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“WHEN THE ENEMY DREW OUR ATTENTION”¹: RECONSIDERING PRIOR RESTRAINT IN THE CONTEXT OF DUAL USE RESEARCH OF CONCERN

Caine Caverly*

INTRODUCTION

Through 2016 and 2017, a team led by Canadian virologist David Evans, and funded by an American pharmaceutical company, attempted to synthesize the previously extinct horsepox virus.² After just six months and an expenditure of \$100,000, the research team was able to successfully construct the virus “using only commercially available information, technology and tools.”³ In January of 2018, the team went on to publish their information in an American-based journal, *PLOS ONE*.⁴

The publication was controversial because it included a potential “blueprint” for the synthesis of a genetic strand in the same viral family as the highly lethal, albeit eradicated, smallpox virus.⁵ Though horsepox does not itself cause infection in humans,

¹ In 2001, as al-Qaeda operatives fled from Kabul, a *Wall Street Journal* reporter acquired access to a computer that was used by several high-ranking members in the terrorist organization. One of the documents recovered from the computer’s hard drive was a 1999 memo written by Ayman al-Zawahiri, one of Osama bin Laden’s top lieutenants. The memo described al-Qaeda’s intent to pursue a biological and chemical warfare program. “The memo laments al-Qaeda’s sluggishness in realizing the menace of these weapons, noting that ‘despite their extreme danger, we only became aware of them when the enemy drew our attention to them by repeatedly expressing concern that they can be produced simply.’” Alan Cullison & Andrew Higgins, *Forgotten Computer Reveals Thinking Behind Four Years of al Qaeda Doings*, WALL ST. J. (Dec. 31, 2001, 2:50 PM), <http://www.wsj.com/articles/SB100975171479902000> [<http://perma.cc/83JV-WWDT>].

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² See Ryan S. Noyce et al., *Construction of an Infectious Horsepox Virus Vaccine from Chemically Synthesized DNA Fragments*, 13 PLOS ONE, 1, 1–2, 13 (2018), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0188453> [<http://perma.cc/FRT9-LSW5>].

³ World Health Organization [WHO], *Advisory Committee on Variola Virus Research: Report of the Eighteenth Meeting*, ¶¶ 18.1–18.2 (Nov. 2–3, 2016), <http://www.who.int/csr/resources/publications/smallpox/18-ACVVR-Final.pdf?ua=1> [<http://perma.cc/2R8U-CG6W>] [hereinafter *WHO Report*].

⁴ Noyce et al., *supra* note 2.

⁵ See Tom Inglesby, *Horsepox and the Need for a New Norm, More Transparency, and*

some have argued that the findings presented in *PLOS ONE* are dangerous nonetheless because “[t]he publication of the horsepox synthesis process lowers technical hurdles for making smallpox de novo.”⁶ Evans himself recognized the prospective risks inherent in such works, noting that although he notified the proper regulatory authorities, they “may not have fully appreciated the significance of, or potential need for, regulation or approval of any steps or services involved in the . . . synthesi[s] and replicat[ion] [of] a virulent horse pathogen.”⁷

Research such as Evans’s, which does not pose an immediate threat but could be detrimentally misapplied for a possible bioterrorist attack, is not itself unique. This type of research is categorized as dual use research of concern (DURC).⁸ The Office of Science and Technology Policy, which advises the executive branch on the effects of science and technology on domestic and international affairs defines DURC as:

life sciences research that, based on current understanding, can be reasonably anticipated to provide knowledge, information, products, or technologies that could be directly misapplied to pose a significant threat with broad potential consequences to public health and safety, agricultural crops and other plants, animals, the environment, materiel, or national security.⁹

In the case of the horsepox virus, though the intent of the research—an attempt to craft a less toxic alternative to the smallpox vaccine¹⁰—was inherently noble, its publication posed a potentially insidious threat to national security because of its ability to serve as a blueprint for the synthesis of smallpox.¹¹ The commercial availability of the research team’s materials, the relatively modest sum that was needed, and the short amount of time in which the synthesis was concluded, all contribute to the conclusion that replication and ill-intended expansion may not be difficult tasks to achieve.¹²

Stronger Oversight for Experiments that Pose Pandemic Risks, 14 *PLOS PATHOGENS*, 1, 1–2 (2018), <http://journals.plos.org/plospathogens/article/file?id=10.1371/journal.ppat.1007129&type=printable> [<http://perma.cc/VM6V-K396>].

⁶ *Id.* at 1.

⁷ *WHO Report*, *supra* note 3, ¶ 18.3.

⁸ Joel Achenbach & Lena H. Sun, *Scientists Synthesize Smallpox Cousin in Ominous Breakthrough*, *WASH. POST* (July 7, 2017), <http://www.washingtonpost.com/news/speaking-of-science/wp/2017/07/07/scientists-synthesize-smallpox-cousin-in-ominous-breakthrough/> [<http://perma.cc/27R8-CKMM>].

⁹ OFFICE OF SCI. & TECH., UNITED STATES GOVERNMENT POLICY FOR INSTITUTIONAL OVERSIGHT OF LIFE SCIENCES DUAL USE RESEARCH OF CONCERN 3 (2014), <http://www.phe.gov/s3/dualuse/Documents/durc-policy.pdf> [<http://perma.cc/2ZTV-RRCJ>].

¹⁰ *See* Noyce et al., *supra* note 2, at 6.

¹¹ *See* Inglesby, *supra* note 5, at 1.

¹² *Id.*; *see also* *WHO Report*, *supra* note 3, ¶¶ 18.1–18.3.

The publication of materials regarding DURC poses a difficult dilemma for research journals. The situation often forces publishers to choose between two, potentially antagonistic, options: help advance scientific progress through the proliferation of new information, or help ensure national security by limiting the chance of harmful information falling into the hands of nefarious actors.¹³ Transparency within the scientific community allows other researchers to build upon previous research rather than expending unnecessary resources in an attempt to reinvent the wheel.¹⁴ This is particularly useful in the quickly evolving field of genetic research.¹⁵ Contrarily, those whose arguments are more concerned with ensuring national security raise worries that the potential benefits do not outweigh the great risks within the current regulatory regime.¹⁶

Weighing these conflicting arguments invokes several different considerations: bioethical,¹⁷ economic,¹⁸ and, most pertinent to this Note, constitutional.¹⁹ More specifically, the publishers must balance the compelling interest in ensuring national security with freedom of the press protections afforded by the First Amendment.

The research and publication regarding the horsepox virus exemplifies this DURC dilemma. Prior to getting published in *PLOS*, David Evans’s team was turned down by two other research journals who refused to publish its findings due to the potential complications arising from dual use research of concern.²⁰ Furthermore, the subsequent calls for increased regulatory oversight and censorship over such research help frame the underlying concerns and establish the timely need for guidance in this area. This need for guidance is particularly acute regarding the constitutional concerns which necessarily follow all requests for prior restraint over the publication of any subject matter.

Although numerous political commentators, scientists, and bioethicists have commented on the issue of DURC and the oversight policies that are currently

¹³ See Brian J. Gorman, *Thinkpiece Balancing National Security and Open Science: A Proposal for Due Process Vetting*, 7 *YALE J.L. & TECH.* 491, 497–98 (2005).

¹⁴ See Ana Nordberg et al., *Cutting Edges and Weaving Threads in the Gene Editing Revolution: Reconciling Scientific Progress with Legal, Ethical, and Social Concerns*, 5 *J.L. & BIOSCIENCES* 35, 51 (2018).

¹⁵ See *id.*

¹⁶ See Vickie J. Williams, *The “Jurassic Park” Problem—Dual-Use Research of Concern, Privately Funded Research and Protecting Public Health*, 53 *JURIMETRICS J.* 361, 362 (2013).

¹⁷ See Stephen M. Maurer, *End of the Beginning or Beginning of the End? Synthetic Biology’s Stalled Security Agenda and the Prospects for Restarting It*, 45 *VAL. U.L. REV.* 1387, 1394–95 (2011).

¹⁸ See Caroline R. Baskin & Todd J. Richardson, *Dual Use Research Policy Implementation*, 7 *ST. LOUIS U. J. HEALTH L. & POL’Y* 59, 60 (2013).

¹⁹ See Williams, *supra* note 16, at 362.

²⁰ Kai Kupferschmidt, *How Canadian Researchers Reconstituted an Extinct Poxvirus for \$100,000 Using Mail-Order DNA*, *SCIENCE* (July 6, 2017, 5:00 PM), <http://www.sciencemag.org/news/2017/07/how-canadian-researchers-reconstituted-extinct-poxvirus-100000-using-mail-order-dna> [http://perma.cc/3UEJ-WURY].

exercised over it, there has been a notable lack of discussion regarding the First Amendment rights of the researchers. To the extent that there has been such discussion, the constitutional arguments have largely been used as a shield against any call for restraint placed on the publications.²¹ To be certain, arguments for a regime in which the government is more inclined to censor a work, or disqualify it for publication altogether, are hampered by the fact that courts have been remarkably hesitant to permit prior restraint over publications in general.²² This idea is exemplified by the relatively high success rate of journalists in Supreme Court litigation involving press regulation.²³

This is not to suggest, however, that the government is never permitted to subject a publication to increased oversight or censorship. The Supreme Court has articulated an exception in instances where national security is at stake.²⁴ In *Near v. Minnesota*,²⁵ a seminal case in the jurisprudence of prior restraint, the Supreme Court articulated that curtailing the First Amendment may be warranted in instances where the nation is at war and thus subject to a unique threat of danger.²⁶ The Court stated that “[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.”²⁷ Since the *Near* decision came down in 1931, this exception has been interpreted incredibly narrowly.²⁸ Due to the Court’s current hesitancy in accepting prior restraint, any calls for censorship over publications involving DURC would face an uphill battle in articulating a strong enough justification for the restraint in terms of national security interests.

The purpose of this Note is to suggest that the courts should reevaluate the high burden associated with the national security exception articulated in the *Near* decision.²⁹ The Court’s reasoning in that case is nearly 100 years old. Threats to national security no longer come in the exclusive form of bullets and bombs. “In an age of terrorism, it is not just guns, explosives, and chemical or radiologic hazards that destabilize communities and countries; there is also the prospect of accidental or deliberate release of dangerous pathogens.”³⁰

²¹ See, e.g., Williams, *supra* note 16, at 372.

²² See Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 439–40 (1987).

²³ See ERIC B. EASTON, MOBILIZING THE PRESS: DEFENDING THE FIRST AMENDMENT IN THE SUPREME COURT 183 (2012).

²⁴ Daniel Ortner, *The Terrorist’s Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad*, 12 NW. J.L. & SOC. POL’Y 1, 17–18 (2016).

²⁵ 283 U.S. 697 (1931).

²⁶ *Id.* at 716.

²⁷ *Id.*

²⁸ See Ortner, *supra* note 24, at 17–18.

²⁹ *Near*, 283 U.S. 697.

³⁰ Lawrence O. Gostin & Katharina E. Ó Cathaoir, *Lurching from Complacency to Panic in the Fight Against Dangerous Microbes: A Blueprint for a Common Secure Future*, 67 EMORY L.J. 337, 339–40 (2018).

As gene-editing technologies continue to evolve and become more readily available to actors who may have interests adverse to those of the State, the potential for biowarfare on a national scale increases significantly.³¹ In instances such as the recent horsepox debate, where the published materials decrease the burden of synthesizing a deadly virus and thus increase the potential for bioweaponization, courts should be less tentative in considering some form of prior restraint.

Part I of this Note will explore key cases involving the application of the prior restraint doctrine. It will particularly focus on cases involving restrictions placed against publications alleged to have threatened national security in some capacity.³² Part II will explore in more detail the dangers associated with the publication of dual use research of concern, whether those dangers be in the form of a bioterrorist application or accidental exposure by unregulated entities.³³ Part II will also apply the courts' reasoning discussed in Part I to an argument in favor of exploring the potential applicability of prior restraint in the context of dual use research of concern.³⁴

I. KEY CASES ON PRIOR RESTRAINT

Though the *Near* Court was careful to categorize “prior restraint” as inherently suspect, it largely failed to establish a working and consistent definition of the term itself.³⁵ Nor did the Court articulate, with any sort of precision, exceptions to the doctrine of prior restraint.³⁶ This lack of clarity has led to a series of inconsistent applications of the doctrine, both within the judiciary and academia.³⁷ Though this Note will delve deeper into the scope of the exceptions to the prior restraint doctrine, its purpose is not to glean a common, definitional trend from precedent. As a preliminary matter, it is enough to say that “prior restraint” can be defined as a suppression of speech before it is disseminated, a categorization which should be juxtaposed with subsequent punishment that occurs on a *post hoc* basis.³⁸ Rather than analyzing the case law for the purpose of narrowing in on a more exact definition, a pointed inquiry into the applicable precedent will be utilized to see how the publication of

³¹ Sami Ghanmi, *New Biological Weapons Could Emerge from Today's Technology: Here's how that Might Happen*, TECHTIMES (June 20, 2018), <http://www.techtimes.com/articles/230713/20180620/new-biological-weapons-could-emerge-from-today-s-technology-here-s-how-that-might-happen.htm> [<http://perma.cc/4V58-PJY8>].

³² See *infra* Part I.

³³ See *infra* Section II.A.

³⁴ See *infra* Section II.B.

³⁵ See Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087 (2001).

³⁶ See *id.*

³⁷ See *id.* at 1087–88.

³⁸ See, e.g., *Alexander v. United States*, 509 U.S. 544, 553–54 (1993); Angela Rulffes, *The First Amendment in Times of Crisis: An Analysis of Free Press Issues in Ferguson, Missouri*, 68 SYRACUSE L. REV. 607, 621–22 (2018).

dual research of concern may fit within the preexisting doctrine. By no means exhaustive, the analysis in this Section will primarily focus on four court opinions.

A. *Near v. Minnesota*³⁹

The First Amendment, which has been incorporated against the States,⁴⁰ prescribes that the federal government “shall make no law . . . abridging the freedom of speech, or of the press”⁴¹ These few short words have produced many court decisions, which have sought to define the exact scope of the aforementioned rights, one of the most crucial of these being *Near v. Minnesota*.⁴² Though the case does not deal directly with issues of DURC, this seminal decision does serve as a useful starting point for determining the scope of First Amendment protections over the publication of particularly sensitive subject material.⁴³

In the *Near* case, a Minnesota statute allowed a court to enjoin an individual or business entity from engaging in the publication of any “malicious, scandalous and defamatory newspaper, magazine or other periodical.”⁴⁴ The defendant in the case was a publisher of *The Saturday Press*, a Minneapolis-based newspaper which regularly published articles alleging that an organization of Jewish gangsters controlled the city’s illegal activities.⁴⁵ The paper also accused local law enforcement officers of being paid off by the gang.⁴⁶ The Minnesota Supreme Court first found that the statute was constitutionally valid, arguing that the Constitution does not afford protection over publications that were “devoted to scandal and defamation.”⁴⁷ The court went on to articulate that the publications the defendant was engaged in were in violation of that statute.⁴⁸

In a 5–4 decision, Chief Justice Charles Evans Hughes, in his majority opinion, reversed the decision of the Minnesota Supreme Court.⁴⁹ Justice Hughes focused on the distinction between prior restraint and the punishment that could follow allegations of libel.⁵⁰ Quoting Blackstone, Hughes laid out the principle that:

[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon

³⁹ 283 U.S. 697 (1931).

⁴⁰ See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴¹ U.S. CONST. amend. I.

⁴² See NAT HENTOFF, *THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA* 187 (1980).

⁴³ See EASTON, *supra* note 23, at 60–61.

⁴⁴ *Near*, 283 U.S. at 702.

⁴⁵ HENTOFF, *supra* note 42, at 188.

⁴⁶ *Id.*

⁴⁷ *State ex rel. Olson v. Guilford*, 219 N.W. 770, 770 (Minn. 1928).

⁴⁸ *Id.* at 773.

⁴⁹ *Near*, 283 U.S. at 722–23.

⁵⁰ *Id.* at 713–15.

publications Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press⁵¹

The Court found that prior restraint poses a peculiarly troublesome threat to First Amendment protections since the dissemination of information allows public discourse over the truthfulness or importance of particular statements. In other words, prior restraint does not permit these statements to ever enter into the public sphere.⁵² If the published statements are later found to be libelous or defamatory in some meaningful way, adequate remedies exist in a subsequent punishment context.⁵³

The Court did, however, indicate that the freedom of the press is not absolute.⁵⁴ Chief Justice Hughes articulates four potential exceptions to the rule against prior restraint.⁵⁵ Pertinent to this Note, Hughes articulates an exception for situations in which the nation is at war, opining that “[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.”⁵⁶ Ultimately, the Court found that the Minnesota statute did not fall into any of these narrow exceptions, and, accordingly, the judgment of the Minnesota Supreme Court was reversed in favor of the defendant-publisher.⁵⁷

B. *New York Times Co. v. United States (Pentagon Papers Case)*⁵⁸

Forty years after the *Near* decision, the Supreme Court once again revisited the issue of prior restraint on publication.⁵⁹ In *New York Times Co. v. United States*, perhaps more readily known as the *Pentagon Papers Case*, the Court was forced to determine the constitutionality of injunctions placed on the publication of a classified Department of Defense (DoD) study in two major newspapers.⁶⁰ The study, entitled “History of U.S. Decision-Making Process on Viet Nam Policy,” was leaked by one of its DoD authors to both the *New York Times* and the *Washington Post*.⁶¹

⁵¹ *Id.* at 713–14 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52).

⁵² *Id.* at 719–20.

⁵³ *Id.* at 720.

⁵⁴ *Id.* at 716.

⁵⁵ See Meyerson, *supra* note 35, at 1091–92. In a broad sense, the four exceptions that Chief Justice Hughes articulates are: (1) cases involving national security; (2) publications of obscenities; (3) incitements of violence; and (4) situations where it is necessary to protect private rights according to equitable principles. See *id.* at 1106.

⁵⁶ *Near*, 283 U.S. at 716.

⁵⁷ *Id.* at 722–23.

⁵⁸ 403 U.S. 713 (1971) (per curiam).

⁵⁹ *Id.* at 714.

⁶⁰ See JOE MATHEWSON, THE SUPREME COURT AND THE PRESS: THE INDISPENSABLE CONFLICT 34 (2011).

⁶¹ *Id.*

The newspapers, after considering the implications of the study, began printing excerpts from what began to be called the Pentagon Papers.⁶²

The United States sought to enjoin future publication of the study, arguing that its dissemination posed a serious threat to national security, and that accordingly, the Executive branch was constitutionally permitted to take action to protect the safety of the country.⁶³ The district courts refused to enjoin the publishers, finding that the government had not met its heavy burden in demonstrating the need for prior restraint.⁶⁴

In a 6–3 per curiam opinion, with each of the nine justices adding their own concurring or dissenting opinions, the Court affirmed the decision of the district courts.⁶⁵ Though the opinions differed in their interpretations of prior restraint and the case at bar, the per curiam opinion recognized that with prior restraint, there came “a heavy presumption against its constitutional validity.”⁶⁶

In his concurring opinion, Justice White writes: “I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.”⁶⁷ The Justice goes on to recognize that there may be instances, even in the case of the Pentagon Papers, where publication will likely lead to “substantial damage to public interests.”⁶⁸ Nevertheless, Justice White found that the government had not met the high burden necessary to justify prior restraint being placed on the publication of this information.⁶⁹ Though the concurring opinion fails to include a defined articulation of what the government would need to show in order to justify an injunction against publication, it does suggest that the Court may be more inclined to uphold instances of prior restraint if Congress were to designate certain types of publications that posed a particular threat to national security.⁷⁰

Justice Stewart, in his concurring opinion, largely echoes the same idea that a free and robust press permitted to publish without impediment is key to an enlightened citizenry.⁷¹ The concurrence suggests that although the publication of certain sensitive information could be incredibly detrimental to national security, there are adequate remedies to the situation in the form of criminal laws that would permit subsequent punishment in the applicable circumstances.⁷² Justice Stewart concludes his opinion by suggesting, perhaps inadvertently, a standard in which to determine when the national security exception articulated in *Near* can come into play.⁷³ He

⁶² *Id.*

⁶³ *N.Y. Times Co.*, 403 U.S. at 717–18 (Black, J., concurring).

⁶⁴ *Id.* at 714 (per curiam).

⁶⁵ *See id.* (citations omitted).

⁶⁶ *Id.*

⁶⁷ *Id.* at 731 (White, J., concurring).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* at 732–33.

⁷¹ *See id.* at 728 (Stewart, J., concurring).

⁷² *Id.* at 730.

⁷³ *See id.*

suggests that the government may have been successful if it were able to show that the publication of the sensitive information would lead to “direct, immediate, and irreparable damage to our Nation or its people.”⁷⁴

C. *United States v. Featherston*⁷⁵

Following on the heels of the *New York Times Co.* decision, the Fifth Circuit, in 1972, affirmed the convictions of two leaders of the Black Afro Militant Movement (BAMM) who provided instructions to the group’s members on how to craft incendiary and explosive devices.⁷⁶ The court found that the group had violated 18 U.S.C. § 231(a)(1),⁷⁷ which criminalized the act of teaching another to create explosives or firearms with the knowledge that that information would be used in the furtherance of a civil disturbance.⁷⁸

The court, on the grounds that the dissemination of such information was a “clear and present danger” to society, as that standard was articulated in *Dennis v. United States*,⁷⁹ upheld the convictions of the defendants.⁸⁰ As one scholar explained, “[w]hile the basis for the court’s rejection of [defendants’] First Amendment [argument] is not crystal clear, the court appears to distinguish between protected ‘advocacy’ and specific instructions on how to commit crimes.”⁸¹ Thus,

⁷⁴ *Id.*

⁷⁵ 461 F.2d 1119 (5th Cir. 1972), *cert. denied*, 409 U.S. 991 (1972).

⁷⁶ *Id.* at 1121, 1123.

⁷⁷ This statute provides:

Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function . . . [s]hall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 231(a)(1) (1994).

⁷⁸ *Featherston*, 461 F.2d at 1121.

⁷⁹ 341 U.S. 494 (1951). The *Dennis* Court was concerned with potential threats to the United States that were internal in nature, as opposed to external invasions or attacks. *See id.* at 509. In articulating what the phrase “clear and present danger” meant, the Court stated: “[T]he words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed . . .” *Id.* *But see* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). *Brandenburg* established the “incitement to lawless action” standard, which moves away from the “clear and present danger” doctrine on which *Dennis* purported to rely.” *See id.* at 448–49; *id.* at 449–50 (Black, J., concurring).

⁸⁰ *See* Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 17 (2012).

⁸¹ *Id.*

the dangerousness of the defendants' convictions was apparently evidenced by the movement's professed plans for the "coming revolution" in addition to the idea that the instructions themselves contained potentially endangering information.⁸²

*D. United States v. Progressive, Inc.*⁸³

In 1979, the Department of Justice brought suit under the Atomic Energy Act⁸⁴ against *The Progressive*, a Wisconsin-based magazine in order to enjoin them from publishing an article entitled, "The H-Bomb Secret: How We Got It, Why We're Telling It."⁸⁵ The article allegedly included information, some already within the public domain and some not, which explained how a hydrogen bomb is designed and how it functions.⁸⁶ The government argued that "its national security interest . . . permits it to impress . . . censorship upon information originating in the public domain, if when drawn together, synthesized and collated, such information acquires the character of presenting immediate, direct and irreparable harm to the interests of the United States."⁸⁷

While recognizing that any prior restraint on publication comes into court with a heavy presumption against its constitutional validity, the court nevertheless found that the article in this case fell into the narrowly defined national security exception that was articulated in *Near*.⁸⁸ In discussing the potentially harmful nature of the publication in question, the opinion states: "What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself."⁸⁹

After balancing the need for free speech protections and national security concerns, the court found that the risk involved in the unbridled publication of such sensitive information was simply too important.⁹⁰ The opinion stated that it was better to err on the side of caution, for the proliferation of such information "could pave the way for thermonuclear annihilation . . ."⁹¹ If such destruction were to occur, "our right to life [would be] extinguished and the right to publish [would become] moot."⁹² The court ultimately imposed a temporary restraining order on the defendant, marking

⁸² See *Featherston*, 461 F.2d at 1122–23.

⁸³ 467 F. Supp. 990 (W.D. Wis. 1979).

⁸⁴ 42 U.S.C. § 2280 (2012).

⁸⁵ HENTOFF, *supra* note 42, at 213.

⁸⁶ See *id.* at 213–14.

⁸⁷ *Progressive*, 467 F. Supp. at 991.

⁸⁸ *Id.* at 992–93, 996.

⁸⁹ *Id.* at 995.

⁹⁰ See *id.* at 996.

⁹¹ *Id.*

⁹² *Id.*

the first time in American history that a preliminary injunction was granted against press publication.⁹³

Perhaps more elucidating than the order itself is the manner in which the court rationalized its decision against the defendant’s arguments. *The Progressive* raised several points in relation to the precedent which seemed to be clearly in their favor.⁹⁴ Essentially, the defendant argued two main, interrelated points: (1) the publication in question was the product of information already in the public domain,⁹⁵ and (2) the idea that the publication would lead to grave and irreparable harm, as articulated in *New York Times Co.*, was too attenuated, especially when considering the fact that the nation was not currently at war.⁹⁶

In response to the first argument raised, the court and the government conceded that some of the information presented in the proposed publication was indeed available in the public sphere.⁹⁷ But the court went on to state that “[e]ven 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 expertise to recognize relevant, as opposed to irrelevant, information and to assimilate the information obtained.”⁹⁸ Stated differently, the court reasoned that the author was only able to produce the article due to his individual skill; after applying this expertise in the collection and compilation of his findings, the author then made the knowledge far more accessible to those without the otherwise requisite skill that was needed.⁹⁹ The opinion states that even though the publication includes information available to the public, and even though the publication would most likely not serve as a “do-it-yourself” guide to hydrogen bomb crafting, the dissemination of this information could “provide a ticket to by-pass blind alleys.”¹⁰⁰

With regards to the defendant’s second argument, the court disagreed with *The Progressive*, finding that there is indeed a threat of grave and irreparable harm associated with the publication of this information.¹⁰¹ Throughout the opinion, the court restates the proposition that annihilation in the form of a hydrogen bomb is one of the gravest threats posed against the country.¹⁰² The court distinguishes this case from *New York Times Co.* because the publication at issue there contained historical data that may simply cause some embarrassment to the United States, rather than an imminent threat to national security.¹⁰³ In addressing the *Near* exception for national

⁹³ HENTOFF, *supra* note 42, at 214–15.

⁹⁴ *Progressive*, 467 F. Supp. at 994.

⁹⁵ *Id.* at 993.

⁹⁶ *Id.* at 991–93.

⁹⁷ *Id.* at 993.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 995–96.

¹⁰² *See id.*

¹⁰³ *Id.* at 994.

security, the court opines that the nature of war and national security threats have changed since the 1930s.¹⁰⁴ “Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced.”¹⁰⁵

No higher court was able to review the decision as the case did not proceed past the Western District Court of Wisconsin.¹⁰⁶ This is due to the fact that three days after the case was argued to the Seventh Circuit, another magazine published essentially the same potentially jeopardizing information that the government was trying to restrain *The Progressive* from publishing.¹⁰⁷ The only difference between this new publication and the *Progressive* article was that the published piece included more information regarding the specific operation of the fusion weapons themselves.¹⁰⁸

II. PROPOSAL FOR INCREASED AVAILABILITY OF PRIOR RESTRAINT IN THE CONTEXT OF DURC

Although there has been a clear interest in addressing the issue of DURC and its publication, little consensus on what should actually be done has thus far emerged.¹⁰⁹ One source of apparent agreement amongst those within and outside of the scientific community, however, is that restraints on DURC publication would most assuredly be struck down as unconstitutional.¹¹⁰ To be clear, however, this is currently little more than an assumption, as no court has ever addressed the constitutionality of different restrictions on DURC or DURC publication.¹¹¹ But in an area of such grave concern—which poses a problem with no immediately apparent solution—why should some form of publication restriction be deemed inherently unlawful without ever looking to its potential merits?

From a policy perspective, outside the realm of constitutional debates, arguments raised in opposition to expanded DURC oversight and calls for increased safeguards

¹⁰⁴ *Id.* at 996.

¹⁰⁵ *Id.*

¹⁰⁶ See Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1349 (2007).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“[T]he government ‘conceded that the secret was indeed out’ and ‘announced that it was abandoning its case.’ In other words, the government’s case that [the *Progressive* author’s] article posed a danger to national security was mooted by the disclosure of information contained nowhere within his work.”).

¹⁰⁹ See Williams, *supra* note 16, at 371 (“Numerous articles appeared in the popular media about . . . the controversy, and the scientific literature abounded with commentary and opinions . . . about the proper balance between the free flow of scientific information, national security and public health and safety. Although the debate has been robust, little consensus has emerged.”).

¹¹⁰ See, e.g., *id.*

¹¹¹ See Vickie J. Williams, *Life Sciences Dual Use Research of Concern, Public Health and Safety, and the Doctrine of Unconstitutional Conditions*, 7 ST. LOUIS U. J. HEALTH L. & POL’Y 81, 83 (2013).

in the publication process have expressed the need to ensure transparency in the community and to guarantee a robustly free system of publication.¹¹² Even proponents of a new regulatory regime have been careful to avoid suggestions of outright prior restraint due to the presumption of unconstitutionality articulated by the Supreme Court.¹¹³ But should this presumption completely invalidate an option that may be more effective in addressing the publication of DURC than the system currently in place?

This Note does not suggest that prior restraints on publication should be more willingly pursued by the government and upheld by the courts in all instances. It does not even necessarily suggest that such censorship would be the most effective way of addressing the national security concerns that arise from the publication of dual use research of concern. Rather, it simply suggests, by way of an examination of the DURC dilemma, that as threats to national security change, so should our constitutional response. The world is not the same as it was in 1931 when the Supreme Court decided *Near v. Minnesota* and established a national security exception where prior restraints could be viewed more favorably by the courts.¹¹⁴ And as the world has changed, so have the national security threats which exist therein.

This Part of the Note will first briefly discuss the potential danger posed by the publication of dual use research of concern and its relation to national security concerns. Secondly, this Part will address how a potential restraint on DURC publication would fit within the general prior restraint framework discussed in Part I. After exploring some of the holdings of the cases discussed above, this Note seeks to demonstrate that although prior restraints have generally been frowned upon by the courts, there is some precedent to suggest that an imposition of such restraint on DURC publications may withstand constitutional scrutiny.

A. DURC: A Modern Threat to National Security

The threat involved in DURC publication is multifaceted: it involves a threat of bioterrorist application, accidental release by the researchers conducting the studies, or accidental exposure by those who may attempt to replicate the published DURC experiments in settings that may not be subject to strenuous oversight policies.¹¹⁵

¹¹² See Christian Enemark, *Influenza Virus Research and EU Export Regulations: Publication, Proliferation, and Pandemic Risks*, 25 MED. L. REV. 293, 304 (2017).

¹¹³ See, e.g., Brian J. Gorman, *Balancing National Security and Open Science: A Proposal for Due Process Vetting*, 7 YALE J.L. & TECH. 491, 500 (2005) (describing prior restraint as a “loathsome option”); Williams, *supra* note 111, at 106–07.

¹¹⁴ 283 U.S. 697 (1931).

¹¹⁵ See Heidi Ledford, *Life Hackers: Amateur Hobbyists Are Creating Home-Brew Molecular-Biology Labs, but Can They Ferment a Revolution?*, 467 NATURE 650, 650–51 (2010), <http://www.nature.com/news/2010/101006/pdf/467650a.pdf> [<http://perma.cc/U29M-F8AB>]; Jonathan E. Suk et al., *Dual-Use Research and Technological Diffusion: Reconsidering the Bioterrorism Threat Spectrum*, 7 PLOS PATHOGENS, 1, 1 (2011), <http://journals.plos.org>

Though the CDC does not currently anticipate any immediate or direct bioterrorist threat,¹¹⁶ the potential for extensive harm remains. One grim assessment of the dangers associated with smallpox stated:

[I]f obtained and intentionally released, smallpox could cause a public health catastrophe because of its communicability. Even a single case could lead to 10 to 20 others. It is estimated that no more than 20% of the population has any immunity from prior vaccination. There is no acceptable treatment, and the communicability by aerosol requires negative-pressure isolation. Therefore, these limited isolation resources in medical facilities would be easily overwhelmed.¹¹⁷

In 2012, the Senate Committee on Homeland Security and Governmental Affairs explored the threat of dual use research of concern.¹¹⁸ It sought to balance the competing interests of the free exchange of scientific information and the necessity of ensuring national security.¹¹⁹ Senator Susan Collins (R-ME) made it clear that the threats of dual use research are real and increasingly prevalent in the modernizing world: “These are not hypothetical threats. Before he was killed, Anwar al-Awlaki [Yemeni-American al-Qaeda propagandist] reportedly sought poisons to attack the United States. Adding to these concerns, the new leader of al-Qaeda has a medical background. Therefore, he may have an even greater interest in pursuing chemical and biological terrorism.”¹²⁰ Senator Joe Lieberman (D-CT) concluded the hearing by recognizing that while the government had a policy in place, there was a continued need to review U.S. policies addressing the problems associated with DURC publication.¹²¹

/plospathogens/article/file?id=10.1371/journal.ppat.1001253&type=printable [http://perma.cc/SQ78-TQCY]; James G. Vanzant, *Dangerous Minds: Controlling the Publication of Biological Research*, 4 HARV. L. & POL’Y REV. ONLINE (2010), <http://harvardlpr.com/online-articles/dangerous-minds-controlling-the-publication-of-biological-research/> [http://perma.cc/2CHG-ANDU].

¹¹⁶ For a general overview of CDC bioterrorism procedures, see *Emergency Preparedness and Response*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://emergency.cdc.gov/bioterrorism/index.asp> [http://perma.cc/V8NQ-KJBB].

¹¹⁷ Mark G. Kortepeter & Gerald W. Parker, *Potential Biological Weapons Threats*, 5 EMERGING INFECTIOUS DISEASES 523, 526 (1999).

¹¹⁸ For a full reading of the reports, see *Biological Security: The Risk of Dual-Use Research: Hearing Before the Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2012).

¹¹⁹ *Id.* at 3 (statement of Sen. Joseph I. Lieberman) (“Those are difficult questions to balance, and again, I repeat that we ask them here in this Committee because of the direct connection between the scientific work and the homeland security of the American people, which it is our first responsibility to protect.”).

¹²⁰ *Id.* at 4 (statement of Sen. Susan Collins).

¹²¹ *See id.* at 28 (“[W]e want the benefits of scientific inquiry. . . . We also need to mitigate

Of particular concern today are the advancements being made in the field of genetic engineering and manipulation, namely with regards to developments in CRISPR-Cas9 technologies.¹²² CRISPR, an acronym for “Clustered, Regularly Interspaced, Short Palindromic Repeats,” is, in relatively simplistic terms, a gene editing process that implements “RNA guided nucleases to make site specific double strand breaks in the genome for the purpose of inactivating genes, modifying mutations, or inserting intact genes.”¹²³ Essentially, CRISPR allows for the manipulation of genetic strands in a manner that is uniquely cost-effective and precise.¹²⁴

The relative availability and precision of this new gene-editing tool has sparked immense interest—and fear—from large segments of the population who, while recognizing its potential for novel advancements in medicine, are concerned with CRISPR’s dual use threat.¹²⁵ Due to the rapid acceptance of this new technology and its broad availability, concerns regarding the potential hazards of CRISPR have not been adequately addressed by either lawmakers or the scientific community itself.¹²⁶ This lack of adequate legislative oversight leaves numerous threats unaddressed, particularly that of bioterrorist application.¹²⁷ “CRISPR’s ease of use . . . means that dangerous outcomes can result . . . Pathogens could be engineered for biological attacks . . . against humans or against the food supply with devastating effects. . . . The problem is always one of uncertain risks at the beginning of the spread of new tools like this.”¹²⁸

Speaking in a sense broader than CRISPR-related threats, it is difficult to quantify the impact or likelihood of any potential bioterrorist attack (and more specifically,

risk, and I think the policy that we have now is clearly aimed at doing exactly that. So we will follow it to see how it is going. Maybe we will come back again and do [another] hearing. . . .”).

¹²² John Laueran, *Gene Editing*, WASH. POST (Nov. 26, 2018), http://www.washingtonpost.com/business/gene-editing/2018/11/26/af0354c6-f1a1-11e8-99c2-cfca6fcf610c_story.html?utm_term=.fbd09babf37b [<http://perma.cc/NF7U-XVNH>].

¹²³ Katherine Drabiak, *Untangling the Promises of Human Genome Editing*, 46 J.L. MED. & ETHICS 991, 991 (2018).

¹²⁴ See Joel Achenbach, *A New CRISPR Breakthrough Could Lead to Simpler, Cheaper Disease Diagnosis*, WASH. POST (Apr. 13, 2017), http://www.washingtonpost.com/news/speaking-of-science/wp/2017/04/13/a-new-crispr-breakthrough-could-lead-to-simpler-cheaper-disease-diagnosis/?utm_term=.32952e0209c1 [<http://perma.cc/2B3A-NP8B>].

¹²⁵ See, e.g., Marc A. Thiessen, *Gene Editing Is Here. It’s an Enormous Threat*, WASH. POST (Nov. 29, 2018), http://www.washingtonpost.com/opinions/gene-editing-is-here-its-an-enormous-threat/2018/11/29/78190c96-f401-11e8-bc79-68604ed88993_story.html?utm_term=.fb4be4409284 [<http://perma.cc/7P8Q-Q6UY>] (“Playing with humanity’s genetic code could open a Pandora’s box. Scientists will eventually be able to alter DNA not just to protect against disease but also to create genetically enhanced human beings. . . . This would have profound societal implications.”).

¹²⁶ See Barry R. Furrow, *The CRISPR-Cas9 Tool of Gene Editing: Cheaper, Faster, Riskier?*, 26 ANN. HEALTH L. 33, 37–38 (2017).

¹²⁷ See *id.* at 38–42.

¹²⁸ *Id.* at 39–40.

the threat associated with the publication of DURC-related information).¹²⁹ The risks inherent in the situation, however, could contribute to a compelling enough government interest in the form of ensuring national security.

B. DURC's Place in Prior Restraint Precedent

Though precedent clearly establishes that any prior restraints placed on publication are immediately viewed by the courts as suspect, courts have allowed prior restraints on publications to preserve national security.¹³⁰ This Section will explore how the issues involving DURC publication fit within a general framework of prior restraint jurisprudence. It will also further attempt to demonstrate that the DURC issue is distinguished from the situations involved in the precedential Supreme Court cases of *Near v. Minnesota*¹³¹ and *New York Times Co.*¹³²

By addressing the potential dangers involved in the publication of dual use research of concern, it will become evident that the DURC dilemma's threat to national security may bring the issue into the realm of a *Near* exception. Ultimately the problems associated with the publication of this sensitive information make the situation more akin to cases like *United States v. Progressive*¹³³ and *United States v. Featherston*.¹³⁴

1. Applying the DURC Issue to *Near v. Minnesota*

As one of the first cases that the Supreme Court heard regarding prior restraint, *Near v. Minnesota* established the enduring precedent that prior restraints on publication should be viewed as immediately suspect.¹³⁵ In *Near*, Justice Hughes wrote that in order to avoid the problems associated with an overly burdensome and restrictive system of publication that plagued Great Britain, the Founding Fathers were careful to ensure broad protections for free speech.¹³⁶ Hughes wrote: "In determining the extent of the

¹²⁹ When it is difficult to objectively assess the risks of different options and situations, the precautionary principle encourages one to consider the worst possible outcomes of different choices and make the choice that avoids them. See David B. Resnik, *H5N1 Avian Flu Research and the Ethics of Knowledge*, 43 HASTINGS CTR. REP. 22, 28 (2013) ("Although we cannot quantify the risks [of publishing DURC-related findings], the threats are plausible and serious. The precautionary principle would instruct us to take reasonable measures to avoid, minimize, or mitigate those risks.").

¹³⁰ See discussion *supra* Part I.

¹³¹ 283 U.S. 697 (1931).

¹³² 403 U.S. 713 (1971).

¹³³ 467 F. Supp. 990 (W.D. Wis. 1979).

¹³⁴ 461 F.2d 1119 (5th Cir. 1972).

¹³⁵ See Richard Favata, Note, *Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169, 172, 175 (2003).

¹³⁶ *Near*, 283 U.S. at 713–14.

constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”¹³⁷ But the opinion does not stop there. The Court carefully articulated exceptions to the general rule, writing that “[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.”¹³⁸

Important to this Note, the exception regarding the sailing dates of transports and the location of troops has historically been interpreted to be a somewhat broader exception for ensuring national security in general.¹³⁹ Though the Supreme Court has never articulated the exact parameters of the national security exception, it has the possibility, at least in a theoretical sense, of reaching situations in which the publication of particularly sensitive information could lead to catastrophic effects on national well-being.¹⁴⁰ Thus, a prior restraint placed on dual use research of concern may at least have the possibility of being shoehorned into the national security exception articulated in *Near*.

It is also important to draw parallels specifically between the issue at hand in *Near* (not just the exceptions articulated) and the issues surrounding DURC. The state statute at issue in *Near* did not seek to address matters of national security.¹⁴¹ It was instead aimed at stamping out obscenities and potentially scandalous or defamatory publications.¹⁴² Perhaps the Supreme Court took such a strong stance in opposition to prior restraint simply because of the issue that was before them at that very moment. Besides its belief that the United States has historically and unequivocally relied on the presumption that prior restraints on publication are an inherent evil, the Court also justified its decision to strike down the state statute based on two other principles.¹⁴³ Firstly, the Court argued that if a party was adversely affected by the scandalous and defamatory publications that the state attempted to stamp out, said party would have a way to get redress post-publication, namely through state libel laws.¹⁴⁴ Secondly, the Court appears to suggest that in cases of defamatory and

¹³⁷ *Id.* at 713.

¹³⁸ *Id.* at 716.

¹³⁹ Roger W. Pincus, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813, 818–19 (1987); Sonja West, *When the President Stopped the Presses*, CNN (Nov. 21, 2017, 10:45 AM), <http://www.cnn.com/2017/11/21/opinions/information-leak-cases-opinion-west/index.html> [<http://perma.cc/BVQ3-J9GB>].

¹⁴⁰ See Pincus, *supra* note 139, at 819. Because the courts have generally not addressed the national security exception in great detail, it is possible that it may only apply in times of war. See *id.* This idea, however, is refuted, at least in some sense, by the exception’s application in *Progressive*. See *infra* Section II.B.4.

¹⁴¹ See Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 303 (2012).

¹⁴² See *id.*; see also *Near*, 283 U.S. at 701–02.

¹⁴³ See *Near*, 283 U.S. at 719–22.

¹⁴⁴ See *id.* at 719–20 (“The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous

obscene remarks, the most effective manner of addressing these problems may be within a marketplace of free ideas, for any impediment to such a system of free speech would be more detrimental than the defamatory or potentially inflammatory remarks themselves.¹⁴⁵

Taken in turn, it is not immediately apparent that these two justifications would also correspond with restrictions placed on dual use publication, or any other matters involving potential threats to national security. With regards to the Court's first justification, there may indeed be a system of subsequent punishments in place for the publication of potential threats to national security.¹⁴⁶ However, these subsequent punishments do not effectively cover what occurs with DURC publications. The jurisprudence in this field of law, specifically with respect to the Espionage Act,¹⁴⁷ has historically involved instances where a government agent has disclosed sensitive and confidential information to another person, rather than delivering it to the press for publication.¹⁴⁸

A journal that publishes the findings of an experiment involving dual use research of concern would most assuredly never be prosecuted under any such statutes. For one, the information that would be published, although sensitive, would not be considered classified government materials. Furthermore, there is even some question as to whether different publishers could ever be prosecuted under the current statutory regimes.¹⁴⁹ It is possible that prosecution under these legislative acts can only be pursued against the government agents who disseminated the sensitive information in the first place, and not the publishers or, more importantly in the context of DURC, the non-governmental scientists conducting the research in the first place.¹⁵⁰ Ultimately, unlike the state libel laws in *Near v. Minnesota*, there is no system of subsequent punishment in place for the proliferation of dual use research that may lead to later catastrophic events.

The second principle that the Court in *Near* seems to rely on to justify its condemnation of prior restraint is the idea that the most effective way of combatting

restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.”).

¹⁴⁵ See *id.* at 721–22.

¹⁴⁶ See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 262–77 (2008) (describing the current statutory regime that addresses the publication of information that poses a threat to national security, including: the Espionage Act, the Atomic Energy Act, and the Intelligence Identities Protection Act).

¹⁴⁷ See generally Espionage Act of 1917, ch. 30, 40 Stat. 217 (current version at 18 U.S.C. §§ 792–99 (2012)).

¹⁴⁸ See generally Papandrea, *supra* note 146.

¹⁴⁹ See *id.* at 282.

¹⁵⁰ See *id.* at 283 (“Whatever the scope of the government’s power to restrict the First Amendment rights of its employees, the Court has been very explicit that a different First Amendment analysis applies to persons who have not voluntarily accepted a position of trust and a duty of confidentiality. Any prosecution against someone without a trust relationship with the government, therefore, must satisfy rigorous First Amendment standards.”).

certain ill-effects of publishing information is to have a system of robust public discussion.¹⁵¹ The concept behind this marketplace of ideas is that the public should be presented with all possible expressions to then consume the most credible source of information.¹⁵² The Supreme Court in *Near* opined that the effects of an impeded marketplace of ideas, especially a robustly open marketplace of ideas, would be far more detrimental than the effects of a scandalous publication.¹⁵³ But in the case of DURC publications, the potential harms associated with it are far greater than the harms associated with the publication of scandalous or defamatory articles.¹⁵⁴

2. Applying the DURC Issue to *New York Times Co.*

The Supreme Court, in *New York Times Co.* helped further elaborate on what the national security exception in *Near* did and did not cover.¹⁵⁵ This case involved a situation in which *The New York Times* and *The Washington Post* both engaged in a publication campaign in which they gradually released excerpts of the Pentagon Papers.¹⁵⁶ The Pentagon Papers, which were leaked by Daniel Ellsberg, a former military analyst, contained a voluminous history of the United States’ involvement in Southeast Asia that was commissioned by Robert MacNamara in 1967.¹⁵⁷

Important to the case’s relevance to the DURC discussion, this particular history of U.S. involvement in Vietnam and the surrounding Southeast countries was just that, a history.¹⁵⁸ The Pentagon Papers, at least as the Supreme Court viewed it, did not include any information that could potentially have an impact on future endangerments of national security.¹⁵⁹ Rather, the Pentagon Papers merely demonstrated that individuals “at the highest levels of the [American] government . . . [had] deliberately deceived the American people” regarding the country’s position and decision-making strategy in the Vietnam War.¹⁶⁰

¹⁵¹ *Near v. Minnesota*, 283 U.S. 697, 721–22 (1931).

¹⁵² Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas,”* 23 SOC. THEORY & PRAC. 235, 236 (1997).

¹⁵³ *Near*, 283 U.S. at 722.

¹⁵⁴ See *supra* Section II.A.

¹⁵⁵ See generally *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁵⁶ See Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. TIMES (Dec. 20, 2017), <http://nyti.ms/2DgpAd4>.

¹⁵⁷ LEE C. BOLLINGER, *UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 21* (2010).

¹⁵⁸ See HENTOFF, *supra* note 42, at 192.

¹⁵⁹ See BOLLINGER, *supra* note 157, at 21–22.

¹⁶⁰ HENTOFF, *supra* note 42, at 192. The Pentagon Papers showed that President Johnson was making efforts to commit more troops to Vietnam, while at the same time condemning his political opponent, Barry Goldwater, for “want[ing] to escalate the war.” *Id.* The Papers also showed instances where leaders of the State and Defense Departments made public announcements that victory in Vietnam was imminent, while privately knowing that the end was nowhere in sight. *Id.*

Nevertheless, the government, in an attempt to enjoin the newspapers from publishing further excerpts from the document, argued that prior restraint should be permitted in this instance because national security would indeed be jeopardized by further dissemination of the information.¹⁶¹ The government argued that by allowing the publication of such sensitive information, the Court would endanger the lives of American prisoners in Vietnam and would weaken the country's ability to engage in foreign policy.¹⁶² But, the Court disagreed, finding that the government had not met its burden to show that such a historical account of United States' involvement would have a substantial enough effect on national security to invoke the *Near* exception for allowing prior restraints on publication.¹⁶³

The issues involving the publication of dual use research of concern can be distinguished from the subject matter at question in *New York Times Co.*¹⁶⁴ There, the information being published was historical,¹⁶⁵ and the government was accordingly unable to demonstrate any semblance of evidence that the publication posed a significant threat to national security, at least not to the extent that the Court felt comfortable in chilling the press's First Amendment protections.¹⁶⁶ As demonstrated earlier in this Note, the publication of novel dual use research is not merely a summary of past events—instead, it is a potential blueprint for future, nefarious purposes.¹⁶⁷ Dual use research of concern should thus be interpreted more in line with the *Near* Court's articulation of threats to the traditional sanctity of the American military.¹⁶⁸

Although the Court in *New York Times Co.* reaffirmed the idea expressed in *Near v. Minnesota* that prior restraints are viewed with a presumption of invalidity,¹⁶⁹ a

¹⁶¹ *N.Y. Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring).

¹⁶² HENTOFF, *supra* note 42, at 192–93. The government took the position that “other nations would no longer trust the ability of the [United States'] leaders to maintain the total confidentiality” required in diplomatic dealings. *Id.*

¹⁶³ *N.Y. Times Co.*, 403 U.S. at 713–14 (per curiam); see also *id.* at 729–30 (Stewart, J., concurring).

¹⁶⁴ See *infra* notes 164–67 and accompanying text.

¹⁶⁵ *N.Y. Times Co.*, 403 U.S. at 722 n.3 (Douglas, J., concurring) (“I had gone over the material listed in the *in camera* brief of the United States. It is all history, not future events.”).

¹⁶⁶ *Id.* at 726 (Brennan, J., concurring) (“Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.”).

¹⁶⁷ See *supra* notes 8–13 and accompanying text; see also *Environmental Health and Safety: Dual Use Research of Concern (DURC)*, U. MD. BALT., <http://www.umaryland.edu/ehs/programs/biosafety/dual-use-research-of-concern-durc/> [<http://perma.cc/TE8A-XFKJ>] (last visited Oct. 16, 2019).

¹⁶⁸ *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“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.”).

¹⁶⁹ *N.Y. Times Co.*, 403 U.S. at 714 (per curiam) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

majority of the justices were careful to articulate that the unjustifiability of prior restraints is not absolute.¹⁷⁰ For instance, Justice Stevens did not disclose the possibility of prior restraints being placed on the publication of information that could “inevitably, directly, and immediately” lead to a threat to national security.¹⁷¹ As this language appeared in just two of the concurring opinions, the Court did not articulate a proper scope of a national security exception and much less the scope of these three adjectives.¹⁷²

If these words were to be taken at face value, it would appear that any publication, no matter how sensitive and potentially detrimental to national security, would not lead to an inevitable and immediate imperilment to the security of the country.¹⁷³ Even the publication of troop locations, specifically set aside as an exception in *Near*, would not necessarily lead to an inevitable, direct, and immediate cataclysm.¹⁷⁴ Surely, there must be some sort of leeway in determining a publication’s threat to national security, for to take the Court’s phraseology literally would render the exception articulated in *Near* moot.¹⁷⁵

¹⁷⁰ See *id.* at 722 (Douglas, J., concurring) (“We need not decide therefore what leveling effect the war power of Congress might have [on the government’s ability to restrict the freedom of the press here, because this case arises from a war authorized by the president and not Congress].”); *id.* at 724–25 (Brennan, J., concurring) (“[O]ur judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government.”); *id.* at 730 (Stewart, J., concurring) (“I am convinced that the Executive is correct with respect to some of the documents involved[,] [b]ut I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”); *id.* at 731 (White, J., concurring) (“I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.”); *id.* at 742 (Marshall, J., concurring) (“And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President’s mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to ‘national security,’ however that term may be defined.”); *id.* at 749 (Burger, C.J., dissenting) (“[T]he First Amendment right itself is not an absolute”); *id.* at 757 (Harlan, J., dissenting) (“[T]he judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security”); *id.* at 761 (Blackmun, J., dissenting) (“First Amendment absolutism has never commanded a majority of this Court.”).

¹⁷¹ See *id.* at 726–27 (Brennan, J., concurring).

¹⁷² See *id.*; *id.* at 730 (Stewart, J., concurring) (leaving open the possibility of allowing prior restraints for information that “will surely result in direct, immediate, and irreparable damage to our Nation and its people”).

¹⁷³ See *infra* notes 174–75 and accompanying text.

¹⁷⁴ See *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

¹⁷⁵ Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 273–74 (1996) (stating that although the *Near* Court’s articulation of a narrow exception was incredibly vague, it certainly left open some possibility for an exception to the prior restraint jurisprudence based on interests of national security).

Thus, a prior restraint on DURC publications may find its place in this apparent realm of unspecified application of threats deemed to cause “direct, immediate, and irreparable damage to [the] Nation.”¹⁷⁶ *Progressive* will help shed further light on what instances the courts may be inclined to apply this language in allowing prior restraints on particularly harmful publications.¹⁷⁷

3. Applying the DURC Issue to *United States v. Featherston*

From the outset, it is important to recognize that *Featherston* is not a civil case in which the court articulated its finding under a prior restraint analysis.¹⁷⁸ Rather this court affirmed the convictions of the two defendants in question by looking purely at the legislation in question¹⁷⁹ and whether the statute itself violated the defendants’ free speech rights.¹⁸⁰ However, *Featherston* still provides a useful insight into how some courts have sought to guard against the proliferation of scientific or technical information that poses a potential threat to national security.¹⁸¹

Most pertinent to this Note is the manner in which the court articulated the “clear and present danger” test to the facts before it.¹⁸² The court found that the actions of the Black Afro Militant Movement (BAMM) were not constitutionally protected by the First Amendment.¹⁸³ The Fifth Circuit made this determination for a number of reasons.¹⁸⁴ Particularly important to the Circuit’s opinion was “that BAMM was a ‘cohesive and organized group . . . [consisting of] a force regularly trained in explosives and incendiary devices,’” that “oral testimony revealed that the members of BAMM were told to have the ingredients necessary to configure incendiary devices in their homes in order to prepare for the ‘coming revolution,’” and that “[m]embers were also told to be ready to use the devices ‘at a moments notice.’”¹⁸⁵

With all of this being considered, however, there was simply no testimony to suggest that the revolution the defendants were preparing for had a concrete and

¹⁷⁶ *N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring).

¹⁷⁷ See *infra* Section II.B.4.

¹⁷⁸ See *United States v. Featherston*, 461 F.2d 1119, 1120–23 (5th Cir. 1972) (affirming the criminal conviction of two defendants after finding the statutory grounds for the convictions were not unduly vague nor ran afoul of the free speech clause of the First Amendment), *cert. denied*, 409 U.S. 991 (1972).

¹⁷⁹ 18 U.S.C.A. § 231(a)(1) (West 1994).

¹⁸⁰ *Featherston*, 461 F.2d at 1120–21.

¹⁸¹ See Bhagwat, *supra* note 80, at 31 (“*Featherston* . . . could easily have been placed within the category of scientific and technical facts—indeed, *Featherston* might even be considered a case involving military secrets.”).

¹⁸² *Featherston*, 461 F.2d at 1122–23.

¹⁸³ See *id.* at 1121–23.

¹⁸⁴ *Id.*

¹⁸⁵ R.J. Larizza, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?*, 47 MERCER L. REV. 581, 627 (1996) (quoting *Featherston*, 461 F.2d at 1122).

immediately forthcoming start date.¹⁸⁶ The militant movement, though providing technical instructions for future acts of terrorism, did not “set a specific date,” it did not specify exact actions that the movement was planning to take, and it did not articulate any “specific target[.]”¹⁸⁷

All of this is referenced to show that the “clear and present danger” that the *Featherston* court was concerned with, was not necessarily an imminent one.¹⁸⁸ The Fifth Circuit suggested in this case that the First Amendment does not protect speech—or more specifically—instructions that pose a certain kind of threat, even if that threat is simply *speculative* at the time.¹⁸⁹

I again want to recognize that this is not a prior restraint case, but rather one in which the constitutionality of a criminal statute was considered by the court.¹⁹⁰ Additionally, the type of speech at hand in *Featherston* was considered to be “crime-facilitating speech,” as there was truly only one purpose for it—to encourage civil disobedience and destruction.¹⁹¹ This should be juxtaposed with dual use research of concern, which, by its nature, cannot be considered to have solely a criminal purpose.¹⁹² For these reasons, the case is not directly on point with any potential calls for prior restraint to be placed on dual use research of concern publications.

However, I believe the holding of the Fifth Circuit in *Featherston* still helps support an argument in favor of prior restraints on the publication of dual use research of concern. If the courts are willing to entertain situations in which First Amendment protections are waived due to the potential threat that the speech poses, then the opportunity for prior restraints in a DURC context may stand up to judicial scrutiny. The fact that the court was still willing to support a statute that chilled the defendants’ free speech rights, despite there being no particularly imminent attack or even a specified target, helps support the idea that a similar rationale could be

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at 628.

¹⁸⁸ *Featherston*, 461 F.2d at 1122 (“The words ‘clear and present danger’ do not require that the government await the fruition of planned illegal conduct of such nature as is here involved.”).

¹⁸⁹ *See Larizza, supra* note 185, at 628 n.189 (“Arguably, violent acts resulting from training BAMM members in the making of explosive devices could have been months or even years away based on the equivocal statement ‘we must get our heads and minds and bodies right for the revolution, no telling when the revolution might come.’”) (quoting *Featherston*, 461 F.2d at 1123 n.4).

¹⁹⁰ *Featherston*, 461 F.2d at 1120–21.

¹⁹¹ Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1375–76 (2016).

¹⁹² *Dual Use Research of Concern (DURC)*, U. CALIF. IRVINE OFF. OF RESEARCH, <http://www.research.uci.edu/ref/durc/index.html> [<http://perma.cc/P945-CHWD>] (last visited Oct. 16, 2019) (“[DURC] . . . is life sciences research that . . . can be reasonably anticipated to provide knowledge, information, products, or technologies that could be directly misapplied to pose a significant threat, with broad potential consequences, to public health and safety . . . or national security.”).

applied to the type of indeterminate threat posed by the dissemination of dual use research of concern.¹⁹³

4. Applying the DURC Issue to *United States v. Progressive*

Progressive, though useful in analyzing how at least one court has handled the publication of dual use research of concern, has not necessarily been well-received¹⁹⁴ and its reasoning was never reviewed by a higher court.¹⁹⁵ In fact, the government dismissed the case just three days after oral argument in front of the Seventh Circuit.¹⁹⁶ For these reasons, I do not suggest that the opinion should be viewed as any form of binding precedent, or even a necessarily persuasive case for future courts to rely on. That said, I find it important to explore the reasoning of the District Court for the Western District of Wisconsin for the primary reason that it is one of the few, if not the only, courts that have explored the issue of prior restraints being placed on DURC publications (though the court never explicitly considered the issue as such).¹⁹⁷

It is important to draw parallels between the actual information that was to be published in *Progressive* with the type of information that is associated with dual use research of concern. In *Progressive*, the court was concerned with the publication of technical information that could be used for nefarious purposes, writing

¹⁹³ One of the common criticisms of imposing restraints on the publication of dual use research of concern is the idea that it is nearly impossible to measure the probability of an attack, or the causation between the publication of DURC and mal-intentioned applications of that information. See, e.g., Michael J. Imperiale & Arturo Casadevall, *A New Synthesis for Dual Use Research of Concern*, 12 PLOS MED. 1, 3–4 (2015), <http://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1001813&type=printable> [<http://perma.cc/HK3B-5THX>] (“Attempts have been made to estimate the probability of an accident, and while there is disagreement about the actual numbers, the chances are clearly greater than zero. We are faced with risks of bioterror and biosafety breaches that we can only guess at or estimate.”).

¹⁹⁴ See, e.g., John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 423–24 (1993) (“[I]t seems very likely that *Pentagon Papers* . . . calls for rejection of injunction claims like those advanced by the Government in the *Progressive* case.”); Williams, *supra* note 16, at 364 (“The ensuing court case [*Progressive*], and what happened while the case was pending, illustrates the law’s inadequacy to deal with threats posed by publication of DURC that is in private hands.”).

¹⁹⁵ Williams, *supra* note 16, at 364.

¹⁹⁶ Masur, *supra* note 106, at 1349.

¹⁹⁷ Though not recognizing the issue as one of dual use research of concern, the court struggled with the conflicting goals of facilitating the open exchange of useful, technical information and ensuring safety. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979) (“A mistake in ruling against *The Progressive* will seriously infringe cherished First Amendment rights. . . . It will infringe upon our right to know and to be informed as well. A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all.”).

specifically that “this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.”¹⁹⁸ Arguably, this information could have also been used in the name of expanding scientific understanding, just as dual use research of concern seeks to do with publications regarding life sciences research.¹⁹⁹

The court’s opinion, while recognizing the heavy presumption against prior restraint in American jurisprudence, ultimately feared the dangers of thermonuclear annihilation more than it feared the necessary chilling effect on free speech protections for the publisher.²⁰⁰ In other words, “the district court placed ‘the right to life, liberty and the pursuit of happiness’ above the freedom of the press in its ‘hierarchy of values.’”²⁰¹ Prior restraint on dual use research of concern, as has previously been argued in this Note, finds its justification on these grounds for national security.

The threat of ill-intentioned bioterrorist application of DURC, as the threat of “thermonuclear annihilation”²⁰² in *Progressive*, is incredibly grave, and its impact on society’s well-being cannot be understated.²⁰³ While a fear of global, thermonuclear proliferation is not merely a relict of the Cold War,²⁰⁴ the fears have at least changed to encompass the threat of bioterrorism as well.²⁰⁵ This modern threat, with its cataclysmic potential, should be considered in the same manner as the threat of nuclear annihilation was considered by the *Progressive*.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 995–96 (“Erwin Knoll, the editor of *The Progressive*, state[d] he [was] ‘totally convinced that publication of the article will be of substantial benefit . . . because it will demonstrate that this country’s security does not lie in an oppressive . . . system of secrecy . . . but in open, honest, and informed public debate’”).

²⁰⁰ *Id.* at 995–97.

²⁰¹ Kyle Witucky, Comment, *Striking the Optimal Balance Point Between National Security and a Free Press: A Model Statute and a Call to Congress*, 38 CAP. U. L. REV. 567, 583 (2010).

²⁰² *Progressive, Inc.*, 467 F. Supp. at 995 (“What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself.”).

²⁰³ *See supra* Section II.A.

²⁰⁴ Jonathan Hunt, *Why the Arms Race Is Still White Hot Decades After the Cold War Ended—and How to Stop It*, WASH. POST (Nov. 2, 2018), http://www.washingtonpost.com/outlook/2018/11/02/why-arms-race-is-still-white-hot-decades-after-cold-war-ended-and-how-stop-it/?utm_term=.602ab79beae6 [<http://perma.cc/GG7J-CDNG>] (“[D]id the Cold War arms race actually end, or have we merely sat through a 30-year intermission? Nuclear arms control is not just stuck in neutral, it is shifting into reverse, worldwide. Every nuclear-weapon state is now modernizing its arsenal.”).

²⁰⁵ Dean A. Wilkening, *BCW Attack Scenarios*, in *THE NEW TERROR: FACING THE THREAT OF BIOLOGICAL AND CHEMICAL WEAPONS* 76, 96 (Sidney D. Drell et al. eds., 1999) (“States may have a greater incentive to acquire BCW [biological and chemical weapons] today for their security because the international system is less stable now than in the bipolar Cold War era.”).

CONCLUSION

Freedom of speech, and particularly freedom from censorship, is necessary for the functioning of an ordered democracy. It ensures that the represented people will have an avenue to voice their concerns and criticisms of the government without having to resort to revolution. It allows a multitude of ideas and expressions to be considered in the marketplace of ideas. And, pertinent to this Note, it helps facilitate the advancement of knowledge, which one would hope to be used exclusively for beneficial purposes. The First Amendment's unique importance in American governance is exemplified by the Supreme Court's opinion in *Near*: "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."²⁰⁶

However, not all speech is for benevolent purposes, and even when such expression is well-intentioned, it can still lead to unforeseen, harmful circumstances. It is for this reason that not all speech is protected, and it is arguably the reason that the Supreme Court has articulated certain instances where prior restraints on publication are permitted. It is in the context of these articulated exceptions, namely the exception for national security, that an argument can be made for constitutionally permissible prior restraints being placed on the publication of dual use research of concern.

While recognizing the immense importance of free speech protections, the threat that unregulated DURC publication poses is immense. Although it is far from clear that outright restraints are the best way to address the threat, or even a particularly practical way to address it, its sensibleness should be explored, free from the idea that *all* prior restraints are immediately violative of the First Amendment.

²⁰⁶ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).