

A Journalist's View of *The Progressive* Case: A Look at the Press, Prior Restraint, and The First Amendment From the Pentagon Papers to the Future

Albert Einstein once said:

We scientists recognize our inescapable responsibility to carry to our fellow citizens an understanding of the simple facts of atomic energy and its implications for society. In this lies our only security and our only hope—we believe that an informed citizenry will act for life and not death.¹

Einstein was discussing the knowledge of the atomic bomb. *The Progressive*² case was also about knowledge, but knowledge of a more severe threat. The case concerned the hydrogen bomb (the thermonuclear or fusion reaction), a force which is 100 times more powerful than an atomic bomb (the fission reaction). The case dealt with great consequences—the consequences of error involving human life on an awesome scale.³ Excepting obscenity cases, *The Progressive* was under the longest prior restraint in history.⁴ However, the courts never had a chance to fully determine the need for a prior restraint. Another newspaper, unknown to most everyone, including the Justice Department, printed the information, forcing the Government to drop its suit against *The Progressive*.

Since there was no appellate court decision, the primary focus of this Note will not be an in-depth critique of the trial court decision. Instead, the author intends to give the reader a thorough understanding of the historical basis for and the development of *The Progressive* case. To aid in analysis of the issues and effects of the case upon the press, the Note presents a brief review of the history of prior restraint and the details of the *Pentagon Papers* cases.⁵ The Note then considers the effects of the *Pentagon Papers* cases and how they set the stage for *The Progressive* case. Press reaction to *The Progressive* and the effects of the case's mooted is next examined. Finally, the Note examines the future. For example, could a similar case arise again? If so, how would the Supreme Court react? Will the Atomic Energy Act withstand a constitutional challenge? What else might the Government do? And how will the press react to all of this?

1. Letter from Albert Einstein (Jan. 22, 1947) (appealing for support for the Emergency Committee of Atomic Scientists), *quoted in No Defense*, THE PROGRESSIVE, Nov. 1979, at 17.

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

3. *Id.* at 995.

4. The previous longest prior restraint in history was in the *Pentagon Papers* cases, *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which both the *New York Times* and the *Washington Post* were enjoined from publication for ten and seven days respectively. *The Progressive* was enjoined for over six months. For a discussion of the doctrine of prior restraint, see text accompanying notes 76-145 *infra*.

5. The popular name refers to *New York Times v. United States*, 403 U.S. 713 (1971).

I. *The Progressive Case* AND THE
HISTORY OF PRIOR RESTRAINT

A. The Progressive Case

The target of the longest prior restraint in history was *The Progressive* magazine's article planned for its April 1979 issue⁶ entitled: *The H-Bomb Secret—How we got it, why we're telling it*. *The Progressive* was founded in 1909 by Senator Robert LaFollette. It has a nationwide circulation of 40,000, a national reputation for political analysis and commentary, and has previously published many articles about the nuclear arms race and proliferation.⁷

The defendant editors, Erwin Knoll⁸ and Samuel Day, Jr.,⁹ decided to print the article to puncture the myth of secrecy that resulted in discouraging debate on policy issues involving national security, energy, environmental protection, and allocation of human and natural resources.¹⁰ Morland said:

Knowledge of the basic principles of hydrogen weapon design . . . provides insight into the purposes of continued nuclear testing . . . and the devastating effects of nuclear war.¹¹ . . . We have less to fear from knowing than from not knowing. What we do with the knowledge may be the key to our survival.¹²

The idea for *The Progressive's* article was conceived in early 1978. In April 1978, Day contacted the Department of Energy's (DOE) Office of Public Affairs to arrange a tour of facilities engaged in nuclear weapons production. He visited three government production facilities in late June 1978 with DOE's permission and cooperation. About this time he met writer-defendant Howard Morland, who had already done extensive research in the area.¹³

6. The article was eventually published in *THE PROGRESSIVE*, Nov. 1979, at 14.

7. Bagdikian, *A Most Insidious Case*, *THE QUILL*, June 1979, at 22.

8. Knoll is the coauthor of a book entitled *ANYTHING BUT THE TRUTH: HOW THE NEWS IS MANAGED IN WASHINGTON*, was on the Nixon enemies list, and worked as a reporter for the *Washington Post* and a Washington correspondent for *The Progressive*. He is known for his strong views and his battles with government agencies and policies. See Friedman, *infra* note 13, at 28.

9. Day worked as an editor of the *Bulletin of Atomic Scientists* and has written extensively about nuclear weapons.

10. Morland, *The H-Bomb Secret—How we got it, why we're telling it*, *THE PROGRESSIVE*, Nov. 1979, at 23.

11. *Id.* at 17.

12. *Id.* at 23.

13. Morland had grown up in Oak Ridge, Tennessee, where many of the components for hydrogen bombs were manufactured, and had been exposed at an early age to what he calls the "mystique of nuclear scientists." He was a pilot during the Vietnam conflict, which increased his awareness of the H-bomb. In the spring of 1977 he took part in a sit-in demonstration at the site of the Seabrook nuclear plant in New Hampshire and spent two weeks as a prisoner in the Portsmouth National Guard Armory. When released he decided to devote himself to anti-nuclear issues that he felt people were not protesting because "they didn't have the information. They didn't know where the weapons are made, how they work, how many there are, or even what they do." He then began his research to discover the "secret of the H-bomb." For extensive discussion of Morland's background, see Friedman, *United States v. The Progressive*, *COLUM. JOURNALISM REV.*, July/Aug. 1979, at 30

After meeting Morland and assigning the article, Day notified the DOE that Morland would continue the project. The DOE agreed to cooperate. With the Government's help Morland toured most of the plants at which bomb components are manufactured. The Government set up ground rules that allowed Morland to ask any questions he wanted, but left it to the person he was interviewing to cut him off if his questions involved classified data. In the course of his research he was told how to obtain an unclassified version of a nuclear generator, he conducted a full-length interview with plant officials about technical aspects of bomb components, and he photographed every weapon on display in the National Atomic Museum in Albuquerque. He was told only once his questions were off-limits.¹⁴

The Progressive claimed that Morland identified himself as a journalist during all the interviews and had no access to classified documents.¹⁵ However, the Government claimed he used pseudonyms to obtain the information.¹⁶ In the course of this research he collected a six-foot-high stack of books and public documents, including an *Encyclopedia Americana* entry by Edward Teller, the "father of the hydrogen bomb."¹⁷ His research led to an initial article about tritium published in the February 1979 issue.¹⁸ The DOE made no objections.

In February 1979, Morland sent the magazine his eighteen-page manuscript on the bomb "secret." To verify accuracy, Day and Morland mailed copies of an incomplete draft of the article to a few scientists and acquaintances. One of them, a student at the Massachusetts Institute of Technology (MIT), gave a copy to George William Rathjens, a government affiant and professor at MIT. He in turn sent the draft to the DOE's director of classification. After learning this, Day sent a complete draft, along with the sketches and captions for the article, to the DOE. In a letter accompanying the article Day stated that it contained "technical information pertaining to hydrogen weapon design and manufacture," and asked for verification of the article's technical accuracy. The article was received on February 27.

Two days later the DOE notified Day and Knoll that the article contained "restricted data" as defined by the Atomic Energy Act (the Act),¹⁹ which requires such data to be classified information. They also informed the editors that publication of the article would injure the United States and give an advantage to foreign nations. The next day DOE

14. Friedman, *supra* note 13, at 30.

15. Public Brief for Appellant at 5, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979). See Morland, *supra* note 10, at 23, for a discussion of how Morland obtained the "secret."

16. Public Brief for Appellee at 72, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

17. TELLER, *Hydrogen Bomb*, 14 *ENCYCLOPEDIA AMERICANA* (1976).

18. *THE PROGRESSIVE*, Feb. 1979.

19. 42 U.S.C. § 2014(y) (1976).

officials flew to Madison, met with the editors, and informed them that publication of the article would violate the Act. The editors expressed their conviction that the information was obtained entirely from sources in the public domain. The government officials claimed, however, that about twenty percent of the text (approximately six pages) and all the captioned sketches contained "restricted data." They refused to specify which parts were restricted, but offered to rewrite the article.

On March 7, *The Progressive's* counsel notified the DOE that the magazine intended to publish the article. The DOE filed an action requesting a preliminary injunction the following day in the United States District Court for the Western District of Wisconsin. The judge, the Honorable James E. Doyle, disqualified himself and the case was transferred to the Eastern District of Wisconsin, in which court the Honorable Robert W. Warren was assigned the case.²⁰ On March 9, Judge Warren held a hearing on the Government's request for a temporary restraining order to enjoin the defendants from publishing or disclosing the restricted data in the article. The court issued the order²¹ and scheduled the hearing on the preliminary injunction. When he granted the order in open court Judge Warren said: "I want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin. It appears to me that is what we're doing here."²²

On March 26, Judge Warren granted the injunction²³ under the authority of section 2280 of the Act.²⁴ Judge Warren decided the case totally on the basis of the affidavits submitted by the parties.²⁵ He prefaced his opinion by quoting the Supreme Court's opinion in *New York Times Co. v. United States*²⁶ that, although any prior restraint on publication comes under judicial scrutiny with a heavy presumption against its constitutional validity, first amendment rights are not absolute.²⁷ Warren then stated that the case had met the requirements of the national security exception for prior restraint recognized by the Supreme Court in *Near v. Minnesota*.²⁸ The court determined that the concepts in the article were not in the public domain,²⁹ were not declassified,³⁰ could provide a medium-

20. Warren is a former Wisconsin attorney general with a "law and order" reputation. He was appointed to the federal bench by Nixon in 1974. See Friedman, *supra* note 13, at 31.

21. *United States v. The Progressive, Inc.*, No. 79-C-98 (W.D. Wis. Mar. 9, 1979) (order granting temporary restraining order).

22. Friedman, *supra* note 13, at 31.

23. 467 F. Supp. 990, 990 (W.D. Wis. 1979).

24. 42 U.S.C. § 2280 requires the Government to show that the material incorporates restricted data as defined in 42 U.S.C. § 2014(y).

25. 467 F. Supp. 990, 992 (W.D. Wis. 1979).

26. 403 U.S. 713 (1971).

27. 467 F. Supp. 990, 992 (W.D. Wis. 1979).

28. 283 U.S. 697 (1931). Chief Justice Hughes in *Near* said: "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." *Id.* at 716.

29. 467 F. Supp. 990, 993 (W.D. Wis. 1979). The court continued:

Even if some of the information is in the public domain, due recognition must be given to the human skills and expertise involved in writing this article. The author needed sufficient

size nation with sufficient information to move faster to produce hydrogen bombs,³¹ and could increase the number of nations that have thermonuclear weapons.³²

The judge then voiced his opinion that he could “find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue,”³³ a comment for which he has been much criticized.³⁴ The court distinguished *The Progressive* article from *New York Times* by commenting that the Pentagon Papers discussed historical events whose publication did not possess the threat of future harm as did publication in the present case. He found the Atomic Energy Act not to be unconstitutionally vague or overbroad.³⁵ Judge Warren concluded that the defendants had reason to believe the publication would injure the United States or secure an advantage to a foreign nation as stated in section 2274(b) of the Act, and held publication would meet the *New York Times* standard of “direct, immediate and irreparable” damage.³⁶

The decision stressed a hierarchy of rights—the potential to nullify the freedom of speech compared with life itself. Asserting a view of the need for practicality, Judge Warren stated, “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.”³⁷

The district court opinion consisted of blunt statements to the effect that every facet of the Government’s argument had prevailed over the defendants’. The opinion revealed few of the judge’s thought processes in issuing the injunction. With due deference to Judge Warren—this case may well have been the most difficult he has ever had to decide—the opinion reflected little else than his fear and his certainty that the case would reach the Supreme Court.

The judge attempted to base the decision wholly on his factual determination that the material was not in the public domain. Based on the affidavits of scientists and government officials presented to him *in camera*, he agreed with the Government that the combination of materials Morland discovered through “educated guesses” and “asking the right

expertise to recognize relevant, as opposed to irrelevant, information and to assimilate the information obtained. The right questions had to be asked or the current educated guesses had to be made.

30. *Id.* at 998.

31. *Id.* at 993, 999.

32. *Id.* at 994, 999.

33. *Id.* at 994.

34. *See, e.g.*, Friedman, *supra* note 13, at 33.

35. 467 F. Supp. 990, 994 (W.D. Wis. 1979).

36. *Id.* at 999.

37. *Id.* at 995.

questions"³⁸ was not in the public domain, and was therefore a national security threat.³⁹

He let himself become overwhelmed by the government officials who suggested the potential harm.⁴⁰ Every statement in the opinion suggested only conjecture—a probability of harm. He said the article “could possibly” provide sufficient information to allow a medium-size nation to move faster in developing the weapons⁴¹ and that it “could” accelerate the number of nations that obtain the hydrogen bomb.⁴² He did not explain, however, how the legal standards of “could” and “possible” square with the *New York Times* standard of “direct, immediate, and irreparable” harm.

Nor did Judge Warren explain how, if a journalist with no scientific background could investigate the matter and learn to “ask the right questions,” foreign spies and scientists could not do, and have not already done, the same thing. It is extremely naive to think that a foreign intelligence network has less ability to discover this information than a lay American journalist.

The judge attempted to rebut *The Progressive's* argument that the information was easy to obtain by saying “only” five countries have a hydrogen bomb.⁴³ He failed to explain, however, how the other four nations obtained the information, which originally only the United States had. He even admitted that “one does not build a hydrogen bomb in the basement,”⁴⁴ but did not carry this to the logical conclusion that, just because only five countries have the hydrogen bomb, only five have the knowledge to build a hydrogen bomb. What most countries lack is not the knowledge, but the massive resources to build a bomb.

With his comment that he saw no plausible reason for the need to print the technical information,⁴⁵ Judge Warren acted in an unprecedented manner by judging for himself what information the public needs to know. This decision belongs to the press, for it is explicitly this type of decision that the first amendment was intended to protect. The judge's view, or even the prevailing public view, that technical information is not needed for public debate on policy does not mean *The Progressive's* editors had no right to print it. A prior restraint must be based on the strict standards of imminent and grave harm, not a judge's conclusion that the defendant's ideas are absurd. Judge Warren furthered his attack on the editors' motives, stating that publication would harm their position against nuclear nonproliferation.⁴⁶ He might have been correct, but this was only his

38. *Id.* at 993.

39. *Id.* at 995.

40. Friedman, *supra* note 13, at 33.

41. 467 F. Supp. 990, 993, 999 (W.D. Wis. 1979).

42. *Id.*

43. *Id.* at 994.

44. *Id.* at 993.

45. *Id.* at 994.

46. *Id.*

opinion and not a fact that should have been taken into account in the decision.

In his blind acceptance of the Government's argument, Judge Warren virtually ignored the potential constitutional problems the Atomic Energy Act presents. In one sentence he summarily stated that the statute was not unconstitutionally vague or overbroad,⁴⁷ but never mentioned the constitutional issue again. He never gave any reason or basis for this conclusion, appearing to have accepted the statute's constitutionality at face value. This was a serious error, as the Act's constitutionality, as will be shown later, is extremely doubtful. The Act has never been tested in court, and if read as the Government argued, represents a grave threat to the first amendment.⁴⁸

The judge's heirarchy-of-right argument might be logical if it were based on an open-minded view of the facts. In expressing the "disparity of risk"⁴⁹ and the "awesome" consequences of error involving human life,⁵⁰ he once again forgot that the danger already exists and has existed since the Soviet Union built its first hydrogen bomb. He justified his opinion by balancing what he perceived as this immediate risk against that of a prior restraint which would not "in any plausible fashion impede the defendants in their laudable crusade to . . . bring about enlightened debate. . . ."⁵¹ He erred by once again relying on his personal opinion that the information was not necessary for public debate. In the process, he denigrated Patrick Henry and the impact of Henry's famous statement upon freedom of our nation.

Judge Warren further justified his opinion by commenting on the press' fears that taking the case to the Supreme Court would create permanent harm to the first amendment,⁵² a press view that is hypocritical in itself.⁵³ Furthermore, the court's job is to interpret the law, not public opinion.

The reality that the case was undoubtedly headed for the Supreme Court may have been the biggest factor in the decision. Judge Warren appeared not to want to risk his reputation; he essentially passed the buck.

In deference to the press' fears, he offered the parties an opportunity to avoid a test in the Supreme Court through mediation.⁵⁴ *The Progressive* turned down the offer, however, and the injunction was issued.

After the injunction was issued, the American Civil Liberties Union began assisting in preparation for the appeal. On May 7, an ACLU

47. *Id.*

48. See text accompanying notes 242-65 *infra* for a discussion of the Act and potential interpretation in the future.

49. 467 F. Supp. 990, 995 (W.D. Wis. 1979).

50. *Id.*

51. *Id.* at 996.

52. *Id.*

53. See text accompanying notes 178-99 *infra* for a discussion of the press reaction to the case.

54. 467 F. Supp. 990, 997 (W.D. Wis. 1979).

researcher visited the Los Alamos Scientific Laboratory Library in New Mexico, which contains the world's most extensive collection of information related to nuclear weapons and is the only DOE library that permits some public access.⁵⁵ The researcher found a document entitled the University of California Radiation Laboratory Report (UCRL) 4725 on an unrestricted access shelf that contained the basic design principles for a hydrogen bomb. A copy machine was also available.

On May 23 a Senate subcommittee held hearings⁵⁶ to investigate the matter, and discovered the document had been "inadvertently declassified" from April 1977 to May 1979. The committee also learned that another, more sensitive document, UCRL 5280, had been freely available to the public from April 1977 to May 1978. Shortly thereafter, the Government closed the library. The Government asserted that the documents had been placed on open shelves by clerical errors⁵⁷ and that the material was classified, but erroneously marked "declassified."⁵⁸

In preparation for a district court hearing to vacate the preliminary injunction, *The Progressive* made a motion that the court allow oral testimony and cross-examination at the hearing. The court denied the motion.⁵⁹

The Progressive supplemented its motion to vacate with the information gathered at Los Alamos, reiterated its request for oral argument, and asked for limited discovery. The court denied this motion also and restricted the hearing to *in camera* oral arguments.⁶⁰ After refusing to consider *The Progressive's* evidence of access to the library, the district court on June 15 denied the motion to vacate the preliminary injunction.⁶¹ This seven-page opinion was secret and Judge Warren made only a brief public statement. The district court sealed all the documents presented in the case, which included affidavits, library materials, and one of Morland's college textbooks that he had underlined.

The Progressive then filed a petition in the United States Supreme Court for a writ of mandamus to expedite the hearing in the court of

55. The library has 290,000 volumes of books and journals; 500,000 reports; 4,500 journal titles; and other publications, all dealing with weapons programs. Not all the information is publicly available. Public Supplemental Brief for Appellant at 18-19, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

56. *The Release of Classified Nuclear Weapons Information: Hearings Before the Senate Subcommittee on Energy, Nuclear Proliferation, and Federal Services*, 96th Cong., 1st Sess. (1979).

57. Appellee's Public Brief at 20, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

58. *Id.* at 77.

59. *United States v. The Progressive, Inc.*, No. 79-C-98 (W.D. Wis. May 30, 1979) (order denying motion to allow oral testimony and cross-examination at hearing to vacate injunction).

60. *United States v. The Progressive, Inc.*, No. 79-C-98 (W.D. Wis. June 5, 1979) (order denying supplemental motion to vacate preliminary injunction and to allow oral testimony and limited discovery).

61. *United States v. The Progressive, Inc.*, No. 79-C-98 (W.D. Wis. June 15, 1979) (order denying motion to vacate preliminary injunction).

appeals. It was denied on July 2 in a per curiam opinion, essentially because *The Progressive* itself had delayed in filing.⁶²

During the summer of 1979 the issue caught the attention of scientists, writers, and other publications.⁶³ In its July/August issue the *Columbia Journalism Review* announced that it, too, had learned the secret.⁶⁴ The case also caught the attention of writer Charles R. Hansen,⁶⁵ who had been collecting documents on nuclear energy since 1971. He prepared an eighteen page letter to Senator Charles H. Percy about the availability of nuclear weapons design information. He claimed that three scientists had breached security, particularly in discussion with Morland, and included his research on "the secret." He sent copies to eight newspapers including the *Daily Californian*, which is the University of California at Berkeley student newspaper, and the *Madison Press Connection*.⁶⁶ Hansen provided the government with a copy of the article and a list of the publications to which he had sent it. This list, however, did not include the *Press Connection*. The Government contacted all the publications and, when only the *Daily Californian* said it planned to publish, obtained a restraining order against it on September 15 in San Francisco.

The *Press Connection* first published an article on September 15 saying it would publish the information. The next day it ran the article in a special edition.⁶⁷ Two days later, after notifying the Government of its intentions to do so, the *Chicago Tribune* reprinted the letter. According to Hansen, his information came from a *Time* magazine article,⁶⁸ the 1976 speeches of visiting Soviet scientists, and the *Encyclopedia Americana* diagram.⁶⁹

On September 17, only one week after the oral arguments in the Seventh Circuit, the Justice Department announced it would move for dismissal of the case. It also dropped the injunction against the *Daily Californian*.

The Progressive article finally went to press on October 1 and was printed in the November edition.⁷⁰ The article itself is ten pages and

62. *Morland v. Sprecher*, 443 U.S. 709 (1979).

63. See Day, *The other nuclear weapons club*, *THE PROGRESSIVE*, Nov. 1979, at 32-35, for a detailed discussion of other scientists and writers who also became involved in the hunt for public information.

64. Comment, *COLUM. JOURNALISM REV.*, July/Aug. 1979, at 22.

65. Hansen was a computer programmer from Mountain View, California, who had been researching nuclear energy in his free time. *NEWSWEEK*, Oct. 1, 1979, at 45. See Day, *supra* note 63, at 33-34, for a detailed discussion of Hansen's actions.

66. The *Press Connection* was started in Oct. 1977 by striking employees of the *Madison Times* and the *Wisconsin State Journal*. The small, struggling daily paper has a circulation of 11,000 and a staff of 48 fulltime and 9 part-time members. Consoli, *The Progressive triumphs in H-bomb case*, *EDITOR & PUBLISHER*, Sept. 22, 1979, at 9.

67. *Press Connection*, Sept. 16, 1979, at 1, col. 1.

68. *TIME*, Apr. 12, 1954, at 21.

69. Teller, *supra* note 17.

70. *THE PROGRESSIVE*, Nov. 1979, at 14. See the entire issue for several articles detailing various aspects of the case.

includes seven schematic diagrams, one of which is reproduced on the cover. In the article Morland declares:

Why am I telling you? It's not because I want to help you build an H-bomb. Have no fear, that would be beyond your capability—unless you have the resources of at least a medium-sized government. . . . I am telling the secret to make a basic point as forcefully as I can: Secrecy itself, especially the power of a few designated "experts" to declare some topics off limits, contributes to a political climate in which the nuclear establishment can conduct business as usual, protecting and perpetuating the production of these horrible weapons.⁷¹

After the Justice Department dropped the suit, *The Progressive* filed a motion with the district court to modify the protective order that governed all *in camera* material filed in the case. On February 8, 1980, Judge Warren signed an order making public the previously secret opinion on the motion to vacate the preliminary injunction.⁷²

For over six months the parties negotiated a settlement as to the remaining sealed documents that had been submitted *in camera*. On September 4, 1980 the Justice Department announced it would not prosecute anyone. At that time, both parties signed a stipulation releasing between ninety and ninety-five percent of the sealed documents. Only five to ten percent of the material remains *in camera*, including UCRL 4725. Additionally, by stipulation, the parties designated another five to ten percent as "sensitive."⁷³ The released material included a substantial amount of articles and affidavits submitted by the Government. The remaining *in camera* material is classified information that was peripheral to the case.⁷⁴

The Progressive then filed a motion with the court requesting Warren to repudiate his prior opinion. He declined the offer, and *The Progressive* does not intend to pursue the issue.⁷⁵

B. History of Prior Restraint

To fully appreciate the impact of *The Progressive* and its subsequent mooted, a clear understanding of the theory of the doctrine of prior restraint and the history of its development is necessary. Of particular importance are the *Pentagon Papers* cases, their effect upon the press, and the backdrop they set for *The Progressive* case.

The concept of prior restraint deals essentially with the official restrictions imposed upon speech or other forms of expression in advance of actual publication.⁷⁶ It is distinguished from another form of restriction on

71. *Id.*

72. *United States v. The Progressive, Inc.*, No. 79-C-98 (W.D. Wis. Feb. 8, 1980) (order making public the previously secret opinion).

73. Conversation with Earl Munson, Jr., attorney for *The Progressive* (Sept. 5, 1980).

74. *Id.*

75. *Id.*

76. Emerson, *The Doctrine of Prior Restraint*, 20 J. OF L. & CONTEMP. PROB. 648 (1955).

speech—subsequent punishment—which does not block publication in advance but attempts to deter it by causing fear of the resulting punishment. Prior restraints have historically been considered more threatening to the first amendment than subsequent punishment. This belief is expressed by noted first amendment scholar Thomas Emerson:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment. . . . It is likely to bring under government scrutiny a far wider range of expression; . . . [A]s the system allows less opportunity for public appraisal and criticism, the dynamics of the system drive toward excesses.⁷⁷

One of the major differences between a criminal prosecution and a prior restraint is the criminal defendant's right to assert the first amendment defense. But when a prior restraint operates, a defendant who ignores the imposed restraint loses the right to assert the defense in a subsequent prosecution for ignoring the restraint rather than obeying it while challenging it.⁷⁸ A further distinction is the censors' tendency toward "unintelligent, overzealous, and usually absurd" administration.⁷⁹ The decisions often rest with a single government official, providing an opportunity for discrimination and abuse.⁸⁰ Prior restraint can also deter a greater amount of expression with far less expenditure of time, funds, energy, and personnel than subsequent punishment.⁸¹

1. *Early Development of Prior Restraint*

State action against an individual for publishing "dangerous thoughts" has existed for centuries. In 1633 Galileo was tried by the Inquisition for publishing a book that confirmed the Copernican thesis that the earth revolved around the sun rather than the opposite.⁸²

Prior restraint began in England in 1501 after the invention of the printing press, when Pope Alexander VI established a policy of prior restraint by banning unlicensed printing.⁸³ During the sixteenth and seventeenth centuries the complexity and amount of prior restraint greatly increased. The Licensing Act of 1662 created sweeping controls.⁸⁴ Eventually the laws expired and were never revived. "In the course of the eighteenth century, freedom of the press from licensing came to assume the

77. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1st ed. 1970). See also A. BICKEL, *THE MORALITY OF CONSENT* 61 (1st ed. 1975), in which Bickel says: "A criminal statute chills, prior restraint freezes."

78. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 726 (1978).

79. Emerson, *supra* note 76, at 658. See also Note, *Prior Restraint and the Press Following the Pentagon Papers Cases—Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927, 931 (1972).

80. Note, *supra* note 79, at 931.

81. Emerson, *supra* note 76, at 656-60.

82. Bagdikian, *supra* note 7, at 24.

83. Emerson, *supra* note 76, at 650. See also Note, *The Purloined Pentagon Papers and Prior Restraint: The Press Prevailed!*, 46 ST. JOHN'S L. REV. 81, 91 (1971).

84. Emerson, *supra* note 76, at 650.

status of a common-law or natural right."⁸⁵ Blackstone commented on the law in his well-known passage: "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."⁸⁶

Events in America paralleled those in England. Blackstone's comment represented the dominant belief in 1791 when the first amendment was adopted. It was argued then that the first amendment was not intended to cover subsequent punishment.⁸⁷ This issue was settled, however, in *Schenck v. United States*,⁸⁸ which required that the famous "clear and present danger" test be used to determine whether the speech could be punished. In *Near v. Minnesota*⁸⁹ the Court reiterated that "it is the chief purpose of the [first amendment] guaranty to prevent previous restraints upon publication."⁹⁰ The Court held that an injunction issued under a state statute regulating "malicious, scandalous and defamatory matter" was an unconstitutional prior restraint. Chief Justice Hughes noted in the majority opinion, however, that freedom from prior restraint is not absolute. The Chief Justice listed three exceptions, including obscenity and laws against incitement to violence or revolution, and then stated: "[N]o 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."⁹¹ *Near* is important because the Court for the first time vigorously and effectively enunciated the doctrine of prior restraint.⁹²

However, *Near* left many questions unanswered: What constituted the national security exception? What must the Government prove to take advantage of the exception? Until *New York Times*, no decision had squarely faced these questions, although throughout American history there had been considerable conflict between national security and the first amendment.

Government attempts to suppress information deemed harmful to national security date back to 1797, when General George Washington first complained of press leaks.⁹³ During the Civil War the press agreed to

85. *Id.* at 651.

86. 4 W. BLACKSTONE, COMMENTARIES *151-52. The passage continued: "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

87. Emerson, *supra* note 76, at 652.

88. 249 U.S. 47 (1919). See Note, *supra* note 83, at 93-94 for a detailed discussion of *Schenck*, a case concerning a conviction under the Espionage Act of 1917, ch. 30, 40 Stat. 217, 218-19 (1917) (current version at 18 U.S.C. §§ 793-794 (1976)).

89. 283 U.S. 697 (1931).

90. *Id.* at 713.

91. *Id.* at 716.

92. Emerson, *supra* note 76, at 654.

93. Comment, *The National Security Exception to the Doctrine of Prior Restraint*, 13 WM. & MARY L. REV. 214 (1971).

refrain from printing material that might aid the enemy, but there were many breaches.⁹⁴ Eventually, President Lincoln issued a sweeping order providing for the court-martial of correspondents whose reports were found to be of aid to the enemy.⁹⁵

The Espionage Act of 1917⁹⁶ was passed after the outbreak of World War I and spelled out detailed offenses, but the Government relied on voluntary censorship by the press.⁹⁷ In World War II the Government again relied on voluntary censorship organized through the Office of Censorship, which issued a code on wartime practices.⁹⁸ The program worked well⁹⁹ with two notable exceptions. The *Chicago Tribune* and *Washington Times-Herald* published the Government's secret war mobilization plans only three days prior to the attack on Pearl Harbor,¹⁰⁰ and in 1942 the *Tribune* was accused of leaking the fact that the United States had broken the Japanese Naval Code.¹⁰¹

Since the end of World War II official secrecy mushroomed with the impact of the cold war and the nuclear weapons race.¹⁰² Congress passed the Atomic Energy Act in 1946. A preview of *The Progressive* case occurred in 1950 when the Government used the Act to censor an article in *Scientific American* on the technical aspects of the atomic bomb. The editors decided not to fight the case, but it was later discovered that the article was censored because President Truman did not want public debate on the issue.¹⁰³ Years later it was found that the censored material in the article had been previously published, partially in the same magazine.¹⁰⁴

National defense was defined in *Gorin v. United States* as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."¹⁰⁵ In *United States v. Heine*¹⁰⁶ Judge Learned Hand redefined it as excluding national defense information that was already in the public domain.

During the early 1960s the Court developed a standard for testing all systems of prior restraints in *Bantam Books, Inc. v. Sullivan*,¹⁰⁷ saying that

94. *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1193 (1972) [hereinafter cited as *Developments in the Law*].

95. Comment, *supra* note 93, at 214.

96. Ch. 30, 40 Stat. 217, 218-19 (1917) (current version at 18 U.S.C. §§ 793-794 (1976)).

97. See *Developments in the Law*, *supra* note 94, at 1193, for a more detailed discussion of the World War I press controls and interwar years developments.

98. *Id.* at 1194.

99. See *Developments in the Law*, *supra* note 94, for a further discussion of the program.

100. Comment, *supra* note 93, at 215.

101. *Id.*

102. See Buell, *Atomic secrecy: fuel for the cold war*, THE PROGRESSIVE, Nov. 1979, at 24, for a discussion of the release of atomic bomb information and the resulting wave of secrecy.

103. Bagdikian, *supra* note 7, at 26.

104. Friedman, *supra* note 13, at 29.

105. 312 U.S. 19, 28 (1941).

106. 151 F.2d 813 (2d Cir. 1945).

107. 372 U.S. 58, 70 (1963).

any system of prior restraint of expression comes to the court bearing "a heavy presumption against its constitutional validity." The standard was reiterated in *Organization for a Better Austin v. Keefe*,¹⁰⁸ in which the Court said the Government carries a heavy burden of showing justification for the imposition of such a restraint

2. *The Pentagon Papers Cases*— *New York Times v. United States*

When *New York Times* reached the Supreme Court in 1971, the Court once again cited *Near*, *Bantam Books*, and *Organization for a Better Austin*, and in a one-paragraph per curiam opinion held that the Government had not met its burden.¹⁰⁹

In *New York Times* the Government sought to block the *New York Times*' and *Washington Post*'s publication of the Pentagon Papers, a classified document that had been stolen by Daniel Ellsberg.¹¹⁰ The papers described activities in Vietnam prior to 1968 and President Johnson's decision to escalate the conflict. The Government claimed that publication would prolong the war, endanger national security, and embarrass United States' diplomatic activities. The Justice Department sought to fit the case into the *Near* military exception.

The action was filed, litigated, and decided within eighteen days. The *New York Times* introduced the first installment on Sunday, January 13, 1971, with a rather dull headline—"Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement."¹¹¹ The *Times* printed the information because it felt it was the "press' fundamental responsibility" to publish information that "helps the people of the United States to understand their own government processes," but stated it would not have published it if there had been reason to believe it endangered the nation's security.¹¹² The *Times* printed two more daily installments.¹¹³ Publication of the document, which proved extremely embarrassing to the Government, sent shock waves throughout the White House, Congress, and the Departments of State, Defense, and Justice. It created deep concerns with allies as well.¹¹⁴

On June 15 the Government, after asking the paper to voluntarily cease publication, obtained a temporary restraining order from the federal district court in Manhattan,¹¹⁵ however, on June 19 the court denied the

108. 402 U.S. 415 (1971).

109. 403 U.S. 713 (1971).

110. The leak was called the greatest leak of classified information in the history of the United States. *TIME*, June 28, 1971, at 11. Ellsberg was a former government consultant and Pentagon official.

111. *N.Y. Times*, June 13, 1971, at 1, col. 1.

112. *Id.* at 44, col. 1.

113. *N.Y. Times*, June 14, 1971, at 1, col. 2; *N.Y. Times*, June 15, 1971, at 1, col. 4.

114. For a more detailed discussion of official reaction, see Note, *supra* note 83, at 82.

115. *United States v. New York Times Co.*, No. 71 Civ. 2662 (S.D.N.Y. June 15, 1971) (order granting temporary restraining order).

request for a preliminary injunction.¹¹⁶ Meanwhile, on June 18, the *Washington Post* had published part of the document.¹¹⁷ After being denied a temporary restraining order by the United States District Court for the District of Columbia,¹¹⁸ the Government obtained one from the United States Court of Appeals for the District of Columbia.¹¹⁹

On June 21 the District Court for the District of Columbia denied the Government's request for a preliminary injunction.¹²⁰ On June 23 both courts of appeals rendered decisions. The Second Circuit found for the Government but remanded the case to the district court for additional proceedings.¹²¹ The District of Columbia Circuit, however, ruled in favor of the *Post*.¹²² On June 25 the Supreme Court granted a writ of certiorari and scheduled arguments for the next day.¹²³ The Court announced its decision on June 30.¹²⁴

During the *Pentagon Papers* litigation the Government vigorously argued that publication would directly cause deaths of American prisoners of war, soldiers, CIA agents, and employees of other Governments. One factor that most certainly injured the Government's case, and that makes *The Progressive* case comparable, is that one of the documents the Government dramatically presented during the *in camera* proceedings to show its "worst case of damage" was discovered by a reporter to have already been an officially published government document.¹²⁵ This may have been the single event, more than any other, that helped the press win the *Pentagon Papers* cases.¹²⁶

Since ten separate opinions were written in the case, including the brief per curiam opinion, it is virtually impossible to come to any single *New York Times* standard for prior restraint. However, a six-three majority of the Court apparently restricted the cases of prior restraint to at least a very narrow area. The opinions ranged from those of Justices Black and Douglas, who expressed absolutist views of the first amendment, to that of Justice Blackmun, who expressed fear that the publications may have caused serious harm to national security.

Justice Black, who was joined by Justice Douglas, advanced the absolutist view that the first amendment forbids all injunctions. He would

116. *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971).

117. *Wash. Post*, June 18, 1971, at 1, col. 1.

118. *United States v. Washington Post Co.*, No. 71-1487 (D.D.C. June 18, 1971) (order denying temporary restraining order).

119. *United States v. Washington Post Co.*, 446 F.2d 1322 (D.C. Cir. 1971).

120. *United States v. Washington Post Co.*, No. 71-1487 (D.D.C. June 21, 1971) (order denying preliminary injunction).

121. *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971).

122. *United States v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir. 1971).

123. *New York Times Co. v. United States*, 403 U.S. 942 (1971) (mem.).

124. 403 U.S. 713 (1971).

125. Bagdikian, *supra* note 7, at 26.

126. *Id.*

not even have allowed the Court to maintain the status quo to ensure proper judicial review.¹²⁷ He emphatically rejected the injunction because the guarding of military secrets at the expense of informed representative government provided "no real security" for our Republic.¹²⁸

Justice Douglas asserted views quite similar to Black's, but he allowed one exception to the doctrine against prior restraints when the country was involved in a war declared by Congress, thereby distinguishing the Vietnam conflict.¹²⁹ However, he also noted that there was no statute barring publication,¹³⁰ which distinguishes *New York Times* from *The Progressive*.

Justice Brennan's opinion is often quoted as being representative of the holding of the case. He acknowledged that the first amendment could be abrogated in a "single, extremely narrow" area in time of war to protect national security.¹³¹ To meet the heavy burden of proof, he required the Government to show that publication would "inevitably, directly and immediately" cause a grave event.¹³² This required showing is comparable to the *Near* description of imperiling the safety of ships already at sea. However, he felt neither the proof nor the allegations in *New York Times* met the exception, and suggested a "nuclear holocaust" and "an event of that nature" as examples of proof that would meet the standard.¹³³ This statement is particularly relevant in light of *The Progressive*.

In a concurring opinion joined by Justice White, Justice Stewart asserted that in some circumstances prior restraints would be permissible, but that here the Government had not met the heavy burden of justification. In this context he stated: "I cannot say that disclosure . . . will surely result in direct, immediate and irreparable damage to our Nation. . . ." ¹³⁴ However, Justice Stewart suggested that his opinion might have been different if a statute were involved.¹³⁵

Justice White's opinion, which Justice Stewart joined, closely follows Justice Stewart's. White said that in certain circumstances the Government could impose a prior restraint, but in the absence here of congressional authorization of one, the Government had not met the burden.¹³⁶ He also expressed his hope that a responsible press would not publish materials that endanger national security.¹³⁷

127. 403 U.S. 713, 715 (1971).

128. *Id.* at 718-19.

129. *Id.* at 723-24.

130. *Id.* at 720.

131. *Id.* at 726.

132. *Id.* at 726-27.

133. *Id.* at 725-26.

134. *Id.* at 730.

135. *Id.*

136. *Id.* at 731.

137. *Id.* at 733.

Most of Justice Marshall's concurring opinion dealt with the issue of separation of powers. He concluded that it would be entirely "inconsistent with the concept of separation of powers" for the Court to allow the executive's imposition of a prior restraint without congressional approval.¹³⁸

In his dissent Chief Justice Burger declined to consider the merits of the case. Instead, he chastised the *Times* for not returning the stolen documents and for concealing them for three to four months while editing, implying a justification for prior restraint.¹³⁹ Finally, he condemned the haste with which the litigation took place.¹⁴⁰

Justice Blackmun, dissenting, voiced similar concern with the haste of the litigation,¹⁴¹ but endorsed a balancing test to resolve the conflict.¹⁴² He expressed his fear that disclosure could cause great harm to the nation.¹⁴³

Justice Harlan's opinion largely stressed the separation of powers problem.¹⁴⁴ Like the other dissenting Justices, he condemned the "feverish" speed with which the Court decided the case and listed important questions of fact, law, and judgment that he felt had received insufficient consideration.¹⁴⁵

II. ANALYSIS OF THE RECENT CASES AND THEIR EFFECT UPON THE PRESS

A. *The Pentagon Papers Cases—Legal Implications and Effect upon the Press*

In his *New York Times* dissent, Justice Harlan quoted Justice Holmes' famous comment: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judg-

138. *Id.* at 742.

139. *Id.* at 750.

140. *Id.* at 749, 751.

141. *Id.* at 760.

142. *Id.* at 761.

143. *Id.* at 762.

144. *Id.* at 755-57.

145. *Id.* at 753-55. The questions he left unanswered that are particularly relevant to *The Progressive* are: (1) Whether the first amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security; (2) whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that, regardless of the contents of documents, harm enough results simply from the demonstration of such a breach of secrecy; (3) whether the unauthorized disclosure of any of these particular documents would seriously impair the national security; (4) what weight should be given to high officers in the executive branch of the Government in these actions; (5) whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of (a) the strong first amendment policy against prior restraints on publication; (b) the doctrine against enjoining conduct in violation of criminal statutes; and (c) the extent to which the materials at issue have apparently been otherwise disseminated.

ment."¹⁴⁶ The *Pentagon Papers* cases "must be deemed great or hard, or at least dramatic."¹⁴⁷ However, rather than being bad law, the result was almost no law at all. The Court was sharply divided and splintered while a majority was obtained on the narrowest grounds. The result was explained and justified in a "most cryptic opinion."¹⁴⁸

Just how important was the case? Opinions vary, but Professor Emerson said it was of comparable importance to the *John Peter Zenger Case* and that it was "truly a landmark decision."¹⁴⁹ Professor Alexander M. Bickel, who argued the case for the *Times*, claimed the decision increased the press' freedom:

Those freedoms which are neither challenged nor defined are the most secure. In this sense, for example, it is true that the American press was more free before it won its battle with the Government in *New York Times* in 1971 than after its victory. . . . This was a first attempt at prior restraint. The *New York Times* won its case over the *Pentagon Papers*. But that spell was broken, and in a sense freedom was thus diminished. But freedom was also extended in the *Pentagon Papers* case in that the conditions in which government will not be allowed to restrain publication are now clearer and perhaps more stringent than they have been.¹⁵⁰

Initial press reaction to the decision sounded triumphant. *Newsweek*¹⁵¹ sported a cover with the headline "Victory for the Press," while the text inside said, "Few clearer gauges of the sanctity of the first amendment freedoms, few plainer demonstrations of the openness of American society, could be imagined."¹⁵² However, a smaller article on the next page cautioned readers that a close reading of the opinions made it clear that the triumph was far from unqualified.¹⁵³

Journalist Ben Bagdikian¹⁵⁴ commented that the euphoria was unjustified because the decision "probably signalizes not the triumphant end, but the start of a struggle."¹⁵⁵ Journalist-lawyer Jack Landau¹⁵⁶ asserted

146. *Id.* at 752, 753, 6 quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

147. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971).

148. *Id.*

149. Emerson, *The First Amendment on Trial—Where We Stand: A Legal View*, COLUM. JOURNALISM REV., Sept./Oct. 1971, at 38.

150. Bickel, *supra* note 77, at 60.

151. NEWSWEEK, July 12, 1971.

152. *Id.* at 16.

153. *Id.* at 17.

154. Bagdikian was the assistant managing editor for national news at the *Washington Post*, author of *THE INFORMATION MACHINES* (1st ed. 1971) and now teaches journalism at the University of California Graduate School of Journalism at Berkeley. He is known as one of the nation's foremost press critics. Bagdikian, *supra* note 7, at 21; Bagdikian, *The First Amendment on Trial—What Did We Learn?*, COLUM. JOURNALISM REV., Sept./Oct. 1971, at 45.

155. Bagdikian, *The First Amendment on Trial—What Did We Learn?*, *supra* note 154.

156. Landau is the director of The Reporters Committee for Freedom of the Press, the prime legal defense fund and organization for the American press, Bagdikian, *supra* note 7, at 23.

that, far from making the press stronger as Bickel claimed, "the traditional interpretation of freedom of the press was probably weakened by the whole affair."¹⁵⁷

Other legal commentators agreed that the decision signaled danger for the future of the first amendment. Professor Emerson said: "The result was certainly favorable to a free press. Put the other way, a contrary result would have been a disaster. . . . The outcome was a sound outcome. On the other hand, the legal theory that the Court adopted is, I think, cause for concern."¹⁵⁸

And certainly the Court's hodgepodge of opinions was a cause for concern. Only three Justices—Black, Douglas, and Brennan—were truly against a prior restraint in nearly all circumstances. Justices White's and Stewart's opinions left open some very broad exceptions that would probably allow the Government to obtain an injunction in most cases in which any substantial issue of national security was raised. Justices Stewart, White, Marshall, and even Brennan suggested that they would broaden the *Near* exceptions substantially if there were slight alterations in the factual setting. The life-threatening nature of the hydrogen bomb in *The Progressive* case may be just the small change that would meet the exception these four Justices had in mind.

On the other hand, the decision suggests that the Government has authority to classify, but that if it makes a mistake causing the press to obtain secret documents, it cannot stop the press from publishing those documents.¹⁵⁹ This is exactly what *The Progressive* did, assuming that the documents Morland used were supposed to be classified. But four Justices—White, Stewart, Burger, and Blackmun—would probably allow even this to be overcome if the extremely heavy burden is met.¹⁶⁰

Another important factor in the *Pentagon Papers* decision is the substantial difference that congressional action would have made.¹⁶¹ Two Justices—White and Stewart—indicated that the Congress could have passed a law requiring prior restraint in limited circumstances. Justice White said he would not allow the injunction in the absence of congressional legislation.¹⁶² Justice Stewart said the Congress has the power to enact such legislation and the Court has the duty to decide its constitutionality, and further suggested that he would probably defer to executive or legislative power.¹⁶³ A third Justice, Justice Marshall, concurred on the

157. THE QUILL, Aug. 1971, at 7.

158. Emerson, *supra* note 149, at 35.

159. Bickel, *supra* note 77, at 79.

160. Kalijarvi & Wallace, *Executive Authority to Impose Prior Restraint upon Publication of Information Concerning National Security Affairs: A Constitutional Power*, 9 CALIF. W.L. REV. 468, 487 (1973).

161. Note, *supra* note 79, at 952-53. See also Kalijarvi & Wallace, *supra* note 160, at 490-91; Bagdikian, *The First Amendment on Trial—What Did We Learn?*, *supra* note 154, at 46.

162. 403 U.S. 713, 732-33 (1971).

163. *Id.* at 727-30.

basis that the Court could not "enact" law which the Congress had refused to pass.¹⁶⁴

Adding the three dissenters' votes to Justices White's and Stewart's, five Justices in the *New York Times* Court would have allowed a prior restraint if a statute had been involved. Four of those five remain on the Court. In addition, Justice Marshall's opinion leaves open the question whether a statute in this area could be constitutional.

The Court's affirmance of prior restraint simply because a statute exists would severely threaten press immunity from prior restraint. This would be inconsistent with *Near*, which involved a statute that was struck down. However, the hypothetical statutory prior restraint here could be distinguished because it would involve national security.¹⁶⁵ This interpretation partially resulted from the *Times* arguments themselves. In fact, the *Times* argued: "To the extent it is not absolute, the prohibition must at least presumptively be imposed pursuant to a legislative mandate."¹⁶⁶

The holding may not have limited the press' first amendment rights, but it did not, despite Bickel's claims, give the press specific standards for the future.¹⁶⁷ It was inevitable after the *Pentagon Papers* cases that there would be future clashes between the press and the Government¹⁶⁸ similar to what occurred in *The Progressive* case. It appeared likely the doctrine would face a rough test in the area of national security. Furthermore, the per curiam opinion in *Pentagon Papers* suggested that in the future the Government could overcome the heavy burden.

The decision left many unanswered questions as the country entered the 1970s. The case gave no guidance concerning what kind of public interest would be protected against press publication, what weight should be given different public interests and the press' interests, or what types of evidence would meet the Government's burden.¹⁶⁹

The case also left unchallenged the Government's right to continue to classify in the face of evidence of massive over-classification,¹⁷⁰ a key issue that arose again in *The Progressive* case. The press still has no judicially sanctioned way to disclose information unnecessarily classified.

The *Pentagon Papers* decision did change the press' attitudes and view of its role in society. The press was emerging not only as an activist critic but as "a powerful fourth party advocate" in the affairs of the Government.¹⁷¹ One journalist foresaw the next challenge for the press as

164. *Id.* at 747.

165. See Note, *supra* note 79, at 953, for further discussion of this theory.

166. *Id.* at 953-54, quoting Brief for Petitioner at 23, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

167. Kalijarvi & Wallace, *supra* note 60, at 493.

168. 18 LOY L. REV. 151, 167 (1971-72).

169. Henkin, *supra* note 147, at 272.

170. Rubin, *Foreign Policy, Secrecy, and The First Amendment: The Pentagon Papers In Retrospect*, 17 HOW. L.J. 579, 610 (1972).

171. *Id.* at 606.

avoiding the self-censorship that he feared would come as the press attempted to avoid future confrontations.¹⁷² The case also pointed to the deeper problem of Government and press mistrust of each other.¹⁷³ The case shows the press was willing to press the issue to the limits, and was not willing to voluntarily censor itself as it did in World War II and prior to the Bay of Pigs invasion.¹⁷⁴ The press also seemed more willing to attack the motives of the nation's leaders.

Perhaps another issue that the decision forced the press to face squarely was its relationship with the public. Alexander Hamilton once suggested that liberty of the press depends on the general public opinion, "and on the general spirit of the people and of the government."¹⁷⁵ Much of the public agreed with the Government's *New York Times* position. Professor Emerson advised the press to teach the public about the significance of the entire system of free expression and suggested that the case "opened up the possibility of making people aware of what the role of the press is: that its role isn't simply to take handouts given by the Government; it's for the people."¹⁷⁶

The case had many effects upon the press and its attitudes. It no doubt reflected the early development of the Court's insensitive attitude toward the press, further documented in recent Supreme Court decisions that tend to limit its freedom.¹⁷⁷ The decision, although upholding the first amendment, suggested that the future held the likelihood of an exception for a prior restraint on publication. The doctrine was not tested for eight years. And then *The Progressive* case appeared.

B. United States v. The Progressive and Press Reaction to the Case

According to *The Progressive's* editors and counsel, the case was based on fear.¹⁷⁸ Fear, the "powerful persuader," made a distinctive impact upon *The Progressive's* fellow journalists. This was evident in much of the press reaction, although eventually most of the press did support *The Progressive* out of a different fear—fear of a harmful Supreme Court decision. Several amicus curiae briefs were submitted to the court of appeals in favor of *The Progressive*.¹⁷⁹

172. Bagdikian, *The First Amendment on Trial—What Did We Learn?*, *supra* note 154, at 50.

173. See Note, *supra* note 79, at 955, for further discussion of the disturbing aspect of the press not checking with the Government before printing the documents.

174. *Developments in the Law*, *supra* note 94, at 1197.

175. Note, *supra* note 79, at 927, quoting A. HAMILTON, THE FEDERALIST No. 84, at 535 (B. Wright ed. 1961).

176. Emerson, *supra* note 149, at 39.

177. For three recent examples see *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

178. Public Brief for Appellant at 2, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

179. On one brief were the P.E.N. American Center, Authors League of American, Committee for Public Justice, and *Scientific American*. A second brief included the Association of American Publishers, the Association of American University Presses, the *New York Times*, the American

Despite the support in amicus briefs, a majority of newspapers in the country came out against publication. Some questioned Knoll's motives.¹⁸⁰ Others felt the existence of one enterprising individual who could get the information was no reason to give it to the unenterprising as well.¹⁸¹ Other editors believed the story met the *Near* exception.¹⁸² The editors of the *Saturday Review* took one of the most drastic positions claiming the debate was "mortifying" and said "publishing the piece would be a crime against humanity. . . . To seek to publish such an article, *The Progressive's* editor must be a fool or a publicity hound, or both—in any event, a discredit to his tribe."¹⁸³

The majority of press criticism was based on the theory that *The Progressive* was being irresponsible to the press and press freedom by taking the risk of pursuing the case to the Supreme Court. In an editorial entitled "John Mitchell's Dream Case,"¹⁸⁴ the *Washington Post* urged *The Progressive* to neither pursue the case nor print the article because it was a "real first amendment loser which, if they [fought], they seem[ed] almost certain to lose, given the present judicial climate." The president of the American Society of Newspaper Editors said the editors were wrong not to accept mediation, and the head of the Reporter's Committee for Freedom of the Press agreed they should not pursue the case.¹⁸⁵

Washington Post Editor Ben Bradlee later reversed his position and agreed to support *The Progressive* when it appeared the case was definitely destined for the Supreme Court. He said, however, that he was reluctantly cornered into supporting *The Progressive* and that he was doing it "with about as much enthusiasm as I support Larry Flynt and *Hustler*."¹⁸⁶

Examples of similar comments by other newspapers include the *Milwaukee Journal's* editor's hope that *The Progressive* would shelve the article and drop the case because taking the case to the Court would risk "converting the lower court defeat into a majestic precedent for the spread

Society of Newspaper Editors, the National Association of Broadcasters, and the Globe Newspaper Co. A third brief was joined by *The Nation*, *Playboy*, *National Journal*, *New York*, *New West*, *Juris Doctor*, *Inquiry*, *Working Papers*, *New York Review of Books*, *The New Republic*, *New Engineer*, *Focus Midwest*, *The Village Voice*, *St. Louis Journalism Review*, *The Black Scholar*, *Rolling Stone*, *Editor & Publisher*, *The Witness*, *Sojourners*, *The Texas Observer*, *American Lawyer*, *Cleveland Magazine*, *Seven Days*, *Transaction*, *I.F. Stone's Weekly*, the American Booksellers Association and the Council for Periodical Distributors Association. The Society of Professional Journalists-Sigma Delta Chi, the professional journalism organization, took no official stand on the matter.

180. NAT'L REV., March 30, 1979, at 404.

181. The *Virginian Pilot*, Norfolk, Va., March 28, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 309 (1979).

182. The *Evening Bull.*, Philadelphia, Pa., March 20, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 309 (1979).

183. SATURDAY REV., June 23, 1979, at 52.

184. Wash. Post, March 11, 1979, at c-6, col. 1.

185. Bagdikian, *supra* note 7, at 23.

186. Comment at a symposium sponsored by the Alicia Patterson Foundation. SATURDAY REV., June 23, 1979, at 52.

of censorship and the erosion of press freedom on a hundred fronts."¹⁸⁷ The *Los Angeles Times* asserted the case was "the wrong issue, at the wrong time, in the wrong place."¹⁸⁸

A minority of publications, some of which were major newspapers, did support *The Progressive* from the beginning. These included the *Chicago Tribune*, the *St. Louis Post Dispatch*, the *New York Times*, the *Minneapolis Tribune*, the *Boston Globe*, the *Columbia Journalism Review*, and *The Nation*. Saying there was more at stake in *The Progressive* case than the *Pentagon Papers* cases, Ben Bagdikian put forth a detailed and forceful commentary.¹⁸⁹ He described the case as "the greatest leap yet into the destruction of freedom of expression, and consequently of an open society,"¹⁹⁰ and further chided those who claimed it was a bad time to bring the case by raising the very rational point that the Government does not bring such suits unless it has decided that it is a bad time for the press to fight them.¹⁹¹ Still others, without directly supporting *The Progressive*, criticized the Government for overreaction and carelessness in safeguarding classified material.¹⁹²

Overall, the press reacted with a tendency toward hysteria and sensationalism. Very few publications editorializing on the matter had all the facts. Of course, with many facts censored by the Government, they were admittedly difficult to obtain. But the press often resorted to bad reporting and inaccuracy. The title of the article was often quoted incorrectly. Unprofessional headlines abounded; for example, one in the *Lansing State Journal* read, "You, Too, Can Build H-Bomb."¹⁹³ This type of reporting in turn resulted in many hostile editorials.¹⁹⁴

The multitude of discussion throughout journalistic and legal circles about the impact of the case upon the first amendment, the doctrine of prior restraint, and the press came to a screeching halt on September 17 when the Justice Department announced it was dropping the suit. Reaction was strong and quick. Morland appeared in public wearing his previously classified T-shirt with the "secret" H-bomb diagram on it.

187. The Milwaukee J., March 28, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 310 (1979). See also N.Y. Daily News, March 28, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 309 (1979).

188. L. A. Times, March 13, 1979, Part II, p. 4, col. 1, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 304 (1979).

189. Bagdikian, *supra* note 7, at 22-25.

190. *Id.* at 22.

191. *Id.* at 24. See also THE NATION, May 12, 1979, at 526, for Knoll's comment that "we can't keep the [first] amendment in a footlocker until the right Court comes along."

192. THE NEW REPUBLIC, March 24, 1979, at 11. The editors claim the Justice Department "blundered into a lawsuit that will cause far more harm than if *The Progressive* had been allowed to publish without fuss."

193. Lansing State J., March, 1979, as quoted in Bagdikian, *supra* note 7, at 23. See also the discussion of the headline in the *San Francisco Chronicle* which read "A Handy Guide to Building Your Own H-Bomb." *Id.*

194. See Bagdikian, *supra* note 7, at 22, for a fuller critique of the press' reporting of the event.

Despite a general sigh of relief that the whole ordeal was over, most of the press reaction continued to be that of outrage at *The Progressive*. Floyd Abrams, who wrote one of the amicus briefs in favor of *The Progressive*, criticized the editors for submitting to censorship by forwarding a copy of the article to the DOE.¹⁹⁵ Several other newspapers and publications similarly criticized *The Progressive* for the way it handled the matter.¹⁹⁶ Many other papers continued to criticize *The Progressive* as being irresponsible for wanting to publish the article and take the case to the Court. "There should be some room for editorial responsibility in the offices of the news media . . .," said *The Toledo Blade*,¹⁹⁷ while the *Atlanta Constitution* asserted that "perhaps the most crazies of all," are the people who wrote and published the article.¹⁹⁸

A much smaller minority of publications ever bothered to criticize the Government. The National News Council criticized the Government for the classification system, its reaction to the discovery of UCRLs 4725 and 5280, and its failure to retrieve copies of the article that others had.¹⁹⁹

C. *Effect of Mooting The Progressive*

The dismissal of the case was a fortunate event for the press and first amendment freedoms. The case was no doubt headed toward being the "bad law" that Chief Justice Holmes and Justice Harlan predicted.²⁰⁰ *The Progressive* was about to set an ominous precedent.

The immediate effect of the decision was to create a jubilant atmosphere in the offices of *The Progressive* and the *Press Connection*. The *Press Connection*'s managing editor proclaimed it a victory for the first amendment,²⁰¹ while *The Progressive*'s editor Knoll commended the *Press Connection* for its actions²⁰² and claimed: "We believe we have won a small but important victory in a continuing struggle."²⁰³ *The Progressive*'s editors declared in the November issue, in which the article is printed, that its publication was a triumph for the first amendment.²⁰⁴

195. Abrams, *Progressive Education*, COLUM. JOURNALISM REV., Nov./Dec. 1979, at 28.

196. See, e.g., Charleston Evening Post, Sept. 20, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 1036 (1979). See also Burkett, *The Progressive Case Revisited*, THE QUILL, Sept., 1979, at 35-36, in which Knoll claims he was "unhappy" that he followed his attorney's advice in sending copies to DOE.

197. Tol. Blade, Sept. 19, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 1039 (1979).

198. Atlanta Const., Sept. 19, 1979, reprinted in EDITORIALS ON FILE (Facts on File, Inc.) 1033 (1979). See also L.A. Times, Sept. 19, 1979, Part II, p. 6, col. 1, reprinted in EDITORIALS ON FILE, *supra*, at 1028; and The Christian Sci. Monitor, Sept. 19, 1979, p. 3, col. 1, reprinted in EDITORIALS ON FILE, *supra*, at 1029.

199. COLUM. JOURNALISM REV., Sept./Oct. 1979, at 84. The REVIEW also blamed the Government for not keeping the document secret. COLUM. JOURNAL REV. Sept./Oct. 1979, at 24.

200. 193 U.S. 197, 400-01 (1904); 403 U.S. 713, 752-53 (1971).

201. Consoli, *supra* note 66, at 9.

202. *Id.*

203. Knoll, *Wrestling with leviathan*, THE PROGRESSIVE, Nov. 1979, at 28.

204. Comment, *The 'secret' revealed*, THE PROGRESSIVE, Nov. 1979, at 6.

Beyond mere victory celebration the case means much more. One thing the case and subsequent events did was give the press strength and encouragement to fight such encroachment of their first amendment rights. This represents a trend on the part of journalists simply to publish and not wait for the Government to censor. This may mean the doctrine prior restraint will never again be considered; it may have reached its demise. If the Government has realized that it cannot win a case involving a hydrogen bomb, perhaps it will not try again.²⁰⁵ If the Government is still willing to attempt future prior restraints, it is at present difficult to imagine anything more dangerous than the hydrogen bomb. Additionally, it seems likely that small, often underground, papers will print almost anything, if for no other reason than pure shock value. This may happen again if the Government obtains an injunction against a more widely circulated publication.

The situation, however, is not quite so simple. The first amendment is not necessarily any stronger than it was after the *Pentagon Papers* cases. The press did not totally win its case, as this was essentially a nonlegal victory. Instead of being a clear victory for the public or the press, the case more clearly resembled a circus. Nothing was decided, except that the *Press Connection* editors, under intense time pressure, felt an impulsive, overriding conviction that the article had to be published to preserve the first amendment freedoms.²⁰⁶ However, the editors' courage derived more from blinding compulsion than true valor. The negotiations that followed dismissal of the case actually did more for freedom of the press than all the preceding events. The negotiations were conducted after *The Progressive* filed a motion to open up the documents that had remained sealed at the end of the case.

It was most sensible that the parties agreed to unseal all the materials that *The Progressive* had provided to the Court. With Hansen's help, *The Progressive* had proved that the material was found in the public domain. Moreover, the Government's best argument in the case was that the new arrangement of the items made it much more harmful to national security.²⁰⁷ Since this "new arrangement" is now published, not only in *The Progressive*, but in the *Press Connection* and the *Chicago Tribune*, a newspaper with a large national and international circulation, the individual items Morland used to compile his piece could no longer feasibly be considered a security threat.

The affidavits of scientists and other classified material submitted by the Government presented a more difficult negotiation issue. *The Progressive* won a great victory for the press by successfully opening up between

205. Abrams, *supra* note 195, at 29.

206. See McCrea, *Reflections—A nation beset by confusion and fear*, THE PROGRESSIVE, Nov. 1979, at 36-37, for the editor's views on why he published.

207. Public Brief for Appellee at 52 n. 51, United States v. The Progressive, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

ninety and ninety-five percent of the documents. However, an especially tough issue was UCRL 4725, the accidentally declassified document found in the Los Alamos library. The document had been submitted to the court in an appendix to an affidavit. Since the document was in the public domain at one time, *The Progressive* argued the right to have it made public, while the Government argued that the possibility that the document was "compromised" for a short time did not justify publication now. The Government won on this issue, its only victory. *The Progressive*, by way of these negotiations, essentially proved its point that over ninety percent of the information written about the hydrogen bomb is already in the public domain.

The Progressive also won another victory in that the Government announced that it would not prosecute anyone for printing the material. This was perhaps the greatest benefit of the case, and a greater victory for the Press than the *Pentagon Papers* cases. Prosecution of any members of the press could have had a severe chilling effect upon the first amendment. *The Progressive's* editors had few worries, because they printed the material only after very similar material was printed in the *Press Connection* and the *Chicago Tribune*. However, two other groups of persons faced the possibility of prosecution. One group was the scientists that Hansen claimed violated the Atomic Energy Act by transmitting restricted data in conversations with Morland and others. These convictions, however, would have little effect upon the press, other than to potentially dry up information sources in the future.

The other group that potentially faced prosecution was Hansen and the editors of the *Press Connection*. Their prosecution, despite the merits of the case, could have had a definite chilling effect upon the press. It is possible that the Justice Department considered prosecution merely as harassment and as a warning to future potential offenders. This would no doubt have had a detrimental impact upon the press.²⁰⁸ If the Government had prosecuted, the case would have turned on the ability to prove the information came solely from public sources. If Hansen could prove this, it seems unlikely the Government could have won its case. If, however, the Government proved Hansen obtained some materials illegally and convicted him, this might not have necessarily reflected upon the press itself.

The Government, however, might have tried to prosecute and convict Hansen without proving he obtained the materials illegally, but rather by use of a frighteningly broad interpretation of the Atomic Energy Act. Under the Government's interpretation of the Act suggested in *The Progressive* case, all materials on nuclear energy, including articles which aggregate several items from public sources and consequently created a threat in the eyes of DOE officials, would be considered "born classi-

208. See text accompanying notes 237-41 *infra* for a discussion of the future use of convictions.

fied.”²⁰⁹ All materials on the subject would have to be “declassified” by the DOE. This procedure would have staggering potential for abuse by the DOE censors. Under this interpretation, Hansen could have been prosecuted for simply being industrious enough to compile the various public sources of information into one concise article. Whether or not the Court would actually accept this interpretation would depend on further interpretation of several elements of the Act.²¹⁰

Prosecution of the *Press Connection*, however, would have depended upon an interpretation of different wording of the Act. Section 2274 requires that information be “communicated, transmitted or disclosed.” The *New York Times* Court interpreted the same phrase in the Espionage Act, and found that the pertinent provision merely said “communicates” and not “publishes,” while other sections of the statute had distinguished the two words; and that consequently the statute did not apply to the press since the press only “publishes.”²¹¹ This same interpretation problem might have arisen if the Justice Department had attempted to prosecute the newspaper under the Atomic Energy Act.

Although the Government did not prosecute *The Progressive*, it may have other plans to intimidate the editors. After the *Pentagon Papers* cases were over, the FBI ordered an investigation into the background of the *Times* reporter who broke the story. The Government also summoned numerous Vietnam war critics before grand juries to determine what evidence could be uncovered.²¹²

Another important effect that mooted of the case had upon the press was a change in attitudes. The intense criticism of Knoll for his use of “informal clearance” by submitting the article to DOE no doubt raised his awareness, as well as the rest of the press’, of the journalistic ethic: if one truly believes in printing something he is certain is in the public domain, one should not submit to government censorship first. The case also made the press realize that it was likely the Government’s true motives were to cover up its own mistakes and inconsistent policies on classification.²¹³ This made the press, and hopefully the public, realize that the topic of nuclear weaponry should not be totally off-limits to the press and that it has a responsibility to its readers to report the subject more fully than it has previously done.

The *Columbia Journalism Review*, after disclosing that it too had

209. Public Brief for Appellee at 74 n.74, 82, 87-88, 105-06 & n.102, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

210. See text accompanying notes 242-65 *infra* for a discussion of the future of the Atomic Energy Act.

211. Comment, *supra* note 93, at 219-20 n.41. See 403 U.S. 713, 721 (1971) (Douglas, J., concurring).

212. See Rubin, *supra* note 170, at 580-81, for a detailed discussion of further harassment of journalists by the Justice Dept. following the *Pentagon Papers*.

213. Cook, *Publishers Statement*, Chi. Tribune, Sept. 18, 1979 at 12, col. 3.

found the secret, stated the issue succinctly: "Let us be clear; we weren't hungry for this knowledge . . . [but consequently], in our ignorance [the] journalists [have] never probed the limits of public nuclear knowledge [They] were content to delegate to leaders and experts the right to know, and therefore the freedom to decide."²¹⁴ Perhaps, if the case did nothing else, it made the press realize it must open its eyes or risk losing first amendment rights. This case helped remind America how unevenly knowledge is held and controlled in this nation.²¹⁵ To put some of this control, and consequently power, back with the people, the press has realized a need to take more assertive action to gain the knowledge.

III. THE FUTURE

The Progressive case not only had immediate effects upon the press, but will undoubtedly have reverberating effects in the future. The case has changed the doctrine of prior restraint. Although we may see increasing government censorship in different forms, this will not be the final attempt at a government restraint on publication. New technology will raise new issues, and if the Government determines such technology to be equally or more harmful than the hydrogen bomb, the prior restraint doctrine may come into widespread use. The Atomic Energy Act has yet to be tested. Its future is uncertain. The Government may rely more and more on convictions, and the Congress may take other legislative actions. These are issues that must be considered for the future.

A. *The Case Will Arise Again*

Professor Emerson once said that "unless the doctrine of prior restraint is given a more rational and comprehensive form, it is likely to be whittled away in future decisions."²¹⁶ The doctrine may have been whittled away by *The Progressive* case. It is difficult to imagine anything more dangerous than a hydrogen bomb; however, the possibility remains that something will arise in future technology that the Government will attempt to censor by resurrecting the doctrine of prior restraint. Two examples of this are biochemical warfare and recombinant-DNA technology. This technology is not in the future—it is with us now.

Congress has recently been studying proposals for renewing recombinant-DNA research.²¹⁷ The thought that perhaps man will someday be able to control life, reaching into the science fiction world of creating life and cloning, is immensely frightening and, like the hydrogen bomb, has dire consequences for the welfare of the world. Looking ahead,

214. Comment, *supra* note 64, at 22.

215. *Id.* at 22-23.

216. Emerson, *supra* note 76, at 671.

217. Ferguson, *Scientific Inquiry & the First Amendment*, 64 CORNELL L. REV. 639, 657 (1979). See H.R. 1005, 95th Cong., 2d Sess., at 2 (1978).

with some imagination as to future technology, it becomes easier to see the same issue developing. It is possible that publication of this technology could give the information to those who would use it for destructive purposes. At the same time, recombinant-DNA research provokes serious issues that should be publicly discussed.²¹⁸

This future scenario has many similarities to *The Progressive* case. Although DNA technology may not have the ability to cause as immediate and massive destruction as the hydrogen bomb, it is not something we would want in the hands of radical terrorists or Idi Amin,²¹⁹ yet, understanding of scientific information and knowledge in the past has not harmed the public. Galileo's confirmation that the earth revolved around the sun caused no real harm to society. A more recent example is attempts to suppress Darwin's theory on the evolution of man. His information caused much turmoil because of the conflict with religious beliefs, but did not cause any real harm in terms of danger to citizens or the threat of death. These examples are not necessarily fair analogies. A better one is atomic energy, the precursor of the hydrogen bomb.

Much of the knowledge of atomic energy has been distributed to the public, as suggested by Einstein.²²⁰ Although the benefits of nuclear energy are a topic of continuing debate, this knowledge has been used, not with the intention to harm, but with the intention to help the nation. This is quite similar to the issue of DNA research. Even though it has the potential to harm, it could also be used in many beneficial ways. Those opposed to this view would argue, however, that, like atomic energy, DNA research's risks would outweigh its benefits. The risk of a Hitler controlling the world by gene manipulation might be too great to allow information on DNA to be made public.

Another factor that makes *The Progressive* case similar to this hypothetical future case is the fact that scientific opinion is greatly divided on recombinant-DNA research; thus it would be extremely difficult for a court to ascertain the true danger it involves. This would make it easier for the Government to seek an injunction against dissemination of the information by merely showing the potential danger is sufficiently grave, although of indeterminate risk of occurrence.²²¹ The *New York Times* Court required a showing, not only of grave harm, but also immediate harm. If the Court took this approach, it would be lowering the *New York Times* standard and creating the potential for a major increase in successful prior restraints. A great deal of information could be shown to have potentially grave danger at some indeterminate time in the future, but not immediately.

218. *Id.*

219. See text accompanying note 22 *supra*.

220. See text accompanying note 1 *supra*.

221. Ferguson, *supra* note 217, at 658.

As an alternative, the Government might restrain the actual research itself. The Government has already attempted to prevent research on indecipherable computer communication codes because it might enable foreign powers to develop an impenetrable system. The Commerce Department imposed a secrecy order on the research but has since lifted it.²²²

Therefore, although the technology of the future may not have the power to cause immediate massive death, as does the hydrogen bomb, the Government will have valid reasons for wanting to keep secrets, and the public and press will have equally valid reasons to want knowledge on the subject. *The Progressive* conflict has not ended.

B. Possible Supreme Court Reaction

Since there is still a real possibility of this type of press-government conflict in the future, it is necessary to consider what the Supreme Court would do if the case arose while its present members are on the bench. First, one must remember that the *New York Times* Court declared that the Government must meet a heavy burden of presumption against it. In *New York Times* Justices White, Stewart, and Brennan, who all remain on the Court, required a finding that the enjoined materials "will surely" or "inevitably" cause the requisite harm.²²³

In *Nebraska Press Association v. Stuart*,²²⁴ a more recent prior restraint case that did not involve national security, the Court reaffirmed the heavy burden standard, and at least six Justices implicitly agreed to the "direct, immediate and irreparable harm" standard. Justice Brennan first laid out the standard in which Justices Stewart and Marshall concurred.²²⁵ Justice Powell implicitly agreed in his opinion.²²⁶ Justice White did not specifically discuss the standards but expressed doubts that a prior restraint could ever be imposed.²²⁷ Justice Stevens also subscribed to Justice Brennan's opinion,²²⁸ which makes a total of six justices who would definitely require the heavy burden under "direct, immediate and irreparable harm" standards. However, *Nebraska Press* did not deal with national security, and in *New York Times* the Court suggested they would agree to prior restraint if there was legislation permitting it.²²⁹ In a future situation, the Court also could possibly distinguish the *Pentagon Papers* cases as entirely a matter of executive authority and separation of powers.²³⁰

222. *Id.* at 660.

223. 403 U.S. 713, 730, 726-27 (1971).

224. 427 U.S. 539 (1976).

225. *Id.* at 593.

226. *Id.* at 571.

227. *Id.* at 570.

228. *Id.* at 617.

229. See text accompanying notes 161-66 *supra*.

230. See Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971), for a thorough discussion of the view that the *Pentagon Papers* case was a separation of powers case foretold by the *Steel Seizure* Case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Would the Court in a future case impose a prior restraint? In light of the makeup of the present Court, the standards coming out of *New York Times* and *Nebraska Press*, and the seeming willingness of many Justices to defer to legislative judgment, it is very possible the Court would uphold a prior restraint under the Atomic Energy Act or a similar act.

The two Justices who had the strongest views against prior restraint in *New York Times*, Justices Black and Douglas, are no longer on the Court, while two of the three dissenters from *New York Times* do remain. Two new members, Justices Powell and Stevens, would probably follow the "direct, immediate and irreparable harm" standards. Justice Rehnquist would most likely follow fellow conservative dissenter Chief Justice Burger.

Nor has the Court in recent times been particularly friendly to the press. The *Zurcher v. Stanford Daily*,²³¹ *Herbert v. Lando*,²³² and *Gannett v. DePasquale*²³³ decisions are three examples of the Court's attempts to limit the press, without actually imposing on the first amendment. In *Zurcher*, the Court held the societal interest in law enforcement outweighed the press' right to contest a search of its offices before any actual search and seizure takes place. *Herbert* was a public figure defamation case. The Court held the plaintiff could, during discovery, ask the defendant journalist about his state of mind when publishing the alleged defamatory matter and rejected the press' claim that it needed a special "editorial privilege." The *Gannett* Court held, 5-4, that members of the public, and consequently the press, had no constitutional right to attend pretrial hearings in a criminal case. These decisions, which appear to have restricted the press in three different areas, leave even more doubt as to how the Court would react in a situation similar to *The Progressive*.

Two obscure footnotes in *United States v. Snepp*²³⁴ may also suggest the Court's willingness to impose prior restraint. In that case, the defendant had been a CIA agent who had violated his secrecy pledge by publishing information about the agency's actions in Vietnam. Although the case turned on the breach of contract issue, the footnotes suggest that even without a contract, national security agencies could suppress the publication of sensitive information.

In a recent address given after *The Progressive* case was mooted, Justice Brennan criticized the press for overreaction to *Herbert*, and spoke of two "models" of free speech.²³⁵ The first, which he called the "speech model," concerned the actual right to speak out. The other, the "structural model," concerned the gathering of information and preparation by the

231. 436 U.S. 547 (1978).

232. 441 U.S. 153 (1979).

233. 443 U.S. 368 (1979).

234. 444 U.S. 507, 508, nn. 1-2. See NEWSWEEK, Mar. 3, 1980, at 51.

235. Address by Justice William J. Brennan, Jr., Dedication of Samuel I. Newhouse Law Center, Rutgers University, Newark, N.J. (Oct. 17, 1979), reprinted in 5 MED. L. REP. 1837 (1979).

press. He indicated that such areas as the privilege to withhold confidential sources and the search and seizure of newspaper offices dealt with preparation and therefore fell under the "structural model." Morland's research, which the Government claimed dealt with the piecing together of individual items to "give birth" to an article which was much more dangerous than the individual pieces alone, might fall under the "structural model" that Brennan appeared willing to suppress. Brennan made no mention, however, of *The Progressive* or potential similar cases.

If a case similar to *The Progressive* ever reaches the Supreme Court, the outcome would probably turn, as it did in this case, on evidentiary proof that the material was already in the public domain. Opinions vary on whether the Government could have proved this to the Supreme Court in *The Progressive*. The Government already had the benefit of the district court opinion. On the other hand, *The Progressive* had the advantage of the discovery of UCRLs 4725 and 5280. It is largely academic to discuss what could have happened in *The Progressive*, but the case does serve to emphasize the importance of the public domain issue in the future.

If a similar case reaches the Supreme Court, the Court will undoubtedly have to consider whether the Court, Government, or press should decide what information on a particular subject is necessary for public debate. It will then have to wrestle with the major policy argument that technical information, like that in *The Progressive* case, is not necessary for a sufficiently informed public debate on issues like thermonuclear weaponry and DNA research. This is a forceful argument that is supported by many journalists.²³⁶ The Court must look, however, to the opposing arguments. Even though this information may be unnecessary for an informed public debate, suppression of information compromises one of the greatest constitutional principles of our nation—freedom of speech and the press.

Without publishing the hydrogen bomb article, *The Progressive* would not have fully proved the point that the Government has not satisfactorily protected its citizens. Simply printing a statement that the magazine's writers had discovered the information would obviously not have been as effective. But the question still remains whether the shock value benefits of printing the technical information to expose the Government's use of secrecy to stifle debate on policy outweighed the potential harm. If one accepts the view that information in *The Progressive* case was already in the public domain, the benefits of exposition of Government error can be seen to outweigh the damage. On the other hand, if one accepts the view that the information was not totally in the public domain, one can believe the potential harm does outweigh the benefits. The public domain factor is therefore the key upon which a future Supreme Court decision might turn.

236. See text accompanying notes 178-99 *supra*, for a more detailed discussion of journalistic reaction.

The Court will most likely follow the *New York Times* standard of "inevitable, direct and immediate" harm. If the material has already been available in the public domain, the Court could find that any harm has already occurred, and consequently, further publication, although possibly aggravating the harm, could not cause the "inevitable, direct and immediate" harm *New York Times* required. If the material has not previously been in the public domain, such as the Pentagon Papers, the case would probably be decided by the *New York Times* test and the constitutionality of statutes that require the classification of the information.

Policy, however, could influence the Court. If so, there is a remote possibility that the Court would find technical information, like some other forms of speech including obscenity, not to be constitutionally protected speech. Because of the importance to the national interest and general public of any topic likely to be raised in this context, and in light of the Court's reiteration of the heavy burden standard in *Nebraska Press Association*, it is doubtful the Court would decide the case this way.

C. Use of Convictions

If the Government does shy away from the use of prior restraint, it may take a different approach and make greater use of prosecution and threats of prosecution in order to discourage publication. If imposed frequently or abusively, the criminal sanction can become just as chilling as the prior restraint. The deterrence threat can substantially chill in advance, creating the same effect as a prior restraint.²³⁷ Another major problem with criminal sanctions is their tendency to induce self-censorship.²³⁸

Furthermore, if the Government resorts to criminal sanctions, it is very likely that the Court would apply a lesser standard to judge criminality of a publication than it does in judging a prior restraint. In *New York Times* Justices Brennan,²³⁹ Stewart,²⁴⁰ and White²⁴¹ expressed the belief that a new, less-restrictive standard could be used. Consequently the Government could more likely obtain convictions than prior restraint orders. In addition, in a criminal case a jury might be even less sympathetic to a defendant because the general public does not see the need to publish such "harmful" information.

D. Constitutionality of the Atomic Energy Act

If another case arose involving the dissemination of information on

237. For a detailed discussion of the prior-subsequent restraint dichotomy see Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976).

238. *The Supreme Court, 1970 Term—Freedom of Speech, Press, and Association*, 85 HARV. L. REV. 199, 208 (1971).

239. 403 U.S. 713, 726 (1971).

240. *Id.* at 730.

241. *Id.* at 740.

nuclear weapons, one of the foremost issues would be the constitutionality of the Atomic Energy Act. The Act has never been tested, and has been described as remaining to be a "First Amendment minefield."²⁴²

During *The Progressive* case, the Government propounded a very sweeping interpretation of the Act, embracing a broad definition of restricted data which required that all information on the subject be "born classified" and essentially claimed that no technical information was entitled to first amendment protection.²⁴³ The Government's reading of the Act could have potentially rendered criminal "the words of any critic, in academe or elsewhere, who, without access to classified information, happens upon—or creates—a bit of information which some government official believes harmful. . . ."²⁴⁴ Knoll said the Act could possibly be used to keep information from the public about Three Mile Island.²⁴⁵ If this interpretation is to be believed, the Act's powers are extremely dangerous to first amendment freedoms.

The Government would most likely argue, as it did in *The Progressive* case,²⁴⁶ that the legislative mandate allows the DOE to balance a number of factors in making its classification decisions, including "the unpublished state of the art," and would suggest further that there should be judicial deference to this situation when there has been a broad congressional determination of grave injury.²⁴⁷ This argument, however, appears foreclosed by *Landmark Communications v. Virginia*,²⁴⁸ in which the Supreme Court recently held it would not give deference to legislative findings when first amendment rights are at stake.²⁴⁹

Undoubtedly the Government would argue that technical data is not deserving of first amendment protection. The Ninth Circuit in *United States v. Edler Industries, Inc.*²⁵⁰ upheld licensing requirements for arms exporters and ruled that Congress has constitutional power to prevent the dissemination of technical data. However, the court specifically avoided interference with protected speech and limited it to the facts of the case where the communication was for Edler's private economic benefit only. A careful reading of the case shows that it does not aid the Government's argument, but might still be construed as giving a right to limit technical

242. Abrams, *supra* note 195, at 28.

243. Public Brief for Appellee at 74 n.74, 82, 87-88, 105-06 n.102, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

244. See Friedman, *supra* note 13, at 35, quoting Abrams' amicus brief for the *New York Times* and for others.

245. Knoll, *If . . .*, THE QUILL, June, 1979, at 31.

246. Public Brief for Appellee at 35, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

247. *Id.* at 90.

248. 435 U.S. 829 (1978).

249. *Id.* at 1544.

250. 579 F.2d 516 (9th Cir. 1978).

speech by a court dealing with a threat of great injury from thermonuclear weapons.

The Act itself has two levels of graded offenses. In section 2274(a) one of the requirements for conviction is that the person communicate, transmit, or disclose the information "with intent to injure the United States" or "secure an advantage to a foreign nation." The lesser offense in section 2274(b) requires that the person do so "with reason to believe such data will be utilized to injure the United States [or] secure an advantage to a foreign nation." The statute's injunction requirements are vague, however. In section 2280 the Government can apply for an injunction whenever in the judgment of the Commission (now the DOE) "any person had engaged or is about to engage in acts or practices which constitute or will constitute a violation of any provision" of the Act.

Three interpretations of these injunction provisions can be argued, two of which are very destructive of the first amendment. One argument, which the Government forcefully asserted in *The Progressive* case, is that the "reason to believe" or "intent" standards need be met for criminal prosecution but not for an injunction.²⁵¹ The Government claimed that all it must prove for an injunction is that the material falls under the definition of restricted data. If this interpretation were followed by the Supreme Court, which appears highly unlikely, the Government could obtain an injunction any time it desired. The defendant would essentially be enjoined without any notice, and most likely for items that have been discovered in the public domain. The Government could selectively claim the right to prior restraint, establishing a doctrine reminiscent of the historical licensing laws that led to great abuse.

This should also be considered in the light of the Government's tendency to overclassify. It has been suggested that only five to ten percent of classified materials should be so classified.²⁵² Since the Court in *Landmark* took the position against complete deference to the legislative or executive branches, the Court probably would require a greater showing to impose even a temporary prior restraint. Otherwise, the Act would not meet the standards for due process procedural safeguards.

A second interpretation of the Act's provision is that the "reason to believe" standard is required for an injunction; however, the mere fact that the publication contained restricted data and the Government had warned the defendant of the impending injunction would be sufficient notice for the defendant to have "reason to believe" the publication could be injurious to the United States.²⁵³ This interpretation sounds more logical, but is

251. Public Brief for Appellee at 31, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

252. See text accompanying notes 269-81 *infra* for a discussion of overclassification and classification schemes in the future.

253. Public Brief for Appellee at 16, 39, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

nearly as absurd. The “reason to believe” standard requires more than the Government telling the defendant that he has a reason to believe.²⁵⁴ Particularly in a situation like *The Progressive*, if the defendant truly obtained the information from the public domain, he would have no reason to believe this information could cause harm.²⁵⁵

The Supreme Court in 1941 in *Gorin v. United States*²⁵⁶ faced a similar question with the Espionage Act. Interpreting the predecessor to sections 793(b) and 794(a) of the Espionage Act,²⁵⁷ the Court held the definition of “connected with the national defense” not to be unconstitutionally vague, but based this finding on the fact that the statute also required proof of intent or reason to believe disclosure would injure the nation or aid a foreign country. Without this interpretation, the Court recognized there might be a vagueness problem.²⁵⁸ Likewise, for the Atomic Energy Act to be interpreted in a constitutional manner, the Supreme Court should use a third interpretation of the Act, and require a finding of scienter.²⁵⁹ The *Gorin* case, however, concerned a criminal prosecution, and not an injunction; but without use of a similar interpretation requiring a specific finding of “reason to believe” or “intent,” the Act, like the Espionage Act, would be unconstitutionally vague or overbroad.

The Court should interpret the definition of “restricted data” narrowly. Section 2014(y) of the Atomic Energy Act broadly defines it as all data concerning the design, manufacture, or utilization of atomic weapons, but excludes all declassified materials.²⁶⁰ In *The Progressive* case, as could potentially be argued in future cases, the Government asserted that the definition required all information, all knowledge—theoretical or practical—to be classified automatically and remain so until the Government declassifies it. This “classified at birth” concept could feasibly cover not only a journalist’s, like Morland’s, original work product, but a private scientist’s independent research and a university professor’s deductive reasoning. A professor could not even teach the principles of nuclear physics.²⁶¹ The Government in *The Progressive* case rebutted this argu-

254. Public Brief for Appellant at 57, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

255. *Id.* at 16. Nor could the Government show the documents could “surely” or “inevitably” lead to “irreparable harm” if they had been in the public domain for years. Public Supplemental Brief for Appellant at 24, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

256. 312 U.S. 19 (1941).

257. 18 U.S.C. §§ 793(b), 794(a) (1979).

258. 312 U.S. 19, 26-28 (1941). For further discussion see *Developments in the Law*, *supra* note 94, at 1237.

259. 312 U.S. 19, 26-28 (1941). See *Developments in the Law*, *supra* note 94, at 1237.

260. 42 U.S.C. § 2014(y):

The term “restricted data” means 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 pursuant to section 2162 of this title.

261. Public Brief for Appellant at 66, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

ment with the notion that Morland did not "give birth" to the information; hence, *The Progressive* was overreacting.²⁶² This argument perhaps stretches the reality of what the Government would do, but not the reality of what it could do. The wording of the Act leaves open the potential for abuse. Unless the Supreme Court were to interpret this definition narrowly, almost anything, including facts of Three Mile Island, storage of nuclear waste, the discovery of missing uranium from a Tennessee plant, and other pressing nuclear issues could be hidden from the public.

The Court has always been cautious with first amendment cases. In *N.A.A.C.P. v. Button*²⁶³ the Court held that Congress must legislate with precision and "narrow specificity" when attempting to regulate first amendment freedom. If Congress is required to legislate with precision, the Court, in order to save the statute's constitutionality, should interpret it with the same precision. The statute would not be constitutional if interpreted in the broad manner the Government suggested in *The Progressive*. Under the Government's interpretation the executive branch would be left with an unconstitutional, unlimited, discretionary power to censor. The Court follows a well-known policy of interpreting statutes narrowly in order to save their constitutionality, and must do so to save the Atomic Energy Act.

Congress intended to protect our nuclear secrets.²⁶⁴ However, the statute itself proclaims that the intention of the Act is to encourage the dissemination of atomic energy information for scientific and industrial progress and for public debate.²⁶⁵ *The Progressive* was mooted, but the first amendment may still be in danger unless the Act is narrowly construed.

E. *Due Process Requirements*

While *The Progressive* case was in the district court and *The Progressive* was preparing its case on the motion to vacate, the district court refused discovery and refused to allow testimony and cross-examination at the hearing. *The Progressive* was also prevented from having access to the previously open library or its employees. These issues are too complex to be discussed in this context. However, it is appropriate to note that if a case of this type does arise in the future, the Supreme Court may be faced with a situation where the defendant has been denied these same procedural safeguards.

262. Public Brief for Appellee at 105, *United States v. The Progressive*, Nos. 79-1428, 79-1664 (7th Cir. docketed April 12, 1979).

263. 371 U.S. 415, 433 (1963).

264. For the legislative history of the Act, S. Rep. No. 1699, 83d Cong., 2d Sess., reprinted in [1954] U.S. CODE CONG. & AD. NEWS 3456, 3467.

265. 42 U.S.C. § 2161(b):

The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

Courts have broad discretion in the discovery process at preliminary stages of the judicial system. Nevertheless, it is questionable whether this discretion can be so broad that a party is effectively denied all the information it needs to defend itself. In these situations the Government definitely holds the upper hand. The Government employs the vast majority of the scientists who are competent to testify, the Government holds all classified materials, and the Government has the power to remove even unclassified materials from public access. This unfairness should be recognized and compensated for by allowing broader discovery and live testimony during the *in camera* hearings at the early stages of the litigation.

F. Congressional Reaction

It can be expected that this case will have some effect upon Congress. In fact, it did even before the case was mooted. After the discovery of UCRL 4725, a Senate subcommittee held hearings to investigate the Government's release of classified information.²⁶⁶

It is unclear whether Congress will take any steps to change the Act. One commentator has suggested that legislation on national security should treat differently the various groups of people who could violate the acts—such as spies, government employees, government ex-employees, and the press.²⁶⁷ If a reporter is unaware the information he has received is stolen or is told it is not classified by an expert who is under orders not to reveal classified information, the standard for the press' punishment should be different from the punishment for a government employee who should know he is violating the law. On the other hand, if the press has knowledge the information was illegally obtained, as in the *Pentagon Papers* cases, a different punishment standard is needed. It has also been suggested that Congress provide specific guidance regarding the enumerated types of publication that can be enjoined.²⁶⁸

Another area in which the Congress may attempt to legislate, and that the executive branch will most likely reconsider, is classification procedures. Officials in both branches had to face the fact that government error was the primary cause of *The Progressive* case. As one commentator noted: "The DOE officials . . . have been graphically shown that their recipe was less well-guarded than Coca-Cola's secret formula or Colonel Sander's ingredients for finger-lickin' southern fried chicken."²⁶⁹ If the whole affair did nothing else, it undoubtedly awakened the DOE to the glaring reality that its classification system is not working. The system has a long, historical background with a complex, essentially common-law basis for its authority.²⁷⁰ The major problem with the classification system

266. See text accompanying notes 56-58 *supra*.

267. *Espionage Statutes*, 73 COLUM. LAW REV. 929, 1083-85 (1973).

268. *Developments in the Law*, *supra* note 94, at 1242.

269. Lewin, *How a Legal Bomb Works*, THE NEW REPUBLIC, Mar. 24, 1979, at 12.

270. For an extremely detailed history of the classification scheme in the United States, see *Developments in the Law*, *supra* note 94, at 1196-1202.

is that it has gotten extremely out of hand. One retired Pentagon security officer has estimated that only one to five percent of currently classified documents should be.²⁷¹ Former Ambassador to the United Nations Arthur Goldberg testified that only ten percent of the classified documents he had read should have been classified.²⁷² The Government does not even know itself how much material is classified, although it is estimated at twenty million documents at the Department of Defense, one hundred million in the defense industry, and two million at the State Department.²⁷³ A total of thirty-four departments' directors and subordinates have authority to classify.²⁷⁴ In the Department of Defense alone, 803 officials have the authority to classify "top secret" documents; 7,600 have authority to classify "secret" documents; and 31,000 have authority to classify "confidential" documents.²⁷⁵

Another consequence of overclassification in which Congress continually acquiesces is the use of leaks to get classified information to Congress, particularly for appropriations bills. Information is also frequently leaked to the press, tending to create a system of "informal declassification."²⁷⁶ If Congress and the executive branch were to take efforts to scale down the extent of classification, it would not have to break its own rules.

There is no doubt a need for some secrecy and classification. Classification is needed to protect the national safety and security by the aiding of covert intelligence, for diplomatic relations, to keep friendly nations from being reluctant to share information (which is what happened after the *Pentagon Papers* cases), to open channels of communications between hostile nations, and to protect the Government bargaining position at diplomatic talks.²⁷⁷ But if secrecy becomes excessive it defeats its own purpose. The press will begin to ignore it more and more. As Justice Stewart said in *New York Times*, maximum possible disclosure is the way to maintain secrecy.²⁷⁸

The press exposed the weaknesses of the classification system in *The Progressive* case. But that does not mean it can do so every time. Certainly some information needs to be concealed, but much of what should not be concealed will never be discovered by the press.

One proposed method to eliminate overclassification is to provide for automatic declassification of many categories of documents, putting the burden on the bureaucracy to determine and maintain the need for reclass-

271. Kalijarvi & Wallace, *supra* note 160, at 493.

272. *Developments in the Law*, *supra* note 94, at 1201.

273. *Id.* at 1200-01.

274. *Id.* at 1200.

275. *Id.*

276. *Id.* at 1206. See also Bagdikian, *The First Amendment on Trial—What Did We Learn?*, *supra* note 154, at 47.

277. *Developments in the Law*, *supra* note 94, at 1191.

278. 403 U.S. 713, 729 (1971).

sification.²⁷⁹ Another method would be to provide more specific criteria for classification and to create an administrative review board independent of the executive branch.²⁸⁰

It is up to the Government to act in the near future to correct the problems in the classification system. Both Congress and the executive branch have authority to regulate disclosure,²⁸¹ and should consider the problem immediately.

G. *The Press in the Future*

Finally, it is important to look at what this case will mean for the press and individual journalists in the future. The first thing the press should do, if responsible, is to begin a thorough debate²⁸² so that the public can effectively understand what this whole ordeal has meant. The press of the future will undoubtedly take a larger role in informing the public on nuclear energy issues and, in particular, the dangers from such easy access to hydrogen bomb "blueprints." This is extremely crucial in light of Three Mile Island, nuclear waste spills, and the discovery of missing uranium.

On the issue of prior restraint, Professor Emerson suggested after *New York Times* that, as a practical matter, all the press need do to protect itself is not tell the Government in advance. Certainly, more editors in the future will follow their journalistic instincts to publish and not seek censorship when they honestly believe there is a public right to the material and that it consequently cannot endanger national security.

The press also has to do some soul-searching concerning what is and is not responsible journalism. Assuming *arguendo* that *The Progressive's* information was in the public domain, the magazine had a right to print the material. But the next case might be different. If there is truly a risk of harm to our nation, the press has an ethical and moral responsibility to weigh the potential harm against any benefit the publication of technical information might have. No doubt, many editors in the future will be reevaluating their ideas and policies.

The press certainly has less trust for Government after *The Progressive* case. In the future, the press will most likely take a more cautious approach toward accepting government hand out publicity without further investigative searches into what is being improperly hidden from the public eye. The press has a duty to have respect for the Government, as does the Government for the press.²⁸³ But mutual respect is neither mutual depend-

279. Henkin, *supra* note 147, at 280.

280. See *Developments in the Law, supra* note 94, at 1227-31, for a detailed discussion of this proposal.

281. The presidential powers come from the inherent executive power, U.S. CONST. art. II, § 1; Congress' power arises from its power to establish additional offices "by law," U.S. CONST. art. II, § 2; Henkin, *supra* note 147, at 280 n.29.

282. Bagdikian, *supra* note 7, at 24-25.

283. Comment, *New York Times Co. v. United States: Confrontation Between Free Press and Presidential Power*, 20 LOY. L. REV. 140, 147 (1974).

ence nor total cooperation. A healthy, adversary-type relationship is necessary. This antagonism between the two institutions is the nation's means of existence²⁸⁴ upon which our democracy depends. The press also has other duties of which it should be aware. It has a duty to inform its public of all information it deems important. The public has a right to know: "to withhold the truth from the public is to hold the public in contempt."²⁸⁵

IV. CONCLUSION

The Progressive was not an ordinary case. It almost became a "great case." If a permanent prior restraint had resulted, it no doubt would have been a "bad" case for the press and a cataclysmic blow to the first amendment. But the prior restraint that the press feared most never ensued. Instead, the case turned out to be a learning tool. It taught a lot of people and two great institutions—the Government of the United States and the free press—many lessons. Everyone learned that there is no certain answer to first amendment questions. The Government was forced to realize its own ineptitude, and the press learned the age-old maxim that power is knowledge.²⁸⁶

The *Columbia Journalism Review* best summed up the issue by first quoting Robert Penn Warren:

The end of man is knowledge, but there is one thing he can't know. He can't know whether knowledge will save him or kill him. He will be killed, all right, but he can't know whether he is killed because of the knowledge which he has got or because of the knowledge which he hasn't got and which if he had it, would save him. There's a cold in your stomach, but you open the envelope, you have to open the envelope, for the end of man is to know.

and then commenting:

Universal knowledge is no more and no less dangerous than democracy itself. We have chosen the risks of democracy, and it is time that we accept the risk of informing ourselves. *The Progressive* has broken the seal and ripped open the envelope, and that is a historic accomplishment. It may make us uneasy, but this is an anxiety we must learn to suffer.²⁸⁷

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284. *Id.* at 141.

285. Bagdikian, *The First Amendment on Trial—What Did We Learn?*, *supra* note 154, at 50.

286. Kalijarvi & Wallace, *supra* note 160, at 469. In a letter to W. T. Barry written by James Madison on Aug. 4, 1822, Madison said: "A people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."

287. Comment, *supra* note 64, at 23.

