



3-1-1976

National Security and Freedom of the Press: The Constitutionality of S. 1's National Defense Information Provisions

Ronald Keith Silver

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Ronald K. Silver, *National Security and Freedom of the Press: The Constitutionality of S. 1's National Defense Information Provisions*, 9 Loy. L.A. L. Rev. 323 (1976).

Available at: <https://digitalcommons.lmu.edu/llr/vol9/iss2/3>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

NATIONAL SECURITY AND FREEDOM OF THE PRESS: THE CONSTITUTIONALITY OF S. 1's "NATIONAL DEFENSE INFORMATION" PROVISIONS

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.¹

Congress is presently debating the "Criminal Justice Reform Act of 1975" (the Act).² The Act is an attempt to create a "systematic, consistent, and comprehensive federal criminal code to replace the hodgepodge that now exists."³ Included within its coverage are espionage and other related offenses.⁴ Three of the eight sections dealing with espionage have the potential to increase the power of the executive branch to control the flow of news concerning the federal government.

1. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

2. S. 1, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1]. An alternative bill has been introduced in the House of Representatives by Congressmen Kastenmeir, Edwards, and Mikva, H.R. 10580, 94th Cong., 1st Sess. (1975).

3. SENATE COMM. ON THE JUDICIARY, 93d Cong., 2d Sess., REPORT ON CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, pt. 2, at 3-4 (Comm. Print 1974) [hereinafter cited as JUDICIARY REPORT]. The attempt to create a new federal criminal code began with a memorandum from former Assistant Attorney General Ramsey Clark to Attorney General Robert Kennedy. In 1966, President Johnson introduced a proposal to establish a national commission to study and make recommendations on a new criminal code. Congress then created the National Commission on Reform of Federal Criminal Laws (the National Commission). Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended*, Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44. In 1971, the National Commission submitted its final report. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT]. The work of the National Commission was greatly influenced by conservative forces in Congress and the White House. The result of this was the introduction of the *Final Report* in a far more conservative form. S. 1, 93d Cong., 1st Sess. (1973) and S. 1400, 93d Cong., 1st Sess. (1973). Hearings were conducted, after which the two bills were combined into one. S. 1, *supra* note 2. See *Hearings on S. 1, S. 716, & S. 1400, Before the Subcomm. on Criminal Laws & Procedures of the Sen. Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on S. 1, S. 716, & S. 1400*]; *Hearings on S. 1 & S. 1400, Before the Subcomm. on Criminal Laws & Procedures of the Sen. Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on S. 1 & S. 1400*].

4. S. 1, *supra* note 2, §§ 1121-28.

These sections and their possible effect on constitutional freedom of the press are the focus of this Comment.

I. THE STATUTORY SCHEME

A. *The Offenses*

The three sections which will be considered concern the obtaining, communicating, and handling of national defense information.⁵ These sections are: espionage, section 1121;⁶ disclosing national defense information, section 1122;⁷ and mishandling national defense information, section 1123.⁸

5. "[N]ational defense information' includes information, other than information that has previously been made available to the public pursuant to authority of Congress or by the lawful act of a public servant, that relates to:

"(1) military capability of the United States or of an associate nation;

"(2) military planning or operations of the United States;

"(3) military communications of the United States;

"(4) military installations of the United States;

"(5) military weaponry, weapons development, or weapons research of the United States;

"(6) intelligence operations, activities, plans, estimates, analyses, sources, or methods, of the United States;

"(7) intelligence with regard to a foreign power;

"(8) communications intelligence information or cryptographic information;

"(9) restricted data as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014)"

S. 1, *supra* note 2, § 1128(f).

6. "Espionage

"(a) OFFENSE.—A person is guilty of an offense, if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he:

"(1) communicates such information to a foreign power;

"(2) obtains or collects such information, knowing that it may be communicated to a foreign power; or

"(3) enters a restricted area with intent to obtain or collect such information, knowing that it may be communicated to a foreign power. . . ."

Id. § 1121.

7. "Disclosing National Defense Information

"(a) OFFENSE.—A person is guilty of an offense if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he communicates such information to a person who he knows is not authorized to receive it. . . ."

Id. § 1122.

8. "Mishandling National Defense Information

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) being in authorized possession or control of national defense information, he:

"(A) engages in conduct that causes its loss, destruction, or theft, or its communication to a person who is not authorized to receive it;

"(B) fails to report promptly, to the agency authorizing him to possess or control such information, its loss, destruction, or theft, or its communication to a person who is not authorized to receive it; or

"(C) intentionally fails to deliver it on demand to a federal public servant who is authorized to demand it. . . ."

"(2) being in unauthorized possession or control of national defense information, he:

"(A) engages in conduct that causes its loss, destruction, or theft, or

“Espionage” and “disclosing national defense information” prohibit similar conduct,⁹ and they have common elements. First, they both require that the defendant know that the information “may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power.” Second, both offenses require that the defendant’s action involve communication; espionage requires that the communication be made to a foreign power, and the offense of disclosing national defense information requires that the communication be made to any person not authorized to receive it. The offense of “mis-handling national defense information” makes it a crime to communicate such information to someone not authorized to receive it. This section additionally makes criminal conduct that causes the loss, destruction, or theft of such information where no communication is involved.

Sections 1121 and 1122 generally have been designed to deter the unauthorized collection and disclosure of the nation’s military secrets which, if disclosed, would leave the country vulnerable to attack.¹⁰ More specifically, section 1121 is designed to prevent the entering of restricted areas for purposes of spying for a foreign power, collecting information for a foreign power, or communicating information to a foreign power.¹¹ Section 1122 is designed to prevent the communication

its communication to another person who is not authorized to receive it;
 or
 “(B) fails to deliver it promptly to a federal public servant who is entitled to receive it.”

Id. § 1123.

9. See text following note 12 *infra*.

10. JUDICIARY REPORT, *supra* note 3, at 223.

With one exception, the proposed laws are largely reworkings of present espionage statutes. See 18 U.S.C. §§ 793, 794 (1970). See also note 13 *infra*; text accompanying notes 16-17 *infra* and accompanying text. The exception is section 1123(a)(2)(A) which makes it a crime for a person in unauthorized possession of national defense information to engage in conduct that causes its loss, destruction, or theft. See note 8 *supra*; note 15 *infra*. The present law excepts this conduct from liability.

Of the sections intended to restate present law, there are, nevertheless, changes in language. For example, the phrase “information respecting the national defense,” contained in section 793(a), and the phrase “information relating to the national defense,” contained in section 794(a), are changed to “national defense information” in sections 1121(a), 1122, and 1123. For a discussion of the effect of this change see notes 41-54 *infra*. Also, the phrase “is to be used to the injury of the United States, or to the advantage of any foreign nation,” as used in sections 793(a) and 794(a) (although the latter section states “a foreign nation”), is changed to read “could be used to the prejudice of the safety or interest of the United States, or advantage of a foreign power” in sections 1121(a) and 1122. See text following note 93 *infra*.

11. JUDICIARY REPORT, *supra* note 3, at 232.

of information to anyone not entitled to receive it.¹² This section is almost identical to section 1121(a)(1). The only difference is that under section 1122 the communication may be to "any person" unauthorized to receive it whereas under section 1121(a)(1) the communication must be to "a foreign power." The proposed law is based on the language of present federal criminal code sections 793(d) and (e).¹³

Section 1123 is intended to prevent the loss, theft, or destruction of national defense information through gross negligence and the failure to report such loss.¹⁴ It is an attempt to combine parts of sections 793(d) and (e) with section 793(f).¹⁵ Beyond expanding the type of acts

12. *Id.* at 237.

13. 18 U.S.C. §§ 793(d), (e) (1970). When the proposed statute was originally drafted it failed to include the requirement found within section 793, that the individual know the information could be used to the injury of the United States or the advantage of a foreign power. S. 1400, 93d Cong., 1st Sess., § 1122 (1973). In the hearings on the bill, this omission was criticized by several witnesses. See *Hearings on S. 1 & S. 1400, supra* note 3, at 5715-16 (statement of H. Florence); *id.* at 5748 (statement of R. Jencks). The Judiciary Committee (the Committee) cited this criticism as the basis for its inclusion of the knowledge provision when S. 1400 was reworked into S. 1. JUDICIARY REPORT, *supra* note 3, at 238 n.53.

14. JUDICIARY REPORT, *supra* note 3, at 238.

15. Section 1123(a)(2)(B) makes it criminal for someone in unauthorized possession of national defense information to fail to promptly turn the information over to the Government. This is an expansion of 18 U.S.C. § 793(e) (1970) which makes criminal the willful retention of such information by someone not entitled to possess it. Section 1123 has no requirement of willfulness.

The requirement that national defense information which is possessed without authorization be returned, raises a serious question of self-incrimination since the act of returning the information may require an admission of criminal conduct. While unauthorized possession at the instant of possession is not illegal (provided it is not the result of an illegal act), a further act of communication may be illegal under section 1123(a)(2)(A). See note 8 *supra*. Thus, for example, someone who finds and takes possession of secret papers accidentally discarded has done nothing criminal. Returning them to the Government would not place the individual in jeopardy. However, an editor who requests a reporter to divulge national defense information, and a publisher who solicits the information from the editor are both acting as accomplices to a violation of section 1123(a)(2)(A). The reporter who encouraged the source to relate the information in the first place also could be an accomplice under section 1123(a)(1)(A). To compel these persons to return the information under penalty of law may violate fifth amendment guarantees against self-incrimination.

The Supreme Court in *Marchetti v. United States*, 390 U.S. 39 (1968), ruled that a defendant engaging in the business of accepting wagers could not be convicted for failing to register and pay an occupational tax. Compliance with the law would have required the defendant

to provide information which he might reasonably suppose would be available to prosecuting authorities and which would surely prove a significant "link in a chain" of evidence tending to establish his guilt.

Id. at 48 (footnotes omitted). In *Leary v. United States*, 395 U.S. 8 (1969), the Su-

constituting an offense for one in unauthorized possession of information,¹⁶ a change has been made by the removal of the phrase "reason to believe that [the information] could be used to the injury of the United States, or to the advantage of any foreign nation" and the term "willfulness" as elements of the offense involving communication of information or its retention.¹⁷

B. Effective Changes from Prior Law

1. Communication

While the various sections are to some degree a re-enactment of present law, S. 1's use of the word "communicate" in sections 1121 and 1122 marks a significant change. S. 1 defines communication to mean "to import or transfer information, or otherwise to make information available by any means, to a person or to the general public."¹⁸ It was intended that this definition should be considered to include publication

preme Court stated that "the aspect of the self-incrimination privilege which was involved in *Marchetti* . . . is . . . the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." *Id.* at 28.

To the extent that section 1123(a)(2)(B) puts a person in the position of choosing between complying with the law or protecting himself from incrimination, failure to comply should not be criminal.

16. The Committee believed that one in unauthorized possession of information should be held to the same level of care as those in authorized possession who are liable for loss, destruction, or theft. See JUDICIARY REPORT, *supra* note 3, at 241-42.

17. There is a controversy whether, under present law, the "reason to believe" language modifies all the tangible objects listed in section 793(d) and (e), or merely information relating to the national defense. See note 25 *infra*. The United States Justice Department has taken the view that only information relating to the national defense is modified by this language. See *Hearings on S. 1, S. 716, & S. 1400, supra* note 3, at 5477 (statement of K. Maroney, Deputy Ass't Att'y Gen., Crim. Div., Dept. of Justice). The importance of this lies in the interpretation accorded the "reason to believe" language.

In the only judicial interpretation, the United States District Court in *United States v. New York Times Co.*, 328 F. Supp. 324, 330 (S.D.N.Y.), *rev'd*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971), held that scienter was a necessary requirement whether the information was tangible or intangible and that this requirement of scienter sprang from the "belief language." Another view, held by Professors Schmidt and Edgar of Columbia Law School is that while the Justice Department is correct regarding the syntactical question, scienter *is* a requirement whether the information is tangible or intangible because of the requirement that the acts be done willfully. Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1038-46 (1973) [hereinafter cited as Edgar & Schmidt]. If this is true, the dropping of the word "willfully," takes on far greater significance than the loss of the reason to believe language. In either case, all the language that would make scienter an element of the offense has been removed.

18. S. 1, *supra* note 2, § 111.

in a newspaper.¹⁹ Thus, substituting "publication" for "communication", sections 1121 (a) and 1122 may be read as one:

"A person is guilty of an offense if knowing that national defense information could be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he: (1) publishes the information in a newspaper; (2) obtains or collects such information, knowing that it may be published in a newspaper; or (3) enters a restricted area with intent to obtain or collect such information, knowing that it may be published in a newspaper."

In contrast to S. 1, under present law there are two groups of espionage offenses. One involves the communication of highly sensitive material and specifically applies to publishing.²⁰ The second involves the communication of a wide range of information under the rubric of "national defense information," and may not apply to publishing.²¹ The proposed law makes the broad definition in the latter, with some refinement, the general law and the specialized language of the former a higher grade offense. Where previously the type of information involved determined whether publication could constitute an offense at all, under the proposed law, since all types of information are included in one statute clearly encompassing publication, the informational distinction is relevant only to determine the degree of the offense.

This reformulation of the espionage offenses was based on the Judiciary Committee's (the Committee) belief that the word "communicate" as used in present law includes publication. The Committee stated:

Although the district court in [the *New York Times*] case had ruled that the language of the act did not include "publication," . . . this view was rejected not only by Justice White, but also by Justices Stewart and Blackmun and by Chief Justice Burger . . . and was questioned by Justice Marshall.²²

But, contrary to the Committee's conclusion, this issue has not been definitively decided. In *New York Times v. United States*,²³ Justice Douglas²⁴ stated, in dicta, that the statute under which the Government sought to prosecute Daniel Ellsberg for publication of the Pentagon Pa-

19. JUDICIARY REPORT, *supra* note 3, at 227 n.16.

20. 18 U.S.C. §§ 794(b), 798 (1970).

21. *Id.* §§ 793(d)-(e), 794(a).

22. JUDICIARY REPORT, *supra* note 3, at 227 n.16 (citations omitted).

23. 403 U.S. 13 (1971).

24. 403 U.S. at 720 (Douglas, J., concurring). Justice Black joined in Justice Douglas's opinion.

pers, section 793(e),²⁵ bars only non-published communication of information.²⁶ Of the present eight sections in the chapter on espionage and censorship,²⁷ Justice Douglas noted, three specifically bar both communication and publication.²⁸ Therefore, he concluded, "it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."²⁹ By contrasting section 793(e) with those sections using the word "publish," Douglas gave tacit acknowledgement that only these sections containing the word "publish" would prohibit publication of the prescribed information by a newspaper.

Justice White was more direct in stating that newspapers have no blanket immunity from prosecution.³⁰ The first sections he discussed, sections 797 and 798, both specifically prohibit "publishing" and are the same sections that Douglas intimated might be the basis for criminal liability. However, Justice White distinguished his position from that of Justice Douglas when he proceeded to raise the spectre of section

25. 18 U.S.C. § 793(e) (1970) provides:

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it

Shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both.

26. 403 U.S. at 720.

27. 18 U.S.C. §§ 793-99 (1970).

28. Section 794(b) applies to "whoever in time of war with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates" information regarding the disposition of armed forces. *Id.* § 794(b) (emphasis added). Section 797 applies to one who "reproduces, *publishes*, sells or gives away" photographs of defense installations. *Id.* § 797 (emphasis added).

29. 403 U.S. at 721. Justice Douglas also quoted a rejected version of section 793 which twice referred to both publication and communication. He quoted the full text of the rejected bill:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, . . . prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy."

Id. at 720-21, quoting 55 CONG. REC. 1763 (1917). The bill was rejected on the ground that it violated the first amendment and gave excessive power to the President. See 55 CONG. REC. 1808-16 (1917).

30. 403 U.S. at 733 (White, J., concurring).

793(e). He noted that liability could arise when an unauthorized possessor of a document relating to the national defense either communicated the document or willfully retained it.³¹ In a footnote he went on to state:

[F]rom the face of subsection (e) and from the content of the act of which it was a part, it seems undeniable that a newspaper . . . [is] vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by the section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. *I intimate no views on the correctness of that conclusion.*³²

Justice White, therefore refused to speculate on anything but the retention and non-publication communication aspects of section 793(e). At best, then, the contrast between the firm belief of Justice Douglas, that the use of the word communicate does not include publication, and Justice White's indecision highlights the less than clear evidence of legislative intent.

The Committee did not rely solely on the *New York Times* case, but also relied on Congressman Shirley's opinion, given in the debate over the enactment of the Espionage Act of 1917, that the word "communicate" is broader in meaning than the word "publish."³³ But Mr. Shirley went on to state that "'communicate' would seem to embrace any communication, whether it led to or was intended to lead to publication."³⁴ This language seems to indicate that communication can lead to, but may be just short of publication. Other remarks during the debate support this theory.³⁵ While some support can be found for the Committee's conclusion,³⁶ the overall result is inconclusive.³⁷

31. *Id.* at 740. See note 25 *supra*.

32. *Id.* at 739 n.9 (emphasis added). The remarks of the Chief Justice and Justices Stewart and Blackmun, which were cited by the Committee as rejecting the district court decision in *New York Times*, were actually in concurrence with Justice White's opinion, or lack thereof, concerning liability for publication.

33. JUDICIARY REPORT, *supra* note 3, at 227, citing 55 CONG. REC. 1716 (1917) (statement of Congressman Shirley).

34. 55 CONG. REC. 1716 (1917).

35. As it stands, it states that it shall be unlawful to publish or communicate—communicate from person to person—any information relating to the national defense. *Id.* at 1777 (statement of Congressman Norton).

36. Thus, during the House debates on the Espionage Act, it was stated: There ought to be some restrictions upon the publication of those things concerning the vital interests of our national defense and which if communicated to the enemy by such publication would be detrimental to our defense.

Id. at 1810 (statement of Congressman Webb).

37. See Edgar & Schmidt, *supra* note 17, at 1032-38. The authors argue that no distinction should be found between the meaning of "publication" and "communication."

To support its conclusion that the present laws encompasses publication, the Committee additionally noted:

The intent of the Congress also appears from the inclusion in the same Act of a provision, now appearing as 18 U.S.C. 1717, declaring as non-mailable "every . . . newspaper, pamphlet, book or other publication . . . , in violation of sections . . . 793 [or] 794."³⁸

This, however, is a serious misstatement of the language of the law. Section 1717 provides that various types of material may violate various other laws, and are therefore unmailable. The materials listed therein do not individually fall within the purview of each of the enumerated laws.³⁹ For example, aside from newspapers there still remain materials listed which physically could be transported by mail and which could violate section 793 and 794(a) (the two sections containing the word "communicate"). And without the listing of section 793 there are other laws listed which a newspaper could violate and therefore would be unmailable.⁴⁰ Thus, the inclusion of newspapers as one type of material subject to section 1717 and the listing of sections 793 and 794(a) as laws invoking the sanctions of section 1717 do not evince a congressional intent that "communication" includes publication.

2. National Defense Information

All three sections concern national defense information as defined within section 1128, but this definition is excessively broad. At one end of the spectrum of "information" is very precise language of what is to be covered.⁴¹ At the other end of the spectrum is language such as:

But they still maintain that the present law exempts any act of publication from criminal sanctions so long as the conduct was undertaken for any reason that reflects interests protected by the first amendment. *Id.* at 1046. This result is required by a constitutionally supportable reading of the word "willfully" in sections 793(d) and (e).

38. JUDICIARY REPORT, *supra* note 3, at 227 n.16, quoting 18 U.S.C. § 1717 (1970).

39. For instance, it is hard to see how a newspaper could be in violation of section 964 which outlaws the equipping and sending out of a vessel of war to a belligerent nation while the United States is a neutral. 18 U.S.C. § 964 (1970).

40. For example, 18 U.S.C. § 2388 (1970) has been held to be applicable to newspapers. *See Frohwerk v. United States*, 249 U.S. 204 (1918).

41. This includes information directly concerning military spacecraft or satellites, early warning systems or other means of defense or retaliation against large scale attack, war plans, communications intelligence or cryptographic information. S. 1, *supra* note 2, § 1121(b)(1)(B). The definitions of relevant terms are as follows:

"[C]ommunications intelligence information' means information:

"(1) regarding a procedure or method used by the United States or a foreign power in the interception of communications or the obtaining of information from such communications by other than the intended recipient;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use by the United States or a for-

"information that relates to the military capability of the United States or of an associate nation;" or "military planning or operations of the United States;" or "military installations of the United States;" or "intelligence operations . . . or activities of the United States."⁴² None of these phrases have been defined or limited in meaning anywhere in S. 1, or in the Committee's report, and when considered in the aggregate they seem to cover as much as is presently covered under existing law.

In its comment on the proposed law, the Committee stated that it believed national defense information had been given an extensive definition in section 1128.⁴³ Moreover, the Committee noted that national defense information was defined by the Supreme Court in *Gorin v. United States*,⁴⁴ wherein the Court agreed with the Government that national defense "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."⁴⁵ Judge Learned Hand refined the scope of

eign power in the interception of communications or the obtaining of information from such communications by other than the intended recipient; or

"(3) obtained by use of a procedure or method described in paragraph (1), or by use of a device or apparatus described in paragraph (2); . . ."

Id. § 1128(c).

"[C]ryptographic information' means information:

"(1) regarding the nature, preparation, use, or interpretation of a code, cipher, cryptographic system, or other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications of the United States or a foreign power;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use, for cryptographic purposes, by the United States or a foreign power; or

"(3) obtained by interpreting an original communication by the United States or a foreign power that was in the form of a code or cipher or that was transmitted by means of a cryptographic system or other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications of the United States or a foreign power; . . ."

Id. § 1128(d).

42. S. 1, *supra* note 2, §§ 1128(f)(1), (2), (4)-(6). The Committee noted that the enumerated subparagraphs of section 1128(f) are only some of the types of information covered in the current law. There is no mention, however, that the new law will be limited to the subparagraphs, and the language in section 1128 provides no evidence that a narrowing is intended. The language defining national security information in the *Final Report* stated: "National security information means information regarding: . . ." *FINAL REPORT*, *supra* note 3, at 86 (emphasis added). This language would seem to limit the meaning to the listed items. S. 1, however, uses the language: "national defense information includes information that relates to: . . ." S. 1, *supra* note 2, § 1128(f) (emphasis added). The word "includes" would seem to be a non-limiting word.

43. JUDICIARY REPORT, *supra* note 3, at 234.

44. 312 U.S. 19 (1941).

45. *Id.* at 28. Gorin, a Soviet citizen, paid a man who worked for the Office of Naval Intelligence in Southern California to pass on to him the substance of counterintelligence

present law when he construed it as excluding national defense information already made available to the public.⁴⁶

The Committee further stated that the abstract definition found in *Gorin* had been made more concrete by the inclusion of specific examples. Nonetheless, all of the following stories could fall within the definition of national defense information as it now stands: the unauthorized air raids on North Vietnam by Air Force General LaValle⁴⁷ and the massacre at My Lai,⁴⁸ both dealing with information that relates to the military operations of the United States; the systematic torture of Marine prisoners at the Camp Pendleton Brig,⁴⁹ dealing with

reports concerning Japanese in the area. The reports that were considered to relate to the national defense consisted of

a relation of the movements of certain Japanese from one place to another, and activities thereof, such as photography, conferences, and other matters None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft or anything pertaining thereto Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the records does not appear.

Gorin v. United States, 111 F.2d 712, 715-16 (9th Cir. 1940), *aff'd*, 312 U.S. 19 (1941); see JUDICIARY REPORT, *supra* note 3, at 234.

46. *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945).

47. N.Y. Times, June 12, 1972, at 4, col. 4. General LaValle had ordered his pilots to attack targets in North Vietnam from January to March, 1972, exceeding what was then allowed. The airstrikes were falsely reported as defensive measures. When this information was first made public by the *New York Times* it had not been officially released. The news story quoted unnamed, well informed military and congressional sources. It was only on the following day that the Air Force officially announced that the unauthorized raids had been falsified. N.Y. Times, June 13, 1972, at 1, col. 1. The Air Force tacitly acknowledged that the information had still been secret at the time of its disclosure by admitting that the falsified reports were still classified. *Id.* at 6, col. 2.

48. Hersh, *My Lai 4: A Report on the Massacre and its Aftermath*, HARPERS, May, 1970, at 53. In My Lai, a village in South Vietnam, in March, 1968, United States soldiers shot at least one hundred unarmed civilians. The first official version of the incident reported that two companies of the Americal Division had caught a North Vietnamese unit in a pincer movement, killing 128 enemy soldiers. There was no mention of civilian casualties. *Id.* at 72. After the Pentagon became aware of the massacre and decided to prosecute Lt. William Calley for the murder of 109 civilians, the Government still tried to keep the details of the story secret. After the issuance of a press release stating only that Lt. Calley would be prosecuted for the murder of civilians in Vietnam, the Pentagon refused to give any further information to reporters. *Id.* at 82. Also, on October 13, 1969, a month after the press release announcing the trial, the Pentagon contacted Ronald Ridenhour, the former soldier whose letter to Congressman Udall had prompted the investigation. In the letter to Ridenhour the Army stated, "It is not appropriate to report details of the allegations to news media. Your continued cooperation in this matter is acknowledged." *Id.* at 83. It was only after Hersh was able to find Calley that the public found out what happened at My Lai.

49. Sherrill, *Pendleton, Brig: Andersonville-by-the-Sea*, 209 NATION 239 (1969). Sherrill disclosed that during 1969 prisoners in the marine camp brig were being sub-

information that relates to military installations of the United States; and various reports concerning the Central Intelligence Agency (one of the most recent being its secret funding of political parties in Italy),⁵⁰ dealing with information that relates to intelligence operations of the United States. For these stories to come within the definition of national defense information all that is required is for the Government to have tried to keep the information secret.⁵¹ At some point in each of these stories this was the case.

Sections 1121 and 1122 attempt to narrow the information covered by requiring that it "may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power." But, at best, this is only a half-hearted attempt; in all likelihood it would still allow the stories referred to, to come within the statute. The present law requires that the information *is* to be used against the United States or for the foreign government.⁵² Any editor, no matter how patriotic his motives in publishing information shedding light on the mis-

jected to both physical and mental abuse bordering on torture. In the course of the article, Sherrill quoted from a memorandum marked, "for official eyes only," sent from the Quartermaster General of the Marine Corps to the Marine Chief of Staff. The report contained information directly related to a military installation.

"The camp was described by one officer as looking like *Andersonville* (an infamous prisoner-of-war camp holding Union soldiers during the Civil War). . . ."

The 1942 vintage building being utilized for all newly confined prisoners . . . is a fire and safety hazard. In two areas tents are being used for confinement . . . and the tents are extremely overcrowded, the average footage per man in these tents is about 25 square feet. The standard square footage is 75 square feet per man.

Id. at 240. The report also made clear that this information was to be kept secret: "[A] public disclosure of existing conditions could tend to place the Commandant in an embarrassing defensive position." *Id.* at 239.

50. N.Y. Times, Jan. 7, 1976, at 1, col. 8. In an article by Seymour Hersh, the paper reported that the CIA, beginning on December 8, 1975, had given over six million dollars in secret payments to anti-communist politicians in Italy. The information came to the paper through unrevealed sources. That the information was supposed to be secret can be seen by President Ford's reaction to the story. The day after release of the story it was reported that:

President Ford was described as being "angry" about published reports that the Central Intelligence Agency had been funnelling money to anti-communist politicians in Italy. . . .

Such reports, [the President] said, "undermine our capability to carry out foreign policy. . . ."

Id., January 15, 1976, at 13, col. 1.

51. There is no attempt to set a minimum standard of effort on the part of the Government necessary to remove information from the public domain and make it secret. The Committee believed this should be left to judicial development. JUDICIARY REPORT, *supra* note 3, at 233. The probable effect of this is that the least amount of effort as will be judicially accepted will become the standard causing the law to reach its broadest potential.

52. 18 U.S.C. §§ 793(a)-(c), 794 (1970).

deeds of this country, would have to acknowledge that the information *may be used* to the advantage of a foreign power for propaganda purposes if nothing else.⁵³

The above examples are within the purview of S. 1, specifically section 1123, because that section has no scienter requirement. All that is required is communication (publication) of the specified information to someone unauthorized to receive it (the public). Furthermore, the act of preparing these stories necessitated the receipt of the information. This means the reporter may have acted as an accomplice to the unauthorized communication of the information in violation of section 1123 (a)(1)(A)⁵⁴ or the reporter may have violated section 1123(a)(2) (B) by not promptly returning the information to the Government.

II. FIRST AMENDMENT CONSIDERATIONS

Because freedom of the press is guaranteed by the first amendment to the Constitution, any law that would make criminal the publication of information in a newspaper is subject to constitutional scrutiny. As stated by Justice Murphy:

A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.⁵⁵

Freedom of the press, however, is not absolute. The basic test is whether activities prohibited will cause a serious and imminent threat to

53. The propaganda value in the examples given above (notes 47-50 *supra*) is obvious. This value is even more obvious given that section 1121 refers to foreign power, not foreign nation. Foreign power has been defined to include:

"(a) foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States; and (b) an international organization."

S. 1, *supra* note 2, § 111. This definition would possibly include the minority political parties of every nation of the world, Amnesty International, and the International Red Cross.

54. Given the argument that national defense information is still as broad as the standard allowed in *Gorin* (see JUDICIARY REPORT, *supra* note 3, at 238; note 42 *supra* and accompanying text), Hersh's description of how he found Lt. Calley is enlightening. After asking a soldier for Calley's address the soldier replied:

"The only thing I know is that we've got his [Calley's] personnel file in there. I'd have to steal it out of there." There is a long pause. "Come on," I tell him . . . He says: "Well, wait here." And he goes in. He goes in past the old sergeant and comes out a couple minutes later. We get back inside the car. He reaches inside his shirt and pulls out a file marked, "Calley, William L., Jr."

Eszterhas, *The Reporter Who Broke the My Lai Massacre, the Secret Bombing of Cambodia and the CIA Domestic Spying Stories*, Rolling Stone, April 10, 1975, at 78, col. 2.

55. *Craig v. Harney*, 331 U.S. 367, 383 (1947) (Murphy, J., concurring).

a governmental interest worthy of protection. The Supreme Court has held a variety of state interests to be sufficient to allow limitation of the rights of the press. Among these interests are the need for public safety,⁵⁶ the need for the orderly administration of prisons,⁵⁷ and the need for fair administration of justice.⁵⁸ Related to this last interest are a defendant's right to a fair trial⁵⁹ and a grand jury's need for all information relevant to a criminal investigation.⁶⁰

A recent dramatic case demonstrates the non-absolute nature of freedom of the press. In *Nebraska Press Association v. Stuart*,⁶¹ Justice Blackmun (sitting as a circuit court judge) narrowed a broadly drawn gag order to allow limited censorship of the press in order to protect the defendant's right to a fair trial. The Justice stated:

Most of our cases protecting the press from restrictions on what they may report concern the trial phase of the criminal prosecution, a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity. . . .

I . . . conclude that certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial.⁶²

56. *Cf. Brandenburg v. Ohio*, 395 U.S. 444 (1969).

57. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (where information on prison conditions available from sources other than face-to-face interviews of designated inmates, denial of such interview does not violate freedom of press); *Pell v. Procunier*, 417 U.S. 817 (1974) (where inmates have alternate channels of communication, regulation prohibiting face-to-face interview does not deny prisoner's rights).

58. *Craig v. Harney*, 331 U.S. 367 (1947).

59. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). The Court, in balancing the defendant's rights against those of the press, has referred to a fair trial as "the most fundamental of all freedoms." *Id.* at 540.

60. *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Court believed that the importance of the grand jury in determining if there is probable cause to believe that a crime has been committed and in protecting people against unfounded criminal prosecution necessitates a broad investigative power, overriding the claimed privilege of newspapers for protection of their sources. *Id.* at 690-91.

61. 96 S. Ct. 251 (1975).

62. *Id.* at 255. After Justice Blackmun's ruling, the Nebraska Supreme Court limited censorship to events which had occurred prior to the opinion consisting of:

(1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.

Nebraska Press Ass'n v. Stuart, 18 CRIM. L. REP. 2254, 2255 (Neb. Sup. Ct., Dec. 1, 1975).

The importance accorded criminal rights in relation to freedom of the press is also underscored by the unwillingness of the courts to extend to civil actions the ruling of *Branzburg v. Hayes* (see note 60 *supra*), requiring disclosure of confidential news sources. See *Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972); *Democratic*

Given the position which the first amendment freedom of the press is accorded in our constitutional hierarchy, it is possible that rights of the press can be subordinated to the Government's national security interest. In *United States v. Nixon*⁶³ the Supreme Court noted that even the need for information in a criminal trial might not be sufficient to force disclosure of military, diplomatic, or sensitive national security secrets.⁶⁴ If the rights of the press must sometimes be subordinated to those of the courts, and the courts must bow to the needs of national security, it would seem that national security interests can be made superior to the press.⁶⁵

A. National Security as a Governmental Interest

On the federal level the need for national security for many years has been a potent leveler of other constitutional freedoms. In *Schenck v. United States*,⁶⁶ Justice Holmes stated, "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"⁶⁷ The test to be used, he continued,

is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.⁶⁸

Thus, the advocating of draft resistance to potential inductees during World War I, whether by speech, pamphlet, or newspaper, was held to constitute such a danger and Schenck was convicted.⁶⁹ Although the

Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973). As the *Baker* court stated:

[S]urely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.

470 F.2d at 785.

63. 418 U.S. 683 (1974).

64. *Id.* at 706.

65. In *Nixon*, the Court implied that national security information could be withheld even from "in camera inspection with all the protection that a district court will be obliged to provide." *Id.* at 706. Compare such exposure with that resulting from publication in one of the country's widest circulating newspapers.

66. 249 U.S. 47 (1919).

67. *Id.* at 52.

68. *Id.*

69. See also *Frohwerk v. United States*, 249 U.S. 204 (1919), which upheld the conviction of a newspaper publisher of a German-American newspaper for attempting to cause disloyalty, mutiny, and refusal of duty in the military and naval forces. "[I]t is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame . . ." *Id.* at 209. In *Schaefer v. United States*, 251 U.S. 466 (1920), the Supreme Court upheld

danger language was an impressive standard for the Government to meet, the Court found that it had been met with great frequency.⁷⁰ The Government's success was such that one commentator has reflected:

In examining the Court's record in the national security area, one seeks in vain to find a single case in which press freedom has been asserted successfully against a national security claim interposed by the government until the *New York Times* decision.⁷¹

There is no question that the Government has a legitimate interest in preserving the nation's security and that such an interest may justify curtailing civil liberties. Beginning in the 1960's, however, the Supreme Court became less willing to let national defense interests curtail fundamental rights. The Court began to require very specific, narrowly drawn statutes to prohibit conduct protected by the first amendment.

In *United States v. Robel*,⁷² the Court held unconstitutional a statute that made it a crime to work in a defense plant while being a member of the Communist Party. The statute was found to be overly broad in its restriction of the right of association guaranteed by the first amendment. Chief Justice Warren, while recognizing the Government's right to safeguard its vital interests,⁷³ stated that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."⁷⁴ Concurring, Justice Brennan wrote, "The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights"⁷⁵

In *United States v. United States District Court*⁷⁶ the Court found that the national security interest in engaging in wiretapping beyond that allowed by the confines of a narrowly drawn statute, could not take precedence over the fourth amendment's protection against unreasonable searches. In a concurring opinion, Justice Douglas noted that

a conviction against the officers of a German-American newspaper for publishing false reports and dispatches with the intent to obstruct the recruiting and enlistment service of the United States.

70. Justice Holmes often dissented from such findings. See, e.g., *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, Holmes, J.J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

71. Rubins, *Foreign Policy, Secrecy, and the First Amendment: The Pentagon Papers in Retrospect*, 17 How. L.J. 578, 592 (1972) [hereinafter cited as Rubins].

72. 389 U.S. 258 (1967).

73. *Id.* at 267.

74. *Id.* at 265, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963).

75. *Id.* at 275.

76. 407 U.S. 297 (1972).

even though domestic security was involved, the case was not removed from the mainstream of fourth amendment law. Rather, the fourth amendment grew out of a colonial abhorrence for writs of assistance which had been issued for reasons of domestic security.⁷⁷ An analogy can be drawn to the origins of freedom of the press in the trial of John Peter Zenger for seditious libel causing discord in the domestic tranquility.⁷⁸

*B. National Security as a Sufficient Interest to Abridge
First Amendment Rights.*

Unfortunately, there is no Supreme Court case deciding when publication of information by a newspaper is a sufficient threat to the national security so that criminal sanctions against such publication will be upheld as constitutional.⁷⁹ Even though there is a legitimate argument for enacting a statute imposing such sanctions, in view of the Court's efforts to limit the reach of national security, all three sections, 1121-23, would seem unconstitutionally overbroad, and section 1123 would also seem unconstitutionally vague.

1. Overbreadth

Since the defendant in *Gorin* never claimed a violation of first amendment rights, the Court never dealt with the question of overbreadth in the statutory language.⁸⁰ That issue should be reached under sections 1121, 1122, and 1123. The Supreme Court has stated:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.⁸¹

77. *Id.* at 327.

78. See generally J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (2d ed. 1972).

79. This issue could have been decided if the charges against Daniel Ellsberg had not been dismissed due to government misconduct, or the Supreme Court had not refused to reach the issue in *New York Times*. See Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) [hereinafter cited as Nimmer].

80. See notes 44-45 *supra* and accompanying text; notes 84-86 *infra* and accompanying text.

81. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted). The Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) stated:

A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.

Id. at 114 (footnote omitted).

The governmental interest in maintaining secrecy is to keep intact the nation's ability to be prepared for and to withstand any threats to the nation's existence.⁸² It is axiomatic that if the nation does not survive, all the rights guaranteed by the Constitution perish. The interests that must be balanced against this governmental interest in secrecy are the right of the press to inform the public and the public's interest to be informed so that it can intelligently involve itself in the major issues of the day. As Justice Douglas has written, "[t]he right to know is crucial to the governing powers of the people Knowledge is essential to informed decisions."⁸³

Specifically, since section 1123 is expressly applicable to the press and affects its rights under the first amendment to both publish and gather information,⁸⁴ overbreadth is an issue that must be reached. There are innumerable documents and much information that may come within the meaning of national defense information as used in section 1123, the exposure of which could present little or no threat to the country's collective security, much less a serious and imminent threat.⁸⁵ By making criminal the communication of such information, the statute "sweeps within its prohibition"⁸⁶ activities protected by the first amendment activities which the Government has no compelling reason to prohibit. For this reason section 1123 is unconstitutionally overbroad.⁸⁷

Sections 1121 and 1122 prohibit a narrower group of activities than those prohibited by section 1123; nevertheless, they should also be found unconstitutionally overbroad. This overbreadth stems precisely from the language which seemingly limits the conduct to which these

82. See note 71 *supra*.

83. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting). Cf. *Developments in the Law—National Security*, 85 HARV. L. REV. 1130 (1972) [hereinafter cited as *Developments*].

[I]ntelligent public discussion of such issues is virtually impossible when, as often happens, the basic facts necessary for an informed judgment are classified, with the result that the public may not even be aware of the policy options open to the Government.

Id. at 1216.

84. See generally Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

85. See notes 47-50 *supra*; *Craig v. Harney*, 331 U.S. 367 (1947).

86. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); see *id.* at 115-17.

87. If publication would not pose a serious enough threat to justify punishment, the retention of the information, if necessary for the preparation of the story, should likewise not be punishable. See *Developments, supra* note 83, at 1238-39 for a criticism of Justice White's opinion regarding retention in *New York Times*. See text accompanying notes 30-32 *supra*.

sections are applicable: the actor must know that the information may be used to "the prejudice of the safety or interest of the United States or to the advantage of a foreign power." This "knowing" provision, when discussed in terms of the press, is so all encompassing as to be no limitation at all.

The "prejudice to the United States" standard is also an insufficient standard of injury. It must be recognized that as to information which could be used to the prejudice of the United States, this country has many interests—the soundness of its political institutions, its ability to conduct foreign affairs, and safety in its streets. A story such as the one uncovering Central Intelligence Agency payoffs in Italy⁸⁸ might have a prejudicial effect on the nation's ability to engage successfully in foreign affairs. But by informing the citizenry of what a Government is doing in its name, the people are better able to judge whether such a government should remain its representative. Such a story therefore proves a benefit to our political institutions. S. 1 does not acknowledge or in anyway accommodate this beneficial consideration.

In *Aptheker v. Secretary of State*,⁸⁹ the Supreme Court, although upholding the right of Congress to pass legislation to provide for the national security,⁹⁰ held unconstitutional the application to members of the Communist Party a prohibition on travel outside the country. The Court's holding was based, in part, upon the fact that the prohibition excluded "plainly relevant considerations" as to whether the travel would affect the interest Congress sought to protect.⁹¹ Likewise, sections 1121 and 1122 fail to provide explicit provisions mandating that countervailing considerations to governmental interests be taken into account.

Moreover, the "prejudice" standard creates an insufficient standard both as to imminence or likelihood. In *Brandenburg v. Ohio*,⁹² a case involving the right of a state to infringe upon first amendment rights for the purpose of protecting the public order, the Supreme Court stated:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or to produce such action.

88. See note 50 *supra*.

89. 378 U.S. 500 (1964).

90. *Id.* at 509.

91. *Id.* at 514.

92. 395 U.S. 444 (1969).

. . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.⁹³

Whereas present law requires that the information "is to be used," S. 1 requires only that it "may be used." Thus, S. 1 presents a broadening of present law, one which fails to limit the abridgment of first amendment rights to those situations where there is an imminent threat.

A final problem with the "prejudice" standard is the seriousness of the injury that the United States must suffer. If the statute were regulating conduct not constitutionally protected, the prohibition based on prejudice to the state might be sufficient. But, in the words of Justice Brandeis:

Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means of averting a rather trivial harm to society. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of *serious* injury to the State.⁹⁴

The concept of "advantage to a foreign power" raises the further question of whether a law can constitutionally abridge the exercise of the freedom of the press without a requirement that any injury to the state occur.⁹⁵ This provision, referring to the advantage of a foreign power, was deleted by the National Commission without explanation.⁹⁶ The Committee reinstated the language on the ground that it was upheld in *Gorin*.⁹⁷ But, as noted previously, *Gorin* did not reach the issue of infringement on the first amendment. Additionally, the coverage of this provision is expanded because of the change from "intent that it is to be used" to "knowing that it may be used."

In this context, the stories concerning My Lai⁹⁸ and the air raids of General LaValle⁹⁹ may have been, and probably were, of great value to the North Vietnamese in their effort to influence world opinion. But these stories also served a vital interest of Americans, *i.e.*, making clear the full scope of activity engaged in during the Vietnam war. Without

93. *Id.* at 447-48 (emphasis added and footnote omitted).

94. *Whitney v. California*, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring) (emphasis added). See also *Craig v. Harney*, 331 U.S. 367 (1947); *Nimmer*, *supra* note 79, at 331.

95. See *Nimmer*, *supra* note 79, at 330.

96. FINAL REPORT, *supra* note 3, § 1112.

97. JUDICIARY REPORT, *supra* note 3, at 234; see *Gorin v. United States*, 312 U.S. 19, 29-30 (1941).

98. See note 48 *supra*.

99. See note 47 *supra*.

such knowledge it would be difficult for the public to decide whether or not to support the war effort. Since the definition of foreign power includes the political parties of foreign governments,¹⁰⁰ the scope of sections 1121 and 1122 is greatly broadened. Thus, the report on CIA activity would fall within these sections because the information concerning payoffs to certain parties in Italy¹⁰¹ was of great benefit to those political parties not involved. At the same time, this story was significant in informing the American public of the extent of CIA activities.

However, since the language of sections 1121 and 1122 is drawn in the disjunctive, criminal liability would still attach for the publication of these stories. So long as the foreign power is benefited, the gain to the United States is unimportant.¹⁰² This clearly is at odds with language the Supreme Court has used when ruling on the abridgment of the first amendment.¹⁰³ If "prejudice of the safety . . . of the United States" is an insufficient standard of injury, a lack of injury at all must clearly fail.

These statutes, unconstitutionally overbroad on their face, cannot be saved by judicial construction. The Supreme court in *Aptheker* stated:

It must be remembered that "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . ." or judicially rewriting it.¹⁰⁴

The Committee has stated that sections 1121 and 1122 carry forth the provisions of section 793(a)-(c) and (d)-(e) respectively.¹⁰⁵ In giving its opinion of the purpose of these present laws, the Committee commented that

subsections (c) through (f) [of section 793] . . . are principally prophylactic measures, aimed at deterring conduct which might expose

100. S. 1, *supra* note 2, § 111; *see* note 54 *supra*.

101. *See* note 50 *supra*.

102. *Cf.* 40 OP. ATT'Y GEN. 247 (1942), where the transference of defense information to allies under Lend-Lease was ruled not to violate the espionage laws because "the primary advantage sought is that of the United States." The difference there was that the information was transferred in order for the receiving nation to confer the benefit back to the United States. In a situation like Vietnam, there is no intention on the part of the foreign power to confer a benefit on the United States. In some cases the information may be used to the detriment of the United States. *See also* Edgar & Schmidt, *supra* note 17, at 998.

103. *See generally* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Craig v. Harney*, 351 U.S. 367 (1947); text accompanying notes 55, 57, 89-93 *supra*.

104. 378 U.S. at 515, *quoting* *Scales v. United States*, 367 U.S. 203, 211 (1961).

105. JUDICIARY REPORT, *supra* note 3, at 232, 237.

material to foreign eyes rather than against espionage on behalf of foreigners.¹⁰⁶

Given this broad intent, there appears to be no way in which a court could construe the statute within constitutional limits and still do justice to Congress' purpose in writing the law.

2. Vagueness

As recently expressed by Justice Powell:

[T]he objection to vagueness, purely as a matter of due process . . . , rests in the possibility of discriminatory enforcement and in the unfairness of punishing a person who could not reasonably have predicted that the conduct in which he engaged was criminal.¹⁰⁷

The term "national defense information" is so vague as to what it does or does not cover that a statute making criminal its communication, loss, or destruction does not sufficiently make a person aware of what conduct is or is not criminal. Because section 1123 contains no scienter requirement it fails for vagueness under the Supreme Court's ruling in *Gorin*. There the Court ruled that as to the language "information relating to the national defense":

[W]e find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The *obvious delimiting words* in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith.¹⁰⁸

Because both sections 1121 and 1122 modify the phrase "national defense information" by requiring that the accused know the information "may be used to the prejudice of the safety or interest of the United States or to the advantage of a foreign power," these sections would appear to withstand constitutional scrutiny as to vagueness under *Gorin*. Although the necessary state of mind in *Gorin* was intentional and under S. 1 it is "knowing," "knowing" has been defined to mean that the actor

106. *Id.* at 227.

107. *Ellis v. Dyson*, 421 U.S. 426, 449 n.15 (1975). The objection of vagueness is even more critical when it touches on first amendment conduct.

[W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms."

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972), quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).

108. *Gorin v. United States*, 312 U.S. 19, 27-28 (1941) (emphasis added).

is aware of the nature of his conduct, he is aware or believes that requisite circumstances exist, or he is aware or believes that his conduct is substantially certain to cause the result.¹⁰⁹

Thus, it would appear that the "knowing" language will be sufficient to find that the person is put on notice.

III. ACCOMMODATING THE CONFLICTING INTERESTS: IN SEARCH OF A PERMISSIBLE CRIMINAL STANDARD

It has never been the intent of this Comment to claim that the Government does not have a legitimate need for secrecy in some situations, or a concomitant right to insure that this secrecy is maintained. In the words of Justice Clark, "the life or liberty of any individual should not be put in jeopardy because of actions of any news media'"¹¹⁰ Likewise, the life of a nation should not be threatened. As Chief Justice Burger has recently written:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.¹¹¹

The question then is what standard of harm will justify the imposition of criminal sanctions against the press in order to protect national security.¹¹² Although the *New York Times* case did not reach this issue, it has generated a great deal of literature on the question.

In *New York Times*, the Court faced the issue of when a prior restraint in the interests of national security might override a newspaper's constitutional right to publish. Justice Brennan argued that it would require an 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 sea¹¹³

109. JUDICIARY REPORT, *supra* note 3, at 51.

110. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

111. *United States v. Nixon*, 418 U.S. 683, 710 (1974), quoting *C. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 111 (1948).

112. Not all persons have suggested that this secrecy should be maintained by criminal sanctions. Ramsey Clark, former United States Attorney General, in an interview with this author on January 26, 1976, expressed the opinion that criminal sanctions against the press should never be imposed. During World War II there were no prosecutions despite the fact that an American newspaper once published damaging, secret information. Mr. Clark expressed the view that the espionage provisions in S. 1 and the general desire to make criminal certain press activity were a reaction to the publication of the Pentagon Papers and should not be enacted.

113. 403 U.S. at 726-27 (Brennan, J., concurring).

Any claim that the information "could" or "might" or "may" prejudice the national interest would be implicitly rejected. Justice Stewart, in an opinion joined by Justice White, would require direct, immediate, and irreparable damage to the nation before allowing imposition of a prior restraint.¹¹⁴ In his dissent, Justice Harlan, joined by the Chief Justice and Justice Blackmun, agreed with the requirement of irreparable injury, but believed that this finding should be left to the executive and respected by the judiciary.¹¹⁵

Three of the Justices expressed a belief, however, that a second, less restrictive standard should be employed for judging the criminality of a publication. Based on the belief that the primary right guaranteed under freedom of the press is the ability to publish, and not the ability to avoid the consequences of the publication,¹¹⁶ several Justices indicated that a lesser standard could be used to justify post-publication criminal sanctions. This argument proceeds from the fact that the imposition of a prior restraint on publication is more restrictive of expression than criminal sanctions. First, the injunction proceeding itself may delay publication for several days during which time a disobedience by the publisher of the injunction will be grounds for punishment, regardless of the validity of the injunction.¹¹⁷ Second, an injunction issues before publication when the question of danger to national security is less capable of being intelligently answered than at a post-publication criminal trial.¹¹⁸

Noting the criticism of the application of different standards as between prior restraints and criminal sanctions,¹¹⁹ several commentators

114. *Id.* at 730 (White, J., concurring).

115. *Id.* at 757 (Harlan, J., dissenting).

116. *Id.* at 726 (Brennan, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 740 (White, J., concurring).

117. *Developments, supra* note 83, at 1240.

118. *Id.* at 1241. See also *New York Times Co. v. United States*, 403 U.S. 713, 748-52 (1971) (Burger, C.J., dissenting).

119. Underlying the argument favoring a different standard for criminal sanctions is Blackstone's writing that:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published."

Times Film Corp. v. Chicago, 365 U.S. 43, 53 (1961) (Warren, C.J., dissenting), *quoting* 4 BLACKSTONE'S COMMENTARIES 151 (Cooley 4th ed. 1899). This language was criticized by Chief Justice Warren who noted:

There has been general criticism of the theory that Blackstone's statement was embodied in the First Amendment, the objection being "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions; and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he

have argued that the Brennan-Stewart test of irreparable injury should be applied in both situations.¹²⁰ The value of such a standard is that it gives credence to the proposition in *New York Times* that a free flow of information to the public is necessary in a democracy to check governmental power.¹²¹ However, a criminal statute apparently would not have to meet as strict a test as was outlined by Brennan in order to be upheld. Members of the Court in *New York Times* also made clear that guidance from Congress on this issue would be respected.¹²² Another commentator has suggested that the test to determine the validity of a criminal statute should focus upon the intent of the publisher. According to this approach, the first amendment would prohibit the prosecution of a publisher absent a showing of some improper state of mind in publishing information injurious to the national interest.¹²³

Whether one focuses upon the injury to the United States or the intent of the publisher, it appears that in order to accommodate both the national security interest and the Constitution any criminal statute should be limited to guarding against the disclosure of specific information of such a nature that the public's interest in receiving it is minimal

pleased, the public authorities might nevertheless punish him for harmless publications.'"

Id. at 54. Warren's criticism has been further explained:

Warren was quoting Thomas Cooley's Comments on Blackstone in *Constitutional Limitations* (7 ed.) pp. 603, 604. Later in the same passage Cooley states, "The evils to be prevented were not the censorship of the press merely but any actions of the government by which means it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Rubins, *supra* note 71, at 607 n.135.

Also critical of the distinction between prior restraint and criminal sanctions in a case such as *New York Times* is Columbia Law Professor Louis Henkin, who wrote:

The distinction between prior injunction and subsequent punishment is hallowed by history, but its application, at least here, would seem less than persuasive: while a criminal penalty more readily permits "civil disobedience," or reliance on the jury to acquit, stiff penalties will deter—and deny the right to know—almost as effectively as any injunction.

Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278 (1971).

120. See *Developments, supra* note 83, at 1242; Nimmer, *supra* note 79, at 333.

To be sure, *some* injury would result from such a standard, but the harm is more than counterbalanced by the speech values enhanced. . . . [S]peech immunity in this context is likely to carry with it a healthy criticism of government officials whose activities could not otherwise be held up to the public light.

Id.

121. *Developments, supra* note 83, at 1241.

122. 403 U.S. at 730 (White, J., concurring). See Becker, *The Supreme Court's Recent "National Security" Decisions: Which Interests are Being Protected?*, 40 TENN. L. REV. 1, 27 (1972); *Developments, supra* note 83, at 1242.

123. Katz, *Government Information Leaks and the First Amendment*, 64 CALIF. L. REV. 108, 129-31 (1976) [hereinafter cited as Katz].

compared to the grave dangers to security or constitutional executive privilege¹²⁴ that might result from disclosure.¹²⁵ The alternative to S. 1, H.R. 10850, attempts to formulate such a statute. The espionage sections cover the communication of technical details of weaponry and defensive military contingency plans in respect of foreign nations, if such information, if obtained by a foreign government would be used to injure significantly the national defense of the United States.¹²⁶ Further, H.R. 10580's section 1121 requires that the defendant must *intend* the information to be used by a foreign nation to the injury of the national defense.¹²⁷ S. 1, on the other hand, is totally inadequate in this respect.

IV. CONCLUSION

The right of the press to disseminate information to the American public is a constitutionally protected activity. The inclusion of publication of certain information as criminal activity in sections 1121, 1122, and 1123 of S. 1 imposes the requirement that these sections be narrowly and specifically drawn in order to insure that they do not infringe on the protected activity of the press. Unfortunately, the language of these sections is unconstitutionally overbroad in that it may create criminal liability for the publication of information that poses no threat to the security of the United States, and may, in fact, be beneficial to the interest of the public in insuring a representative government. Additionally, section 1123 is unconstitutionally vague in its failure to require scienter as an element. Therefore, S. 1 should be rejected insofar as it represents an impermissible expansion of espionage offenses.

However, since there are also several problems with the present espionage laws,¹²⁸ the effort for reform should not end with a rejection of S. 1. Rather, Congress should attempt to draft a statute that would permissibly accommodate the relevant interests. The Supreme Court has

124. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

125. *Developments*, *supra* note 83, at 1242.

126. H.R. 10580, 94th Cong., 1st Sess., §§ 1121, 1124 (1975). This bill, however, is subject to the same criticism as S. 1 in that there is no requirement of imminence of injury. See notes 92-93 *supra* and accompanying text.

127. Thus, if the publisher's motive is to inform the public there would be no liability. *Katz*, analogizing to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), concluded that since the public in the interest of its well-being has a right to have certain information kept secret, if a publisher, with reckless disregard of that right, discloses the information such publisher should be subject to liability. *Katz*, *supra* note 123, at 131-32.

128. See *Edgar & Schmidt*, *supra* note 17, at 1076-87.

provided some guidance on the issue in *New York Times*, and the Congress has made some significant steps towards achieving a proper statute in H.R. 10850. But when dealing with the writing of criminal laws in such an important area, attention should be paid to former Chief Justice Warren's remarks that:

[T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of the legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideas which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of those liberties . . . which make the defense of the Nation worthwhile.¹²⁹

Ronald Keith Silver

129. *United States v. Robel*, 389 U.S. 258, 264 (1967) (Warren, C.J.).