Prior Restraint and the Press Following the Pentagon Papers Cases--Is the Immunity Dissolving

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NOTES

PRIOR RERAINT AND THE PRESS FOLLOWING THE PENTAGON PAPERS CASES—IS THE IMMUNITY DISSOLVING?

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude of evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.

A. Hamilton, The Federalist

I. Introduction

"Victory for the Press" proclaimed the bold yellow headline on the cover of the July 12, 1971 issue of Newsweek magazine. The rhetoric within the magazine was indicative of the triumphant feelings of many journalists following the announcement of the United States Supreme Court decision in the Pentagon Papers cases: "Few clearer gauges of the sanctity of the First Amendment freedoms, few plainer demonstrations of the openness of American society, could be imagined than the High Court's ruling in favor of the press." However, even in this flush of victory, there were those who were more cautious and examined this seeming "victory" with a more discerning eye. In fact, in the same Newsweek article there were words of caution: "Indeed, a close reading of the nine separate opinions made it clear the press's triumph was far from unqualified." At the time of this note these qualifications are even more apparent. The dangers lurking within the decision have been the subject of discussions within journalistic ranks and some knowledgeable observers have made pessimistic predictions based on this "triumph" of the press.

At the center of the Pentagon Papers cases was the doctrine of prior restraint in the form of injunctive relief. This doctrine, proscribing the use of restraints prior to publication or communication, has been interwoven in a myriad of decisions involving first amendment rights, but nowhere has it been more

1 The Federalist No. 84, at 535 (B. Wright ed. 1961) (A. Hamilton).
2 New York Times Co. v. United States, 403 U.S. 713 (1971). The Supreme Court extended its term, for the first time in fourteen years, to hear both the New York Times and Washington Post cases in which the Government sought to enjoin both newspapers from publishing the contents of a classified study compiled by the Department of Defense entitled "History of U.S. Decision-Making Process on Vietnam Policy." The original restraining order was issued June 15, 1971 against the Times and the cases were decided June 30, 1971. See text Part IV, B, 3, infra.
3 Newsweek, July 12, 1971, at 16.
4 Id. at 17.
5 Landau, Free at Last, At Least, The Quill, Aug., 1971, at 7. An excellent example of such a prediction was that made by Jack C. Landau, New York University Law School graduate and distinguished journalist who has covered the Supreme Court and has also served as director of public relations for the Department of Justice. "Far from making the press 'stronger' than before — as the Time's lawyer, Alexander Bickel, claimed — the traditional interpretation of freedom of the press was probably weakened by the whole affair." Id.
The Quill is the official publication of Sigma Delta Chi, the professional journalistic society.
strictly adhered to than in connection with newspapers and other forms of written or printed expression. This article is intended to explain why the press has received this preferential treatment and how the doctrine has, or has not, been applied to the print medium. The article's scope will be primarily limited to newspapers, but it will be impossible to discuss the doctrine of prior restraint without involving other forms of expression such as movies, books, and even parades. Radio and television will not be discussed due to the unique consideration they receive under the law through the Federal Communications Commission which regulates the broadcast industry.

An examination of the development of the doctrine is essential in an effort to predict its future applicability. The Pentagon Papers cases provide an excellent study of the doctrine as it presently exists, and they will receive a detailed examination. A prime concern of this article is to evaluate the triumph of the press in those companion cases—was it a victory to be celebrated or was it a Pyrrhic victory that should be mourned? Is the press immune from the malady of prior restraint or is the press to be crippled as prior restraints infect this vital area of expression?

II. Definition and Application

A. Definition

The common concept of prior restraint revolves around official governmental restrictions imposed upon speech or other forms of expression in advance of actual publication or dissemination. However, there are types of previous restraints that are not governmentally-sanctioned yet perform the identical function as do governmental forms of restraints—they restrict expression prior to publication. These variations of previous restraints are self-imposed for the most part, but editorial decisions to self-censor can be influenced by the possible ramifications of not utilizing the self-censorship form of prior restraint. However, it is governmental restrictions that the law has been concerned with, not self-imposed prior restraints that may be considered by some as the hallmark of a responsible press.

Prior restraint must be distinguished from subsequent punishment which is imposed following publication of the offensive material. Prior restraint precludes publishing, while subsequent punishment permits dissemination but will inflict penalties following communication. The doctrine of prior restraint was elevated to the status of a constitutional principle through the first amendment and is applicable to the states through the fourteenth amendment. In constitutional terms, the doctrine is interwoven into the fabric of the first amend-

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9 See note 204 infra.
ment's guarantees of freedom of speech, press and assembly. It has been involved in determining constitutional disputes in all three areas, but this article will concentrate on the doctrine's involvement with freedom of the press.

It should be noted that the doctrine has generally involved limitations of form rather than content. Restrictions that would be valid if applied subsequent to publication are held to be invalid if applied in advance of publication. The principle is to allow the communication and then penalize the publisher if it is improper. Statutes that appear to provide for subsequent punishment may in fact be forms of prior restraints and fall under the auspices of the doctrine. In such a case, it is the ultimate effect of the statute that must be considered, not the apparent intention of the statute.

B. Implementation of Prior Restraints

To better understand the doctrine of prior restraint, a quick examination of methods of implementation will prove beneficial.

1. Licensing

The most obvious form of prior restraint, and historically the most common, is a system of licensing. The doctrine's creation was a reaction to sixteenth and seventeenth century attempts to control the press by requiring licenses and permits to publish. Licensing is one manner by which legislatures have attempted to initiate prior restraints and it is the method the American courts have become more intolerant of than any other type of control over the press. It is the potential for censorship that exists within the discretion of the licensing official that causes statutes approving a licensing system to be disallowed in the courts. It is the power of disapproval by an executive official that is the clearest form of prior restraint. A leading case in the area is Lovell v. Griffin in which a city ordinance demanding written permission from the city manager prior to distributing literature was struck down. Chief Justice Charles Evans Hughes delivered the Court's opinion and wrote, "The struggle for freedom of the press was primarily directed against the power of the licensor. . . . Legislation of the type of ordinance in question would restore the system of license and censorship in its baldest form."

2. Taxation

While taxation is not a direct restraint on the press, taxes can become so discriminatory that they result in regulation and restraint of the press. It is an-

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12 Emerson, supra note 7, at 648.
14 Text Part IV, infra, will examine the application of the doctrine in regards to certain forms of communication and types of expression considered not to be within the protection of the first amendment.
15 See text Part III, infra.
16 W. Hachten, supra note 6, at 72.
17 303 U.S. 444 (1938).
18 Id. at 451-52.
other method by which legislatures have tried to influence the press. As with licensing statutes, discriminatory taxes have been disallowed by the courts.

A Louisiana gross receipts tax on the advertising income of newspapers with a weekly circulation of 20,000 or more readers was declared unconstitutional by the United States Supreme Court in *Grosjean v. American Press Co.* The Court ruled the law abridged the freedom of the press because the tax "[I]s seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees."

3. Threat of Subsequent Punishment

The most effective form of legislative prior restraint is the threat of subsequent punishment. Since the press is allowed to publish before the penalty will be utilized, the courts will not usually strike down the penalty on its face as a prior restraint.

In efforts to avoid the penalty, the press will restrain itself and will not publish. The fear of a libel suit or the possibility of being held criminally libel no doubt acts as a strong deterrent and is an effective, even though indirect rather than direct, method of censorship. For example, the threat of a law suit induced the *Christian Science Monitor* to censor itself during the *Pentagon Papers* controversy.

4. Injunction

This is the judicial form of prior restraint. In *Near v. Minnesota* the state of Minnesota asked the Court to enjoin *The Saturday Press* from publishing. The major issue of the *Pentagon Papers* cases was the government’s ability to prevent publication of the papers by obtaining an injunction. In these types of cases the judicial officer has power similar to that of an executive officer administering a licensing statute since the decision as to whether or not the injunction shall issue is made in the officer’s discretion. Even if the decision is appealed after an injunction is issued, there will be a period of time in which a newspaper will be restrained from publishing.

C. Characteristics of Prior Restraint

Recognizing the distinguishing factors that separate prior restraints from

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19 297 U.S. 233 (1936).
20 *id.* at 250. The opinion by Justice George Sutherland provides an excellent historical development of the relationship between freedom of the press and taxation. *See also Jones v. Opelika, 319 U.S. 103 (1943), vacating, 316 U.S. 584 (1942).*
21 *See Note, Prior Restraint—A Test of Invalidity in Free Speech Cases?, 49 Colum. L. Rev. 1001, 1003 (1949).*
22 *The Quill, supra* note 5, at 7.
23 An excellent example once again is the *Pentagon Papers* cases. *The New York Times* went 15 days without using the story while the *Washington Post* was silent for 11 days, the *Boston Globe* for 8 days, and the *St. Louis Post Dispatch* for 4 days.
subsequent penalties is crucial to understanding the ramifications of the doctrine. In the preceding section, means of implementing prior restraints were discussed and in most situations there was a common characteristic—the use of discretion by an executive or judicial official. These restraints include licenses, permits, censorship laws, injunctions and the like. Executive decisions were also required to bring the judicial system into play in both Near and the Pentagon Papers cases. It is evident that one of the most important characteristics of a prior restraint is that the decision to restrain publication often rests with a single government official.

This creates a situation conducive to the rendering of arbitrary decisions by an overzealous government functionary. By not providing the means for public appraisal of this official’s reasoning process, since his decisions are often made far from a public forum, the door is left ajar for the possibility of official discrimination and abuse.

A danger found in a system of prior restraints, not found when there is an attempt to apply a subsequent penalty, is the lack of public attention given the attempt to impose the restraint. The reasons for the decision are not matters of public knowledge and are not held up for public debate, and there is not an opportunity for public scrutiny of an act that involves fundamental constitutional questions. The capability of the official becomes critical as does his capacity to look at a publication objectively with the ability to suppress the knowledge that he must be responsive to his employer—the government—and to remember that he is safeguarding freedom of expression.\(^\text{24}\) As Milton commented, “[W]e may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss or basely pecuniary.”\(^\text{25}\)

Another important distinction between a prior restraint and a subsequent penalty is that a prior restraint is far more broad and effective. All expression, not only the offensive, will be subjected to government inspection and approval. A system of prior restraints would no doubt mean a curtailment of opinions from individuals willing to risk a subsequent penalty. Official opinions and philosophies would meet far less resistance or debate about their merit.

Subsequent punishment is applied because of the content of a communication or the manner of its dissemination, while the sole consideration in a proceeding to enforce a prior restraint is whether or not the communication was approved before it was disseminated. If a publication does not submit to such a system of restraints, the reasons why approval would or would not have been forthcoming could not be considered—all that would count was that the material was not approved before it was offered to the public.

An additional characteristic of prior restraints, and a danger the doctrine attempts to prevent, is that a system of prior restraints would make it easier for the government to restrict free expression by taking advantage of the restraints rather than utilizing possible subsequent penalties.\(^\text{26}\)

All of these characteristics tend to illustrate that any system of prior re-

\(^\text{26}\) Emerson, supra note 7, at 657.
straints would be a greater deterrent to free expression than would a system of subsequent prohibitions, especially to the press where there presently exists great freedom even from subsequent penalties.27

III. History of the Doctrine

A. English Birth

The genesis of our doctrine of prior restraint was the struggle against licensing and censorship in England during the sixteenth and seventeenth centuries.28 As early as 1501 Pope Alexander II attempted to control printing through the use of a prior restraint in a "bull" which prohibited unlicensed printing.29 The rapid development of printing in the two centuries following the fifteenth century invention of the printing press was accompanied by the printer’s freedom being controlled by ruling authorities. The struggle in England from 1538 to 1695 for freedom of the press was primarily a battle against prior restraints, in particular, licensing laws.

The entire English press was subjected to a licensing system by Henry VIII in a 1538 proclamation.30 All material had to be submitted prior to publication for official approval and censorship. Such proclamations, Star Chamber decrees, and Parliamentary enactments continued to flow from the government until 1695 when the licensing law expired and the House of Commons failed to renew it. During the period from 1538 to 1695, printing and publication were thoroughly shackled by prior restraints.

Publication without a license was decreed to be a criminal offense under the Licensing Act of 1662.31 No book could be imported without a license, all printing presses had to be registered, the number of master printers was limited to twenty and they had to be licensed, and the Act also granted the government the power to search homes and shops for suspect material. Acts such as this were never revived following the lapse of the final licensing law in 1695. However, the law prohibiting seditious libel and blasphemy remained unaffected, but it was applied as a form of subsequent punishment rather than a prior restraint.32 The licensing laws were allowed to fade into oblivion for several reasons, one of the strongest of which was that the existing system had become so complex and unwieldy that it had become impossible to manage effectively.33 In addition, there were strong attacks on the system by those opposing such governmental power.34

28 Note, Press Control and Copyright in the 16th and 17th Centuries, 29 YALE L.J. 841 (1920).
29 Emerson, supra note 7, at 650.
30 Id.
31 13 and 14 Car. 2, c. 33.
33 Emerson, supra note 7, at 651.
34 See, e.g., J. MILTON, supra note 25, which contains a passage that is quoted in almost all works dealing with the freedom of press:

And though all the winds of doctrine were let loose to play upon the earth, so
The English common law gradually accepted the concept of freedom from licensing, and Blackstone summarized the English attitude towards prior restraints in a famous statement:

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. 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.\(^3\)

Blackstone’s definition has been subjected to criticism for both being an inaccurate representation of the status of English law in the latter part of the eighteenth century and for being too narrow since it limits freedom of the press to freedom from previous restraints. Professor Zechariah Chafee, Jr., attacked the Blackstone statement on the basis that it is both too restrictive of state actions and, on the other hand, so narrow that it gives inadequate protection to freedom of the press by ignoring the possibility of onerous subsequent penalties.\(^3\) Notwithstanding the intellectual debate, there is no doubt that in 1791, when the first amendment was drafted, adopted and ratified, the struggle over licensing laws was not forgotten and the foreclosure of any system of prior restraints was one of the objectives of the first amendment.

B. Development in America

1. Constitutional Development

The first amendment elevates the concept of freedom of the press, including the doctrine of prior restraint, to the status of a constitutional principle.\(^3\) The presumption that the freedom of press precluded prior restraints has never been challenged and though the prohibition of laws abridging freedom of the press is not limited to laws imposing prior restraints, the United States Supreme Court, in \textit{Patterson v. Colorado},\(^3\) held that the main purpose of the first amendment is to prevent prior restraints while not precluding subsequent punishment for material deemed contrary to the public welfare.

This concept was reaffirmed in a 1952 case dealing with the prior restraint of showing a movie. In \textit{Joseph Burstyn, Inc. v. Wilson},\(^3\) Justice Clark said the Supreme Court had indicated that a “major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication. . . .”\(^4\)

\(^{35}\) W. Blackstone, Commentaries *151-52.
\(^{36}\) Z. Chafee, \textit{Free Speech in the United States} 4-11 (1941).
\(^{37}\) “Congress shall make, no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. 1.
\(^{38}\) 205 U. S. 454, 462 (1907).
\(^{39}\) 343 U. S. 495 (1952).
\(^{40}\) Id. at 503.
Despite the fact the doctrine ceased to be challenged and became elevated to the status of a constitutional principle\(^{41}\) it was not until 1925 that the power of state governments to control expression was brought within the purview of the first amendment through the due process clause of the fourteenth amendment in *Gitlow v. New York.*\(^{42}\)

It was from a courtroom defeat in which Benjamin Gitlow was convicted for publishing a Left Wing Manifesto that this important victory was achieved as the Court finally settled the issue with the unanimous holding: "[W]e may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states."\(^{43}\) The Supreme Court’s power to protect the freedom of expression was now complete due to this triumph for freedom of speech and press.\(^{44}\) Since the doctrine of prior restraint had already become a constitutional principle, it was now also applicable to the states.

2. Near v. Minnesota

It was not until 1931 that the doctrine of prior restraint was delineated in the landmark *Near v. Minnesota*\(^{45}\) case. The post World War I decisions and other cases that might have been suitable for consideration of the doctrine were resolved on other grounds;\(^{46}\) however, the doctrine was invoked in *Near* and was utilized in resolving the case. It is this decision that in all probability accounts for the immunity from prior restraints that newspapers have generally enjoyed, while other forms of expression have proved more susceptible to previous restraints.

The case centered around a Minnesota statute\(^{47}\)—the “Minnesota Gag-law,” as it was commonly known. The statute authorized prior restraint of publications considered undesirable by Minnesota courts by providing that “any person” engaged in the business of regularly publishing a “malicious, scandalous and defamatory newspaper, magazine or other periodical” was guilty of a nuisance. The act authorized suits by the state or, if it refused or failed to act, by any citizen of the county in which the publication was located to enjoin “perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it.” The court issuing the injunction was empowered to punish disobedience, as it would any other contempt—with a fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months.\(^{48}\)


\(^{42}\) 268 U.S. 652 (1925). “[N]or shall any state deprive any person of life, liberty, or property, without due process of law, . . .” U. S. Const. amend. XIV, § 1.

\(^{43}\) Gitlow v. New York, 268 U.S. 652 (1925). Gitlow was pardoned soon after the decision by New York Governor Alfred E. Smith.

\(^{44}\) For a detailed examination of the Gitlow case, its background and its effects, see Z. Chafee, *Free Speech in the United States* 318-25 (1941).

\(^{45}\) 283 U. S. 697 (1931).

\(^{46}\) See Z. Chafee, *supra* note 36, at 42-51, 97-100, 298-305, 549-550 for a discussion of these cases and the issues they were decided upon which usually dealt with denying use of the mails.

\(^{47}\) Mason’s Minn. Statutes, 1927, 10123-1 to 10123-3 (ruled unconstitutional).

\(^{48}\) Near v. Minnesota, 283 U.S. 697, 701-03 (1931).
The particular case involved a Minneapolis weekly newspaper, The Saturday Press, which had been highly critical of government officials in the city. The Supreme Court described the articles that resulted in the injunction as charging "in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcement officers and agencies were not energetically performing their duties."49 The state court issued a permanent injunction, finding the publication constituted a nuisance under the "gag-law."50

Chief Justice Hughes spoke for the majority in the narrow five-to-four decision that held the Minnesota statute was a prior restraint and an abridgment of the first amendment's freedom of the press applicable to the states through the fourteenth amendment since being incorporated by Gitlow. The opinion traces the history of freedom of the press and formulated the following doctrinal concept:

The exceptional nature of its limitations places in a strong light the general conception 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.51

However, this liberty from prior restraints was qualified and could be limited in "exceptional" cases:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.52

The opinion clearly held that material that could be the subject of subsequent punishment was protected from previous restraints by the doctrine of prior restraint.

The minority position in this case was an especially strong one because Near broke with the history of the doctrine of prior restraint because the Court was not dealing with a licensing law but with a statute that only prevented further publication of a "malicious, scandalous and defamatory" newspaper.53 The statute did not require approval prior to publication, but only penalized a newspaper after it had published material the state court considered to be in violation of the law. As Justice Butler argued in his dissenting opinion:

The Minnesota statute does not operate as a previous restraint on the publication within the proper meaning of that phrase. It does not authorize

49 Id. at 704.
50 Id. at 706.
51 Id. at 716.
52 Id.
53 Id. at 712-13.
administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. . . . It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent further publication of malicious, scandalous and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.\textsuperscript{54}

It is here that the majority of the Court ignored the theoretical argument posed by Justice Butler and, instead, looked at the practicalities of the situation. A Minnesota publisher who was aware of the law would no doubt be concerned with his self-protection and personal freedom and try to avoid a fine or a jail sentence by either not publishing articles criticizing alleged official wrongdoing or else by asking for approval of the stories prior to publishing. Thus, the system was by its "operation and effect" a prior restraint\textsuperscript{55} and not a system providing subsequent penalties by way of a contempt procedure. The ramifications of this decision are apparent when examining the \textit{Pentagon Papers} cases.

The \textit{New York Times} and the \textit{Washington Post} both published articles that revealed some of the material in the Pentagon study before the government sought restraining orders and injunctions. Yet the issue was still one of prior restraint because of the practical effects of the government's action. There was a prior restraint of future stories dealing with the study as well as a restraint in the future with regard to newspapers having to clear stories with the government prior to printing them. The prior restraint may be more implicit than explicit, more indirect than direct, but nevertheless it is a prior restraint.

Blackstone's formulation had been expanded upon by the Court in its pronouncement of a substantive doctrine of prior restraint by not limiting the doctrine to instances of pre-publication licensing. The practical aspects of each circumstance and the possible chilling effect of what appears to be a subsequent penalty on the press's decision to publish are two considerations the Court has recognized in cases following \textit{Near}, such as the \textit{Pentagon Papers} cases.

3. Non-Traditional Prior Restraints

The importance of \textit{Near} is evident in instances where there are less obvious methods of imposing prior restraints than through the traditional licensing or permit systems. When \textit{Near} struck down a non-licensing statute on the grounds it was a prior restraint, it provided a foundation upon which protections against other subtle forms of prior restraint could be built. An example of a less conspicuous impairment of the freedom of press was a 1954 amendment\textsuperscript{56} to the \textit{Internal Security Act of 1950}\textsuperscript{57} that made it mandatory for organizations required to register under the \textit{Internal Security Act} also to register all types of printing or publishing equipment in their possession, control or custody. This was a throwback to the Licensing Act of 1662. Yet it was law for nearly a decade until that

\textsuperscript{54} Id. at 735-36.
\textsuperscript{55} Id. at 708.
section of the Act was repealed in early 1964.68 There was little alarm caused by this statute because the political groups restrained found little sympathy forthcoming from a great majority of the public. The risk involved was that, if registration of printing presses controlled by one political group were allowed, there existed the possibility of that registration requirement being expanded to include other groups.69

Notwithstanding the first amendment's ban on prior restraints, there have been other attempts at censorship employed in this country. A subtle form of prior restraint exists within the Atomic Energy Act of 1954.60 The Act forbids publication of information dealing with nuclear science without first clearing it with the Atomic Energy Commission.61 Newspapers have had to submit material to the A.E.C. before printing to find out what has been cleared. While the dangers of allowing prior restraint here are minimized due to the nature of the material that is being restrained, it must be remembered that the doctrine of prior restraint and, therefore, the liberty of the press are being compromised by the A.E.C. In addition to the policy considerations, there are practical problems: declassification officials were flooded with documents and found it difficult to keep up with the incoming material; the cost of hiring personnel to handle the declassification process; the lack of controls over the persons involved in the process; the difficulty of such personnel to distinguish between material that would endanger the nation's security and material that would not; and a very real danger inherent in any censorship or classification system of the temptation to extend the censoring limits and censor material that would not cause any harm except to possibly embarrass the agency.62

An incalculable risk in such a procedure is that the press may come to regard such a system as the natural or usual way to conduct itself with government agencies and submit to such censorship in other circumstances. This certainly would constitute a prior restraint of the public's right to know. The line between a program of this sort and one containing statutory prior restraint requirements appears to be extremely thin. However, the chance of such cooperation between government and the press to the exclusion of the remainder of society is remote if one can regard the Pentagon Papers incident as indicative of how the press cooperates with government. A comparison of the A.E.C. procedure with the Pentagon Papers cases is valuable to the extent that it does expose the problems found in a classification system.63

Another example of a subtle prior restraint that arose in the guise of a subsequent penalty occurred in Montgomery, Alabama when a news stand operator sought a declaratory judgment as to the obscenity of certain publications, some of which had been taken by police officers.64 The court held that the publications were not obscene, but the opinion also considered the effects of

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59 This entire area is discussed in some depth in Wiggins, supra note 8, at 14-19.
62 Wiggins, supra note 8, at 17-18.
63 For an in-depth study of the question of necessary government secrecy, see M. Johnson, The Government Secrecy Controversy (1967).
threats of possible criminal prosecution made by the police officers or other administrative officials. The court said that such threats "can constitute an all too effective prior restraint" and affirmatively stated that the procedure used by the officials in this instance was a "classic prior restraint."

4. Preferential Treatment of the Print Media

While numerous attempts have been made to censor various forms of expression, none have been more free from censorship than newspapers and books. Following Near, the press enjoyed a period of relative freedom from attempts at licensing or censorship laws. Even in Beauharnais v. Illinois, a case in which a person was convicted of distributing libelous leaflets, the Court's decision was based on the notion that certain "well-defined and narrowly limited classes of speech" fell outside the protection of the first amendment. Justice Douglas, in his dissenting opinion, emphatically states the preferred position of freedom of speech:

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. . . .

In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature, for there is no guarantee in the Constitution that the status quo will be preserved against regulation by government. Freedom of speech, however, rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. . . . Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power. . . .

The Court has said that each mode of expression "tends to present its own peculiar problems." It was not until 1952 that the Supreme Court overruled Mutual Film Corp. v. Ohio Industrial Comm'n and held that motion pictures are included within the free expression guaranty of the first and fourteenth amendments. However, motion pictures are subject to obscenity censorship if certain Court-established criteria are complied with by the censorship statute.

Other forms of expression have also been subjected to restraints upheld by

65 Id. at 310.
66 Id. at 309.
67 343 U.S. 250 (1952).
68 Id. at 255-56.
69 The classes of speech the Court thought not to raise any constitutional problem were the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." These classes were stated by Justice Murphy in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
72 236 U.S. 230 (1915).
the courts, while the press was not hindered until 1957, when a New York statute authorizing the chief executive officer of a municipality to invoke an injunctive remedy against the sale and distribution of written and printed material found to be obscene was upheld by the Supreme Court. It was held in *Kingsley Books, Inc. v. Brown* that neither due process requirements nor the first amendment restrict the state to the use of criminal procedures to invoke its police powers to halt the dissemination of pornography. *The Court, with Justice Frankfurter delivering its opinion, cited *Near* when explaining that the freedom of the press is not an absolute right and that the protection from previous restraint is not unlimited.*

Justice Douglas, in his dissent, attacked the majority’s view that this was not a case of prior restraint by acknowledging the impact the censor’s decree could have, since a hearing on the issue of obscenity was not a prerequisite for the injunction to issue. He stated: “This is prior restraint and censorship at its worst.”

Whatever encroachment *Kingsley Books, Inc.* made into the preferred position of printed forms of expression was limited in scope since the Court, while not overruling *Kingsley Books, Inc.*, rather effectively limited the decision to its facts in two subsequent cases.

In *Smith v. California*, a bookseller was the victor over an ordinance which required that the seller must know that the contents of the book were obscene and also imposed strict criminal liability on a bookseller possessing obscene material. In his concurring opinion, Justice Black expounded on his philosophy of freedom of speech and press, “I read ‘no law ... abridging’ [freedom of press] to mean no law abridging. ... Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it.”

In *Bantam Books, Inc. v. Sullivan*, the Court overturned an extralegal attempt to restrain the distribution of books through informal sanctions that had the effect of stopping all sales of books found on a list of publications which a state-created commission considered objectionable for persons under eighteen years of age. Justice Brennan wrote the opinion and commented that what the state had done was create a system of prior administrative restraints to which the publications must be submitted and that such a system violated the liberty of the press and freedom of speech. These two cases reestablished the right of the print media to be free from prior restraints. However, neither case overruled

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75 See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). As to movies, the Court stated that they were not “necessarily subject to the precise rules governing any other particular method of expression.” *Id.* at 503.
77 *Id.* at 441.
78 *Id.*
80 361 U.S. 147 (1959).
81 *Id.* at 157, 160 (Black, J., dissenting).
83 *Id.* at 70. See also note 10 *supra*, which distinguishes *Times Film Corp. v. Chicago*, 365 U.S. 43, which upheld a censorship system for movies. The Court said *Times Film* only considered a particular circumstance and that the holding was expressly confined to motion pictures. *Id.* at 70 n.10.
Kingsley Books, Inc., and the press cannot be considered as retaining the same special preferred status it occupied prior to Kingsley Books, Inc.

Bantam Books is also important for another statement espoused in the majority opinion. After concluding that the statute's sanctions constituted a system of prior restraint, the Court stated the obstacle any such system must hurdle: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." In a later case the Court noted that this presumption imposes upon the government "a heavy burden of showing justification for the imposition of such a restraint." That the burden imposed by the presumption of invalidity is indeed an important development in the constitutional elements of the doctrine of prior restraint is evidenced by the fact that Bantam Books and Organization for a Better Austin were two of the three cases cited in the Supreme Court's per curiam opinion in the Pentagon Papers cases.

So we have seen that the doctrine's history is a long one and its development has come in response to social and political conditions existing at certain periods in history. Because the government will continue to grow and the press will become even more important and influential in contemporary society, it is doubtful that the doctrine's development has come to a halt. While freedom of the press has come to encompass more than freedom from previous restraints, the doctrine remains a major factor in the constitutional protection the press receives.

IV. The Doctrine in Action

A. Exceptions to the Doctrine

It has never been held that the doctrine of prior restraint is unlimited; to the contrary, almost every case that has concerned itself with the doctrine makes it a point to note that certain forms of expression can be restrained prior to publication. Case after case refers back to the three exceptions listed in Near:

"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 . . . no Court could regard them as protected by any Constitutional right." . . . The primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.

These exceptions have been expanded upon in later cases, but Near remains as the foundation for these exceptions. This examination of the various exceptions will begin with the area of obscenity, which has been an extremely troublesome one for the Court.

Justice Hughes did not cite any authority in Near when he listed obscene publications as exceptions to the general liberty from prior restraint. It seems to be an automatic acknowledgment of the attitude that a state has a right to protect its citizens from obscene communications. Justice Douglas observed in a recent article that even though it had been said many times that obscenity was not protected by the first amendment, the issue was never squarely presented to the Court until the Roth and Alberts cases in 1957.

It was in these two cases that for the first time the Court explicitly placed obscenity beyond the protection of the first amendment. The basis of its holding was that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.” The opinion noted that all fourteen states in 1792 had made either blasphemy or profanity statutory crimes. It then justified its analysis of the historical rejection of obscenity by commenting that all 48 states had obscenity laws and that Congress had enacted twenty obscenity laws between 1842 and 1956. Based on its historical analysis and the legislative judgments that obscenity should be restrained, the Court held that obscenity “is not within the area of constitutionally protected speech or press.”

The historical evidence which the majority relied upon was not enough to convince Justice Douglas who stated in his dissenting opinion that “there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment.” He also rejected the Court’s approach that a form of expression that the Court has decreed lacks redeeming social importance may be restrained. His dissent included a discussion of the differences between regulating conduct and content and acknowledged that conduct may be restrained while content itself should not be restricted.

Kingsley Books, Inc. had been decided the same year as Roth and had upheld a state law that allowed a municipality to obtain an injunction against the sale of obscene matter. The three cases (Alberts was decided with Roth) combined to remove from obscenity the shield of constitutional protection and upheld prior restraint of obscene material.

Prior to 1957, the Court had reversed a decision denying a license to show a film by bringing movies within the protection of the first amendment; however in its dictum, the Court did not foreclose all methods of imposing prior restraint.

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89 Douglas, supra note 6, at 7.
91 Id. at 484.
92 Id. at 482.
93 Id. at 485.
94 Id.
95 Id. at 508, 514 (Douglas, J., dissenting).
96 Id. at 512-13. This distinction has been criticized on the grounds that all speech involves some form of conduct and that by regulating conduct, content must necessarily be affected.
97 For a discussion of this case see text Part III, supra.
restraints on movies: "[I]t is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."\(^9\) Once again obscenity had been excepted from a decision dealing with prior restraints and, following 1957, attempts were made to censor motion pictures on obscenity grounds. In *Times Film Corp. v. Chicago,*\(^9\) the Supreme Court, by a five-to-four vote, concluded that a Chicago ordinance requiring films to be submitted and viewed by a censoring board prior to their public exhibition was not unconstitutional on its face.\(^1\) The opinion, delivered by Justice Clark, admitted that the ordinance imposed a prior restraint and said the issue was "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."\(^2\) The answer was no.\(^3\)

Three years later came *Freedman v. Maryland*,\(^4\) which sets definite standards and procedural safeguards which are designed to obviate the dangers found in a system of prior restraints. The risk of delay built into the Maryland censorship system was a prime factor in the Court's rationale and led to these requirements in regards to prior restraints: only a judicial determination can validly impose a prior restraint; a prompt judicial decision must be guaranteed; and any restraint prior to judicial hearing must be brief and limited to the preservation of the status quo.\(^5\)

*Freedman* was the controlling precedent in *Teitel Film Corp. v. Cusack*\(^6\) in which two films were withheld from public showing after the Chicago Police Film Review Section refused to license them on the grounds they were obscene. The Motion Picture Appeal Board upheld the Section's determination and requested a permanent injunction against the exhibition of the films. The Supreme Court decided the period for administrative censorship and the absence of a provision for prompt judicial decision violated the safeguards established by *Freedman*.\(^7\) This case reaffirmed *Freedman* and allowed the procedural requirements to remain.\(^8\) If the requirements are complied with, the censorship system will be valid as a viable exception to the doctrine of prior restraint.

In addition to the possibility of creating the opportunity for the establish-

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\(^{9}\) *Id.* at 505-06.

\(^{10}\) 365 U.S. 43 (1961).

\(^{11}\) The Court was not asked to rule on the content of the film, therefore no standards or criteria emerged from the decision. *Id.* at 47.

\(^{12}\) *Id.* at 46.

\(^{13}\) Chief Justice Warren gave some indication that the Court was aware that prior restraints cause time delays even though this case dealt with movies. Delay problems would be especially acute for newspapers where "the delays in the adjudication may well result in irreparable damage, both to the litigants and to the public." *Id.* at 50, 73 (Warren, C. J., dissenting).

\(^{14}\) 380 U.S. 51 (1965).

\(^{15}\) *Id.* at 58-59. Other safeguards the Court required were that the burden fell on the censoring board to prove the film was unprotected expression and the exhibitor must be assured that the censor will either issue a license or go to court to try to restrain the film within a brief period of time. These standards reflect the fact that movies, similar to other forms of expression, are not placed in the preferred position as the press which, if put under the *Freedman* standards, could not function even with the safeguards.

\(^{16}\) 390 U.S. 139 (1968).

\(^{17}\) *Id.* at 141.

ment of a system of prior restraints for motion pictures, obscenity has allowed attempted inroads on the doctrine relative to other modes of expression. Kingsley Books, Inc. illustrates how obscenity may allow for censorship of published material. That was what Rhode Island attempted before the court struck down its censorship system. 109

The stumbling block for most of these attempts has not been that they imposed prior restraints, but that the material in question did not meet constitutional definitions of obscenity. 110 While the issue of whether or not the content of a form of expression is obscene is important, another issue, the issue of prior restraint, has been settled—if the material is found to be obscene it can be restrained. While the Court may find the material not to be obscene, 111 it has frequently upheld convictions based on obscenity laws. 112 The doctrine of prior restraint is usually nothing more than a statement of conclusion if material is held not to be obscene and is a vehicle for overturning decisions based on invalid censorship systems. The concept of such a system of censorship to deal with obscenity is not contested by the Court if the material is deemed to be obscene. 113

2. Expression Involving National Security

The other two exceptions in Near concerned statements made during war and expression that might endanger the security of the community by inciting acts of violence or the forceful overthrow of the government. Usually the form


110 The question of what is and what is not obscene has proven difficult for the Court to answer. In Roth v. United States it attempted to create a standard that would preclude numerous appeals and at the same time shield non-obscene material from overzealous censors. It held that obscene material was that “which deals with sex in a manner appealing to the prurient interest.” 354 U.S. 476, 487 (1957). The standard was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” Id. at 489.

111 In 1966 the Court ruled in three obscenity cases and tried to elaborate on the Roth standard. In A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Massachusetts the Court held that the book was not obscene and said three elements had to exist before a publication could be held obscene: it must appeal to the prurient interest, it must be patently offensive and it must be utterly without redeeming social value. 383 U.S. 413, 418 (1966). If the material is intended for certain groups it must appeal to the prurient interest of those groups. Mishkin v. New York, 383 U. S. 502 (1966). The most well-known of the three cases was Ginzburg v. United States in which the Court said the publisher’s intent and the manner in which the material is exported can be taken into consideration, 383 U.S. 463 (1966). The Court has not been able to reach any real consensus on what is or is not obscenity or even what to do if obscenity is found. Justice Stewart’s view is probably the most realistic when he says he can’t define obscenity but he knows it when he sees it. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).


113 The Court has brought obscene material back within the protection of the Constitution to some extent with its decision in Stanley v. Georgia. The Court held that the “First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.” 394 U.S. 557, 568 (1969). While not deciding an issue involving prior restraint it may aid in arguing against the imposition of a prior restraint by showing that obscenity is not always without the protection of the Constitution. However, the Court’s holding in United States v. Thirty-Seven Photographs, 403 U.S. 924 (1971), probably limits Stanley to its facts and reaffirms obscene material’s unprotected status.
of expression involved in these incitement cases has been speech, but printed expression has been involved occasionally. In fact, the leading case in the area, and the one cited by Justice Hughes in *Near*, was *Schenck v. United States*\(^1\) in which the "clear and present danger" test was delineated by Justice Holmes and applied to printed material.\(^2\)

The defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment by distributing pamphlets. It is at this point that the notion of exceptions to the doctrine of prior restraint becomes less important because the defendant had already distributed his pamphlets. There was no prior restraint, and this is usually the case in matters in this area.\(^3\)

Most of the cases involve public speech in the form of advocacy or teaching.\(^4\) The print media has been able to avoid this problem area for the most part. The "clear and present danger rule" as developed since *Schenck* has been used primarily in dealing with political radicalism, and the doctrine of prior restraint of the press is at the most only peripherally involved. Therefore, rather than become involved in this complex area of constitutional law, it will suffice to note that prior restraint may be involved, but only infrequently involving the press.\(^5\)

3. Ministerial Restraints

Various forms of expression, including printed material, have been increasingly subjected to various types of municipal licensing schemes. When allowed, these restraints are said to involve speech "plus"—a form of conduct considered to be within the ministerial function of the government.

Governments have argued that licensing is justified in order to prevent public disorder, harm to its citizens, fraud, littering, and to stop traffic from being impeded.\(^6\) The problem of traffic is readily apparent in the case of parades, and in *Cox v. New Hampshire*\(^7\) the Supreme Court upheld a system requiring permission prior to staging a parade.

However, prior restraints were struck down in *Hague v. C.I.O.*\(^8\) and *Terminello v. Chicago*\(^9\) even though meetings were to be held on public property, and *Thomas v. Collins*\(^10\) held that a registration requirement could not be imposed if speech were the predominant element of the meeting. The Court in *Niemotko v. Maryland*,\(^11\) while invalidating a permit system, indicated it would approve a system of narrowly drawn, definite standards. That is what happened in *Poulos v. New Hampshire*\(^12\) where the Court held a statute requiring a license

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\(^{114}\) 249 U.S. 47 (1919).

\(^{115}\) Id. at 52.


\(^{118}\) For an excellent article dealing with the subject, see Linde, *Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

\(^{119}\) Emerson, *supra* note 7, at 662-63.

\(^{120}\) 312 U.S. 569 (1941).

\(^{121}\) 307 U.S. 496 (1939).

\(^{122}\) 337 U.S. 1 (1949).

\(^{123}\) 323 U.S. 516 (1945).

\(^{124}\) 340 U.S. 268 (1951).

\(^{125}\) 345 U.S. 398 (1953).
for public, open-air meetings valid and said no prior restraint was involved.

The Court also reversed its position in regard to trucks equipped with sound amplification systems. In *Saia v. New York*, 126 the Court disallowed a municipal ordinance requiring prior permission to use a sound truck on the basis that the ordinance lacked standards and was vague, thus constituting a prior restraint. Then in *Kovacs v. Cooper*, 127 the Court upheld a similar ordinance that called for subsequent punishment rather than prior permission, even though the practical effects of the two ordinances were the same.

Expression involving printed matter has not escaped from licensing attempts. The most common approach has been to try to control the distribution of pamphlets and other literature. Once again the preferred position of printed material is evident as the Supreme Court has consistently ruled against these ordinances. The aforementioned *Lovell v. Griffin* 128 case held that a city ordinance prohibiting the distribution of literature without written permission of the city manager was void on its face as a prior restraint. The Court reaffirmed its position against any form of advance permission in *Schneider v. State* 129 and again in *Cantwell v. Connecticut*. 130 The basic theme running through these cases seems to be that the Court will not allow any permit system or form of licensing involving any discretion on the part of an issuing official. In this manner, the allowed exceptions to the doctrine of prior restraint have been limited to non-print forms of expression.

One other exception to the doctrine remains to be examined and it, along with the obscenity exception, is one that directly affects the liberty of the press while the other exceptions involve other varieties of expression.

4. **News Management**

The doctrine has not been utilized against one form of prior restraint because this restraint is not derived from any legal source, but is extralegal in nature. However, extralegal or not, it is truly effective in blocking or delaying publication and was involved in the *Pentagon Papers* cases. The form of restraint is news management. This is a complex area that has been the subject of much debate, but little clarification of the legal ramifications of news management has been forthcoming.

News management is an area in which two important issues clash and must be balanced—national security and the right of the people to know. The classification of government documents, the withholding of unclassified but potentially embarrassing information, the criteria to be used in deciding what government information should be disclosed and information that should be withheld, the motives behind government secrecy and, due to the great size of government

126 334 U.S. 558 (1948).
129 308 U.S. 147 (1939).
130 310 U.S. 296 (1940). This case dealt with solicitation of funds rather than distributing literature and would allow a city to require any person intending to solicit "to establish his identity and his authority to act for the cause which he purports to represent." Id. at 306. See also *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).
versus a comparatively smaller press corps, the responsibility of government to inform the public are all legitimate concerns that must be faced by both the press and the government.\footnote{For an in-depth examination of the troublesome area of government secrecy, see M. Johnson, \textit{The Government Secrecy Controversy} (1967).}

It is obvious that a dogmatic, all-or-nothing approach will not be adequate since both government and press have grown too influential and become too complicated to have either one ride roughshod over the other. It must be remembered that this confrontation involves a basic constitutional freedom that cannot be abused. A more penetrating question might be to whom does the freedom of press apply—the press per se or the public it is supposed to inform? That is why news management is so dangerous—not only does it cut off the flow of news to the press but in the overview it may force the press to compromise and accept some form of management which may be acceptable to most of the press but nevertheless precludes public access to information as certainly as does overt government manipulation of information.\footnote{\textit{See generally id. at 45-51.}}

The argument has been made that the public is not interested in all the information that the press wants the government to make available and that newsmen are not really concerned about their status as representatives of the people but are concerned with their individual problems in getting a story.\footnote{A much softer word than censorship.} The argument runs that the reporter is only one channel of government information and that when executive officials and elected representatives are made aware of the information, then the people are being informed vicariously through these representatives.\footnote{\textit{See generally id. at 42-43.}} That is a tenuous position since there is no guarantee that the elected official will pass the information on to the public, and if he does, it will be at his discretion and probably through one of the journalism mediums anyway. A basic flaw in the argument is that it does not lend sufficient weight to the concept that the people must ultimately make the final decisions and that if the people are to rule they must be informed and not receive information at the discretion of an official or representative who either has a vested interest in the government or a desire to be re-elected.\footnote{\textit{See generally M. Johnson, supra note 131, at 124-31.}

A counter-argument from the press has been that the people have a right to know how their money is being spent and that there is already too much subscription to the attitude that the public should only be made aware of what the government thinks is good for the public to know.\footnote{\textit{See generally M. Johnson, supra note 131, at 124-31.}}

A press that would submit to such censorship could not truly be a free press, but nevertheless there are strong arguments that press-government cooperation\footnote{\textit{See generally id. at 45-51.}} is a necessity and, in fact, is an everyday occurrence as evidenced by the amount of news released through controlled leaks. This approach of mutual cooperation and mutual responsibility would provide an adequate solution to the government secrecy controversy according to its advocates.\footnote{\textit{See generally M. Johnson, supra note 131, at 124-31.}}

The concept is that news affecting national security must be based on more
than news judgment and that since cooperation would run both ways, there would be sufficient protection against unnecessary government secrecy. Such a system would mean altering the adversary relationship between the press and government, which primarily exists in foreign affairs matters, making each more aware of the other's problems. This position is geared to answer a basic question—how is the national security best served: through an adversary situation involving the press and government or by a program of press-government cooperation? Still unanswered, though, is another fundamental question—would a system of press-government cooperation violate the constitutional immunity of prior restraint and abridge the people's right to know? Government-press cooperation may be fine for government-press relations, but it may deprive the people of the media's critical evaluation and scrutiny of governmental acts.

One legal writer has argued that the liberty of the press and the doctrine of prior restraint were not devised for the benefit of newspapers, but to provide for the flow of information to the public and that consent to prior restraint through a program of official press-government cooperation would endanger the public’s access to information as much as legally enforceable censorship. Of course, any cooperation that might exist would prove to be the most effective and ruthless type of prior restraint—it would stop the information at its source.

The Supreme Court, in several fairly recent decisions, has shown concern with the notion of self-censorship and the right of the people to be informed. In Smith v. California, the Court was involved in deciding whether or not a bookseller had to know that a book he was selling was obscene before the book’s sale could be restricted. Justice Brennan spoke for the Court and said that requiring the bookseller to familiarize himself with all the material he sold would prove such a burden that when combined with possible criminal liability the “public’s access to forms of the printed word” would be restricted due to the seller’s desire to avoid criminal penalties. “The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public. . . . Through it, the distributing of all books . . . would be impeded.”

This concern also appears in another of Justice Brennan’s opinions, New York Times, Inc. v. Sullivan:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually un-

138 Domestic cooperation in situations such as riots and civil disturbances carries with it a spirit of reasonableness if the limitations are for an extremely short period of time. However, even this type of a program, such as withholding news of a riot for 30 minutes, also inherently contains the policy problems of prior restraint on the people's right to know what is happening and what is being done in response to the situation. An interesting discussion of an example of press-government cooperation can be found in D. Clark and E. Hutchison, Mass Media and the Law (1970) which contains articles on the Los Angeles riots and the Indianapolis News-30 code. Id. at 43-55.
139 Id. at 129-31.
140 See Wiggins, supra note 8, at 18-19. The author argues that the authors of the Bill of Rights were trying to provide a system that would prevent government control of information and that censorship by a conspiracy of government officials or office holders would not be any less offensive than censorship imposed and enforced by Congress.
141 361 U.S. 147 (1959).
142 Id. at 154-55.
limited in amount—leads to a comparable "self-censorship" [as in Smith v. California]. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer wider of the unlawful zone." . . . The rule thus dampens the vigor and limits of the public debate. It is inconsistent with the First and Fourteenth Amendments.144

The Court again protected the right of the people to know in Time, Inc. v. Hill:145

[S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us.146

Justice Brennan's opinion in Rosenbloom v. Metromedia147 talks of allowing "breathing space" for the freedom of press and that the fear of guessing wrong as to how a jury might assess the publication's investigatory procedure and verification process would "inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred."148

It is evident that the concept of self-censorship is not one that the Court seems willing to accept since the Court places in the paramount position the right of the people to have access to information. It is the people's right—not the press's. So even though press-government cooperation appears reasonable, it is still prior restraint of publication which the first amendment prohibits and such cooperation comes at the expense of the public. From this perspective, it is indeed a fine line to draw as to where press-government cooperation is allowable and to where it so jeopardizes the public's right to information that it is invalid.

B. The Doctrine Enforced149

1. NON-PRINT MATERIAL

Most of the cases in this area deal more with speech or speech "plus" and the manner and place of speech rather than its content. As discussed earlier, it has been in connection with speech "plus" that exceptions to the doctrine have been allowed.150 The important point is that the decision to issue a permit or

144 Id. at 279.
145 385 U.S. 374 (1966). Once again Justice Brennan spoke for the Court and he remained consistent with his view of protecting the public's right to know from the threat of self-censorship.
146 Id. at 389 '(emphasis added).
147 403 U.S. 29 (1971).
148 Id. at 50.
149 The enforcement of the doctrine has been covered fairly extensively in the text, supra, while discussing the doctrine's history and its applicability and exceptions.
150 See text Part IV, A, 3, supra.
to allow a speech cannot be arbitrary or based solely on a public official's discretionary determination.

In *Hague v. C.I.O.*,\(^{151}\) it was held that permits for public meetings could not be arbitrarily refused and the meeting could not be subjected to unlimited control. This concept was expanded in *Thomas v. Collins*\(^{152}\) where the Court held that even a registration requirement that did not involve the use of discretion could not be imposed upon a meeting, the predominant activity of which was speech. However, *Poulos v. New Hampshire*\(^{153}\) has confused the situation by allowing a licensing requirement for open-air public meetings. This case is indicative of the Court's concern for allowing a government to perform its ministerial functions.

Prior restraints of movies are now controlled by *Freedman v. Maryland*\(^{154}\) and its procedural safeguards.\(^{155}\) Since *Freedman*, the *Teitel Film Corp. v. Cusack*\(^{156}\) case was decided, and it reaffirmed *Freedman*’s tests and indicates that the Court will adhere to these requirements and apply them strictly.

If, in addition to the question of whether or not a prior restraint exists, the material is related to religion, the doctrine will probably be enforced and the restraint disallowed. This was the case in *Joseph Burstyn, Inc. v. Wilson*\(^{157}\) where the Court struck down a statute allowing a censor to revoke a license for the exhibition of motion pictures on the grounds that the movie was "sacrilegious." It said the sacrilegious test was too vague and that the state "has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."\(^{158}\) In *Kunz v. New York*,\(^{159}\) the Court disallowed a city ordinance requiring a permit to hold religious meetings when a permit had been denied Carl Kunz because he had ridiculed and denounced other religions.\(^{160}\) The Court has consistently held invalid ordinances licensing the distribution of leaflets and pamphlets, with the majority of cases involving the distribution of religious material.\(^{161}\)

2. Newspapers and Books

The immunity of newspapers is evidenced by the fact that the first newspaper case dealing with a state law that attempted to infringe on a newspaper's freedom was the 1931 *Near v. Minnesota*\(^{162}\) decision. Chief Justice Hughes effectively protected the press from most prior restraints by allowing them only in exceptional cases. It was a particularly strong case for the press since it

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151 307 U.S. 496 (1939).
152 323 U.S. 516 (1945).
153 345 U.S. 395 (1953).
155 See text Part IV, A, 1, *supra*; note 105 *supra*.
156 390 U.S. 139 (1968).
158 *Id.* at 505.
dealt with criticism of public officials. It was not until the Pentagon Papers cases that the Supreme Court was actually confronted with a difficult case dealing with the Near philosophy of proscribing prior restraints in all but exceptional circumstances. That fact lends additional weight to Chief Justice Hughes' observation that for nearly one hundred and fifty years "there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers [and that] is significant of the deep-seated conviction that such restraints would violate constitutional rights." 6

Prior to the Pentagon Papers cases and subsequent to Near, the Supreme Court did have the opportunity to rule on several cases involving prior restraints on newspapers and books. In 1963, the Court struck down an informal system of prior restraints on "obscene" literature in Bantam Books, Inc. v. Sullivan. 166 In a recent case involving the distribution of printed leaflets which characterized a real estate broker as a "blockbuster," the Court held that the Illinois courts could not issue an injunction preventing the distribution of the literature. The Court said the "heavy burden of justifying the imposition of the prior restraint" was not met, expanding Near from literature critical of public officials to include public criticism of an individual's business practice. 167 The Court in the same case applied the Near holding where the prior restraint was not based upon a statute, but was judicially-created.

Newspapers were directly the objects of an Alabama statute that forbade any "electioneering" on the day of an election. In Mills v. Alabama, 168 the Court struck down the law, and, while not mentioning prior restraint explicitly, there can be little doubt that the Alabama law did have the effect of a prior restraint and that this effect was a major factor in the law's invalidation. Justice Black said the statute, which made it a crime to publish an editorial on election day, was an "obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." 169 This type of law acts as a prior restraint by threatening to inflict heavy subsequent punishment that has a chilling effect on newspapers, effectively suppressing editorial comment.

3. Pentagon Papers Cases

On June 12, June 13 and June 14, 1971, the New York Times published portions of a classified study entitled "History of U.S. Decision-Making Process on Vietnam Policy." On June 15, the United States Government applied for a temporary restraining order forbidding the Times to publish any more of the study. The restraining order was issued on that date, and a hearing was held June 18 in United States District Court for the Southern District of New York. The next day District Judge Gurfein denied approval of an injunction, but con-

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167 Id. at 419-20.
169 Id. at 219.
continued the restraining order to allow the Government to seek a stay from the Court of Appeals for the Second Circuit. The stay was granted.

The Washington Post had also printed excerpts of the study, and the Post's original hearing was held June 21, and Judge Gesell's ruling against the Government was rendered and appealed the same day. The Court of Appeals for the District of Columbia did allow a restraining order to provide the Government with an opportunity to appeal the decision without having the study published. The Government's appeals in the two cases were heard by the respective courts of appeals on June 22. Judgments were announced the next day with the Court of Appeals for the Second Circuit finding in favor of the Government and reversing the district court, while the Court of Appeals for the District of Columbia affirmed the district judge's holding in favor of the Post.

On June 24, both the Times and the Government appealed to the Supreme Court. The records of both cases were received during the afternoon of June 25, and the briefs were received less than two hours prior to argument on June 26. On June 30, the Court announced its 6-3 decision against the issuance of the injunctions with nine individual opinions.\(^1\)

The Government had attempted to carve out a new exception to the doctrine of prior restraint—one that would allow the President to obtain an injunction whenever he could convince a court that the information the newspaper wants to reveal would create grave and irreparable injury to the public interest.\(^2\) The basis of the "grave and irreparable injury" exception is the President's power to conduct foreign affairs and his position as Commander-in-Chief. The Government's contention was that this power, in addition to the inherent power of any government to protect itself, gave the President the authority to impose previous restraints on the press to protect his ability to deal effectively with foreign nations and to conduct the military operations of the United States.\(^3\) There was no statute authorizing any executive action along this vein, although the Government did attempt to bring the newspapers within the meaning of 18 U.S.C. § 793 (e) which provides criminal sanctions for communicating national defense information to a person not authorized to receive it. The Court did not allow this statute to be utilized as a prior restraint, but did allow for its use in a possible criminal action against the newspapers and their sources.\(^4\)

The majority of the Court disallowed the Government's request for an injunction, but there were wide differences of opinion as to why, as evidenced by the short per curiam opinion and the nine individual opinions. Justices Black, Douglas and Brennan disallowed the Government's action on the basis that any injunctive relief would constitute a prior restraint which would abridge the freedom of the press. Justices Stewart and White concurred in the judgment, but only on qualified grounds. Both felt the executive branch might have the power to obtain injunctions in certain circumstances, but not on the facts in the two

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171 See id. at 718 (Black, J., concurring); id. at 732 (White, J., concurring).
172 Id. at 741 (Marshall, J., concurring); see U.S. Const. art. II.
173 See New York Times Co. v. United States, 403 U.S. 713, 720-22 ' (1971) (Douglas, J., concurring); id. at 735-40 (White, J., concurring). The criminal cases are presently in various stages of investigation and Daniel Ellsberg, the provider of the study, has been before a grand jury and indicted.
cases that were before the Court.\textsuperscript{174} Both appeared to be thinking of "grave and irreparable danger" in terms similar to the clear and present danger test. Justice White said much of the difficulty in the Government's position was in the "grave and irreparable danger" standard itself. He asserts that the Court's decision, if based on such a standard, would be of little guidance to other courts in other cases and that he was not willing to go that direction in the absence of Congressional legislation.\textsuperscript{175}

Congressional action would have made a substantial difference in the Court's decision as two other justices, in addition to Justice White, indicated that they might rule in favor of injunctive relief, if Congress passed a law authorizing such a procedure. Justice Stewart said Congress has the power to pass such legislation and that the Court has the duty of deciding the constitutionality of such law.\textsuperscript{176} His opinion, which talks of the executive's responsibility in the areas of foreign affairs and national security, indicates that if Congress were to buttress any inherent power the President has with specific legislation, he would probably defer to the combination of executive and legislative desires.\textsuperscript{177}

Justice Marshall concurred with the majority on the basis that the Court could not "enact" law that Congress has "refused to pass."\textsuperscript{178} The opinion discusses Congress's refusal to grant the executive branch the power that the Government contended it has and leaves open the question as to whether or not he would allow such prior restraints if authorized by an act of Congress.

There were three dissents. Chief Justice Burger said he was not prepared to reach the merits of the case due to the haste with which the entire situation was handled and that the Court did not have the facts.\textsuperscript{179} It is apparent though that the Chief Justice was anything but sympathetic towards the two newspapers as he asked: "Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?"\textsuperscript{180} His opinion expresses disappointment with the newspapers and states that he is in agreement with the other two dissenters, Justices Harlan and Blackmun.\textsuperscript{181}

Justices Harlan and Blackmun would have granted the injunction. Justice Harlan argued that the conclusions of the executive branch were not given the consideration owed them by the Court of Appeals for the District of Columbia as coming from a co-equal branch of the Government and that the decision of the Court of Appeals for the Second Circuit should be affirmed because the scope of judicial review is narrowly restricted in passing upon actions of the executive

\begin{itemize}
\item \textsuperscript{174} Id. at 730 (Stewart, J., concurring). Justice Stewart stated of the documents the Government wanted to prevent from being published, "I cannot say that disclosure of any of them will surely result in direct, immediate and irreparable damage to our Nation or its people." \textit{Id. See also id.} at 730-31 (White, J., concurring opinion).
\item \textsuperscript{175} Id. at 732-33.
\item \textsuperscript{176} Id. at 730.
\item \textsuperscript{177} \textit{See id.} at 727-29.
\item \textsuperscript{178} Id. at 747.
\item \textsuperscript{179} \textit{Id.} at 748 (Burger, C. J., dissenting). Chief Justice Burger not only said the Court did not have the facts, but that "no District Judge knew all the facts. No Court of Appeals Judge knew all the facts." \textit{Id.}
\item \textsuperscript{180} Id. at 748.
\item \textsuperscript{181} Id. at 732.
\end{itemize}
Justice Blackmun commented that the "First Amendment, after all, is only one part of an entire Constitution" and that the right of the press to print must be weighed against the "narrow" right of the Government to prevent publication. He wanted to remand the cases, saying he couldn't subscribe to a doctrine of absolutism for the first amendment.

So, the newspapers won their cases but at what price? If the opinions are evaluated on the issue of prior restraint, it appears the immunity newspapers have enjoyed from prior restraints is threatened. Only two of the Justices, Justices Douglas and Black, came out squarely against the implementation of prior restraints in any circumstances. Justice Black's opinion leaves no room for doubt as to what he thought of the Government's position: "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." Justice Douglas said the stays that had been in effect in both cases "constitute a flouting of the principles of the First Amendment as interpreted in Near v. Minnesota."

Justice Brennan did not wander far from the constitutional stand taken by Justices Black and Douglas as he conceded that there was a "single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." He flatly rejected the Government's contention and stated that the first amendment would not tolerate any prior restraints based on conjecture that unwanted consequences might result from publication.

It is with the remaining six opinions that the position of the press becomes less firm as Justices White, Stewart and Marshall waiver on the issue of prior restraint, and Justices Blackmun, Harlan and Chief Justice Burger would have allowed these injunctions.

The first trio would have probably upheld the injunctions, if it had been authorized by an act of Congress. This means that a prior restraint would be allowed in a situation similar to the Pentagon Papers cases as long as Congress had enacted a law permitting such action. This position certainly appears inconsistent with the Court's holding in Near, since in that landmark case, the Court was dealing with a statutorily authorized prior restraint. The two may be distinguished on the grounds that Near was involved with a state, not a federal, law and that the national security was not involved in Near; but nevertheless a prior restraint is a prior restraint and the Pentagon Papers cases do not fall into any of the three exceptions of Near. If the Government's attempt at imposing a prior restraint through the President's inherent powers fails because prior restraints are violative of the first amendment, it is difficult to perceive how Congressional action would be any less of an abridgment of the freedom of the press.

If the press is now more susceptible to the imposition of prior restraints,

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182 Id. at 756, 758 (Harlan, J., dissenting).
183 Id. at 761 (Blackmun, J., dissenting).
184 Id.
185 Id. at 761-62.
186 Id. at 714-15.
187 Id. at 724.
188 Id. at 726.
189 Id.
one of the reasons could be the manner in which *New York Times, Co. v. United States*\(^{190}\) was argued. Instead of fighting against all prior restraints, the *Times* adopted more of a reasonableness tactic. In fact, the *Times* may have opened the door to subsequent legislative encroachments upon the liberty of the press when it argued: "To the extent it is not absolute, the prohibition must at least presumptively be imposed pursuant to a legislative mandate."\(^{191}\) It appears that the *Times* was contending that the prior restraint the Government was trying to implement could be legalized by a statute. This is indeed a strange argument for a newspaper to make because it offers the possibility of infringement of the freedom of the press through legislative channels. Justice White explains that he was not willing to sustain the Government’s position in the *Pentagon Papers* cases without Congressional guidance and that, while "Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information," it had not authorized injunctive relief against threatened publication.\(^{192}\) The door has been opened, if but slightly, and once ajar it is far easier to swing it further open than if it had remained tightly shut.

The two cases presented a myriad of problems and issues and resolved few of them. The newspapers were protected in this instance, but this was certainly a freak situation and the decision will surely affect future controversies involving the first amendment. The cases signal a change in the posture of the Court in its attitude towards the press.

In *Times Film Corp. v. Chicago*,\(^{193}\) Chief Justice Warren emphasized the dangers of delay caused by prior restraints and the importance of immediacy, while Justice Harlan in the *Pentagon Papers* cases said: "I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly. . . ."\(^{194}\) The opposite argument is apparent—immediacy is the hallmark of the press because what is important today might be worth nothing tomorrow and, in addition, who is to say that for a newspaper to act responsibly it must maintain the status quo. In other words, if a newspaper were to maintain an existing situation, it might be abdicating its responsibility to its readers.

Justice Harlan’s decision that he would have continued the restraints on publication is met head on by Justice Brennan’s statement: "The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise."\(^{195}\) He went on to conclude that all the restraints issued in both cases violated the first amendment even if the restraint was justified on the basis of allowing time to examine the cases more thoroughly. This tactic directly meets any attempt to discuss "reasonable" restraints—either a restraint violates the Constitution or else it does not. It would not by falling

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\(^{190}\) 403 U.S. 713 (1971).


\(^{192}\) *Id.* at 725.

\(^{193}\) 403 U.S. 713, 740 (1971).

\(^{194}\) *Id.* at 725.

\(^{195}\) *Id.* at 725.
within one of the narrow exceptions the Court acknowledged in Near. Yet in New York Times Co., the Court moved away from this position as six of the justices talked in terms that would allow restraints to provide for a deliberative procedure to rule on the restraints' legality. Of course, in many instances, that would mean that no matter what the final decision the publication has already been restrained and the story may become dated and worthless.  

It may be that there is a deeper problem involved in these cases—one of mistrust of government by newspapers and mistrust of the press by government. All of the rights guaranteed in the Bill of Rights are based on an assumption that they will be used to safeguard certain fundamental freedoms and will not be abused. However, even if they are abused the freedoms are paramount to restrictions that would proscribe these freedoms. The freedom of the press is particularly sensitive to any restrictions since it is constantly involved in matters of great importance to the national security and the concept of a responsible press seems inherent with the granting of its freedom.

This still leaves open the question of what is a responsible press. Chief Justice Burger, in his dissenting opinion in the Pentagon Papers cases, dealt with what he considered to be the duty of an “honorable” press. He thought the newspapers should have informed the government of the fact they had the material and that “orderly” litigation would have resolved any differences as to what was publishable. He has touched on the difficult area of press-government cooperation.

The question of why the press did not check with the government is disturbing because it illustrates the lack of trust between these two powerful influences on our society. The issue is not whether the press would blindly trust the government and heed its dictates, but should it feel it a necessity to hide from the government and refuse to cooperate at all, no matter what the risk to the nation? The factors breeding this mutual mistrust must be examined and dealt with or else the possibility of having a power struggle in which extreme positions would be taken exists. No matter which side won, this country’s constitutional foundation will have been altered to a degree that could result in a repressive backlash against the press. There can be little doubt that an adversary-type relationship between the press and the government is healthy, but if the relationship becomes one of deep mistrust, we, as citizens, would be the real losers. Such a relationship could lead to the government’s hiding material from the press that should be made public, while the press would be printing any material it could get its

196 An example of such an incident was set out in Landau, supra note 5, at 10. Suppose a city had a tense racial situation and a newspaper had a picture showing a white policeman hitting a pregnant, black nurse with his nightstick. The police see the photographer and the city goes to court and applies for an injunction to stop publication of the photo on the basis that it could cause a riot. A judge, looking at the Pentagon Papers cases, would likely restrain the paper from using the photo. The picture is news, it shows what was occurring, but the city, in an effort to protect itself just as any government would do, would attempt to suppress its publication. Does this interfere with the public’s right to know what is happening and with its right to know about its government and its representatives?

197 403 U.S. 713, 750-51 (1971). Chief Justice Burger said the duty to report rests on both taxi drivers and the New York Times. However, this ignores the fact that the taxi driver is not attempting to publish under the protection of the first amendment and that both may be prosecuted under the criminal statutes.
hands on without considering the effects the material might have on the national security or foreign affairs.

C. The Doctrine’s Future

The doctrine’s future is difficult to predict. There remains a heavy reliance on it as displayed in Organization for a Better Austin and the Pentagon Papers cases. The latter cases indicate that the doctrine may be subjected to some arduous testing in the future, especially in regards to the national security. Prior restraints have been allowed in other areas of expression and the possibility of these restraints affecting newspapers is a real one.

The Pentagon Papers cases could be used in the future to uphold prior restraints of the press, especially if the restraint is Congressionally authorized. Justice Harlan said the judiciary should limit its inquiry of executive action to satisfying itself that the subject matter of the dispute between the press and the executive lies within the President’s foreign relations power, and that the decision that disclosure of the material would irreparably harm the national security was made by the appropriate head of the executive department following actual personal consideration by that officer. His concern was with the President’s powers, not with the freedom of the press.

Justice Blackmun said, “What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and the very narrow right of the government to prevent.” His opinion and Justice Harlan’s acknowledge the right of the government to restrain the press—a right not found anywhere in the Bill of Rights or the Constitution. Justice Blackmun’s “balancing” concept is full of pitfalls, e.g., how are “properly developed standards” to be developed, that seems similar to the dilemma the Court finds itself in in developing standards of obscenity.

Justice Stewart also indicated a belief in strong executive power that might lead to the implementation of prior restraints:

The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.

The danger to the freedom of press is that if prior restraints are allowed in the area of foreign affairs and national defense, what is going to keep the censor out of other areas and who is going to oversee the censor?

Restraints of movies will be upheld if the procedural safeguards of Freedman are complied with by the censoring body. This 1965 decision has already spread from movies into the area of public meetings. In Carroll v. Princess Anne, 393 U.S. 175 (1968).

198 Id. at 757.
199 Id. at 761.
200 Id. at 728-29.
201 393 U.S. 175 (1968).
local officials received an *ex parte* restraining order blocking the holding of a rally by the National States Rights Party. The Court utilized *Freedman* in disallowing the restraint.\(^{202}\) So the test designed for films has been used in a case involving ministerial duties of a local government. If this approach continues, it may be used in a newspaper case, which would be unfortunate since *Freedman* allows for the maintenance of the status quo which may not be possible for a newspaper with a news story that would lose its value if delayed.

Another danger is that the idea of fighting the restraint may not appeal to a newspaper; so it will not publish a story at all. The possibility of self-censorship was not lost on the Government in the *Pentagon Papers* cases. "I would hope the Court's opinions," said an Administration legal strategist, "will persuade the papers to put some restraint on themselves."\(^{203}\)

There is a chipping away at the doctrine of prior restraint. From Blackstone's formula to *Near's* exceptions to *Freedman's* procedural requirements to the restrictions against obscenity and now possibly to allowing prior restraints in cases involving national security, the doctrine has been modified. While these changes have been occurring, there has been a change in the attitude taken toward the press as the press has grown large and powerful. A mistrust of the press, fostered to some extent by the government, has grown up in this country and this mistrust may ultimately lead to a discarding of the doctrine of prior restraint.

As Hamilton's quote at the beginning of this article states, the security of the press depends on public opinion and the spirit of the people and of the government. If this spirit turns against the press, then its freedom is jeopardized.\(^{204}\)

This danger is apparent in the *Pentagon Papers* cases where Chief Justice Burger's dissenting opinion discusses the procedure an "honorable" paper would have followed.\(^{205}\) While cooperation of press and government might be a form of prior restraint, it may be better than allowing government to restrain the press through the use of injunctions. Such government action may not disturb a large portion of the public if the restraints appear reasonable, so the press can't anticipate a large amount of public support in its struggle against restraint. The press and government should come to grips with the problem in a fair and understanding manner so that a basis of trust can be established between the two in order to prevent the public from having to choose sides in a struggle between the two powers unless one desires either a revolution or an abandonment of the freedom of the press.

### V. Conclusion

The doctrine of prior restraint has a long development. While prior restraints take many forms, it was generally considered that their abolition was

\(^{202}\) *Id.* at 181.

\(^{203}\) *Newsweek*, July 12, 1971, at 17. The quote was later attributed to United States Solicitor General Erwin N. Griswold. Landau, *supra* note 5, at 7.


\(^{205}\) 403 U.S. 713, 750 (1971).
the purpose of the first amendment's guarantee of freedom of the press. The
doctrine has been employed to deal with restraints in other areas of expression
as well as the press, but the press has always received the most protection. The
status of the press now appears to be jeopardized by encroachments from other
areas of expression where restraints have been allowed. Exceptions to the doc-
trine may render it useless and it may be stripped of all importance.

The real problem arises in deciding what makes a restraint a prior restraint
that abridges the constitutional guaranty of freedom of the press. If branding a
restriction as a prior restraint is to be considered more than just a statement of
conclusion, the Court must define the doctrine of prior restraint.

At the present time, the press still enjoys freedom from the imposition of
prior restraints, but the Pentagon Papers cases have opened avenues on which
restraints might be able to travel in the future, thus resulting in a narrowing of
the liberty of the press. It appears as though Thomas I. Emerson was correct in
1955 when he wrote: "Unless the doctrine of prior restraint is given a more
rational and comprehensive form, it is likely to be whittled away in future
decisions."206

Perhaps the Court will move back to its position in Curtis Publishing Co.
v. Butts207 where Justice Harlan observed that it had "rejected all manner of
prior restraints . . . despite strong arguments that if the material was unprotected
the time of suppression was immaterial."208 However, it is apparent that the
Court will no longer find all manner of prior restraint to be invalid; the only
question is how far the Court is going to go in shedding the doctrine of prior
restraint as a constitutional shield for the press.

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206 Emerson, supra note 7, at 671.
207 388 U.S. 130 (1967).
208 Id. at 149.