facing the country. In this era of radical Islam, a time in which a holy war has been declared against the United States, Congress must enact legislation that, although consistent with *New York Times Co. v. United States*,²⁸ allows the Executive to seek injunctive relief when the press aims to release top secret information that, if disclosed, would cause direct, immediate, and irreparable harm to the security of the United States.

In Part II, this comment examines the First Amendment freedom against prior restraints on the press when national security is at issue by taking a close look at the Pentagon Papers and the Supreme Court's decision in *New York Times Co. v. United States*. In comparison, this comment examines *United States v. Progressive, Inc.*,²⁹ a 1979 case in which a district court enjoined the press from publishing an article regarding the development of hydrogen bombs because the threat to national security met the standard set forth in *New York Times Co. v. United States*.³⁰ Finally, Part II examines the current criminal provisions in the United States Code that penalize communicating certain information relating to national defense and describes the relevant legislative history behind those provisions.

Part III of this comment explores the controversial 2005, 2006, and 2009 publications of the *Times* in an attempt to strike a necessary balance

²⁵ David E. Sanger, *U.S. Rejected Aid for Israeli Raid on Nuclear Site*, N.Y. TIMES, Jan. 11, 2009, at A1.

²⁶ *Id.*

²⁷ Letter from Thomas Jefferson to Samuel Kercheval, in 3-4 *supra* note 15, at 41.

²⁸ 403 U.S. 713 (1971).

²⁹ 467 F. Supp. 990 (W.D. Wis. 1979).

³⁰ *Id.* at 998, 1000.

between a free press and national defense. In light of the current national security crisis facing the United States, this comment proposes a model statute designed to enable the government to punish those who publish top-secret information that, if disclosed, would cause direct, immediate, and irreparable harm to the security of the United States. In addition, the proposed statute authorizes the Executive to seek injunctive relief against a publication upon showing of clear and convincing evidence that disclosure will cause such harm to American security. To finish Part III, this comment explains why the proposed statute is constitutional and why Congress should act—before it is too late.

II. BACKGROUND

A. *Prior Restraint*

To fully grasp the Supreme Court's reasoning in *New York Times Co. v. United States* and the depth of the debate between freedom of press and national security, it is necessary to thoroughly understand the historical objection to restraints on the press. In the eighteenth century, William Blackstone noted:

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 from the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.³¹

Although “Congress shall make no law . . . abridging the freedom . . . of the press,”³² a prior restraint of speech, as opposed to punishment subsequent to speech, is especially disfavored.³³ Prior restraints, described as “administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to

³¹ 4 WILLIAM BLACKSTONE WITH THOMAS A. GREEN, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (1979) (*cited in* *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 713–14 (1931)).

³² U.S. CONST. amend. I.

³³ *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

occur,”³⁴ are “the most serious and the least tolerable infringement on First Amendment rights.”³⁵ Prior restraints are especially dangerous because of the collateral bar rule. Normally, one violating an unconstitutional law may challenge the constitutionality of the law, and if successful, will not be punished.³⁶ However, the collateral bar rule prevents individuals who violate even unconstitutional prior restraints from substantively challenging them, and, generally, they may be punished for the violation.³⁷

Despite being the least tolerable infringement upon First Amendment rights, the Supreme Court has opened the door to restraints upon the press when national security may be jeopardized. In *Near v. Minnesota*,³⁸ the Court stated, “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.”³⁹ In addition, in *Schenck v. United States*,⁴⁰ the Court noted, “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 endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁴¹

The ultimate question is where a court should draw the line between freedom of press and national security.

B. *The Pentagon Papers*

“The *Times*’s disclosure of the top secret study was probably the single largest unauthorized disclosure of classified documents in the history of the United States.”⁴² The *History of U.S. Decision Making Process on Vietnam Policy*, commonly referred to as the Pentagon Papers, was a forty-seven volume, sixty-pound study prepared secretly at the Pentagon between June 1967 and January 1969.⁴³ Former Secretary of Defense

³⁴ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4–14 (1984)).

³⁵ *Neb. Press Ass’n*, 427 U.S. at 559.

³⁶ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1094 (2d ed. 2005).

³⁷ *Id.*

³⁸ 283 U.S. 697 (1931).

³⁹ *Id.* at 716.

⁴⁰ 249 U.S. 47 (1919).

⁴¹ *Id.* at 52.

⁴² DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 2 (1996).

⁴³ *Id.*

Robert S. McNamara commissioned the “massive” study⁴⁴ and examined in excruciating detail American policy toward Indochina from roughly 1940 to 1968.⁴⁵ In sum:

This enormous collection of documents and commentary undoubtedly deepens our understanding of the political premises and strategic objectives that have underlain the Indochina, and especially the Vietnam, policies of four American administrations. And, on the military level, these papers marshal a large body of important documentation and analysis bearing on discussions and decisions within several administrations concerning U.S. efforts to achieve these objectives.⁴⁶

Given the depth of the information reported, the study earned “top secret—sensitive” classification.⁴⁷ Executive Order 10,501 classified “top secret” information as material information, the improper disclosure of which “could result in exceptionally grave damage to the nation.”⁴⁸ This included information that could lead “to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.”⁴⁹ Defense Secretary McNamara requested Morton H. Halperin, one of his top aides, to direct the study.⁵⁰ Halperin and the two other officials involved were extremely worried about a leak of the information.⁵¹ “In their view the Papers contained an extraordinary amount of information that was properly

⁴⁴ *Id.* at 1.

⁴⁵ *See id.* at 28–29 (“For each episode [within the study] a brief summary and analysis was followed by a lengthy chronology that recounted the events of each episode on an almost day-to-day basis.”).

⁴⁶ *Id.* at 29–30 (quoting George McT. Kahin, *The Pentagon Papers: A Critical Evaluation*, 69 AM. POL. SCI. REV. 675, 675 (June 1975)).

⁴⁷ *Id.* at 30 (quoting MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW 7 (1977)).

⁴⁸ Exec. Order No. 10,501, 18 Fed. Reg. 7051 (Nov. 10, 1953), *revoked by* Exec. Order No. 11,652, 37 Fed. Reg. 5209, 5214 (Mar. 10, 1972) (establishing a new classification scheme).

⁴⁹ Exec. Order No. 10,501, 18 Fed. Reg. 7051 (Nov. 10, 1953).

⁵⁰ *See* RUDENSTINE, *supra* note 42, at 20.

⁵¹ *See id.* at 32.

classified as top secret, that could seriously harm the national security if prematurely disclosed, and that was politically sensitive.”⁵²

On March 19, 1971, those fears were realized: Daniel Ellsberg released the top-secret study to the *Times*.⁵³ Ellsberg was a Harvard graduate⁵⁴ and had worked at the Pentagon as a White House consultant through RAND,⁵⁵ a civilian research institute considered “the brain trust” of the U.S. Air Force.⁵⁶ He was “a confidant of high-ranking Pentagon and State Department officials,” which is how he gained access to the Pentagon Papers.⁵⁷ He left a copy of the voluminous study with a reporter for the *Times*, with full knowledge the reporter would photocopy the top-secret study.⁵⁸

On Sunday, June 13, 1971, the *Times* published its first installment of the “‘massive’ Pentagon study.”⁵⁹ It described “‘how the United States went to war in Indochina’ . . . [and how] four [American] administrations ‘progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time.’”⁶⁰ Upon receiving word the *Times* had access to the top-secret study, and before its publication, James C. Goodale, general counsel for the *Times*, examined the potential liability of the *Times* if it published.⁶¹

Goodale analyzed two provisions of federal espionage laws, specifically 18 U.S.C. §§ 794(a) and 793(e).⁶² He determined that the *Times* could not be prosecuted under § 794(a), which made it a crime to disclose to a foreign government information “relating to the national

⁵² *Id.*

⁵³ *See id.* at 49, 52.

⁵⁴ *Id.* at 33–34.

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 34–35.

⁵⁷ *Id.* at 39–40.

⁵⁸ *See id.* at 52–53 (explaining that although Ellsberg “did not give Sheehan permission to copy or to duplicate the documents in any way,” Ellsberg, motivated by his desire to have the documents released as well as his desire to evade criminal prosecution, likely placed Sheehan in a situation where he could copy the documents without Ellsberg being conscious of it).

⁵⁹ *Id.* at 1 (quoting Sheehan, *supra* note 3, at A1).

⁶⁰ *Id.*

⁶¹ *Id.* at 50–51.

⁶² *See id.* at 51.

defense” with the intent to injure the U.S. or provide an advantage to the foreign government.⁶³ Goodale was more concerned with liability pursuant to § 793(e).⁶⁴ This section prohibited communicating information that is possessed without authorization and “relat[es] to the national defense” where “the possessor has reason to believe [it] could be used to the injury of the United States.”⁶⁵ Because of its vagueness, Goodale found comfort in the phrase “relating to the national defense” and saw two arguments for the *Times*. First, he believed that in the face of criminal prosecution, a court might construe the phrase “relating to the national defense” narrowly enough to exclude the study.⁶⁶ Second, Goodale thought the statute might be unconstitutionally vague because the phrase “relating to the national defense” was not precisely defined.⁶⁷

C. New York Times Co. v. United States

The second installment of the *Times*’ Pentagon Papers series was published on Monday, June 14, 1971.⁶⁸ On Tuesday morning, pursuant to President Nixon’s direction, his administration asked a federal court in New York to enjoin the *Times* from publishing further installments.⁶⁹ This “was the first time since the adoption of the U.S. Constitution that the federal government had sued the press to stop it from disclosing information because of national security.”⁷⁰ The district court granted a temporary restraining order until it could hold an evidentiary hearing on Friday, June 18.⁷¹

⁶³ *Id.* (quoting 18 U.S.C. § 794(a) (1970) (current version at 18 U.S.C. § 794(a) (2006)).

⁶⁴ *See id.*

⁶⁵ 18 U.S.C. § 793(e) (1970) (current version at 18 U.S.C. § 793(e) (2006)).

⁶⁶ RUDENSTINE, *supra* note 42, at 51.

⁶⁷ *See id.* at 51.

⁶⁸ Neil Sheehan, *Vietnam Archive: A Consensus to Bomb Developed Before '64 Election, Study Says*, N.Y. TIMES, June 14, 1971, at A1.

⁶⁹ *See* RUDENSTINE, *supra* note 42, at 2; *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971), *rev'd*, 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971).

⁷⁰ RUDENSTINE, *supra* note 42, at 2; *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (“So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession.”).

⁷¹ *United States v. N.Y. Times Co.*, 328 F. Supp. at 325–26. Because this was the first time the United States sued to enjoin a newspaper from publishing information in its possession, it follows that the district court’s restraining order marked the first time a publication was ever enjoined due to national security.

On that Friday, June 18, the *Washington Post* published its first installment regarding the classified study after acquiring a portion of the top-secret report.⁷² The administration immediately filed a second suit in federal district court in Washington, D.C. to enjoin publication.⁷³ Meanwhile, in New York, the district court listened to the arguments of the government and the *Times* all day on Friday until after 11 p.m.⁷⁴

On Saturday, June 19, the Southern District of New York denied the government's request for an injunction.⁷⁵ The district court said, "[N]o cogent reasons were advanced as to why these documents except in the general framework of embarrassment . . . would vitally affect the security of the Nation."⁷⁶ On the same day, the United States Court of Appeals for the District of Columbia decided that its district court erred in granting a temporary restraining order the evening before.⁷⁷ Both decisions were appealed, and by Wednesday, June 23, there was a circuit split. The Second Circuit in New York remanded the case for further hearings, whereas the D.C. Circuit affirmed the denial of the government's request for injunctive relief.⁷⁸ The United States Supreme Court granted certiorari for both cases on Friday, June 25, 1971 and scheduled oral arguments to begin on Saturday, June 26, at 11 a.m.⁷⁹

1. "A Heavy Burden"—The *Per Curiam* Opinion

The United States Supreme Court rendered a *per curiam* opinion, and each of the nine justices wrote individual opinions.⁸⁰ In its *per curiam* opinion, the Court recognized the "heavy presumption against" prior restraints and the government's "heavy burden" to justify imposing one.⁸¹

⁷² See Roberts, *supra* note 6, at A1; RUDENSTINE, *supra* note 42, at 2.

⁷³ See RUDENSTINE, *supra* note 42, at 2; United States v. Wash. Post Co., 446 F.2d 1322, 1323 (D.C. Cir. 1971).

⁷⁴ See RUDENSTINE, *supra* note 42, at 3.

⁷⁵ United States v. N.Y. Times Co., 328 F. Supp. at 330.

⁷⁶ *Id.*

⁷⁷ United States v. Wash. Post Co., 446 F.2d 1322, 1324 (D.C. Cir. 1971).

⁷⁸ See United States v. N.Y. Times Co., 444 F.2d 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971); United States v. Wash. Post Co., 446 F.2d 1327 (D.C. Cir. 1971).

⁷⁹ N.Y. Times Co. v. United States, 444 F.2d 544, *cert. granted*, 403 U.S. 942 (1971); United States v. Wash. Post Co., 446 F.2d 1327, *cert. granted*, 403 U.S. 943 (1971).

⁸⁰ See N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

⁸¹ *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

By a 6-3 majority, the Court held “that the Government had not met that burden.”⁸²

2. *The Majority: No Prior Restraint Without Congressional Guidance*⁸³

Justice Black believed that prohibiting the newspaper from publishing news from “whatever the source” was “a flagrant, indefensible, and continuing violation of the First Amendment.”⁸⁴ Black was a strict protectionist of free speech and felt that the “the history and language of the First Amendment” outweighed any argument for censorship.⁸⁵ He disposed of the idea that speech could be curtailed to protect national security by arguing that the term “‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁸⁶

Justice Douglas stated that the First Amendment “leaves . . . no room for governmental restraint on the press.”⁸⁷ He concluded that the injunctions against the *Times* and the *Post* “constitute a flouting of the principles of the First Amendment.”⁸⁸ Douglas took special note of the fact that, in his opinion, no statute prohibited the press from publishing material that could potentially jeopardize national security.⁸⁹ He argued that 18 U.S.C. § 793(e), which makes it a crime to “communicate” without authorization “information relating to the national defense,”⁹⁰ is distinguishable from “publishing” information relating to the national defense.⁹¹ In Douglas’ opinion, the *Times* and *Post* were “publishing,”

⁸² *Id.*

⁸³ Justice Black was the only justice who was willing to impose an unconditional ban upon prior restraints. *See id.* at 717 (Black, J., concurring). The remaining members of the majority, Justices Douglas, Brennan, Stewart, White, and Marshall, all left open a loophole through which the press might be restricted. *See id.* at 720–48 (Douglas, J., concurring; Brennan, J., concurring; Stewart, J., concurring; White, J., concurring; Marshall, J., concurring).

⁸⁴ *Id.* at 715, 717 (Black, J., concurring).

⁸⁵ *Id.* at 717.

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* at 720 (Douglas, J., concurring).

⁸⁸ *Id.* at 724.

⁸⁹ *See id.* at 720.

⁹⁰ 18 U.S.C. § 793(e) (1970) (current version at 18 U.S.C. § 793(e) (2006)).

⁹¹ *See* N.Y. Times Co. v. United States, 403 U.S. at 720–21 (1971) (Douglas, J., concurring). *See infra* Part II.E, for a discussion of 18 U.S.C. § 793(e).

which is not explicitly prohibited by statute, and therefore, not subject to § 793(e).⁹²

In Justice Brennan's concurring opinion, he agreed the injunctions issued against the *Times* and *Post* violated the First Amendment.⁹³ Although he stated that "the First Amendment stands as an absolute bar . . . in circumstances of the kind presented by these cases,"⁹⁴ he recognized that prior restraint upon the press may be permissible when the nation "is at war."⁹⁵ During a time of 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."⁹⁶ Although the nation certainly was at war, Justice Brennan determined the government failed to meet its burden because the government claimed that release of the information "'could,' or 'might,' or 'may' prejudice the national interest."⁹⁷ Justice Brennan was unwilling to grant an injunction based "upon surmise or conjecture."⁹⁸ Nonetheless, Justice Brennan set forth a standard describing when a prior restraint might be constitutional. "[O]nly 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 can support even the issuance of an interim restraining order."⁹⁹

Justice Stewart, in his concurring opinion, ultimately rested his decision upon separation of powers grounds. He refused to enjoin the newspapers because it is the "constitutional duty of the Executive . . . through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."¹⁰⁰ Justice Stewart refused to allow the Court to perform what he saw as the duty of the Executive.¹⁰¹

⁹² See *N.Y. Times Co. v. United States*, 403 U.S. at 721–22 (1971) (Douglas, J., concurring).

⁹³ *Id.* at 727 (Brennan, J., concurring).

⁹⁴ *Id.* at 725.

⁹⁵ *Id.* at 726 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

⁹⁶ *Id.* (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

⁹⁷ *Id.* at 725.

⁹⁸ *Id.*

⁹⁹ *Id.* at 726–27.

¹⁰⁰ *Id.* at 729–30 (Stewart, J., concurring).

¹⁰¹ See *id.* at 730.

Justice Stewart also explored the role of Congress in protecting government property and in preserving its secrets.¹⁰² He noted that there were criminal statutes of relevance and that, “if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.”¹⁰³ Justice Stewart implicitly set forth a standard under which prior restraint would be permissible: the press may be enjoined when the disclosure of the disputed information would result in the “direct, immediate, and irreparable damage to our Nation or its people.”¹⁰⁴

Justice White concurred largely because he was hesitant to award an equitable remedy in the absence of specific legislative authority to do so.¹⁰⁵ He denied that the First Amendment stands as an absolute bar against prior restraint, but decided the government had not satisfied “the very heavy burden that it must meet to warrant an injunction against publication . . . , *at least in the absence of express and appropriately limited congressional authorization for prior restraints.*”¹⁰⁶ Justice White examined the criminal statutes under which the *Times* could possibly be prosecuted before concluding that Congress chose “to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.”¹⁰⁷ Congress “has not, however, authorized the injunctive remedy against threatened publication.”¹⁰⁸ In sum, Justice White qualified his opinion in three different places by stating that he refused to grant an injunction, “at least in the absence of legislation by Congress.”¹⁰⁹

Similar to Justices Stewart and White, Justice Marshall refused to legislate from the bench. He made this clear, “The issue is whether this Court or Congress has the power to make law.”¹¹⁰ Justice Marshall concurred with the separation of powers argument, deciding that “[i]t

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.* (“I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”).

¹⁰⁵ *See id.* at 730–31, 737 (White, J., concurring).

¹⁰⁶ *Id.* at 731 (emphasis added).

¹⁰⁷ *Id.* at 740.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 731–33.

¹¹⁰ *Id.* at 741 (Marshall, J., concurring).

would . . . be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit.”¹¹¹ In 1917, Congress specifically rejected legislation that precluded “publishing” and instead adopted provisions criminalizing the communication, delivery, or transmittal of information that jeopardizes national security.¹¹² Accordingly, Marshall refused to allow the Court and Executive to “‘make law’ without regard to the action of Congress.”¹¹³

3. *The Dissenting Justices*

The dissenters, Chief Justice Burger and Justices Harlan and Blackmun, believed that the Court moved too quickly. Chief Justice Burger refused to take a stance on the merits of the case because no district court judge, court of appeals judge, or Supreme Court Justice, knew all the facts.¹¹⁴ Rather, Chief Justice Burger believed these cases were conducted too hastily: “Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.”¹¹⁵

Justice Harlan agreed with the Chief Justice’s concern, noting that the Court was “almost irresponsibly feverish in dealing with these cases.”¹¹⁶ Against “[t]he strong First Amendment policy against prior restraints on publication,”¹¹⁷ Justice Harlan believed the Court must weigh the power of the Executive to conduct foreign affairs.¹¹⁸ Justice Harlan argued the lower courts failed to give the Executive “the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.”¹¹⁹

¹¹¹ *Id.* at 742.

¹¹² *Id.* at 745–46.

¹¹³ *Id.* at 742. Marshall referred to 18 U.S.C. § 793(e), which made it a crime for one having unauthorized possession of information relating to the national defense to “communicate[], deliver[], transmit[]” that information to anyone not entitled to receive it. *See id.* at 745.

¹¹⁴ *Id.* at 748.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 753 (Harlan, J., dissenting).

¹¹⁷ *Id.* at 754.

¹¹⁸ *See id.* at 756.

¹¹⁹ *Id.* at 758.

Finally, Justice Blackmun agreed that the cases were decided much too hastily¹²⁰ and that proper deference was not given to the Executive branch's power to conduct foreign affairs.¹²¹ He refused to "subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions."¹²² Further, he noted that "First Amendment absolutism" would be a severe break in Supreme Court precedent, a concession that "even the newspapers" made.¹²³ He concluded, "What is needed here is a weighing, upon properly developed standards, the broad right of the press to print and of the very narrow right of the Government to prevent."¹²⁴

4. "No Harm Was Done"

Following the Supreme Court's decision, the *Times* and the *Post* immediately resumed publishing.¹²⁵ The government prosecuted Daniel Ellsberg on eight counts of espionage, six counts of theft, and one count of conspiracy.¹²⁶ After government misconduct during the prosecution was revealed,¹²⁷ the district court dismissed the case.¹²⁸ The government's unsuccessful prosecution of Ellsberg was the only criminal action instituted by the government; charges were never filed against the *Times* or the *Post*.¹²⁹ According to Solicitor General Erwin Griswold, who argued

¹²⁰ See *id.* at 759–61 (Blackmun, J., dissenting).

¹²¹ See *id.* at 761.

¹²² *Id.*

¹²³ *Id.* Alexander Bickel, a Yale Law School professor who argued for the *Times*, stated in his oral argument before the Court, "We concede—we have all along in this case conceded—for purposes of the argument, that the prohibition against prior restraint, like so much else in the Constitution, is not an absolute." MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955, at 171–72 (Peter Irons & Stephanie Guitton eds., 1993). The audio of the entire oral argument is also available online at http://www.oyez.org/cases/1970-1979/1970/1970_1873/argument.

¹²⁴ *N.Y. Times Co. v. United States*, 403 U.S. at 761 (Blackmun, J., dissenting).

¹²⁵ See RUDENSTINE, *supra* note 42, at 323.

¹²⁶ *Pentagon Papers: Case Dismissed*, TIME, May 21, 1973, <http://www.time.com/time/magazine/article/0,9171,907273,00.html>; *Ellsberg v. Mitchell*, 353 F. Supp. 515, 516 (D.D.C. 1973). An alleged co-conspirator, Anthony Russo, was also named in the indictment. See RUDENSTINE, *supra* note 42, at 342.

¹²⁷ See *Ellsberg v. Mitchell*, 353 F. Supp. at 516; *United States v. Banks*, 374 F. Supp. 321, 333 (D.C.S.D. 1974).

¹²⁸ See *United States v. Banks*, 374 F. Supp. at 333.

¹²⁹ See RUDENSTINE, *supra* note 42, at 342–43.

before the Supreme Court on behalf of the government,¹³⁰ “In hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers.”¹³¹

D. *United States v. Progressive, Inc.*

United States v. Progressive Inc. is the only other case to weigh a free press against national security.¹³² On March 9, 1979, the U.S. government petitioned the District Court for the Western District of Wisconsin for an injunction against magazine publishers to prevent an article titled, *The H-Bomb Secret: How We Got It, Why We’re Telling It*.¹³³ The court found the article presented technical details about hydrogen bomb construction that “could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon.”¹³⁴

Although it recognized that “any prior restraint on publication comes into court under a heavy presumption against its constitutional validity,” as set forth in the per curiam opinion in *New York Times Co. v. United States*, the court also recognized that “First Amendment rights are not absolute.”¹³⁵ The court appreciated that if it issued a preliminary injunction, the injunction would constitute the first instance in American history in which a prior restraint against publication was permitted for the sake of national security.¹³⁶

The magazine relied on the *New York Times Co. v. United States* decision.¹³⁷ However, the court distinguished the facts in three important ways.¹³⁸ First, the court noted that the information in the Pentagon Papers was “historical data” about past events.¹³⁹ Second, the district court found the security interest carried more weight in this case because it would cause more than just “some embarrassment to the United States.”¹⁴⁰ Third,

¹³⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713, 713 (1971).

¹³¹ RUDENSTINE, *supra* note 42, at 327.

¹³² *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

¹³³ *Id.* at 991.

¹³⁴ *Id.* at 993.

¹³⁵ *Id.* at 992.

¹³⁶ *See id.* at 996.

¹³⁷ *See id.* at 994.

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* However, this factor may have been disputed by Justices on the Court that decided the *Pentagon Papers* case. For instance, in reference to the classified report:

(continued)

and most importantly, a specific statute was involved in *Progressive*, specifically, § 2274 and § 2014 of the Atomic Energy Act.¹⁴¹

Section 2274 prohibits anyone from communicating, transmitting, or disclosing any restricted data to any person “with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.”¹⁴² The Act defines “restricted data” as “all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category [by the Atomic Energy Commission].”¹⁴³

Of special note, the district court construed § 2274 to include publishing in a magazine¹⁴⁴—a step the Supreme Court was unwilling to take when construing the language of the Espionage Act¹⁴⁵ in *New York Times Co. v. United States*.¹⁴⁶ Therefore, the district court framed the issue as “a basic confrontation between the First Amendment right to freedom of the press and national security,” wherein the information sought to be published involved “the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself.”¹⁴⁷ In other words, the district court placed “the right to life, liberty and the pursuit of happiness” above the freedom of the press in its “hierarchy of values.”¹⁴⁸

“I’ve seen things that shake me,” [Justice] Stewart told his clerks It wasn’t “frivolous.” “There is no question that there is some stuff in there that could get people killed, and I hope it never gets out.” But he remained unsure whether its publication would immediately and gravely affect national security.

WOODWARD & ARMSTRONG, *supra* note 1, at 146.

¹⁴¹ *United States v. Progressive, Inc.*, 467 F. Supp. at 994 (quoting 42 U.S.C. § 2014 (1976) (current version at 42 U.S.C. § 2014 (2006)); 42 U.S.C. § 2274 (1976) (current version at 42 U.S.C. § 2274 (2006))).

¹⁴² 42 U.S.C. § 2274 (1976) (current version at 42 U.S.C. § 2274 (2006)).

¹⁴³ 42 U.S.C. § 2014(y) (1976) (current version at 42 U.S.C. § 2014(y) (2006)).

¹⁴⁴ *United States v. Progressive, Inc.*, 467 F. Supp. at 994.

¹⁴⁵ 42 U.S.C. § 793 (2006).

¹⁴⁶ See discussion *supra* Part II.C.2.

¹⁴⁷ *United States v. Progressive, Inc.*, 467 F. Supp. at 995.

¹⁴⁸ *Id.*

Certain of these rights have an aspect of imperativeness or centrality that make them transcend other rights. Somehow it does not seem that the right to life and the right to not have soldiers quartered in your home can be of equal import in the grand scheme of things. While it may be true in the long-run, as Patrick Henry instructs us, that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live.

Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression.¹⁴⁹

The court recognized that, in reality, the choice might not be so stark; that is, a decision to deny the requested injunction may not actually lead to the destruction of human life.¹⁵⁰ To solve this “panoply of rights” dilemma, the court examined “the disparity of the risk involved.”¹⁵¹ On one hand, if the court found for the government, the risk was restricting a free press.¹⁵² The court found this risk to be mitigated by the fact that “it is always possible . . . for a bad law to be repealed or for a judge’s error to be subsequently rectified.”¹⁵³ On the other hand, ruling in favor of the press “could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.”¹⁵⁴

Given the disparity of the risks involved, the court analogized the dispute to *Near v. Minnesota*. Specifically, it stated “that publication of the technical information on the hydrogen bomb contained in the article is analagous [sic] to publication of troop movements or locations in time of war.”¹⁵⁵ Therefore, the disputed article fell “within the extremely narrow

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *See id.* at 995–96.

¹⁵³ *Id.* at 995.

¹⁵⁴ *Id.* at 996.

¹⁵⁵ *Id.* (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)).

exception to the rule against prior restraint.”¹⁵⁶ In addition, the court found that the government satisfied “its burden under section 2274 of The Atomic Energy Act . . . [and] met the test enunciated by two Justices in the *New York Times* case, namely grave, direct, immediate and irreparable harm to the United States.”¹⁵⁷

Subsequently, Progressive Inc. moved for reconsideration and the district court denied the motion.¹⁵⁸ In its motion, Progressive, Inc. argued that after it was enjoined, several articles released the protected information to the public, and thus, the injunction was moot.¹⁵⁹ The district court decided that the other articles were “highly speculative and generalized,” and did not present the threat to national security posed by the article Progressive, Inc. sought to publish.¹⁶⁰ Accordingly, the district court denied the motion for reconsideration and the injunction remained in effect.¹⁶¹ Progressive, Inc. appealed to the Seventh Circuit, but the government voluntarily dismissed the case because the information had been published elsewhere.¹⁶²

E. The Espionage Provisions

Particularly noteworthy, the *Progressive* court read the Atomic Energy Act to include “publishing” when the language punishes only one who “communicates, transmits, or discloses” restricted data.¹⁶³ The court made this finding despite that several Supreme Court Justices refused to read “publishes” into the Espionage Act,¹⁶⁴ which also used the language,

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Interestingly, the court noted, “the Court is acutely aware of the old legal adage that ‘bad cases make bad law.’ This case in its present posture will undoubtedly go to the Supreme Court because it does present so starkly the clash between freedom of press and national security.” *Id.*

¹⁵⁸ *United States v. Progressive, Inc.*, 486 F. Supp. 5, 9 (W.D. Wis. 1979).

¹⁵⁹ *See id.* at 6.

¹⁶⁰ *See id.* at 8–9.

¹⁶¹ *Id.* at 9.

¹⁶² *See United States v. Progressive, Inc.*, 610 F.2d 819, 819 (7th Cir. 1979); *see also* RUDENSTINE, *supra* note 42, at 353.

¹⁶³ *United States v. Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wis. 1979) (citing 42 U.S.C. § 2274 (1976) (current version at 42 U.S.C. § 2274 (2006))).

¹⁶⁴ *See, e.g., N.Y. Times Co. v. United States*, 403 U.S. 713, 720–22 (1971) (Douglas, J., concurring); *id.* at 733–40 (White, J., concurring); *id.* at 745–47 (Marshall, J., concurring).

“communicates, delivers, [or] transmits.”¹⁶⁵ The Justices reached their respective conclusions after reviewing the legislative history behind the Espionage Act.¹⁶⁶

In 1917, during a debate over the original Espionage Act, Congress rejected a proposal giving the President authority to prohibit publishing information relating to the national defense in a time of war or when there was a threat of war.¹⁶⁷ The proposal provided:

During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the *publishing* or communicating of, or the *attempting to publish* or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than \$10,000 or by imprisonment of not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same.¹⁶⁸

Following debate on the Senate floor, Congress refused to place the power of monitoring the press in the hands of the President.¹⁶⁹

Additionally, in 1957, Congress rejected a proposal from the United States Commission on Government Security¹⁷⁰ that would have made it a crime “for any person willfully to disclose without proper authorization, for any purpose whatever, information classified ‘secret’ or ‘top secret,’ knowing, or having reasonable grounds to believe, such information to

¹⁶⁵ 18 U.S.C. § 793(e) (2006).

¹⁶⁶ See, e.g., sources cited *supra* note 164.

¹⁶⁷ 55 CONG. REC. 1763, 2167 (1917); see also *N.Y. Times Co. v. United States*, 403 U.S. at 721–22 (Douglas, J., concurring).

¹⁶⁸ 55 CONG. REC. 1763 (1917) (first and second emphases added).

¹⁶⁹ See 55 CONG. REC. 2167 (1917); see also *N.Y. Times Co. v. United States*, 403 U.S. at 721–22 (Douglas, J., concurring).

¹⁷⁰ *N.Y. Times Co. v. United States*, 403 U.S. at 747 (Marshall, J., concurring) (citing 103 CONG. REC. 10,447–10,450).

have been so classified.”¹⁷¹ Congress opened debate on the proposal after a report from the Commission on Government Security found that periodicals and “even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons.”¹⁷² The report, however, did not convince Congress to place security above a free press.¹⁷³

What remains of the 1917 debate is currently codified at 18 U.S.C. § 793, which provides in relevant part:

Whoever having unauthorized possession of . . . any . . . [information] relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, [or] transmits . . . to any person not entitled to receive it, or willfully retains the same . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.¹⁷⁴

The language of the statute plainly does not prohibit “publishing,” and as indicated by the legislative history, Congress most likely did not intend to include publishing within the proscribed conduct.

Currently, there are three provisions of the Espionage Act that specifically prohibit “publishing” certain narrowly-defined categories of information relevant to the national defense. Section 794 penalizes one who, in a time of war, and with the intent that the information “shall be communicated to the enemy, . . . *publishes*, or communicates, . . . any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces.”¹⁷⁵ Similarly, 18 U.S.C. § 797 prohibits one from publishing without authorization any “picture, drawing, [or] map” of any defense installations.¹⁷⁶

Finally, 18 U.S.C. § 798 applies to “[w]hoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes*, . . . any classified information” concerning the “cryptographic system” or the “communication intelligence

¹⁷¹ *Id.* (quoting 1957 U.S. COMM’N ON GOV’T SEC. REP. 620).

¹⁷² 1957 U.S. COMM’N ON GOV’T SEC. REP. 620.

¹⁷³ *N.Y. Times Co. v. United States*, 403 U.S. at 747 (Marshall, J., concurring).

¹⁷⁴ 18 U.S.C. § 793(e) (2006).

¹⁷⁵ *Id.* § 794(b) (2006) (emphasis added).

¹⁷⁶ *Id.* § 797 (2006).

activities” of the United States or any foreign government.¹⁷⁷ Although § 798 criminalizes “publishing,” it reaches “only a small category of classified matter,”¹⁷⁸ namely “the methods, techniques, and material used in the transmission by this Nation of enciphered or coded messages,” and American methods of code-breaking.¹⁷⁹

The provision that would likely circumscribe the greatest amount of sensitive information, 18 U.S.C. § 793, does not proscribe publishing, according to the Court in *New York Times Co. v. United States* and its legislative history.¹⁸⁰ The three provisions that do criminalize publishing apply only to very narrow categories of defense information. Clearly, none of these provisions explicitly authorize the government to seek injunctive relief when information with the potential to jeopardize national security might be published.

III. RECENT DEVELOPMENTS

The United States is at war.¹⁸¹ It has been since radical Islamic terrorists flew commercial jets into the World Trade Center and Pentagon, with one airliner crashing in Pennsylvania after its passengers heroically fought off the terrorists aboard the plane, causing it to crash in a field instead of its target in Washington, D.C.¹⁸² Despite this fact, and despite the fact that the United States is battling a faceless enemy willing to do anything to take innocent American lives, the *Times* on three occasions decided that it is more important to inform the public of American national security programs than it is to withhold the information in the name of national security. In December 2005, the *Times* released an article detailing a *classified* NSA program that monitored international phone

¹⁷⁷ *Id.* § 798(a) (2006) (emphasis added). “Cryptographic system” is defined as “any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications.” *Id.* § 798(b) (2006). “Communication intelligence” encompasses “all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.” *Id.*

¹⁷⁸ H.R. REP. NO. 1895, at 1 (1950).

¹⁷⁹ *Id.* at 2.

¹⁸⁰ See sources cited *supra* note 164.

¹⁸¹ See, e.g., Sanger, *supra* note 25, at 1.

¹⁸² See Serge Schmemmann, *U.S. Attacked: President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A1; Risen & Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Sanger, *supra* note 25, at 1.

calls and e-mails of suspected terrorists.¹⁸³ In June 2006, the *Times* published an article about the SWIFT program, another *classified* program initiated after 9/11 allowing counterterrorism officials to access an international banking database to track the financial records of suspected terrorists.¹⁸⁴ Finally, as recently as January 11, 2009, the *Times* released a story detailing how President Bush refused a secret request by Israel for bunker-busting bombs needed to destroy Iran's primary nuclear complex, but instead, told the Israelis that he authorized a "covert" action designed to sabotage Iran's effort to develop nuclear weapons.¹⁸⁵

A. NSA Eavesdropping Program

Pursuant to a 2002 presidential order, the NSA began monitoring international phone calls and e-mails without warrants.¹⁸⁶ The program started in early 2002 after CIA officials captured Al Qaeda operatives in missions overseas.¹⁸⁷ The officials seized the computers, cell phones, and phone directories of the operatives.¹⁸⁸ Subsequently, the NSA began its surveillance program with the intention of using the numbers seized to link to other suspected terrorists.¹⁸⁹ The NSA also began monitoring phone numbers and e-mail messages linked to those originally captured, increasing the number of persons monitored under the program.¹⁹⁰ The effort was designed to track "'dirty numbers' linked to Al Qaeda."¹⁹¹ Most numbers and addresses monitored were located outside of the United States, but reportedly, hundreds were located within the United States.¹⁹²

¹⁸³ See Risen & Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹⁸⁴ See Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

¹⁸⁵ See Sanger, *supra* note 25, at 1.

¹⁸⁶ See Risen & Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. Because of the secrecy surrounding the program, the very article subject to scrutiny here must be relied upon for information. Risen and Lichtblau obtained their information from leaks within the government, reported to be nearly a dozen current and former officials who discussed the program on condition of anonymity because the program was classified. *See id.*

¹⁸⁷ *Id.* at A1.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*

¹⁹¹ *Id.* at A1.

¹⁹² *See id.* at A1.

The program is the subject of controversy. Normally, the government can monitor U.S. phone numbers and e-mails only after it obtains a court order from the Foreign Intelligence Surveillance Court, which holds closed sessions at the Justice Department so that the information is kept secret.¹⁹³ Warrantless wiretapping of domestic suspects raises questions regarding the constitutionality of the search.¹⁹⁴

Two *Times* reporters wrote that a number of officials touted the success of the program.¹⁹⁵ The program was credited with uncovering a plot by an Ohio trucker assisting Al Qaeda in a plot to collapse the Brooklyn Bridge using blowtorches.¹⁹⁶ The trucker, Iyman Faris, who was a naturalized American citizen, pled guilty to the charges in 2003.¹⁹⁷ The program was also credited with exposing another Al Qaeda plot to attack “British pubs and train stations” with fertilizer bombs.¹⁹⁸ Defenders of the program said it was “a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.”¹⁹⁹

The Bush White House asked the *Times* not to publish the article, arguing that doing so “could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny.”²⁰⁰ The White House feared that publicly disclosing the program would terminate its usefulness.²⁰¹ The *Times* delayed publication for a year and omitted some

¹⁹³ 50 U.S.C. § 1801–1812 (2006).

¹⁹⁴ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); see also *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 316–17 (1972) (“Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.”).

¹⁹⁵ See Risen & Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹⁹⁶ See *id.*

¹⁹⁷ *Id.*; see also *United States v. Faris*, 388 F.3d 452, 454 (4th Cir. 2004), *vacated*, 544 U.S. 916 (2005).

¹⁹⁸ See Risen & Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹⁹⁹ *Id.* at A1.

²⁰⁰ *Id.* at A1.

²⁰¹ See *id.*

material, but despite the success of the program and pleas from the White House, the *Times* decided to go forward with publication.²⁰²

B. SWIFT Program

The 9/11 Commission urged the U.S. government to put more emphasis on tracking the flow of terrorist funds, in addition to disrupting the funds, to learn how terrorist networks are organized.²⁰³ The 9/11 attackers financed their attack partially by moving funds through banks around the world.²⁰⁴ For example, nine of the hijackers received \$130,000, and part of that money was wired from Europe and the Middle East to SunTrust bank accounts in Florida by people overseas with known links to Al Qaeda.²⁰⁵

In response, the Bush administration initiated a secret program allowing counterterrorism officials to access financial records from an international database called SWIFT, a Belgian cooperative known as the “nerve center” of global banking.²⁰⁶ Virtually every major commercial bank uses the SWIFT database, which routed more than eleven million transactions each day in 2006.²⁰⁷ The government cannot use the database to view the most basic routine financial transactions conducted in the United States, such as an ATM withdrawal.²⁰⁸ Rather, the government only tracks the banking transactions of those suspected of having ties to Al Qaeda whose activity is routed through the international SWIFT database.²⁰⁹ For instance, the program allows the government to trace money from the bank account of a suspected terrorist in Saudi Arabia “to a mosque in New York.”²¹⁰

Government officials described the program as “the biggest and most far-reaching of several secret efforts to trace terrorist financing.”²¹¹

²⁰² *See id.*

²⁰³ *See* Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1; *see also* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 381–82.

²⁰⁴ *See* Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *Id.*

Officials have also noted that “the program is relied upon especially heavily when intelligence chatter from phone and e-mail intercepts suggested an imminent attack, conveying real-time intelligence for counterterrorism operations.”²¹² The data gathered through the program provides “clues to money trails and ties between possible terrorists” and the groups helping to finance them.²¹³ It “has pointed to new suspects” and added support for “cases already under investigation.”²¹⁴

As of 2006, the program had been extremely successful.²¹⁵ It helped the federal government capture Riduan Isamuddin, “the most wanted [Al] Qaeda figure in Southeast Asia.”²¹⁶ Isamuddin, known as Hambali, was “believed to be the mastermind of the 2002 bombing of a” resort in Bali.²¹⁷ Data gathered through SWIFT identified a previously unknown operative in Southeast Asia engaging in financial transactions with a suspected Al Qaeda member; ultimately, this led to locating Hambali in Thailand in 2003.²¹⁸ SWIFT data also helped identify Uzair Paracha, a Brooklyn man “convicted on terrorism-related charges, . . . who worked at a New York import business.”²¹⁹ Paracha aided an Al Qaeda operative in Pakistan by laundering him \$200,000.²²⁰ Domestically, financial data from the program has led the government to potential terrorist cells and raised flags with Islamic charities that might be linked to extremists.²²¹

In addition, the *Los Angeles Times* reported the SWIFT program was valuable “in tracking lower and mid-level terrorist operatives and financiers who believe[d] they [had] not been detected, and militant groups, such as Hezbollah, Hamas and Palestinian Islamic Jihad.”²²² Interestingly, before

²¹² Meyer & Miller, *supra* note 19, at A1. On the contrary, Lichtblau and Risen claimed that the program did not provide real-time information. See Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²¹³ Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²¹⁴ *Id.*

²¹⁵ See, e.g., Meyer & Miller, *supra* note 19, at A1.

²¹⁶ Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²¹⁷ *Id.*

²¹⁸ See *id.*

²¹⁹ *Id.*; see *United States v. Paracha*, 313 Fed. Appx. 347, 348 (2d Cir. 2008).

²²⁰ Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²²¹ *Id.*

²²² Meyer & Miller, *supra* note 19, at A1.

the SWIFT program was authorized by the Bush administration, CIA operatives clandestinely figured out “ways to access the SWIFT network” in the late 1990s when “trying to track Osama bin Laden’s money.”²²³ However, a former CIA official reported that the program was blocked by officials within the Treasury Department “because they did not want to anger the banking community.”²²⁴

Similar to the NSA eavesdropping program, the Bush administration asked the *New York Times* not to publish the story by arguing that its disclosure could jeopardize its effectiveness.²²⁵ Bill Keller, Executive Editor of the *Times*, declined the plea from the White House.²²⁶ He stated:

We have listened closely to the administration’s arguments for withholding this information, and given them the most serious and respectful consideration. We remain convinced that the administration’s extraordinary access to this vast repository of international financial data, however carefully targeted use of it may be, is a matter of public interest.²²⁷

Keller and the *Times* faced harsh criticism because of the decision to publish the article regarding the classified program. President Bush stated:

[T]he disclosure of this program is disgraceful. We’re at war with a bunch of people who want to hurt the United States of America, and for people to leak that program, and for a newspaper to publish it, does great harm to the United States of America. What we were doing was the right thing. Congress was aware of it, and we were within the law to do so.

The American people expect this Government to protect our constitutional liberties and, at the same time, make sure we understand what the terrorists are trying to do. The 9/11 Commission recommended that the Government be robust in tracing money. If you want to figure out what the terrorists are doing, you try to follow

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *See* Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²²⁷ *Id.*

their money. And that's exactly what we're doing. And the fact that a newspaper disclosed it makes it harder to win this war on terror.²²⁸

C. Covert Iranian Nuclear Weapons Program

Most recently, the *Times* published an article regarding a covert American program designed to sabotage the efforts of Iran “to develop nuclear weapons.”²²⁹ Considering a strike on Iran’s primary complex for uranium enrichment, Israel requested from the United States special bunker-busting bombs capable of penetrating deep into the Iranian complex.²³⁰ To avoid any overt attack on Iran—one that would certainly implicate U.S. involvement—the Bush administration denied the request for weapons.²³¹ Instead, the administration increased intelligence-sharing with Israel, including details about the covert program.²³² The secret program began in early 2008 and included “renewed American efforts to penetrate Iran’s nuclear supply chain abroad, along with new efforts, some of them experimental, to undermine electrical systems, computer systems and other networks on which Iran relies.”²³³ The ultimate goal of the program is to delay the day on which Iran will be capable of producing weapons-grade uranium.²³⁴ When asked about the program, officials refused to “speak on the record because of the great secrecy surrounding the intelligence developed on Iran.”²³⁵

“[A]t the request of senior United States intelligence and administration officials,” the *Times* noted that it omitted several details of this “major covert program” designed to “subtly sabotage Iran’s nuclear infrastructure.”²³⁶

²²⁸ President’s Remarks Following a Meeting with Organizations That Support the United States Military in Iraq and Afghanistan and an Exchange with Reporters, 42 WEEKLY COMP. PRES. DOC. 1223 (June 26, 2006).

²²⁹ Sanger, *supra* note 25, at 1. Again, because of the secrecy of the program, this comment must rely on the article published by the *Times* for information regarding the operation.

²³⁰ *See id.*

²³¹ *See id.* at 12.

²³² *See id.* at 1.

²³³ *Id.*

²³⁴ *See id.* at 12.

²³⁵ *Id.* at 1.

²³⁶ *Id.*

IV. ANALYSIS

A. Congress Must Enact Legislation Criminalizing “Publishing” and Authorizing the Executive to Seek Injunctive Relief

America’s challenge to protect its citizens is unprecedented. It is not because its enemies are larger or more powerful nations than rivals of the past; but rather, because its enemies operate clandestinely and have the capacity and desire to obtain and detonate a nuclear or biological weapon that could kill hundreds of thousands, if not millions, of innocent civilians.²³⁷

Now, in the early years of the twenty-first century, the nation faces the intertwined menaces of global terrorism and proliferation of weapons of mass destruction. A city can be destroyed by an atomic bomb the size of a melon, which if coated with lead would be undetectable. Large stretches of a city can be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that has been coated with radioactive material. Smallpox virus bioengineered to make it even more toxic and vaccines ineffectual, then aerosolized and sprayed in a major airport, might kill millions of people. Our terrorist enemies have the will to do such things and abundant opportunities, because our borders are porous both to enemies and to containers. They will soon have the means as well.²³⁸

Because the United States faces such unheralded challenges, the point of equilibrium on the scale weighing a free press with national security must be shifted toward the latter. One way to enhance national security is to prohibit the press from releasing top-secret American intelligence information, thereby making the information more readily available to radical Islamic enemies. To do this, Congress and the Supreme Court must adjust to the current threat facing the United States and reconsider the balance between national security and a free press. Although judicial “thralldom to precedent . . . might play a major role in an assessment of a

²³⁷ See Bill Powell, *When Outlaws Get the Bomb: Kim Jong II’s Crude Blast Punctuates a Scary Reality: The Law of the Jungle Now Governs the Race for Nuclear Arms*, TIME, Oct. 23, 2006, at 32.

²³⁸ RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 2 (2006).

mature body of constitutional law,” precedent “has limited significance in the context of today’s national security crisis.”²³⁹ Rather, the threat of catastrophic terrorist attack is novel, and “[t]he case law addressing constitutional rights affected by measures to meet the terrorist threat is in its infancy.”²⁴⁰

However, under the current Espionage Act and pursuant to *New York Times Co. v. United States*, a court would likely reject any attempt by the government to enjoin the publication of information relating to the national defense. This is clear from *New York Times Co. v. United States*, in which several justices denied injunctive relief on grounds of separation of powers and the absence of a statute criminalizing “publishing.”²⁴¹

Today, in the face of a continuing national security crisis, Congress must enact legislation and courts must be willing to grant injunctive relief when a publication of classified information will cause direct, immediate, and irreparable harm to the safety of American citizens. Based upon the reasoning of the Supreme Court in *New York Times Co. v. United States* and the doctrine of separation of powers, the Court is more likely to uphold such a rule if Congress enacts a statute authorizing the Executive to seek an injunction against such publications and specifically imposes criminal sanctions for “publishing” top secret information that, if disclosed, would cause “direct, immediate, and irreparable damage to” the security of the United States or its citizens.²⁴² The following proposed statute is consistent with the Constitution and *New York Times Co. v. United States*, and is necessary to social policy.²⁴³

²³⁹ *Id.* at 28.

²⁴⁰ *Id.*

²⁴¹ See discussion *supra* Part II.C.

²⁴² See *id.*

²⁴³ See Mark R. Alson, Note, *Someone Talked! The Necessity of Prohibitions Against Publishing Classified Financial Intelligence Information*, 42 VAL. U. L. REV. 1277, 1312–14 (2007). Alson proposes a statute, 18 U.S.C. § 800, which would “allow the prosecution of persons, including journalists and publishers, who disclose confidential programs or methods utilized by the government to monitor the transfers of funds that often occur in correspondence with terrorist activities.” *Id.* at 1314. Specifically aimed at government programs that monitor “information related to financial data obtained from financial institutions,” such as the SWIFT program, Alson takes the position that those who publish such information should be punished. *Id.* at 1314–16. Although Alson is moving in the right direction, this comment takes the position that his proposed 18 U.S.C. § 800 does not go far enough. The statute would only allow the prosecution of disclosure, including publishing, of information related to terrorist finance tracking programs. This would
(continued)

B. Proposed Statute

(a) Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any information classified ‘top secret’ pursuant to subsection (c)(1), information the unauthorized disclosure of which causes *direct, immediate, and irreparable damage to the security of the United States or its citizens, or to the safety of its servicemen and servicewomen serving abroad*, knowingly and willfully communicates, furnishes, transmits, *publishes*, or otherwise makes such information available to an unauthorized person, shall be fined under this title or imprisoned not more than ten years, or both.

(b) Whenever, in the judgment of a department or agency of the United States government expressly designated by the President pursuant to subsection (c)(1), any person has engaged or is about to engage in any acts or practices, which constitute or will constitute a violation of this section, or any regulation or order issued thereunder, the Attorney General, on behalf of the United States, may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and *upon a showing of clear and convincing evidence* by the Attorney General that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.²⁴⁴

(c) As used in section —

exclude other sorts of intelligence activities and national defense programs, such as the covert program to disrupt Iran’s nuclear enrichment program, the disclosure of which might cause immediate harm to the United States. In addition, Alson’s proposed 18 U.S.C. § 800 does not allow for injunctive relief. *Id.* at 1313–14. Once information regarding a classified national security program is published, the damage is already done. Although punishment might serve as an effective deterrent, the government must be able to enjoin publication, provided the information is classified and its disclosure will cause direct, immediate, and irreparable harm to the United States.

²⁴⁴ Subsection (b) of the proposed statute is based largely upon 42 U.S.C. § 2280 (2006).

(1) The term ‘top secret’ refers to information or material relating to the national defense that requires the highest degree of protection.²⁴⁵ Information or material is properly classified ‘top secret’ as follows:

(A) The test for assigning ‘top secret’ classification shall be whether its unauthorized disclosure could reasonably be expected to cause *exceptionally grave damage* to the national security. Examples of ‘exceptionally grave damage’ include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technologic developments vital of national security. This list of examples is not exhaustive, but this classification shall be used with the utmost restraint.

(B) The authority to classify information or material ‘top secret’ shall be restricted solely to those offices within the Executive branch that are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. The authority to classify information or material ‘top secret’ under this section shall be exercised only by such officials as the President may designate in writing by:

(i) The heads of the Departments listed below;

(ii) Such of their senior principal duties and assistants as the heads of such Departments may designate in writing; and

(iii) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing include: Central

²⁴⁵ Subsection (c)(1) of the proposed statute is based largely upon Exec. Order No. 11,652, 37 Fed. Reg. 5209 (Mar. 10, 1972).

Intelligence Agency; National Security Agency; Department of Homeland Security; Atomic Energy Commission; Department of State; Department of the Treasury; Department of Defense; Department of the Army; Department of the Navy; Department of the Air Force; United States Arms Control and Disarmament Agency; Department of Justice; National Aeronautics and Space Administration.

(2) The term ‘unauthorized person’ means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States government which is expressly designated by the President to engage in intelligence activities for the United States.²⁴⁶

(d) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.²⁴⁷

(e)(1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of state law —

(A) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and

(B) any of the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1).

²⁴⁶ These definitions are taken from the communications intelligence statute codified at 18 U.S.C. § 798 (2006).

²⁴⁷ 18 U.S.C. § 798(e) (2006).

C. The Proposed Statute Is Narrowly Tailored to Withstand a First Amendment Challenge

The proposed statute explicitly authorizes the Executive to seek an injunction against such publications upon a showing of clear and convincing evidence and specifically imposes criminal sanctions for “publishing” top-secret information that, if disclosed, would cause direct, immediate, and irreparable damage to the security of the United States or its citizens. Seeking consistency with the First Amendment and *New York Times Co. v. United States*, the proposed statute places a very heavy burden upon the government. As written, the proposed statute will withstand a First Amendment challenge.

Subsection (a) of the proposed statute, which explicitly criminalizes “publishing” the restricted information, seeks to fill a gap left in the current version of the Espionage Act. The purpose of using this term is to avoid any ambiguity inherent in the Espionage Act, 18 U.S.C. § 793, which punishes one who “willfully communicates, delivers, [or] transmits . . . information relating to the national defense.”²⁴⁸

Given that several provisions within the Espionage Act restrict free speech and a free press—and those provisions impose lower standards than the “direct, immediate, and irreparable” standard presented by the proposed statute²⁴⁹—it is unlikely that a free speech challenge to subsection (a) of the proposed statute would prevail. Further, “First Amendment absolutism has never commanded a majority of the Court,”²⁵⁰ and the proposed statute proscribes the disclosure of only a very narrow category of information, that which falls within the “top secret” classification, as designated by the Executive, and then is found by a court to cause, if disclosed, direct, immediate, and irreparable damage to the security of the United States.

Subsection (b), the injunctive relief provision, requires the government to prove by clear and convincing evidence that the unauthorized disclosure of top-secret information would directly cause immediate and irreparable damage to the security of the United States. Although any provision authorizing a prior restraint bears “a heavy presumption against its

²⁴⁸ 18 U.S.C. § 793(d)–(e) (2006).

²⁴⁹ See 18 U.S.C. § 793(e) (2006) (“relating to the national defense”).

²⁵⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting).

constitutional validity,²⁵¹ and the government “carries a heavy burden” to overcome the presumption,²⁵² the proposed statute is precisely drafted to overcome such a burden.

First, the enactment of the statute itself overcomes the separation of powers issue that was of primary concern to Justices Douglas, Stewart, White, and Marshall in *New York Times Co. v. United States*.²⁵³ To avoid any ambiguity, subsection (b) of the proposed statute specifically includes “publishing” and grants the Executive the authority to apply to an appropriate court for a permanent or temporary injunction. This provision aims to eliminate the hesitancy of judges and justices to violate separation of powers doctrine by legislating from the bench.

Second, the proposed statute only allows a court to punish or enjoin the communication or publishing of classified information, the disclosure of which causes *direct, immediate, and irreparable damage* to the security of the United States or its citizens, or to the safety of its servicemen and servicewomen serving abroad. A similar standard was set forth by Justices Brennan and Stewart in *New York Times Co. v. United States*²⁵⁴ and applied by the Western District of Wisconsin when it granted an injunction in *United States v. Progressive*.²⁵⁵ This familiar standard is designed to ensure that only the most sensitive information is capable of being enjoined.

Although a publisher would likely argue that this standard is unconstitutionally vague, each of the three terms within the standard can be further defined to overcome this challenge. A publication “directly” harms national security if its disclosure, absent any intervening circumstances, harms national security by making the United States or its citizens more vulnerable. That is, disclosure followed by receipt by an unauthorized person, without any intervening circumstances, harms national security.²⁵⁶ An example of an “intervening circumstance” is the publication of the top-secret information elsewhere, a circumstance ultimately leading to the government’s dismissal of its case in *United States v. Progressive*.²⁵⁷

²⁵¹ *Id.* at 714 (per curiam) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

²⁵² *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

²⁵³ *See id.* at 714; *see* discussion *supra* Part II.C.

²⁵⁴ *See* *N.Y. Times Co. v. United States*, 403 U.S. at 726–27 (Brennan, J., concurring); *id.* at 730 (Stewart, J., concurring).

²⁵⁵ *See* *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979).

²⁵⁶ Note, however, that the information must first be properly classified “top secret.”

²⁵⁷ *See* discussion *supra* Part II.D.

Disclosure “immediately” harms national security if its publication instantly makes the information more readily accessible to unauthorized persons than it would have been without the disclosure *and* instantly harms American security interests. Lastly, publishing “irreparably” harms national security if any attempt to revoke or amend the disclosure is insufficient to mend the harm already done; that is, regardless of any subsequent action by the publisher, the harm to national security is permanent.

Third, to surpass the “heavy burden of showing justification” imposed by the Court in *New York Times Co. v. United States*, the proposed statute requires the Attorney General to convince a court by “clear and convincing evidence” that publication of the disputed information will cause direct, immediate, and irreparable damage to the security of the United States. The proposed statute explicitly sets forth a standard under which the Attorney General must persuade a court “by clear, unequivocal, and convincing proof,” and “by a substantial margin,”²⁵⁸ that publication, in fact, will directly cause immediate and irreparable harm to the security of the United States.

Finally, the proposed statute provides two angles of attack for any defendant. The statute aims to create this additional safeguard by adopting the classification system set forth in Executive Order 11,652.²⁵⁹ By incorporating this classification system into the statute, a publisher can argue: (1) that the information was improperly classified “top secret” by the Executive, either because disclosure of the information could not reasonably be expected to cause exceptionally grave damage to national security or because it was classified by an improper person or agency; and (2) that the information does not meet the direct, immediate, and irreparable harm standard. For example, in its first argument, a defendant can specifically point to the examples of “exceptionally grave damage” set forth in the statute and argue that the information was improperly designated “top secret” because its disclosure could not reasonably be expected to result in armed hostilities against the United States. If a court determines that the information was properly classified “top secret,” a defendant can still argue that the government cannot prove by clear and convincing evidence that publishing the information will result in the direct, immediate, and irreparable harm to American security.

²⁵⁸ See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 737 (1966) (citing *Schneiderman v. United States*, 320 U.S. 118, 125 (1943)).

²⁵⁹ Exec. Order No. 11,652, 37 Fed. Reg. 5209 (Mar. 10, 1972).

By imposing such a heavy burden upon the government, and by providing multiple angles of attack for a defendant, the proposed statute falls easily within the holding in *New York Times Co. v. United States*. Not only will the proposed statute withstand a First Amendment challenge, but also it strikes a necessary balance between a free press and national security.

D. The Proposed Statute Strikes the Necessary Balance Between National Security and a Free Press and Should Be Enacted to Protect American Security Interests

The proposed statute should be enacted because it only slightly adjusts the balance from a free press toward national security, thereby increasing national defense while minimally infringing upon guaranteed First Amendment rights. Second, it authorizes the government to seek injunctive relief before top-secret information is published. Once such information is disclosed, the harm is done; foreign enemies already know how to adapt their strategies. Finally, the proposed statute overcomes separation of powers concerns by explicitly proscribing “publishing” and authorizing injunctive relief, thereby allowing a court to make a factual determination as to the necessity of injunctive relief.

1. An Optimal Point of Balance

Distinguished legal scholar and Circuit Court Judge Richard Posner has recognized the compelling need to enhance national security, even at the expense of certain First Amendment rights.²⁶⁰ Posner advocates the use of a balancing approach.²⁶¹ Specifically, he submits that the current constitutional challenge is to strike a “balance between the interest in liberty from government restraint or interference and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation’s security.”²⁶² The optimal point of balance, which cannot be located precisely, is “the point at which a slight expansion in the scope of the right would subtract more from public safety than it would add to personal liberty and slight contraction would subtract more from personal liberty than it would add to public safety.”²⁶³ The balancer must ask whether the

²⁶⁰ POSNER, *supra* note 238, at 1.

²⁶¹ *Id.* at 40.

²⁶² *Id.* at 31.

²⁶³ *Id.*

implementation of a certain national security measure promotes safety more or less than it harms liberty.²⁶⁴

The proposed statute promotes safety more than it harms liberty. In finding the “optimal point of balance,” the proposed statute, if anywhere, errs on the side of a free press. First, for the government to seek injunctive relief, the information must be properly classified “top secret.” If the press has unauthorized access to information classified only “secret” or “confidential” pursuant to Executive Order 11,652,²⁶⁵ the proposed statute will not apply. Second, disclosure must cause direct, immediate, and irreparable harm to the security of the United States, a recognizable and very high standard to meet. Further, if the government seeks injunctive relief, it must convince a court by clear and convincing evidence that disclosure will surpass that very high standard. Given these safeguards, only a small amount of speech will be suppressed, and therefore, the harm to civil liberties is minimal.

On the other hand, the disclosure of such highly classified information to America’s radical enemies could prove disastrous. As stated by former White House Press Secretary Dana Perino, “We know the terrorists pay attention to our strategy to fight them, and now have another piece of the puzzle of how we are fighting them. We also know they adapt their methods, which increases the challenge to our intelligence and law enforcement officials.”²⁶⁶ The risk imposed by releasing top-secret information to terrorists is enormous. Terrorists can adapt their methods of communicating and transferring funds, making it even more difficult to prevent or prepare an attack—one that could cost millions of innocent Americans their lives. As such, Congress must slightly adjust the point of balance between civil liberties and national security toward the latter. Ultimately, the final decision must be based upon a hierarchy of values, as described in *United States v. Progressive*.²⁶⁷ Is the right to print the equivalent of one’s right to live?

²⁶⁴ *Id.* at 32.

²⁶⁵ Exec. Order No. 11,652, 37 Fed. Reg. 5209 (Mar. 10, 1972).

²⁶⁶ Lichtblau & Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

²⁶⁷ See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 995 (W.D. Wis. 1979).

2. *If Congress Is Willing to Punish the Communication of Classified Information Relating to the National Defense, Then Why Should Publishing Such Information Not Be Enjoined in Advance?*

Although the Espionage Act punishes the communication of classified material relating to the national defense that the possessor has reason to believe could be used to injure the United States or to advantage any other nation, no statute explicitly punishes journalists or the media for “publishing” illegally leaked classified information. According to Posner, this begs the ultimate question:

[S]ince the Espionage Act does punish the *communication* of material relating to national defense (surely including defense against modern terrorism) that could be used to injure the nation, it is difficult to see why the publication of such material, which obviously is a form of communication and would seem, therefore, to violate the act, should not be enjoined in advance.²⁶⁸

Posner maintains that if one of the primary purposes of criminal punishment is to deter future, would-be criminals, then society has made the judgment that the activity criminalized should not take place.²⁶⁹ If society has determined it should not take place, then why should it not be prevented beforehand?²⁷⁰ This rings true especially in the scenario examined in this comment: when “the cost to national security of speech that reveals classified material could well exceed the benefit of such speech, and in that event an injunction, if that is the more effective remedy, would increase rather than reduce social welfare.”²⁷¹

Once top-secret information is published, the harm is already done. For instance, terrorists know precisely how the United States is tracking them; Iran knows exactly how the United States is attempting to undermine its nuclear weapons program. Although criminalizing the unauthorized disclosure of top-secret information, as prescribed by subsection (a) of the proposed statute, might deter some publishers, the government must be able to prevent this information from reaching the hands of its enemies in the first place.

²⁶⁸ POSNER, *supra* note 238, at 109 (emphasis added).

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *Id.*

3. *By Eliminating Separation of Powers Concerns, the Proposed Statute Enables a Court or Jury to Make a Factual Determination*

The proposed statute should be enacted because it is necessary to enable a court to make a factual decision when considering whether to grant an injunction and a jury to make a factual determination when considering whether to criminalize a publisher. By applying the proposed statute, a court will be able to focus on whether the information the government seeks to enjoin will cause direct, immediate, and irreparable harm to the security of the United States, and whether the government has proven as much by clear and convincing evidence. In addition, in a criminal action brought subsequent to publishing, a jury can apply the standard prescribed in the statute to the facts presented and simply determine if the publication surpassed the direct, immediate, and irreparable harm standard.

The point is to eliminate judicial reluctance to punish or proscribe “publishing” under appropriate circumstances. For instance, in *New York Times Co. v. United States*, Justice White was “confident” that disclosure of some of the documents contained within the Vietnam study would do “substantial damage to public interests.”²⁷² However, Justice White refused to grant an injunction against publishing “in the absence of express and appropriately limited congressional authorization for prior restraints.”²⁷³ The proposed statute would provide very limited congressional authorization for prior restraints by imposing a great burden on the government and greatly restricting the kind of information capable of being enjoined. This will eliminate judicial debate as to whether the Espionage Act restricts “publishing” and allow courts to focus on the real issue: whether disclosure will cost American lives.

V. CONCLUSION

Constitutional law must adjust in times of national emergency. As set forth by eighteenth-century philosopher David Hume, “The safety of the people is the supreme law: All other particular laws are subordinate to it, and dependent on it.”²⁷⁴ When two airliners crashed into the World Trade Center, one crashed into the Pentagon, and one was diverted heroically to a

²⁷² *N.Y. Times Co. v. United States*, 403 U.S. 713, 731 (White, J., concurring).

²⁷³ *Id.*

²⁷⁴ POSNER, *supra* note 238, at 158 (quoting DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPALS OF MORALS 29 (1777)).

rural Pennsylvania field,²⁷⁵ it became instantly apparent that America was facing a national security crisis. Islamic radicals, such as Osama Bin Laden, continue to pronounce their hatred toward America and its ideals and remain the primary threat to American national security.²⁷⁶

Nonetheless, American newspapers continue to release information potentially devastating to American national security. As such, Congress must strike the necessary balance between the First Amendment and national security by enacting legislation that definitively criminalizes and authorizes the Executive to seek injunctive relief when “publishing” will cause direct, immediate, and irreparable harm to the security of the United States. The proposed statute is entirely consistent with the Supreme Court’s holding in *New York Times Co. v. United States* and is a necessary tool for a government battling faceless enemies who are enormously dangerous—even without the help of the press.

Would, however, the *Times*’ publications regarding the NSA eavesdropping program, the SWIFT program, and the Iranian nuclear weapons program have been enjoined under the proposed statute? If the government were too late to seek injunctive relief, would the *Times* face criminal prosecution for publishing these controversial stories? Pursuant to the proposed statute, a court can make the necessary factual determination. Did the Attorney General present clear and convincing evidence that disclosure will result in direct, immediate, and irreparable damage to the security of the United States? Can a prosecutor convince a jury beyond a reasonable doubt that a publication caused direct, immediate, and irreparable harm to American security? Was the information properly classified “top secret” because its disclosure was reasonably expected to cause grave damage to the national security, or was it classified “top secret” because of its mere potential to embarrass the government? Did the unauthorized persons receiving the information already have access to it because it was readily accessible elsewhere, and thus, no “direct” harm was done? These questions are for a judge or jury to answer and would be answered under the proposed statute, as opposed to another situation in which a court must debate whether the term “communicate” includes “publishing” while being fearful of legislating from the bench. The proposed statute simply provides a much-needed tool for the government so that these questions will not be preemptively resolved against it because

²⁷⁵ See Schmemmann, *supra* note 182, at A1.

²⁷⁶ See Barack Obama, President, Remarks of January 14, 2009 (Jan. 14, 2009), available at <http://transcripts.cnn.com/TRANSCRIPTS/090114/sitroom.01.html>.

the Espionage Act does not explicitly proscribe “publishing” or authorize injunctive relief.

Congress must answer this call to action. When will the press disclose the next top-secret program used by the United States to track terrorist activities? Will the next publication cause American intelligence officials to lose track of terrorists smuggling a dirty bomb into the United States, who, were it not for a recent publication telling them how they were being tracked, would have been stopped at the border? Presumably, most Americans would rather not find out.