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United States v. Progressive, Inc.: The National Security and Free Speech Conflict

Janet M. Nesse

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COMMENTS

UNITED STATES *v.* PROGRESSIVE, INC.. THE NATIONAL SECURITY AND FREE SPEECH CONFLICT

The first amendment of the Constitution grants a broad guarantee of freedom to the press.¹ This freedom, however, is not absolute.² One limitation on the first amendment involves the protection of national security; a publication that endangers the safety of the United States may be proscribed.³ The United States District Court for the Western District of Wisconsin confronted these conflicting interests of national security and freedom of the press in *United States v. Progressive, Inc.*⁴

In *Progressive*, Judge Warren granted a preliminary injunction that prevented The Progressive magazine from publishing an article on thermonuclear weaponry until specified portions were deleted.⁵ The disputed sections contained technical information about the construction of nuclear weapons that the government claimed would endanger the national security by assisting other nations to produce thermonuclear weapons.⁶ In granting the injunction, the district court was the first to authorize a prior restraint on the press based on national security interests.

This Comment will explore the history of litigation in the field of prior restraints on the press and will explain how Judge Warren's decision departed from precedent. Based on this review of prior case law, the Comment concludes that the court misapplied both

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

2. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 708, 716 (1931); *Whitney v. California*, 274 U.S. 357, 371-73 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

3. *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1918)).

4. 467 F Supp. 990 (W.D. Wis.), *dismissed*, No. 79-1428 (7th Cir. Oct. 1, 1979).

5. *Id.* at 997.

6. *Id.* at 995.

the Atomic Energy Act of 1954,⁷ under which the government proceeded, and the standards that govern injunctive relief in first amendment cases. Through its errors, the court severely diminished the scope and force of the first amendment guarantee of freedom of the press.

UNITED STATES v PROGRESSIVE, INC.

In *Progressive*, the government sought to restrain publication of a magazine article on nuclear weapons written by Robert Morland. The *Progressive* magazine assigned Morland to research and write an article about the hydrogen bomb.⁸ Morland then assimilated information gathered from the public domain⁹ into the contested concepts, obtaining some information independently and other data from government officials. The magazine's managing editor submitted a copy of Morland's article, entitled "The H-Bomb Secret — How We Got It, Why We're Telling It," to the Department of Energy, requesting verification of its technical accuracy. After reviewing the article, the Department of Energy determined that it contained restricted data, publication of which would constitute a violation of the Atomic Energy Act. When the magazine announced that it intended to publish the full article, the government sought a restraining order. In the action to enjoin publication of the article in its original form, the government relied on the Atomic Energy Act, which permits restraining orders when the Department of Energy decides that important secrets will be re-

7. 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975).

8. 467 F Supp. at 998.

9. *Id.* at 991. The government argued that although the information was in the public domain, it could impress classification on such information if, "when drawn together, synthesized and collated, such information acquire[d] the character of presenting immediate, direct and irreparable harm to the interests of the United States." *Id.* In accepting this argument, the court determined that the public nature of the information was irrelevant when the publication "would surely result in direct, immediate, and irreparable harm." *Id.* at 996.

That material may be "classified at birth" has been accepted by other courts. In *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975), the Fourth Circuit concluded that the appropriate inquiry in determining what information is in the public domain is whether the information is "so generally believed to be true" that publication would have no impact. *Id.* at 1370-71. See also *Aspin v. Department of Defense*, 453 F Supp. 520 (E.D. Wis. 1978); *Halperin v. CIA*, 446 F Supp. 661 (D.D.C. 1978).

vealed.¹⁰ In response, the magazine asserted that an injunction would contravene fundamental first amendment principles.¹¹

The opinion balanced the conflicting claims of national security and freedom of the press by relying primarily on *Near v. Minnesota*,¹² in which the Supreme Court first mentioned the national security exception to first amendment protection, and by distinguishing *New York Times v. United States*,¹³ in which the Court declined to apply this exception. Judge Warren reasoned that if the article served to accelerate, even slightly, the rate at which another country might develop nuclear weaponry, then such aid could be disastrous because of the deadly nature of such weapons. His decision rested on the assumption that the addition of nations to the nuclear community would increase the likelihood of a nuclear holocaust.¹⁴ He noted that if the right to live were balanced against freedom of the press, the first amendment would fade in importance because without life, the issue of self-expression necessarily would be moot.¹⁵ Moreover, the court discerned no reason why technical aspects of hydrogen bomb construction would be essential to the first amendment object of preserving the public's right to engage in informed discussion.¹⁶ Evaluation of the cogency of Judge Warren's analysis requires an understanding of the effect of the first amendment on prior restraints of publication and a determination of the effect, if any, of congressional authorization on the validity of these restraints.

PRIOR RESTRAINTS

The first amendment and judicial interpretation of its provisions rest philosophically on the concept that a free exchange of ideas is essential to the discovery of truth and the maintenance of a political democracy.¹⁷ A prior restraint by definition inhibits this ex-

10. Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975).

11. 467 F. Supp. at 991.

12. 283 U.S. 697 (1931).

13. 403 U.S. 713 (1971).

14. 467 F. Supp. at 996.

15. *Id.* at 995-96.

16. *Id.* at 994.

17. The courts have subscribed to the view that truth emerges from open debate. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); *Abrams v.*

change of ideas because it withholds from the public the opportunity to appraise the content and merit of a concept. Such censorship is subject to the abuses of arbitrariness and discrimination imposed by those who administer it.¹⁸ If prior restraints were permitted, then a publisher no longer would have the option of airing his ideas and subsequently submitting to statutory punishment. For these reasons, courts burden prior restraints with a heavy presumption of invalidity¹⁹

Historically, prior restraints exercised through licensing systems have proved extremely effective in controlling the press. Prior restraints thus have been favored by those who wish to control public opinion,²⁰ and opposed by authorities such as Blackstone, who believed freedom from prior restraints is the essence of a free press.²¹ Blackstone's view prevailed in the United States and the

United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Alexander Meiklejohn is the chief proponent of the theory that the major function of the freedom of speech is the facilitation of open political discourse within a democratic society. *See generally* A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1st ed. 1948).

18. Thomas Emerson, a first amendment scholar, wrote that a system of prior restraint is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970). *See also* Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROB.* 648, 658 (1955); Litwack, *The Doctrine of Prior Restraint*, 12 *HARV. C.R.-C.L. L. REV.* 519 (1977).

John Milton viewed the system with suspicion because of the kind of man who fills the role of censor. Milton wrote,

[T]here cannot be a more tedious and displeasing journeywork, a greater loss of time levied upon his head, than to be made perpetual reader of unchosen books and pamphlets [W]e may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary.

J. MILTON, *AREOPAGITICA* 20-21 (Everyman ed. 1927).

19. *See, e.g.,* *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

20. Such authority has been wielded both by religious and secular authorities. For example, in 1501, Pope Alexander VI issued a papal bull prohibiting unlicensed printing. 4 *W. HOLDSWORTH, A HISTORY OF ENGLISH LAW* 360-79 (2d ed. 1937). Similar control and censorship were exercised by Parliament through the Licensing Act, 13 & 14 Car. 2, c. 33 (1662). *See* Emerson, *supra* note 18, at 650.

21. The liberty of the press is indeed essential to the nature of a free state; but this

elimination of prior restraints was a primary target of the first amendment.

Prior restraints on the press so seldom are requested or granted that little case law exists on the subject. The significant cases that discuss the issue are *Near v. Minnesota*²² and *New York Times v. United States*.²³ In neither decision was the prior restraint upheld. In *Near*, however, the Supreme Court stated that the prior restraints might be valid in cases of national emergency.²⁴ The Court expanded this position in *Times Film Corp. v. City of Chicago*²⁵ by refusing to invalidate on its face a law that required that all movies be reviewed by a film board before screening. The decision indicated that a prior restraint is not invalid per se, but must be judged on its merits with careful scrutiny of the factual circumstances.²⁶

In *Progressive*, the government relied on the national security exception enunciated in *Near*.²⁷ In *Near*, the State of Minnesota attempted to exercise a prior restraint on the press through a statute that provided that a publisher of a defamatory newspaper or magazine was guilty of a nuisance and could be enjoined from future violations.²⁸ Despite the scurrilous nature of the newspaper

consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press.

4 W. BLACKSTONE, COMMENTARIES *151-52 (emphasis original). For examples of decisions adopting Blackstone's view, see *Near v. Minnesota*, 283 U.S. 697; 713 (1931) and *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

22. 283 U.S. 697 (1931).

23. 403 U.S. 713 (1971).

24. 283 U.S. at 716.

25. 365 U.S. 43 (1961).

26. *Id.* at 49-50.

27. 467 F. Supp. at 996.

28. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

involved,²⁹ the Supreme Court held that the law was unconstitutional because it suppressed and censored the publisher, thus contravening the intent of the drafters of the Bill of Rights.³⁰ The Court noted that such restraints are invalid except in severely limited circumstances, such as times of war. Even during war, however, the permissible restraints were narrow: "[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."³¹

The Court in *Near* cited *Schenck v. United States*³² as authority for this position. The defendants in *Schenck* had distributed anti-war, socialist propaganda during World War I and were prosecuted under the Espionage Act of 1917.³³ The Court upheld the conviction of the propagandists, saying, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."³⁴ The Court's reference to *Schenck* indicated that the exception to the rule against prior restraints was associated specifically with wartime. This strict standard of review for prior restraints has operated from 1931 when *Near* was decided until the present day.

Although Judge Warren relied heavily on *Near*, *Progressive* is distinguishable from *Near* and *Schenck* in several respects. These earlier cases referred to national security during wartime. *Progressive*, however, must be viewed within a peacetime context even though, as Judge Warren noted, the nature of nuclear weapons makes war an imminent possibility.³⁵ Notwithstanding this omnipresent danger, to judge all speech for the duration of the nuclear

1925 Minn. Laws ch. 285, quoted in *Near v. Minnesota*, 283 U.S. 697, 702 (1931).

29. The dissenting opinion quoted the following excerpt from the newspaper as typical: "Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW" 283 U.S. at 724 n.1 (Butler, J., dissenting).

30. *Id.* at 722-23.

31. *Id.* at 716 (citing *Z. CHAFEE, FREEDOM OF SPEECH* 10).

32. 249 U.S. 47 (1919).

33. Pub. L. No. 24, § 3, 40 Stat. 217 (1917) (current version at 18 U.S.C. § 794 (1970)).

34. 249 U.S. at 52.

35. 467 F Supp. at 996.

age by a wartime standard would inhibit materially the right of expression.

In *Schenck*, Justice Holmes enunciated a test for identifying words that could be prosecuted over first amendment objections. The words must constitute a "clear and present danger" of evils that Congress has the right to prohibit.³⁶ Like the publication in *Near*, the magazine article in *Progressive* fulfilled neither element of this test. Two camps of eminent scientists disagreed on whether the information would harm the United States;³⁷ the danger thus was far from clear. Even if a danger did exist, it was not a present danger. Judge Warren agreed that the information in the Morland article only could have advanced the future date at which a country would be able to explode a thermonuclear device.³⁸ For these reasons, this case fell outside the narrow limits delineated by the Court in *Near* as they were formulated in *Schenck*.

Examples of governmental attempts to impose prior restraints on the press for national security reasons seldom arise; the last such case was *New York Times v. United States*.³⁹ The New York Times and Washington Post were preparing to publish documents entitled "History of U.S. Decision-Making Process on Vietnam Policy," otherwise known as the Pentagon Papers.⁴⁰ The documents contained a comprehensive, top secret review of American involvement in Indochina, which was commissioned by Robert McNamara in 1967 and included details of covert operations, secret decisions, and all phases of executive policy making. The government attempted to suppress publication of the documents on the basis of national security, asserting that the case fell within the rule of *Near* and *Schenck*. Rejecting the government's claim, the Supreme Court issued a per curiam opinion based on a vote of six to three, that stated only that the government had failed to meet the heavy burden against the validity of a prior restraint.⁴¹

36. 249 U.S. at 52. In *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes reformulated the test in *Near* as a requirement of "a present danger of immediate evil." *Id.* at 628 (Holmes, J., dissenting).

37. Affidavit of Sewell at —, Affidavit of Pickering at —, Affidavit of Van Doren at —.

38. 467 F Supp. at 994.

39. 403 U.S. 713 (1971).

40. THE NEW YORK TIMES, THE PENTAGON PAPERS (1971).

41. 403 U.S. at 714. The three dissenting Justices, Burger, Harlan and Blackmun, were

In *Progressive*, Judge Warren distinguished *New York Times* on three grounds. In *New York Times*, the government had shown no cogent reason why the release of the information would injure the United States; in *Progressive*, however, the government provided convincing reasons. In addition, the information in the Pentagon Papers was historical, whereas the Morland article reported technical data. Finally, in *New York Times* the government based its case solely on executive privilege; in *Progressive*, the government acted under the auspices of a specific statute.⁴²

Judge Warren's first distinction, based on the "cogent reasons" presented in *Progressive*, merits criticism. In *New York Times*, Justice White voted for disclosure even though he believed publication would do serious damage to the United States.⁴³ Justice Douglas also noted in his opinion that the documents might well have a serious impact on the country,⁴⁴ and Justice Stewart discussed his fear that the loss of credibility occasioned by publication of the Pentagon Papers would damage the ability of the President to conduct foreign affairs.⁴⁵ These Justices recognized the potentially serious consequences of publication of the material, indicating that the government in that case likewise offered cogent reasons why publication should not occur. Judge Warren's distinction between the two cases on this basis thus was invalid. Cogent reasons not to publish alone do not constitute a sufficient basis for issuance of an injunction.

Judge Warren also stated that the technical information included in the magazine's proposed article was more damaging than the historical information in the Pentagon Papers, which concerned events that had occurred between three and twenty years

opposed more to the Court's procedure than to its opinion on the merits. Each believed the Court had rushed its decision without due care and investigation. Chief Justice Burger said he had no time to review the case in detail and felt that the Court should have considered the illegal methods by which the documents were obtained. *Id.* at 750-52 (Burger, C.J., dissenting). Justice Harlan characterized the Court's action as "irresponsibly feverish." *Id.* at 753 (Harlan, J., dissenting). Justice Blackmun said that, because of extreme haste, the Court's decision had "much writing about the law and little knowledge and less digestion of the facts." *Id.* at 760 (Blackmun, J., dissenting).

42. 467 F. Supp. at 994.

43. 403 U.S. at 731 (White, J., concurring).

44. *Id.* at 722-23 (Douglas, J., concurring).

45. *Id.* at 729-30 (Stewart, J., concurring).

before the publication controversy arose.⁴⁶ This second distinction is invalid for two reasons. First, the disclosure of historical data can be extremely damaging, as recognized in *New York Times*.⁴⁷ Second, the historical nature of the data was not mentioned at any length in the several opinions in *New York Times*, indicating that the Justices considered this irrelevant to the decision.

CONGRESSIONAL AUTHORIZATION

Distinguishing *New York Times* and *Progressive* on the basis that the latter involved a statute presents a more complicated issue. Some of the Justices in *New York Times* discussed the hypothetical effect of a statute on the case although none existed. According to Justices Black and Douglas, congressional authorization could not legitimize any prior restraint because the first amendment states that Congress can make "no law" abridging freedom of the press.⁴⁸ Justice Stewart recognized that if Congress passed a specific law authorizing injunctive proceedings, the Court would have to decide both its applicability and its constitutionality.⁴⁹ An injunction authorized by Congress may be unconstitutional because, in the words of James Madison, the Bill of Rights was designed to be "an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."⁵⁰

The statute cited in *Progressive* as congressional authorization for an injunction was the Atomic Energy Act of 1954.⁵¹ Reliance on this statute, however, was misplaced. First, the Act was inapplicable to the facts presented. Second, the Act itself is unconstitutionally vague and overbroad.⁵²

46. 467 F Supp. at 994.

47. See notes 39-41 *supra* & accompanying text.

48. 403 U.S. at 716-17 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring).

49. *Id.* at 730 (Stewart, J., concurring).

50. 1 ANNALS OF CONGRESS 439 (Gales & Seaton eds. 1789).

51. 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975).

52. "Void for vagueness" is defined as the condition where the statute contains "words and phrases so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law." *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 243 (1932). This test is particularly applicable to the facts of this case because "the standard of definiteness for statutes curtailing free expression is stricter than it is for other

The Atomic Energy Act of 1954 revised the Atomic Energy Act of 1946.⁵³ One of the major purposes of the 1954 amendments, as enunciated by President Eisenhower when he proposed the legislation, was to increase dissemination of information about the atomic bomb to allies. By 1954 the United States no longer had a monopoly on nuclear power; the President thus desired legislation to "make it possible for us to exchange information with our military allies and also to cooperate more closely with friendly nations."⁵⁴

Although Congress retained strict controls on Restricted Data in section 2274, Representative Van Zandt characterized the House bill as "an unequivocal directive to the [Atomic Energy] Commission to maintain continuous review of all classified information and to declassify and publish all scientific and technical data which can be published without undue risk to the common defense and security."⁵⁵ The authors of the statute thus actually intended to maximize dissemination of information to the public.

Congress believed that classifying only information with potentially devastating impact would promote greater overall security and protection of atomic secrets.⁵⁶ The smaller the bulk of material to be safeguarded, the less supervision required. Moreover, if people were aware that only essential documents are classified, they would respect the system more than if they believed that much classified information was harmless. Possibly, the legislators also sought to restrict the quantity of secret information to curb the

types of statutes." Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MTN. L. REV. 275, 288 (1957) (citing *Winters v. New York*, 333 U.S. 507 (1948)).

53. Pub. L. No. 585, 60 Stat. 755 (1946) (current version at 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975)).

54. 100 CONG. REC. 11655 (1954). The American monopoly in nuclear weaponry ended in the summer of 1949 with the Soviet Union's detonation of an atomic bomb. See, e.g., T. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 789 (8th ed. 1969).

55. 100 CONG. REC. at 11672. Representative Van Zandt stated that the bill improved "the policy declarations with respect to the Commission's obligations to control of [sic] information in such manner as to assure the common defense and security and to expand and enlarge the Nation's reservoir of scientific knowledge available to all our teachers and research workers." *Id.*

56. "The joint committee has long been of the opinion that the most effective security is attained only if the areas of information requiring protection are held down to include only that information which positively needs protection." *Id.* The word "positively" indicates that Congress intended to exclude information that would yield only speculative risk.

tendency of the executive branch toward excessive secrecy.⁵⁷

In *Progressive*, the government requested the injunction on the basis of sections 2274(b), 2014(y), and 2280 of the Atomic Energy Act of 1954.⁵⁸ Section 2280 of the Act authorizes the government to seek an injunction if an individual is about to violate a preceding

57. In *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978) (per curiam), a case involving the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. II 1978), the court observed this tendency, saying "Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account." 587 F.2d at 1195. Other commentators also have noted this tendency toward secrecy. See, e.g., Cleveland & Braun, *The Limits of Obsession: Fencing in the "National Security" Claim*, 28 *AN. L. REV.* 327, 333 (1976).

58. 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.

42 U.S.C. § 2014(y) (1970).

Communication of Restricted Data

Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data —

(a) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than \$20,000 or both;

(b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

42 U.S.C. § 2274 (1970).

Injunction proceedings

Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

42 U.S.C. § 2280 (1970).

section of the Act. The government alleged that the author of the article was about to violate section 2274(b),⁵⁹ which prohibits the dissemination of Restricted Data, as defined in section 2014(y).⁶⁰ In section 2274(b), the significant phrase is "reason to believe" it will cause harm.⁶¹ The language requires application of a subjective standard, demonstrating that the subject must have had reason to believe that harm would occur, not that he might have believed or that someone else would have known. The statute leaves no room for speculation about what the publication might or could do.

The Act adapted an accepted common law aim of safeguarding the nation's security to the new problems raised by the proliferation of nuclear weaponry. Section 2274(b) requires that the government show that the release would cause actual harm, thereby protecting the publisher from speculative claims. The wording of the statute resembles that of the Espionage Act of 1919,⁶² which forbade the dissemination of classified documents that would injure the United States. This similarity of language indicates that any constitutional problem with the statute in this case is one of over-interpretation rather than unconstitutional text. Because the courts have upheld the Espionage Act,⁶³ they likewise must uphold the language of the 1954 Act.

Application of the Atomic Energy Act

The first issue raised by the statute is whether the Act is applicable to the facts of *Progressive*. Section 2280 authorizes the government to seek an injunction if an individual is about to violate another part of the statute.⁶⁴ In order to violate section 2274(b), the section in question here, the violator must have reason to believe that publication will injure the United States.⁶⁵ This section

59. 467 F. Supp. at 991, 994.

60. 42 U.S.C. § 2014(y) (1970). For the full text of this section, see note 58 *supra*.

61. 42 U.S.C. § 2274(b) (1970). See note 58 *supra*.

62. Pub. L. No. 24, § 3, 40 Stat. 217 (1917) (current version at 18 U.S.C. § 794 (1970)).

63. See *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946); *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd on other grounds*, 246 F. 24 (2d Cir. 1917).

64. 42 U.S.C. § 2280 (1970).

65. *Id.* § 2274(b) (1970).

is inapplicable to Morland's actions because the information he gathered already was in the public domain.⁶⁶ The government contended that publication of certain pieces of information in the article in conjunction with each other was novel; consequently, even though the information was in the public domain, the synthesis of thought in the article was new, and therefore classified at its inception.⁶⁷

According to *United States v. Heine*,⁶⁸ however, information originating in the public domain cannot be used to prosecute a person under such statutory language. In *Heine*, a German-born American citizen sent large quantities of information about the American aviation industry to Germany during the period immediately preceding American entry into World War II. Heine obtained the information from various public sources, including interviews with people in the aviation industry, but he collated, synthesized, and condensed the data himself.⁶⁹ In an opinion written by Judge Learned Hand, the Second Circuit reversed the conviction obtained against Heine⁷⁰ under the Espionage Act of 1917, which prohibited disclosure of information affecting national defense "with intent or reason to believe it [was] to be used to the injury of the United States or to the advantage of a foreign nation."⁷¹ This language bears a striking resemblance to section 2274(b) in its requirement of reason to believe that injury will occur.

In *Heine*, Judge Hand wrote,

"Where there is no occasion for secrecy, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." Obviously, this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign gov-

66. 467 F Supp. at 993. The government initially contested this assertion by the defendants. *Id.* Also, Howard Morland had no security classification, and his correspondence with government officials showed that he requested unclassified visits. See Letter from James Cannon to Howard Morland, Exhibit B, Record at —.

67. 467 F Supp. at 993.

68. 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946).

69. *Id.* at 814-15.

70. *Id.* at 817.

71. Pub. L. No. 24, § 2, 40 Stat. 217 (1917) (current version at 18 U.S.C. § 794 (1970)).

ernment, the "advantage" intended by the section cannot reside in facilitating its use by condensing and arranging it.⁷²

Heine relates to *Progressive* in the following way. If, as the magazine contends, the information was in the public domain, and this contention was supported by correspondence showing that Morland had no security clearance,⁷³ then he could not have violated section 2274(b) and hence no injunctive relief would have been available under section 2280. The Second Circuit reversed *Heine*'s conviction even though the defendant had both intent and reason to believe that the information would help Germany,⁷⁴ and he operated during the months when the United States aided the Allies but had not yet entered the war.⁷⁵ In contrast, Morland wrote during a time of peace and, under the precedent of *Heine*, had no demonstrable reason to believe his article would be harmful to the United States or helpful to a foreign nation. The government admits in its brief that "if the data in question was already available in the public domain and well known in the scientific community, it is difficult to see how the defendant could have reason to believe that the disclosure would injure the United States."⁷⁶

Although the government concedes that much, if not all, of the information was available individually to the average citizen, the government contends that the disputed article is unique because it combines the individual concepts synergistically for the first time.⁷⁷ One must then weigh a fair reading of the statute and congressional intent to determine whether the law was intended to include relationships among concepts with which the scientific community is already familiar. If these relationships were not within the scope of the legislative intent, then Morland could have had no reason to believe he was injuring the United States or aiding a foreign nation under the requirements of section 2274(b). If he was not about to violate the statute, then the government cannot enforce the injunctive provision of section 2280.

72. 151 F.2d at 817 (quoting *Gorin v. United States*, 312 U.S. 19, 28 (1941)).

73. Letter from James Cannon to Howard Morland, Exhibit B, Record at —.

74. 151 F.2d at 817.

75. See, e.g., J. BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II* 7 (1976).

76. Supplemental Brief of United States, at 11.

77. 467 F Supp. at 993.

The statute not only must be applicable to the facts, it also must be constitutional in application.⁷⁸ In *New York Times*, Justice Brennan said that the government's contentions that the national interest "could," "might," or "may"⁷⁹ be prejudiced by the publication were insufficient because "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."⁸⁰ The government's allegations in *Progressive* contained the same qualified words Brennan condemned, using the words "could" and "might" to describe the potential damage.⁸¹ The word "will," as used in the statute, denotes that the legislators did not intend to prohibit vague and indefinite possible dangers. The statute itself therefore is constitutional. The constitutionally definite wording has been misconstrued by the government in bringing its case, and by Judge Warren in granting the injunction. If the statute were intended to restrain publications like Morland's, the terms "might" and "could" would have been used rather than the definite "will" that actually appears.

PRELIMINARY INJUNCTIONS

Four major factors should be weighed in any case involving a preliminary injunction: the plaintiff's likelihood of success on the merits; the prospect of irreparable harm if the injunction is denied; the comparative hardship the injunction will impose on each party; and the impact of relief on the public interest.⁸² When a court considers a request for prior restraint of material ordinarily protected by the first amendment, these factors are applied strictly and the party seeking to enjoin publication must meet a heavy burden of

78. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied with an evil eye and an unequal hand, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (citing *Soon Hing v. Crowley*, 113 U.S. 703 (1885)); *Neal v. Delaware*, 103 U.S. 370 (1880); *Ex parte Virginia*, 100 U.S. 339 (1879).

79. 403 U.S. at 725-26 (Brennan, J., concurring).

80. *Id.*

81. See Brief of United States, at 15.

82. See, e.g., *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1977). See also 7 MOORE'S FEDERAL PRACTICE ¶ 65.04 (2d ed. 1979); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 430-31 (1971); Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

proof.

The evidence in Judge Warren's opinion suggests that the government did not meet this heavy burden under the four factors. First, the government was unlikely to succeed on the merits. As Judge Warren observed, both sides presented copious evidence from experts with impressive credentials.⁸³ This conflicting testimony indicates no certainty of a threat to national security sufficient to justify a prior restraint on speech. Moreover, the material was in the public domain, further weakening the government's argument.

The government claimed that, without the injunction, irrevocable damage to our national security would ensue.⁸⁴ Although denial of the preliminary injunction would have mooted the issue and irrevocably released the potentially harmful information, if the information was harmless no damage would have resulted. The government then still could have prosecuted Morland and the magazine under section 2274(b) of the Atomic Energy Act. Also, as previously stated, the alleged threat to national security was contested. Indeed, this factor was the central issue of the dispute and as such was inextricably bound in the merits of the case.

With respect to the comparative hardship to the parties, the delay caused by the injunction would impose economic hardship on the magazine. The timeliness of articles necessarily is critical to periodicals to maintain circulation. For example, reader interest in an issue that discussed the merits of the SALT treaty would fade once consideration of the treaty ended.

Finally, in cases such as *Progressive*, the interests of all members of the public are affected, not just the interests of those with standing to litigate.⁸⁵ All Americans have an interest both in national security and in preservation of a free press. If the danger to the nation were compelling, then the public interest would favor suppression of the information. In this case, however, the public interest in a free press outweighed the speculative danger to the nation.

83. 467 F Supp. at 992.

84. *Id.* at 995. The government presented testimony to support its contention from both the Secretary of Defense and the Secretary of State. *Id.*

85. See Leubsdorf, *supra* note 84, at 550.

The public interest in a free press is twofold. The information in this particular article would have an impact upon the "uninhibited, robust, and wide-open" debate⁸⁶ of the issues of nuclear testing and disarmament; the magazine asserted that this article was vital to such discussion.⁸⁷ In addition, the public has the more general interest in a free and open marketplace of ideas. Stifling publication poses the danger of external and self-censorship in the future in contravention of the public interest.

Balancing the above four factors is difficult. Some scholars have approached the problem quantitatively,⁸⁸ but for the courtroom judge lacking familiarity with calculus and the desire to reduce human events to a purely scientific formula, the issue becomes one of a common sense balancing of potential injuries to all parties. In a case with such a lack of consensual agreement regarding the interpretation and applicability of the statute, the danger presented by the article, and the probability of success on the merits, the presumption favoring freedom of the press should be determinative and no injunction should issue.

Regardless of whether the preliminary injunction granted to the government was warranted, the court's decision failed to answer the ultimate question of whether the article should be published. The decision only addressed whether the press or the government has the right to decide. That the press generally has the right to decide this matter, even in cases involving national security, is well established.⁸⁹ If the material could prove dangerous, the magazine should exercise its discretion and not use the first amendment as a tool to gain publicity through sensationalistic journalism. Harm might result not only from this particular article, but also from a society that believes the press abuses its freedom and therefore will be willing to enact more stringent controls against the press in the future. In addition, the press might lose credibility with the

86. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

87. *Brief of Progressive, Inc.*, at 10.

88. *See Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

89. *See Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Bridges v. California*, 314 U.S. 252 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

public and thus be unable to perform the watchdog function that is vital to the maintenance of a democratic society⁹⁰

IMPACT AND PROBLEMS OF PROGRESSIVE

Judge Warren greatly expanded the area in which prior restraints are acceptable by eliminating the distinction between wartime and peacetime restraints. In *Abrams v. United States*,⁹¹ the Supreme Court upheld the conviction of several men who spoke against the United States, its efforts in World War I, and its condemnation of the Soviet Union. They were convicted under the Espionage Act because their action endangered the United States during a time of war. The Court explicitly mentioned that such actions would not be punishable during peacetime.⁹² *Near, Schenck*, and *Abrams* all considered wartime context as an important factor when the government seeks to restrain free expression. In *New York Times*, the Court refused to issue an injunction even during the Vietnam War. In *Heine*, the Second Circuit overturned Heine's conviction although the United States already was involved in the European conflict when he aided Germany. Judge Warren eliminated this distinction between peace and war by reasoning that, in the nuclear age, war can erupt at a moment's notice.⁹³ If speech formerly punishable only during wartime now is always punishable, criticism of the government and other sensitive subjects of debate could be smothered at the whim and discretion of the administration and the courts. For the indefinite future, the bounds of free expression could be narrowed to an extent inconsistent with the guarantees of the Bill of Rights.

Judge Warren issued the injunction despite acknowledging that both sides presented convincing evidence.⁹⁴ All of the significant precedent in this area requires that a heavy presumption operate against a request for a prior restraint. As a consequence of this presumption, the government should have borne a burden of proof

90. See generally Hunsaker, *Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society*, 16 Duq. L. Rev. 9 (1978).

91. 250 U.S. 616 (1919).

92. *Id.* at 624.

93. 467 F. Supp. at 996.

94. *Id.* at 992.

substantially heavier than that assigned by the court. In the future, if this approach is followed in other jurisdictions, when the government and the defendant present equal quantities of evidence no weight will be given to first amendment guarantees and the government will receive the requested injunction.

In his decision, Judge Warren used the very speculative words condemned by Justice Brennan in his opinion in *New York Times*.⁹⁵ Warren wrote, "[T]he article could possibly provide sufficient information to allow a medium sized nation to move faster in developing a hydrogen weapon. It could provide a ticket to by-pass blind alleys."⁹⁶ Judge Warren's decision expanded injunctive relief into the realm of surmise and conjecture. Henceforth, the government need present no concrete evidence of danger; ephemeral fears will suffice to justify issuance of an injunction. Expansion of prior restraints into the realms of peace, surmise, and equal evidence will deprive the public of a substantial quantity of evidence that in the past it would have received. This deprivation will result both from the injunctions and from the chilling effect⁹⁷ the decision will have on writers and editors.

CONCLUSION

The importance of both national security and first amendment freedoms made resolution of the issues in this case difficult. In light of the speculative nature of the government's case, the first amendment claim should have outweighed the competing value of national security and no preliminary injunction should have issued. Judge Warren's issuance of a preliminary injunction substantially broadened the availability of prior restraints against publication. The decision thus provides precedent⁹⁸ that threatens the first

95. See notes 78-80 *supra* & accompanying text.

96. 467 F Supp. at 993.

97. The phrase "chilling effect" first appeared in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). It is defined as the deterrent effect of an unconstitutional law or decision on protected activity. See Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 816 (1969).

98. The Court of Appeals for the Seventh Circuit dismissed the case on October 1, 1979. *United States v. Progressive, Inc.*, No. 79-1428 (7th Cir. Oct. 1, 1979).

amendment rights that are fundamental to our political and social systems.

J. M. N.