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The National Security Exception to the Doctrine of Prior Restraint: *United States v. Progressive, Inc.*, 467 F. Supp. 990 (D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979)

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Note

The National Security Exception to the Doctrine of Prior Restraint,

United States v. Progressive, Inc., 467 F. Supp. 990 (D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

I. INTRODUCTION

The language of the first amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1]—reflects a basic characteristic of Anglo-American political systems: the high level of protection accorded to rights of freedom of expression. As traditionally applied, the doctrine against prior restraint buttressed freedom of expression by precluding governmental restriction of expression before dissemination of "objectionable" materials.[2] Under current first amendment theory,[3] any governmental attempt to restrict expression by prior-in-form restraints[4] is presumed to be unconstitutional,[5] and the government "'carries a heavy burden of showing justification for the imposition of such a restraint.'"[6] However, conflict occasionally arises between society's interest in maximizing free expression and other salient societal interests. This potential conflict is drawn into focus when the

1. U.S. CONST. amend. I.
2. *E.g.*, 4 W. BLACKSTONE, COMMENTARIES *151-52.
3. *See generally* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Near v. Minnesota, 283 U.S. 697 (1931); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-12 (1970); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955); Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519 (1977); Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 818 (1976); Note, *Prior Restraint and the Press Following the* Pentagon Papers *Cases—Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927 (1972).
4. For a criticism of the distinction between prior-in-form restraints and subsequent-in-form punishment, see Murphy, *supra* note 3.
5. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).
6. *Id.* (quoting Organization for a Better Austin v. Keffe, 402 U.S. 415, 419 (1971)).

government attempts to suppress expression in the name of national security.

In *United States v. Progressive, Inc.*,[7] the United States sought to enjoin the publication of an article describing the operation of thermonuclear devices.[8] The district court concluded that portions of the article constituted "restricted data"[9] and that publication of the article would harm the national security interests of the United States.[10] Pursuant to section 232 of the Atomic Energy Act,[11] the district court issued a preliminary injunction against the magazine, *The Progressive*, barring publication of the article.[12] *The Progressive* appealed, but publication of a letter containing similar information[13] resulted in dismissal of the injunction.[14]

This note will provide an overview of the national security exception[15] to the doctrine of prior restraint in light of the *Progressive* case.

II. THE *PROGRESSIVE* FACTS

In February 1979, Howard Morland, a free-lance writer, completed an article describing the operation of thermonuclear devices.[16] On February 27, a copy of the Morland article was delivered to the Department of Energy (DOE), along with a letter requesting that the DOE verify the technical accuracy of the arti-

7. 467 F. Supp. 990 (D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).
8. The article, *The H-bomb secret—How we got it, why we're telling it*, by Howard Morland, was scheduled for publication in the May 1979 issue of *The Progressive*. The Morland article was ultimately published in the November 1979 issue of *The Progressive*.
9. The suit was brought under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976). Communication of "restricted data," as defined by § 2014(y), is subject to criminal penalties under § 2274(b); section 2280 authorizes the government to seek injunctive relief for actions which constitute or might constitute violations of the Atomic Energy Act. *See id.* §§ 2014(y), 2274(b), 2280; notes 72-74 *infra*.
10. 467 F. Supp. at 999.
11. 42 U.S.C. § 2280 (1976).
12. 467 F. Supp. at 1000.
13. The letter was published on September 16, 1977. Knoll, *Wrestling with Leviathan—The Progressive knew it would win*, THE PROGRESSIVE, Nov. 1979, at 24, 27.
14. The announcement was made on September 17, 1979.
15. The national security exception to the doctrine originated as dictum in Near v. Minnesota, 283 U.S. 697, 716 (1931).
16. The facts stated in the text are taken directly from the district court's opinion. Where necessary, the district court's facts will be supplemented with information concerning the case published in *The Progressive*. For an account of the history of the Morland article, see Knoll, *'Born Secret'—The story behind the H-bomb article we're not allowed to print*, THE PROGRESSIVE, May 1979, at 12.

cle.[17] DOE officials determined that portions of the article contained "restricted data" within the meaning of the Atomic Energy Act.[18]

On March 1, a DOE representative contacted the editorial staff of *The Progressive* and requested that the magazine refrain from publishing the Morland article, stating that because the article contained restricted data, publication would be detrimental to national security and contrary to the government's efforts to prevent the proliferation of nuclear weapons. The next day, the DOE representatives suggested that the DOE and *The Progressive* rewrite the article to purge the restricted portions.[19] However, on March 7, *The Progressive* notified the DOE that it intended to publish the Morland article as originally written. The following day, the government filed its complaint, and, on March 9, the Federal District Court for Wisconsin issued a temporary restraining order, pending a hearing on the government's motion for a preliminary injunction.[20]

The district court found that: (1) the Morland article contained concepts and analyses of the construction and operation of thermonuclear devices in a form not then available in public literature;[21] (2) the information contained in the article would be "extremely important" to a nation seeking thermonuclear capability;[22] (3) *The Progressive* would not be substantially harmed by a preliminary injunction;[23] and (4) publication would cause direct, immediate, and irreparable damage to the United States by accelerating the capability of non-thermonuclear *nations*[24] to produce

17. A rough draft of the Morland article was sent to several experts for review of the technical materials. *Id.* at 14. One of the experts delivered a copy of the article to a government consultant, who expressed concern about its contents and, in turn, delivered it to the DOE. *Id.* After consultation with counsel, the editorial staff of *The Progressive* sent a copy of Morland's sketches and captions to the DOE. *Id.* at 16. Apparently the DOE did not receive the article from either its consultant or from *The Progressive*. *Id.* On February 26, 1979, *The Progressive* sent a copy of the entire article to the DOE for its comments; this apparently is the copy referred to in the district court's opinion.

18. 42 U.S.C. § 2014(y) (1976).

19. 467 F. Supp. at 998. According to Erwin Knoll, editor-in-chief of *The Progressive*, the DOE offered to rewrite Morland's article in a form acceptable to the government. Knoll, *supra* note 16, at 16.

20. 467 F. Supp. at 991.

21. *Id.* at 999.

22. *Id.*

23. *Id.*

24. The district court was concerned that other *nations* might find the Morland article useful in developing thermonuclear capabilities. "[A] *sine qua non* to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians. *One*

thermonuclear weapons.[25] Thus, on March 26,[26] the district court issued a preliminary injunction, a decision which *The Progressive* appealed. However, on September 16, a Madison, Wisconsin, newspaper published an article containing information similar to that in the Morland article; the next day the government announced that it would dismiss the case against *The Progressive*.[27]

III. ANALYSIS

The district court advanced three arguments to justify the unprecedented imposition of a prior restraint. First, the risks involved in not restraining publication of the Morland article would justify a prior restraint under the national security exception[28] to the doctrine, even without congressional authority. Second, Congress specifically provided for injunctive relief upon a showing that a person either has engaged in or was about to engage in acts which constitute or would constitute a violation of the Atomic Energy Act. Finally, a preliminary injunction would not substantially impede *The Progressive* in its "laudable crusade to stimulate public knowledge of nuclear armament and bring about enlightened debate on national policy questions."[29]

A. Injunctive Relief Under Common Law

1. The Common Law Doctrine

The prohibition against prior restraint evolved from the sixteenth- and seventeenth-century English experience with licensing laws and censorship.[30] It focuses on the threat to free expression inherent in governmental attempts to suppress speech prior to actual dissemination.[31] While such a prior restraint is presumptively unconstitutional,[32] a sanction imposed subsequent to dissemination is permissible.[33] This distinction between prior re-

does not build a hydrogen bomb in the basement." *Id.* at 993 (emphasis added).

25. *Id.* at 999.
26. The district court's opinion was filed on March 26, but the formal findings of fact and conclusions of law were not entered until March 28, 1979.
27. Knoll, *supra* note 13, at 27.
28. Near v. Minnesota, 283 U.S. 697, 716 (1931) (dicta).
29. 467 F. Supp. at 996.
30. T. EMERSON, *supra* note 3, at 504; Emerson, *supra* note 3, at 650-51.
31. One commentator has suggested that any definition of prior restraint that limits the concept to prepublication restrictions is not supported by the Supreme Court's application of the doctrine. Litwack, *supra* note 3.
32. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
33. *E.g.*, Patterson v. Colorado, 205 U.S. 454 (1907).

straint and subsequent punishment appears to stress the form of the restriction over its substantive effect.[34] However, a rational basis for this distinction has been suggested:

> A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; 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. It is true that in some situations subsequent punishment may be more restrictive. But this does not negate the fact that a system of prior restraint presents inherent dangers that make it highly disfavored as a form of regulation.[35]

A central purpose of the first amendment[36] is to maintain a system of expression free from prior restraints. This represents a societal preference for punishing people after they break the law instead of throttling their right to speak by prior-in-form restraints.[37]

2. *Development of the Doctrine*

The invention of the printing press in the fifteenth century and the availability of printing technology during the sixteenth and seventeenth centuries increased the opportunities for disseminating information and opinions. Papal attempts to control publication through licensing began as early as 1501.[38] During the sixteenth and seventeenth centuries, the press in England was subjected to a variety of rules, regulations, and licensing legislation which prohibited some publications and imposed censorship

34. For a criticism of the prior-in-form, subsequent-in-form dichotomy, see Murphy, *supra* note 3.
35. T. EMERSON, *supra* note 3, at 504; Emerson, *supra* note 3, at 655-60.
36. Near v. Minnesota, 283 U.S. 697, 713 (1931).
37. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). In *Conrad*, the Court stated that:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.

Id. at 558-59 (citations omitted) (emphasis in original).

There are significant procedural distinctions between a civil action to obtain a prior restraint and a criminal action to enforce a subsequent punishment. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 741-44 (1978).

38. Emerson, *supra* note 3, at 650.

and licensing requirements on all others.[39]

In 1695, the House of Commons refused to extend the then-existing licensing laws. During the next century, this freedom from licensing developed into a common law right, which Blackstone summarized:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[40]

In light of the English experience, the first amendment was drafted with the intent to at least outlaw any system of prior restraints analogous to the English licensing system.[41] However, the Supreme Court did not consider the permissibility of prior restraints until the twentieth century.

3. The Doctrine and National Security

The only Supreme Court statements concerning the national security exception to the prior restraint doctrine are a dictum from *Near v. Minnesota*[42] and a per curiam *Pentagon Papers* opinion.[43]

Near involved the constitutional validity of a Minnesota statute which provided for the abatement of a defamatory or scandalous newspaper as a public nuisance. Suit was brought against a Minneapolis newspaper which had charged that a Jewish gangster controlled criminal activities in Minneapolis and that local law enforcement agencies were shirking their duties.[44] A state court permanently enjoined publication of the newspaper on the basis of the statute. On appeal, the Supreme Court held that the statute established a prior restraint which was unconstitutional.[45] The Court discussed the history of the first amendment extensively[46] and then stated that "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[47]

The primary importance of *Near* for cases involving prior re-

39. *Id.*
40. 4 W. BLACKSTONE, *supra* note 2, at *151-52 (emphasis in original).
41. *E.g.*, Near v. Minnesota, 283 U.S. 697, 713 (1931).
42. 283 U.S. 697 (1931).
43. New York Times Co. v. United States, 403 U.S. 713 (1971).
44. 283 U.S. at 704.
45. *Id.* at 722-23.
46. *Id.* at 713-18.
47. *Id.* at 716.

straints for national security reasons is the Court's dictum concerning exceptions to the doctrine. While the protection against prior restraint is not boundless, the Court noted that limitations would be recognized only in exceptional cases, listing cases involving issues of national security, obscenity, privacy interests, and seditious activities as examples.[48] In particular, the Court said that in a time of war "[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."[49] This dictum, the genesis of the national security exception, indicated that a prior restraint may be constitutional in certain types of cases.

The standard for identifying the unusual circumstances which would constitutionally justify a prior restraint was suggested by three Justices in the *Pentagon Papers Case*. In June 1971, the *New York Times* and *Washington Post* began publishing excerpts from a classified study on United States policy in Viet Nam.[50] The Government sought to enjoin publication of this study on the grounds that national security interests would be jeopardized. The lower federal courts issued temporary restraining orders, but these were vacated by the Supreme Court in a six-to-three decision. The Court held per curiam that any system of prior restraints carries a heavy presumption against its constitutionality and that the government had not sustained its heavy burden to justify imposing a prior restraint.[51]

The one-page opinion was supplemented by separate opinions from each Justice. Of the six Justices forming the majority,[52] only Justice Black and Justice Douglas would have held that prior re-

48. *Id.* The Court failed to cite any case authority for the proposition that obscenity and sedition were exceptions to the doctrine of prior restraint. The only precedent cited in support of the national security exception was Schenk v. United States, 249 U.S. 47 (1919). *Schenk* involved the constitutionality of the prosecution of individuals during World War I, for distributing literature critical of the draft. The citation to *Schenk* is questionable because *Schenk* was not a prior restraint case. However, it could be argued that under the *Schenk* rationale, expression which threatens to hinder the nation's war effort is not protected by the first amendment, and, therefore, the doctrine would not apply.

49. 283 U.S. at 716.

50. For a chronology of the *Pentagon Papers* litigation, including a descriptive account of the classification system and excerpts from the government's memoranda of law, see THE PENTAGON PAPERS AND THE COURTS (M. Shapiro ed. 1972). For a narrative account of the *Pentagon Papers Cases*, see S. UNGAR, THE PAPERS & THE PRESS (1972).

51. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

52. Justices Black, Douglas, Brennan, Stewart, White, and Marshall concurred in the per curiam opinion, while Chief Justice Burger and Justices Harlan and Blackmun dissented.

straints are constitutionally impermissible under any circumstances.[53] Three Justices—Justice Brennan, Justice Stewart, and Justice White—discussed the nature of the burden which the Government must carry in order to justify a prior restraint.[54]

Justice Brennan argued that the first amendment precluded prior restraints which are predicated upon conjecture that untoward consequences might result from publication.[55] In Justice Brennan's view, the Court's earlier cases recognized that a prior judicial restraint may be properly imposed only in a narrow class of cases, and then only in a time of war:

> 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. . . . [O]nly governmental allegation and proof that publication *must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea* can support even the issuance of an interim restraining order.[56]

The salient factor in Justice Brennan's analysis is that any restraint imposed upon expression must be substantiated by allegation and proof that, in the absence of restraint, harm kindred to the sort and magnitude previously recognized by the Court would occur.

Justice Stewart and Justice White recognized that publishing some documents would "do substantial damage to public interests."[57] However, both argued that the first amendment protection precluded prior restraint absent proof that disclosure would "surely result in direct, immediate, and irreparable damage to our

53. Justice Black reaffirmed his absolutist view of the first amendment and indicated that the injunctions sought by the government were the precise evils that the drafters of the first amendment sought to remedy. 403 U.S. at 715 (Black, J., concurring). Justice Douglas contended that the first amendment left no room for governmental restraint of the press. *Id.* at 720 (Douglas, J., concurring).

54. Justice Marshall also concurred, arguing that the separation of powers doctrine precluded the judicial branch from enjoining action which Congress specifically declined to prohibit. *Id.* at 742 (Marshall, J., concurring). "It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass." *Id.* at 747. The opinions of Justices Stewart and White also reflected a flavoring of the separation of powers analysis. For an examination of the *Pentagon Papers Case* in terms of the separation of powers doctrine, see Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3 (1971-72).

55. 403 U.S. at 725-26 (Brennan, J., concurring).

56. *Id.* at 726-27 (emphasis added).

57. *Id.* at 731 (White, J., concurring, joined by Stewart, J.).

Nation or its people."[58] Because the government failed to prove that the disclosure of the Pentagon Papers would result in harm sufficient to meet this standard, both Justice Stewart and Justice White voted with the majority.

The *Near* dictum and the *Pentagon Papers Case* indicate that prior restraints may be constitutionally permissible in exceptional cases upon a showing that publication of the material in question would inevitably, directly, and immediately result in irreparable damage to the national interest. Thus, the appropriateness of a prior restraint apparently rests on a case-by-case determination of whether the danger to national security interests posed by publication of "objectionable" materials sufficiently outweighs the presumption that prior restraints are unconstitutional.

4. *Application of the Exception in* Progressive

Application of the national security exception apparently requires a two-level analysis in every case.[59] First, the material in question must fall within the narrow class of exceptional cases suggested by the Supreme Court in *Near*. Second, the importance of the purported national security interest must be sufficient, according to some standards, to overcome the heavy presumption against the constitutional validity of prior restraints.

In *Near*, the Supreme Court suggested in dictum that it would be constitutional to judically restrain publication of troop movements in a time of war.[60] However, in the *Progressive* case, the district court de-emphasized the wartime requirement[61] and concluded that, in view of the potential risk to national security, publication of the Morland article was sufficiently analogous to the publication of troop movements to fall within the class of cases which are subject to the national security exception.[62]

Although a majority of the Supreme Court has never enunciated a standard for testing the propriety of prior restraints in national security cases,[63] the *Progressive* court applied the standard

58. *Id.* at 730 (Stewart, J., concurring, joined by White, J.).
59. The precise analysis required for each application of the national security exception is unclear, given the lack of Supreme Court precedent on point. However, the standard announced by Justice Brennan in the *Pentagon Papers Case* appears to require a two-level analysis of each case.
60. *See* text accompanying notes 42-49 *supra*.
61. 467 F. Supp. at 996. The court argued, "Times have changed significantly since 1931 when *Near* was decided. 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." *Id.*
62. *Id.*
63. Neither standard suggested in the *Pentagon Papers Case* includes an analy-

articulated by Justice Stewart and Justice White in the *Pentagon Papers Case*.[64] Under this standard, the court concluded that the threat to national security posed by the Morland article reached the level of grave, direct, immediate, and irreparable harm necessary to justify the prior restraint.[65]

The district court's analysis regarding the threat to national security posed by publication of the Morland article lacks credibility, because it is permeated with a sense of excessive caution. In comparing the risks involved, the court noted that a mistake in restraining publication of the Morland article would curtail *The Progressive*'s first amendment rights in a drastic and substantial fashion,[66] but a mistake in ruling against the government "*could pave the way for thermonuclear annihilation for us all*."[67] While balancing the competing interests of freedom of the press and national security, the district court indicated that the right to continued life outweighed the right to freedom of the press:[68]

> 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.
>
> . . . .
>
> . . . [I]n the short-run, one cannot enjoy freedom of speech, freedom to worship or freedom of the press unless one first enjoys the freedom to live.
>
> Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression.[69]

Once the issue is phrased in terms of freedom of the press versus thermonuclear annihilation, striking the balance in favor of prior restraint is preordained.

B. Injunctive Relief Under the Atomic Energy Act

The district court opined that the salient factor distinguishing the *Pentagon Papers Case* from the *Progressive* case was the presence in the latter of a statute expressly authorizing the use of injunctive relief[70] to prevent disclosure of specific types of infor-

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sis of the effectiveness of the prior restraint as an element in the constitutional inquiry. The recent case of Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565-67 (1976) (fair trial-free press case), indicates the importance of an analysis of the effectiveness of a proposed prior restraint.

64. 467 F. Supp. at 996.
65. *Id.*
66. *Id.*
67. *Id.* (emphasis added).
68. 467 F. Supp. at 995.
69. *Id.*
70. *Id.* at 994.

mation. Section 224(b) of the Atomic Energy Act[71] imposes criminal sanctions on individuals who disclose restricted data with reason to believe that it will be used to injure the United States or to secure an advantage for a foreign nation. "Restricted data" as defined in the Atomic Energy Act includes all data, regardless of its source, pertaining to the design, manufacture, or utilization of nuclear weapons.[72] Only such data that has been declassified pursuant to the Act is deemed not to be restricted data.[73] Section 230 of the Act[74] provides that a court may issue an injunction, restraining order, or any other order upon a showing that any person either has engaged in or is about to engage in acts which constitute or would constitute a violation of the Act.[75]

The DOE contended that portions of Morland's article would violate the Atomic Energy Act by disclosing restricted data. In support of DOE's position, the government argued that national security considerations permit classification and censorship of information originating in the public sector if the information, when

71. 42 U.S.C. § 2274(b) (1976).

> 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 . . .
>
> . . . .
>
> (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.

Id.

72. *Id.* § 2014(y).

> The term 'Restricted Data' means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

Id.

73. *Id.*

74. Section 2280 provides:

> 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.

Id. § 2280.

75. *Id.*

compiled, poses a direct and immediate danger of irreparable harm to national interests.[76] Moreover, the government argued that the article contained a core of information never before available in the public realm.[77] On the other hand, *The Progressive* argued that the information contained in the article was readily available to the public[78] and that a prior restraint was precluded by the first amendment.[79] The district court found, as a matter of fact, that portions of the Morland article contained concepts not publicly available[80] and that its publication would materially reduce the time necessary for other nations to achieve thermonuclear capability.[81] The court also concluded[82] that *The Progressive* had reason to believe that publication of the Morland article would injure the United States or would aid foreign nations.[83] Thus, pursuant to the Atomic Energy Act, the United States was entitled to an injunction restraining publication.[84]

C. Comparative Harm

The district court's final argument in support of the preliminary injunction was that omission of the technical portions of the Morland article would not significantly impair *The Progressive*'s stated goal of encouraging public debate on nuclear weapons policy.[85] The technical portions of the article were found to be unnecessary for informed public debate; in fact, in the court's opinion publication would have a deleterious effect on *The Progressive*'s position in favor of nuclear non-proliferation.[86] Thus, the court concluded that *The Progressive* would not be substantially harmed by issuance of a preliminary injunction while the United States would suffer irreparable harm if a preliminary injunction were not

76. 467 F. Supp. at 991.
77. *Id.* at 993.
78. *Id.*
79. *Id.* at 991. For excerpts of *The Progressive*'s appellate brief, see *"The heart of the First Amendment"—Excerpts from the appeals brief in The Progressive's prior restraint case*, THE PROGRESSIVE, Sept. 1979, at 45. For excerpts of the amicus appellate briefs, see *In defense of the First Amendment—Excerpts from friend-of-the-court briefs in The Progressive's prior restraint case*, THE PROGRESSIVE, July 1979, at 31.
80. 467 F. Supp. at 993, 995, 999.
81. *Id.* at 993-94, 999.
82. The district court also held, without expressing a reason, that 42 U.S.C. §§ 2274(b), 2280 (1976) applied to *The Progressive* and that neither section was unconstitutionally vague or overbroad. 467 F. Supp. at 994, 1000.
83. 467 F. Supp. at 995.
84. *Id.* at 1000.
85. *Id.* at 996.
86. *Id.* at 994.

granted.[87]

However, neither the *Near* dictum nor the *Pentagon Papers Case* requires a finding of lack of substantial harm before a prior restraint can be issued under the national security exception. Thus, it is unclear whether the district court intended this to be part of the analysis required before a prior restraint may issue or whether it was intended only to bolster the conclusion that a prior restraint would be constitutional in this case.

D. Implications for the Prior Restraint Doctrine

The potential impact of the *Progressive* case on the doctrine concerning prior restraints extends beyond the precedent of granting a prepublication injunction under the national security exception. The case potentially will affect substantive first amendment theory in two respects. First, *Progressive* is the only federal decision applying the national security exception to grant prepublication injunctive relief under specific federal legislation. Second, the decision sheds light on the standard used to test whether the harm to national security interests is sufficient to justify such prepublication restraints.

The impact that national legislation authorizing prepublication restrictions might have on the doctrine was suggested by two justices in the *Pentagon Papers Case*. Justice Stewart, joined by Justice White, opined that congressional authorization of civil proceedings would require a two-pronged analysis, beginning with a determination of the constitutional validity of the statute and ending with application of the statute to the facts of the case.[88] The district court in *Progressive* appears to have implicitly adopted this two-level analysis,[89] but it was unclear as to its reasoning regarding what standard to apply to determine the constitu-

87. *Id.* at 999.

88. 403 U.S. at 730 (Stewart, J., concurring, joined by White, J.). Presumably, the degree of harm to national security interests necessary to make a prior restraint constitutionally permissible would be determined under the direct, immediate, and irreparable harm test suggested by Justice Stewart. Language in Justice White's concurring opinion can be read as requiring a lower standard of harm to national security interests where congressional legislation authorizes the use of prepublication restraints: "I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, *at least in the absence of express and appropriately limited congressional authorization* for prior restraints in circumstances such as these." *Id.* at 731 (White, J., concurring, joined by Stewart, J.) (emphasis added).

89. The district court concluded that publication of the technical portions of the Morland article would violate the Atomic Energy Act. 467 F. Supp. at 995. *See* § III B of text *supra*. Moreover, the court held that a prior restraint was justified under the *Near* dicta. 467 F. Supp. at 996. However, the district court did

tionality of a prior restraint issued under express congressional authorization. However, it appears that the district court applied a combination of the ad hoc balancing test[90] and the *Near* dictum[91] to sustain the constitutionality of the prior restraint.

The distressing portion of the district court's opinion is the suggestion that a congressional act may lower the standard concerning the amount of harm to national security interests which must be shown in order to sustain the constitutional validity of a prior restraint.[92] Justice Stewart and Justice White in the *Pentagon Papers Case* assumed that congressional authorization of prior restraints would be an important element in the analysis under the national security exception. The *Progressive* court indicated that the existence of the Atomic Energy Act was the salient distinguishing factor between the *Progressive* case and the *Pentagon Papers Case*.[93] However, the legal and theoretical foundation for the distinction between a prior restraint issued under the common law national security exception and a prior restraint issued pursuant to express congressional authorization has not been adequately explored. Presumably, the distinction is derived from a combination of judicial deference to a coequal branch of government and an implicit recognition that Congress has some ill-defined power to legislatively amend the Constitution. This judicial deference

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not expressly hold that § 230 of the Atomic Energy Act was constitutional, although such a holding was implicit in the court's reasoning.

90. As noted earlier, the district court defined the constitutional issue as involving the right to continued life versus death. *See* text accompanying notes 66-69 *supra*. Once the issue is framed in such stark terms, the solution is unavoidable. Thus, the nebulous nature of the ad hoc balancing test often leads to unpredictable results. For an analysis and criticism of the ad hoc balancing test, see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, 53-56 (1966).

91. 467 F. Supp. at 996. The district court apparently accepted the exceptions to the doctrine of prior restraint suggested in *Near* as law, rather than as dicta.

92. The district court never stated that the standard of harm depends upon the presence of congressional legislation. However, after "balancing" the opposing interests, the court stated, "The government has met its burden under section [230] of the Atomic Energy Act. In the Court's opinion, it has also met the test enunciated by two Justices in the [*Pentagon Papers*] case, namely grave, direct, immediate and irreparable harm to the United States." 467 F. Supp. at 996. This language suggests that the standards may differ.

93. *Id.* at 994. The impression that there was no federal legislation authorizing injunctive relief in the *Pentagon Papers Case* is incorrect. The All Writs Act, 28 U.S.C. § 1651 (1976), provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* § 1651(a). However, no *specific* congressional legislation permitted a prior restraint under the facts of the *Pentagon Papers Case*.

reduces the amount of harm to national security interests needed to justify a prior restraint, and, as a result, the first amendment guarantee of freedom of expression will be significantly eroded.

The *Progressive* case is also indicative of the standard of harm to national security interests necessary to justify a prior restraint in the absence of congressional authorization. By accepting the "grave, direct, immediate, and irreparable harm" test, the district court appears to have laid the foundation for future applications of the national security exception. However, the standard enunciated in the *Progressive* case leaves the scope of the exception open to speculation. Such speculation will chill the exercise of protected rights, particuarly in the vast gray area between protected expression and expression subject to prepublication restraint. Coupled with the nebulous scope of the national security exception, the financial impact of a lawsuit brought to suppress expression may dissuade publishers from disseminating information about sensitive national security issues. In essence, the "grave, direct, immediate, and irreparable harm" standard is not a standard at all; it is only a means by which a court may announce a conclusion that a prior restraint is constitutional.

IV. CONCLUSION

The *Progressive* case reflects the acceptance of the national security exception by the federal judiciary. Originated in *Near*, tacitly accepted in the *Pentagon Papers Case*, and applied in *Progressive*, the national security exception apparently will remain an integral part of first amendment theory and the doctrine of prior restraint. The practical effect of the *Progressive* case should not be underestimated. The implicit suggestion that Congress can lower the amount of harm which must be shown to justify prepublication restraints in the name of the national security interest represents a severe inroad on first amendment rights. Given the nebulous nature of "national security interests," judicial deference to congressional determinations regarding the appropriateness of prepublication relief is unwarranted. Moreover, application of the common-law variant of the national security exception hinges upon a speculative appraisal of the effect of publication on national security interests. Conjecture rationalized by melodramatic rhetoric is clearly insufficient to justify a prior restraint. However, in the *Progressive* case, the district court did just that when it concluded that publication might be injurious to national security interests. Parroting the "grave, direct, immediate,

and irreparable harm" standard does not obscure the lack of substance and analysis in the court's opinion. The *Progressive* case was incorrectly decided; its effect on the fragile fabric of the first amendment, however, may be significant.

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