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Snepp v. United States: The CIA Secrecy Agreement and the First Amendment

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COMMENT

Snepp v. United States: The CIA Secrecy Agreement and the First Amendment

The Central Intelligence Agency (CIA) requires its employees to sign an agreement not to publish any information concerning the CIA without obtaining specific prior approval from the Agency, and reserves the right to suppress any such information.[1] Although the secrecy agreement sharply limits the speech rights of CIA employees, the Supreme Court recently upheld its validity in *Snepp v. United States*,[2] dismissing the petitioner's first amendment challenge in a footnote.

The Court's treatment of the first amendment issues raised by the CIA's prior-approval procedure represents a significant departure from prior case law.[3] This Comment explores the first amendment implications of the procedure. First, it reviews the *Snepp* case itself. Next, it discusses first amendment law in the two areas relevant to the validity of the CIA secrecy agreement: the doctrine of prior restraint, and the courts' treatment of speech restraints imposed in the context of public employment. Drawing on both of these bodies of law, the Comment then evaluates and criticizes the CIA prior-approval procedure. Finally, the Comment proposes an alternative system that protects the legitimate interests of the CIA in a manner more consistent with first amendment values.

I. THE *Snepp* DECISIONS

Frank W. Snepp III, upon joining the CIA in 1968, signed the standard secrecy agreement that all CIA employees are required to sign as a condition of employment. Under this agreement, Snepp promised not to publish any material relating to the CIA, its activities, or "intelligence activities gener-

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1. See note 4 infra. In addition to the provision that is the subject of this Comment, the standard secrecy agreement signed by CIA employees forbids unauthorized disclosure of classified information. For the full text of this provision, see id. Several other federal agencies require their employees to sign similar agreements as a condition of employment. See 22 C.F.R § 10.735-303(b) (1980) (Department of State); 28 C.F.R. § 45.735-12(c) (1980) (Department of Justice); see also statement of Lloyd E. Dean, Federal Bureau of Investigation, April 16, 1980, statement of Daniel C. Schwartz, National Security Agency, April 16, 1980, and statement of George A. Zacharias, Defense Intelligence Agency, March 16, 1980, before the Oversight Committee of the House Permanent Select Committee on Intelligence.

2. 444 U.S. 507 (1980) (per curiam).

3. See text accompanying notes 36-155 infra.

ally," without obtaining specific prior approval from the Agency.[4] The agreement further provided that the CIA could deny permission to publish any material submitted for approval.[5] The contract bound Snepp after, as well as during, the term of his employment.[6]

After resigning from the CIA in 1976, Snepp published the book *Decent Interval,* a highly critical account of the CIA's evacuation of South Vietnam after the fall of Saigon.[7] Snepp had not submitted a manuscript of *Decent*

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4. The relevant portions of the secrecy agreement signed by Snepp in 1968 are as follows:

> 1. I, [Frank W. Snepp III], understand that upon entering on duty with the Central Intelligence Agency I am undertaking a position of trust in that Agency of the Government responsible to the President and the National Security Council for intelligence relating to the security of the United States of America. I understand that in the course of my employment I will acquire information about the Agency and its activities and about intelligence acquired or produced by the Agency.
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> 2. I have read and understand the provisions of the Espionage Act, Title 18, USC, secs. 793 and 794, and I am aware that unauthorized disclosure of classified information relating to the national defense may subject me to prosecution for violation of that Act, whether such disclosure be made while I am an employee of the Central Intelligence Agency or at any time thereafter.
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> 3. In addition, however, as I am undertaking a position of trust, I have a responsibility to the Central Intelligence Agency not to disclose any classified information relating to the Agency without proper authorization. I undertake, therefore, not to discuss with or disclose to any person not authorized to hear it such information relating to the Central Intelligence Agency, its activities, or to intelligence material under the control of the Agency. I further understand that this undertaking is a condition of my employment with the Central Intelligence Agency, that its violation may subject me to immediate dismissal for cause or other appropriate disciplinary action, and that this undertaking shall be equally binding upon me after my employment with the Agency as during it.
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> . . . .
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> 8. Inasmuch as employment by the Government is a privilege not a right, in consideration of my employment by CIA I undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of my employment by the Agency without specific prior approval by the Agency. I understand that it is established Agency policy to refuse approval to publication of or participation in publication of any such information or material.

Upon resigning from the CIA, Snepp signed a "termination agreement," requiring him to submit for prepublication review classified information, or "any information concerning intelligence or CIA" that had not previously been made public by the Agency. See United States v. Snepp, 595 F.2d 926, 930 n.2 (4th Cir. 1979), aff'd in part, rev'd in part, 444 U.S. 507, petition for reh. denied, 445 U.S. 972 (1980). Snepp argued that this second agreement bound him to seek prior approval only of materials that both were classified and had not been publicly disclosed by the CIA, and that it superseded the earlier agreement, which required submission of all publications concerning the CIA. See Brief for Defendant-Appellant, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979). This argument was rejected by all three *Snepp* courts. See United States v. Snepp, 456 F. Supp. 176, 180 (E.D. Va. 1978); United States v. Snepp, 595 F.2d 926, 932 (4th Cir. 1979); Snepp v. United States, 444 U.S. 507, 508 & n.1 (1980).

5. See note 4 supra.

6. See note 4 supra.

7. The United States Court of Appeals for the Fourth Circuit described *Decent Interval* as follows:

> It is a highly critical account of the United States' withdrawal from Vietnam at the close of the war and it also contains allegations that the CIA's intelligence reporting from Vietnam was fabricated and distorted, that the CIA manipulated press reporting from Vietnam by providing false information to reporters, that CIA officials in Vietnam engaged in corrupt practices, and that the CIA mishandled the evacuation from Vietnam by failing to evacuate its indigenous agents and employees.

Interval for Agency approval prior to its publication.[8] The government brought a postpublication[9] suit against Snepp, seeking recovery of all profits realized from sales of *Decent Interval.* For purposes of the litigation, the government conceded that *Decent Interval* contained no information that the CIA could have suppressed under the secrecy agreement.[10] Nonetheless, it maintained that Snepp's failure to comply with the prior-approval requirement had caused the CIA "irreparable harm," for which it was entitled to relief.[11] In defense, Snepp argued that his seerecy agreement was unenforceable as an invalid prior restraint of constitutionally protected speech.[12]

The trial court summarily dismissed Snepp's first amendment arguments,[13] focusing instead upon the nature of his obligation to the CIA, and on the relief available to the government. It found that Snepp had a fiduciary, as well as a contractual, obligation to submit for Agency review all writings concerning the CIA and intelligence activities,[14] and that Snepp's breach of this obligation could be punished even if no information that the CIA could have suppressed under the agreement was actually revealed.[15] The court concluded that the appropriate remedy was imposition of a constructive trust

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595 F.2d at 931. In the course of his employment with the CIA, Snepp had served two tours of duty in South Vietnam. *Decent Interval* was based upon this experience. *Id.* at 930.

8. 444 U.S. at 507.

9. Although dozens of former CIA employees have published books relating to CIA activities without submitting manuscripts for prepublication review, see note 227 infra, Snepp was the first person the government sued after publication for violation of the secrecy agreement. In 1972, the CIA brought a prepublication suit against Victor Marchetti, a former employee, when it learned of his plans to publish a book revealing classified information without seeking prior approval from the CIA. The government obtained an injunction requiring Marchetti to submit his manuscript for prepublication review. United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). Following the Supreme Court's decision in *Snepp,* the CIA initiated several postpublication suits against former employees who failed to submit intended publications for prior approval. One of these authors, John Stockwell, has settled out of court, promising to pay any future royalties from his book to the government, and to submit future writings to the CIA for prior approval. See Wash. Post, September 15, 1980, at B11. Another writer, Phillip Agee, has avoided postpublication sanctions for his unapproved publication by successfully arguing that the CIA has selectively enforced its prior approval requirement against authors of manuscripts that are critical of the Agency. Agee v. CIA, 500 F. Supp. 506, 508-09 (D.D.C. 1980). However, the court issued an order threatening to cite Agee for contempt if he failed to submit future writings for prior approval. Id.

10. See 595 F.2d at 935; 444 U.S. at 511; id. at 516 n.2 (Stevens, J., dissenting).

11. Plaintiff's Answers to Defendant's First Set of Interrogatories (Interrogatories Nos. 6I(a), 82), United States v. Snepp, 456 F. Supp. 176 (E.D. Va. 1978).

12. See 444 U.S. at 509 n.3. Snepp also asserted defenses based upon contract law. See United States v. Snepp, 456 F. Supp. 176, 177-78 (E.D. Va. 1978).

13. See 456 F. Supp. at 180.

14. The court adopted the finding of the Fourth Circuit in an earlier case considering the CIA secrecy agreement, United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (because "confidentiality inheres in . . . the relationship of the parties . . . the law would probably imply a secrecy agreement had there been no formally expressed agreement"). 456 F. Supp. at 182 (quoting 466 F.2d at 1316).

15. The court did not discuss whether *Decent Interval* had disclosed information that the CIA could have suppressed. Rather, it focused merely on Snepp's failure to submit the book for prior approval in determining whether Snepp had violated his obligations. See 456 F. Supp. at 181-82.

on all profits realized by Snepp from sales of *Decent Interval*.[16] In addition, it permanently enjoined Snepp from publishing future writings concerning the CIA or intelligence activities without submitting them to the CIA for prepublication review.[17]

Considering the case on appeal, the Fourth Circuit drew a distinction between classified and unclassified information, recognizing a first amendment right to publish unclassified information.[18] The court reasoned that Snepp could not have a fiduciary obligation to submit for prior approval material that the CIA could not actually suppress.[19] Noting that the government had not asserted that *Decent Interval* disclosed classified information,[20] the court rejected the lower court's finding that Snepp had violated a fiduciary obligation. The court did, however, find a valid contractual obligation[21] and awarded damages for its breach.[22]

The Supreme Court's per curiam opinion[23] dismissed Snepp's first amendment arguments in a footnote, stating that the CIA could protect vital

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16. Imposition of the trust rested upon the court's finding that Snepp had violated a fiduciary obligation to the CIA. 456 F. Supp. at 182. The constructive-trust remedy was without precedent in this context. See Snepp v. United States, 444 U.S. at 517-18 (Stevens, J., dissenting). The propriety of this remedy is beyond the scope of this Comment. For a general discussion of the appropriateness of the constructive-trust remedy in *Snepp*, see Comment, Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action: *United States v. Snepp*, 32 Stan. L. Rev. 409 (1980).

17. 456 F. Supp. at 182.

18. 595 F.2d at 935. This conclusion was based upon the Fourth Circuit's decision in an earlier case, United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), in which the court had found that the first amendment protects the right of CIA employees to publish unclassified information. See id. at 1313.

19. 595 F.2d at 935.

20. Id. at 936. The court stated that if, on remand, the government were allowed to amend its claim to allege that *Decent Interval* disclosed classified information, its "conclusion with reference to the impropriety of imposing a constructive trust would be different." Id. at 935.

21. Id. at 936.

22. Because it found that, on the facts alleged, Snepp had not breached a fiduciary duty, the Fourth Circuit held that imposition of a constructive trust was improper. Id. The court held that the government was entitled to at least nominal damages for breach of contract, and whatever compensatory and punitive damages a jury might assess. Id. at 929. The court also upheld the lower court's permanent injunction against future breaches of Snepp's secrecy agreement. Id. at 934.

23. This opinion was rendered without the benefit of either briefs or oral argument. Snepp had petitioned the Supreme Court for certiorari, and the government filed a cross-petition for certiorari expressly conditional upon the Supreme Court's granting Snepp's petition. See Snepp v. United States, 444 U.S. 507, 524 (Stevens, J., dissenting). The dissent maintained that the Court had effectively granted the government's petition, and not Snepp's, since its treatment of the issues raised by Snepp were confined to a footnote. See id. at 524-25. Since the government's petition was conditional upon the Court's granting Snepp's petition, the dissent argued that the Court's granting of the former was beyond its jurisdiction. Id. at 524.

The majority's summary treatment of the first amendment issues raised by Snepp and its decision to forego oral argument and briefs are particularly noteworthy in view of the fact that *Snepp* was the first occasion on which the Supreme Court considered the enforceability of the CIA secrecy agreement. See 444 U.S. at 520 n.10 (Stevens, J., dissenting). United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), represented the first court test of the CIA secrecy agreements. See note 9 supra. For criticism of the Court's failure to afford an opportunity for briefs and oral argument, see Cox, The Supreme Court, 1979 Term—Foreword:Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 8-11 (1980).

government interests by imposing upon its employees a restraint that would be unconstitutional in other contexts.[24] The Court went on to find that Snepp had a fiduciary obligation to submit all publications concerning the CIA for prior approval,[25] and reinstituted the trial court's order, imposing a constructive trust and enjoining future violations of the secrecy agreement.[26] The Court found that the CIA validly could require prepublication review of both classified and unclassified material and could suppress material the disclosure of which would be "harmful to national security."[27] Justice Stevens, joined by Justices Brennan and Marshall in a vigorous dissent, denounced the CIA prepublication-review system for its chilling effect on the first amendment interest in "the free flow of unclassified information,"[28] and indicated that the procedure was probably unenforceable as an unconstitutional prior restraint of speech.[29] The dissent criticized the Court's imposition of a constructive trust as "unprecedented and drastic."[30]

Although the *Snepp* courts virtually ignored the first amendment,[31] the CIA prepublication-review system raises two important questions under the first amendment. One concerns the constitutionality of the means used by the CIA in regulating its employees' speech. A procedure requiring prior submission for approval is a paradigmatic prior restraint, a means of government control over speech uniformly accorded special treatment by first amendment law.[32] The second question concerns the constitutional limitations on what information the CIA may suppress. The secrecy agreement reserves to the CIA the right to suppress any material submitted to it,[33] and the *Snepp* Court approved the CIA's right to suppress any information whose disclosure it deemed "harmful."[34] Both of these standards, however, may be insufficient under the first amendment.[35]

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24. 444 U.S. at 509 n.3.

25. Id. at 510-11. This aspect of the Court's holding has been a source of considerable controversy. Following the Supreme Court's decision in *Snepp,* a number of constitutional scholars observed that the opinion lends itself to the interpretation that *all* government employees now have an implied "fiduciary obligation" not to reveal confidential information without obtaining specific prior approval, even when no explicit secrecy pledge is involved. See, e.g., interview with Professor Benno Schmidt, "The Wages of Faithlessness," Time, March 3, 1980, at 48; interview with Professor Alan Dershowitz, "Why Decision in Snepp Case Disturbs Publishers," N.Y. Times, March 11, 1980.

Implying a fiduciary obligation of this nature appears to be wholly without precedent. See United States v. Snepp, 595 F.2d at 936 n.9. See generally Comment, National Security and the First Amendment: The CIA in the Marketplace of Ideas, 14 Harv. Civ. Rights-Civ. Lib. L. Rev. 655 (1979). Analysis of this aspect of the district court's and Supreme Court's decisions is beyond the scope of this Comment.

26. 444 U.S. at 516.

27. See 444 U.S. at 511-12. For discussion of the scope of the suppression standard approved in *Snepp,* see text accompanying notes 159-204 infra.

28. 444 U.S. at 520 (Stevens, J., dissenting).

29. Id. at 520 n.9. (Stevens, J., dissenting).

30. Id. at 517.

31. See text accompanying notes 13 & 24 supra.

32. See text accompanying notes 36-57 infra.

33. See note 4 supra.

34. See text accompanying note 27 supra.

35. See text accompanying notes 159-204 infra.

II. Prior Restraints and Public Employment

A. *Prior Restraints*

The first amendment imposes limits on the means the government may use to regulate expression, as well as on the substantive scope of speech that may be suppressed. Nowhere has this aspect of first amendment jurisprudence been developed with greater force than in the Supreme Court's treatment of prior restraints. For purposes of constitutional scrutiny, the Court has singled out for special treatment speech restrictions in the form of prior restraint.[36] Although the concept of prior restraint refers to a particular means of speech regulation,[37] in fact it encompasses a variety of forms, ranging from judicial injunctions against specific expression[38] to administrative censorship schemes that prohibit any communication in the area regulated unless it has been specifically authorized in advance.[39] While it is difficult to derive a general definition of prior restraint from the various speech restrictions that have been identified as such, prior restraints have traditionally been defined as official restrictions that are imposed upon speech in advance of actual communication and thus prevent its occurrence altogether,[40] and have been distinguished from subsequent punishment, a form of speech regulation that "allows" speech to take place, but imposes a penalty for it afterwards.[41]

This traditional distinction is somewhat misleading, since it cannot seriously be maintained that a statutory prohibition in the form of subsequent punishment "allows" the proscribed speech to occur; both its purpose and its probable effect are to deter communications subject to the proscription.[42] Additionally, a prior restraint does not absolutely prevent speech from taking place, since it may be disobeyed. Finally, official sanctions for violations of a prior restraint are imposed after the communication has occurred, just as violations of criminal statutes proscribing speech are subsequently punished.[43] Perhaps a more useful distinction can be drawn on the basis that prior restraints represent an official determination, made in advance of actual communication, that speech will violate the law, while the illegality of speech prohibited by a subsequent punishment statute is determined after it takes place.[44] For a number of reasons, prior restraints may have a significantly greater impact upon free expression than regulation by subsequent punishment,[45] and have therefore been subject to greater constitutional scrutiny.[46]

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36. See text accompanying notes 47-49 infra.

37. See Emerson, The Doctrine of Prior Restraint, 20 L. & Contemp. Prob. 648, 648 (1955).

38. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (injunction against publication of Pentagon Papers by *New York Times* and *Washington Post*).

39. See Emerson, supra note 37, at 655.

40. See id. at 648.

41. See id.

42. See id.

43. See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 537-38 (1951).

44. See Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

45. See text accompanying notes 58-74 infra. The deterrent effect of a prior restraint may be so much greater than that of a subsequent-punishment restriction, see id., that only a slight

1. *Prior Restraints: Presumptively Unconstitutional.* The Supreme Court has repeatedly stated that any system of prior restraint bears "a heavy presumption against its constitutional validity,"[47] and will be upheld only in "exceptional cases."[48] In the overwhelming majority of cases where official regulation of speech is constitutionally permissible, it must be effected by subsequent punishment.[49] Nevertheless, prior restraints have been approved in some cases.[50] The factors that determine whether a prior restraint is permissible, however, are not always clear. The strength of the governmental interest protected by the restraint, although relevant,[51] is apparently not conclusive.[52] The Supreme Court has invalidated prior restraints issued to protect interests as momentous as national security[53] and a criminal defendant's right to a fair trial,[54] yet has approved prior restraints regulating distribution of obscenity.[55]

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overstatement is involved in the proposition that a prior restraint prevents communication altogether, while subsequent punishment "permits" speech subject to later penalties. See text accompanying notes 40-41 supra.

46. See note 57 and text accompanying note 49 infra.

47. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 558 (1975); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. Commissioner of Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

48. Near v. Minnesota, 283 U.S. 697, 716 (1931). In *Near,* the Court gave several examples of "exceptional cases" in which a prior restraint might be justified, which suggest that the gravity of danger threatened by the speech is relevant to the validity of the restraint. These examples included "publication of the sailing dates of transports or the number and location of troops," and communications that incite "to acts of violence and the overthrow by force of orderly government." Id. However, the Court's more recent decisions in New York Times Co. v. United States, 403 U.S. 713 (1971), and Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), make clear that the weight of the government interest is not determinative of a prior restraint's validity. See notes 53-54 and accompanying text, infra.

49. See Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 559 (1975); Near v. Minnesota, 283 U.S. 697, 718-19 (1931). In striking down prior restraints, courts frequently assume that the government could use subsequent punishment to effect suppression of the same speech that could not validly be suppressed by prior restraint. See Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539, 543 (1977); Emerson, supra note 37, at 648.

50. See, e.g., Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

51. See text accompanying notes 88-94 infra.

52. See L. Tribe, American Constitutional Law 729 (1978).

53. New York Times Co. v. United States, 403 U.S. 713 (1971). In *New York Times,* the Court denied the federal government an injunction that would have prohibited the further publication of the Pentagon Papers by the *New York Times* and the *Washington Post,* despite the fact that four of the six concurring Justices were convinced that revelation of these documents could cause substantial harm to national security. 403 U.S. at 731 (White, J., joined by Stewart, J., concurring); id. at 730 (Stewart, J., joined by White, J., concurring); id. at 722 (Douglas, J., joined by Black, J., concurring).

54. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

55. See Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). See also Times Film Corp. v. Chicago, 365 U.S. 43 (1961), in which the Court rejected the petitioner's claim that a censorship system regulating obscenity was an impermissible prior restraint. The petitioner in *Times Film* lodged a broadside attack on a statute requiring submission of all motion pictures for examination prior to their public exhibition. The broad issue considered by the Court was "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." 365 U.S. at 46. The Court's holding thus did not

Examination of the case law indicates that the Court has employed a functional analysis in assessing the validity of prior restraints, and upheld them when the reasons justifying the "heavy presumption" against their validity are absent or minimized.[56] Accordingly, an understanding of the constitutional standard against which the validity of prior restraints is measured requires an understanding of the reasons underlying the doctrine of prior restraint.

2. *Reasons Supporting the Doctrine of Prior Restraint.* The Supreme Court has described prior restraints as "the most serious and least tolerable infringement on First Amendment rights."[57] Courts have invalidated prior restraints because they are an "excessively and unnecessarily stifling"[58] means of regulation, restricting speech to a much greater extent than subsequent punishment.[59] The procedural context in which prior restraints operate con-

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address particular procedural or other standards relevant to the restraint's validity. Rather, it was concerned with the question whether the first amendment poses an absolute bar to any prior restraint of motion pictures. Id. at 47.

56. At times, the Supreme Court has explicitly adopted a functional analysis in assessing the validity of a prior restraint. E.g., Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441-42 (1957). More often, it has analyzed prior restraints in a manner that is consistent with functional analysis, without explicitly stating that it was applying functional analysis. E.g., Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 559 (1975); Freedman v. Maryland, 380 U.S. 51 (1965). See also note 67 and accompanying text infra.

57. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Contemporary legal scholars are in virtually complete agreement that the Framers of the first amendment intended to prevent the establishment of any system of prior restraint similar to the English licensing system. See, e.g., Tribe, supra note 52, at 724; Emerson, supra note 37, at 653. See also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 590 n.17 (1976) (Brennan, J., concurring); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.). Under that system, nothing could be published without the approval of state or church authorities. See Emerson, supra note 37, at 650-51. Although courts have largely abandoned the traditional view that the first amendment prohibits any prior restraints, see Z. Chafee, Free Speech in the United States 9-12 (1941), they continue to accord prior restraints an exceptionally high degree of judicial scrutiny. See note 47 and text accompanying notes 47-48 supra.

58. Barnett, supra note 49, at 543.

59. See id. Because a system of subsequent punishment poses fewer dangers to free expression than do prior restraints, see text accompanying notes 60-74 infra, courts have applied a lower standard of judicial review to the former. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 589 (1976) (Brennan, J., concurring). But see id. at 562, where the Court assessed the validity of a prior restraint according to the test formulated by Judge Learned Hand for determining the validity of subsequent punishment regulations, despite its reiteration that prior restraints are presumptively unconstitutional. For criticism of the Court's adoption of the Hand standard in *Nebraska Press,* see Schmidt, *Nebraska Press Association:* An Expansion of Freedom and Contraction of Theory, 29 Stan. L. Rev. 431, 459-60 (1977). The standard usually applied to determine the constitutionality of a conviction under a criminal statute proscribing speech is the "clear and present danger" test, under which a person cannot be subjected to punishment unless her speech created a "clear and present danger" of bringing about a substantive evil that Congress may prevent. See Schenck v. United States, 249 U.S. 47, 52 (1919); see also Bridges v. California, 314 U.S. 252, 262 (1941). Although the Court has repeatedly insisted on subjecting prior restraints to a greater degree of scrutiny than subsequent-punishment restrictions, see cases cited in note 47 supra, it has not developed a general standard of review of prior restraints more specific than the "presumptively unconstitutional" standard. But see note 94 infra. This "standard" offers little, if any, guidance as to what factors must be present for a court to sustain the validity of a prior restraint. Thus, in order to determine when a prior restraint might survive the "heavy presumption against its constitutional validity," it is necessary to draw relevant distinctions between cases in which prior restraints have been approved and those in which they have been held unconstitutional. See text accompanying notes 77-103 infra.

tributes substantially to this effect. The initial determination to restrain speech, whether by judicial injunction or administrative censorship, is made under a procedure that lacks protections accorded by a system of subsequent punishment, such as trial by jury, the presumption of innocence, and the heavier burden of proof borne by the government, all of which operate in favor of free speech.[60] More importantly, noncompliance with the terms of a prior restraint subjects an individual to sanctions, even if she later establishes her right to engage in the communication.[61] In contrast, an individual prosecuted for violating a statute that imposes a subsequent punishment ordinarily may assert the defense that suppression of her speech is prohibited by the first amendment.[62]

This aspect of prior restraints may produce overbroad suppression of speech. Although the impersonal threat of subsequent punishment may "chill" some protected speech, the virtual certainty of punishment for violating a prior restraint is likely to deter altogether communication that is subject to the restraint, even if the speech is protected by the first amendment.[63] A person subject to a prior restraint faces three choices, each of which offends first amendment values: she can challenge the validity of the restraint in court,

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60. Emerson, supra note 37, at 657. See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-70 (1963). Under an administrative censorship regime the "facts of coverage," which include interpretation and application of the governing suppression standard, see Barnett, supra note 49, at 538, are typically determined by an administrative official, while the "facts of violation" are determined in a subsequent contempt proceeding or by the processes of criminal law. See Freund, supra note 43, at 538. A censorship procedure may, however, provide that the administrative censor must go to court to obtain an order to restrain communication, see, e.g., Kingsley Books Inc. v. Brown, 354 U.S. 436, 443 (1957), in which event the initial determination would also be made by a judge. Under an injunctive scheme, the "facts of coverage" are generally determined by a judge, while the "facts of violation" are determined in a subsequent contempt proceeding or by the processes of criminal law. Freund, supra note 43, at 538. In any of these cases, the "facts of coverage" are not determined under a criminal procedure. In contrast, under a subsequent punishment system, the determination of the facts of coverage and the facts of violation "coalesce into one stage, determined . . . at all events according to criminal procedure." Id.

61. Walker v. City of Birmingham, 388 U.S. 307 (1967); Poulos v. New Hampshire, 345 U.S. 395 (1953); see also Times Film Corp. v. Chicago, 365 U.S. 43, 73 (1961) (Warren, C.J., joined by Black, Douglas, & Brennan, J.J., dissenting). But see Freedman v. Maryland, 380 U.S. 51, 56 (1965), in which the Court indicated that failure to comply with an administrative prior-restraint procedure may not be punished if the procedure itself is unconstitutional. A person who violates a judicial injunction against expression is subject to punishment for contempt. See Barnett, supra note 49, at 553. A person who bypasses an administrative censorship procedure to which her speech is subject is similarly liable to prosecution in a subsequent enforcement proceeding. In re Adele Halkin, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979). See also Snepp v. United States, 444 U.S. 507 (per curiam) (notwithstanding petitioner's apparent right to publish manuscript, his failure to submit it to administrative censor in advance of publication sanctioned), petition for reh. denied, 445 U.S. 972 (1980).

62. L. Tribe, supra note 52, at 726.

63. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Although a person who violates a prior restraint, like someone who violates a criminal statute proscribing speech, suffers punishment after communication, prior restraints are more effective deterrents because of the greater certainty of punishment. Someone who has been told in advance of communication that she will be punished if her speech takes place is less likely to assume the risk of her expression than someone contemplating the more speculative consequences of speech that violates a general legislative prohibition.

meanwhile sacrificing her right to timely expression;[64] she can ignore the restraint, thus preserving her opportunity to speak in a timely manner, but at the cost of almost certain punishment; or she can forego expression altogether.[65] Moreover, a person subject to virtually certain punishment for engaging in communication that violates a prior restraint is likely to err on the side of unnecessary self-restraint, avoiding any speech that arguably falls within the ambit of restraint.[66]

In addition, because they operate in advance of communication, prior restraints often rest upon highly speculative estimates that harm would result from the expression. Thus, they may curtail communication that would not cause harm if it did occur.[67] In contrast, the trier of fact in a subsequent-punishment proceeding can usually determine with relative certainty whether a communication that has already taken place falls within the statutory suppression standard.[68]

Several characteristics peculiar to administrative censorship schemes tend to effect overbroad suppression of speech. A greater amount of communication is brought within the "complex of government machinery" under a system of administrative censorship than under a subsequent-punishment procedure.[69] The former subjects to official scrutiny all expression in the area regulated, including clearly protected, as well as borderline, material.[70] The mere threat of suppression under this procedure may induce some degree of self-censorship.[71] Additionally, overbreadth may result from the very nature

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64. The first amendment protects the right to timely expression. See Carroll v. Comm'r of Princess Anne, 393 U.S. 175, 182 (1968). Cf. New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J., concurring) ("every moment's continuance of [an invalid prior restraint] amounts to a . . . continuing violation of the First Amendment").

65. Barnett, supra note 49, at 553. In an administrative censorship system, delays are posed both while the communicator awaits the censor's intitial determination, and pending judicial review of adverse determinations. See note 232 infra.

66. But see Barnett, supra note 49, at 551 (arguing that "the pinpointed freeze of a narrowly drawn gag order might produce less refrigeration overall than the broader chill of threatened subsequent punishment").

67. This consideration appeared to be a determinative factor in the Supreme Court's refusal to uphold prior restraints in two recent decisions. In New York Times Co. v. United States, 403 U.S. 713 (1971), the Court denied the government an injunction that would have prevented the publication of material the disclosure of which the majority of the Court was persnaded would be harmful to national security. In reaching this result, several Justices stressed the fact that the expected harm could not be established with certainty prior to publication. See 403 U.S. at 725-27; id. at 720 (Stewart, J., joined by White, J., concurring). Similarly, in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the Court denied an injunction designed to prevent harm to a criminal defendant's sixth amendment rights, despite its recognition of the gravity of harm threatened, because the probability that such harm would result "was not demonstrated with the degree of certainty our cases on prior restraint require." Id. at 569.

68. See L. Tribe, supra note 52, at 729-30.

69. Emerson, supra note 37, at 656.

70. Id.

71. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940). ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion"). See also Times Film Corp. v. Chicago, 365 U.S. 43, 66 n.6 (1961) (Warren , C.J., dissenting). The Supreme Court has held that the first amendment protects speech from the threat of suppression, as well as from actual suppression. New York Times Co. v. Sullivan, 376 U.S. 254, 269-71, 278 (1964).

of the censor's function. A censor's job is to censor; thus where there is any doubt whether to suppress a particular item of speech, the censor is likely to err on the side of suppression.[72] In contrast, a government official is likely to resolve doubts in favor of expression when the decision she faces is whether to seek imposition of subsequent punishment. Considerations of time, expense, and likelihood of prevailing on the merits lend to the official's decision to pursue prosecution a hesitancy that is lacking in the censor's determination.[73] Finally, a censor may abuse her discretion and deny approval for improper reasons.[74] This risk is particularly great when censorship power is vested in the hands of those who may be criticized or embarrassed by publication.

3. *Prior Restraint Analysis—A Functional Approach.* Prior restraints are thus disfavored because they are generally an unnecessarily restrictive means of regulating speech. Under a functional analysis,[75] then, a system of prior restraint will be upheld only when there is no less restrictive means available to protect the government's interests.[76] The Supreme Court's treatment of prior restraints indicates that there are two situations in which this could occur.

In limited situations, it is possible to fashion a prior restraint that is no more restrictive than regulation by subsequent punishment. For example, in *Kingsley Books, Inc. v. Brown*,[77] the Court upheld a statute authorizing strictly circumscribed use of injunctions against the sale of obscene books, because the statute imposed limitations that eliminated many of the oppressive effects on speech generally associated with prior restraints. The statute did not require merchants to obtain approval before selling books. Rather, the burden rested upon the government to seek an injunction against the sale of particular books,[78] and a permanent injunction could issue only after a judicial determi-

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72. Emerson, supra note 37, at 658-59. See also Freedman v. Maryland, 380 U.S. 51, 57 (1965); Times Film Corp. v. Chicago, 365 U.S. 43, 75 (1961) (Warren, C.J., dissenting).

73. Emerson, supra note 37, at 657.

74. See Tribe, supra note 52, at 733. This issue has arisen most frequently in the context of licensing requirements designed to regulate the use, for expressive activities, of public fora, in the interest of maintaining public order. See, e.g., Cox v. Louisiana, 379 U.S. 536, 557-58 (1965); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940). Although approval of permit requests under such procedures is supposed to be based upon considerations unrelated to the content of expression, administrators vested with broad discretion in the granting of permits may abuse their discretion to effect a covert censorship of unpopular ideas.

75. See text accompanying note 56 supra. Proponents of a functional analysis have argued that the constitutionality of prior restraints should be determined by evaluating their operation and effect in particular instances, since the detrimental effects on free expression generally associated with prior restraints may be minimized or eliminated in the operation of a particular prior restraint, see Freund, supra note 43, at 539; Barnett, supra note 49, at 553; see also text accompanying notes 77-82, 95-103 infra, and also because the distinctions traditionally drawn between prior restraints and subsequent punishment are too overstated to justify an automatic assumption that any particular prior restraint is more threatening to free expression than subsequent punishment. See Freund, supra note 43, at 573-74; text accompanying notes 40-44 supra.

76. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the Supreme Court stated that a prior restraint will not be upheld unless the court finds that no less restrictive means of protecting the government's interests is available. Id. at 563-65.

77. 354 U.S. 436 (1957).

78. Id. at 442-43.

nation, in an adversary proceeding, that the challenged materials were obscene.[79] Strict limitations governed the duration of temporary injunctions imposed pending a final determination of the obscenity issue.[80] Finally, mere noncompliance with a temporary injunction would not result in punishment if the obscenity issue were ultimately decided in favor of the bookseller.[81] The Court concluded that these features obviated the dangers to free expression generally associated with censorship, making the *Kingsley* procedure more typical of subsequent punishment than prior restraint.[82]

Although *Kingsley* offers a useful illustration of a censorship system that survives scrutiny under a functional analysis, it must be confined to its special facts. Censorship in a manner that avoids the dangers generally associated with prior restraints is uniquely possible in the context of obscenity. A prior restraint issued to suppress obscenity largely avoids problems of overbreadth arising out of the need to speculate whether speech, if it occurs, will satisfy the governing suppression standard.[83] The issue of obscenity can usually be determined with as much certainty prior to communication as afterwards, since the obscene nature of communication does not depend upon contextual elements that take shape only at the time of actual expression.[84] Furthermore, a delay of one or two days while the issue of obscenity is determined poses little threat to first amendment values, since the expression subject to regulation, both protected and unprotected, generally lacks topical content.[85] In contrast, a delay of even one day in the publication of "political" speech is an intolerable infringement of the first amendment right to timely expression.[86]

The heavy presumption against prior restraints may also be overcome when subsequent punishment, although less restrictive than a prior restraint,

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79. Id. at 442-43. The Court noted that the method for determining the issue of obscenity was the same "in essential procedural safeguards" as that typically provided under a system of subsequent punishment.

80. Id. at 440. In Freedman v. Maryland, 380 U.S. 51 (1965), the Court understood the procedure considered in *Kingsley* to have postponed any prior restraint against sale until after a judicial decision following an adversary proceeding. Id. at 60.

81. The Court based its analysis upon the assumption that the *Kingsley* procedure did not authorize punishment for disobedience of an interim injunction by a bookseller who ultimately prevails on the issue of obscenity. 354 U.S. at 443 n.2.

82. Since penalties could not be imposed for violating an invalid restraint, the Court found that the temporary restraint authorized by the statute in *Kingsley* operated in a manner analogous to a subsequent punishment statute, in that its function was to put the bookseller on notice that sale of the publication charged with obscenity in the period before trial might subject her to criminal penalties. See id. at 443. See also note 79 supra.

83. See text accompanying note 67 supra.

84. L. Tribe, supra note 52, at 730. But see Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 561 & n.11 (1975) (noting dangers inherent in judging obscene nature of theatrical production in advance of performance, since precise content of play varied with each performance). In contrast, the determination whether harm to national security will result from publication of certain material almost necessarily rests upon highly speculative estimates. See New York Times Co. v. United States, 403 U.S. 713, 725-27 (1971) (Brennan, J., concurring).

85. L. Tribe, supra note 52, at 730-31.

86. Id. at 731, quoting Carroll v. Comm'r of Princess Anne, 393 U.S. 175, 182 (1968). See also Barnett, supra note 49, at 547.

is clearly inadequate to protect an extremely weighty governmental interest.[87] For example, in *New York Times Co. v. United States*,[88] several Justices indicated that a prior restraint might be permitted if necessary to avert grave and irreparable harm to national security.[89] This position is consistent with a functional analysis: prior restraints are generally disfavored because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand,"[90] but the greater risk of violations associated with subsequent punishment[91] may be intolerable when the prohibition is directed against irreparable harm to an exceptionally weighty interest. A functional analysis does not end, however, when it is determined that speech would cause irreparable harm to such an interest. The particular restraint imposed will be valid only when the characteristics that render prior restraints generally more threatening to first amendment values are minimized.[92] Thus, in *New York Times* the Court refused to uphold an injunction against publication of material that a number of Justices believed could cause substantial and irreparable harm[93] to national security where the threat was merely speculative; the Court indicated that the threat must be established with certainty to support a prior restraint.[94]

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87. Cf. Alderman v. Philadelphia Hous. Auth., 496 F.2d 164, 170 (3rd Cir.), cert. denied, 419 U.S. 844 (1974) (prior restraint must be supported by "compelling proof" that it is "essential to a vital government interest").

88. 403 U.S. 713 (1971) (per curiam).

89. See id. at 727 (Brennan, J., concurring); id. at 730 (Stewart, J., joined by White, J., concurring). See also, L. Tribe, supra note 52, at 731.

90. Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 559 (1975). See text accompanying notes 57-59 supra.

91. See note 63 supra.

92. See note 76 and accompanying text supra.

93. For discussion of problems attending the "grave and irreparable harm" standard, see 403 U.S. at 732-33 (White, J., concurring).

94. See 403 U.S. at 727 (Brennan, J., concurring); id. at 730 (Stewart, J., joined by White, J., concurring). Justice Stewart wrote that the prior restraint at issue in *New York Times* was invalid since he could "not say that disclosure of [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people." Id. at 730. This standard has frequently been cited as reflecting the view of the Court. M. Halperin & D. Hoffman, Top Secret: National Security and the Right to Know, 147 n.22 (1977). See, e.g., Note, Enforcement of CIA Secrecy Agreements: A Constitutional Analysis, 15 Colum. J. L. & Soc. Prob. 455, 476 (1980). This interpretation of *New York Times* is supported by two considerations. First, the concurring opinions of Justices Black and Douglas expressed less tolerance for prior restraints than the opinion of Justice Stewart, in which Justice White joined, and with which Justice Brennan agreed in relevant part. Compare 403 U.S. at 730 (Stewart, J., joined by White, J., concurring) with id. at 726-27 (Brennan, J., concurring). Second, the Stewart formulation for assessing the validity of prior restraints was subsequently approved in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), by a majority of the Court. See id. at 571 (Powell, J., concurring); id. at 593, 605 (Brennan, J., joined by Stewart & Marshall, J.J., concurring); id. at 617 (Stevens, J., agreeing with "most of what Mr. Justice Brennan says"). However, the scope of the "direct, immediate, and irreparable damage" standard may be limited to prior restraints directed against the press, and which have not been authorized by Congress. Both *New York Times* and *Nebraska Press* involved prior restraints against the press, which has traditionally been accorded special protection under the first amendment. Cf. Barnett, supra note 49, at 544-45 (noting functional reasons for disfavoring prior restraints of current news). See also Note, supra, at 478 n.128. Additionally, the opinions of both Justice White and Justice Stewart suggest that the "direct, immediate, and irreparable damage" standard was intended to apply only in the absence of explicit congressional

4. *Minimum Requirements.* The Supreme Court has not left the question of a prior restraint's validity to be determined entirely by ad hoc application of functional analysis. Rather, it has established a number of general rules for determining whether a prior restraint is valid. The Court has refused to uphold prior restraints unless they are specifically authorized by statute; in view of the substantial threat to first amendment freedoms posed by prior restraints, the Court has insisted that their use be supportd by a considered legislative judgment of their necessity.[95] In addition, the Court has identified minimum safeguards that must accompany valid prior restraints, designed to counteract their detrimental effects upon free expression. The Court has sought to minimize the risk of abuse of censorship discretion by requiring that statutory delegation of censorship power provide "narrowly drawn, reasonable and definite standards for the officials to follow."[96] In *Freedman v. Maryland*,[97] the Court identified several procedural safeguards that must be provided under an administrative system of prior restraint:[98] to ensure that too broad suppression by overzealous censors does not effect an invalid final restraint of speech, the Court held that a valid final restraint may be imposed only after a judicial determination that suppression is constitutionally permissible.[99] Furthermore, to avoid lending an "effect of finality" to an administrative censor's initial determination, the Court required that the censor must either authorize communication or seek an injunction within a short, specified period.[100] Any interim restraint imposed in advance of a judicial determination must be strictly limited in scope and duration.[101] The burden of proving that suppression is permissible must rest upon the government.[102] In addition to the *Freedman* safeguards, the Court has held that if a court authorizes a

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or presidential authorization for a prior restraint, and that a less stringent standard may be applicable in assessing the validity of an appropriately authorized prior restraint. See 403 U.S. at 730 (Stewart, J., joined by White, J., concurring); id. at 731 (White, J., joined by Stewart, J., concurring). The import of this suggestion may have been weakened by the reaffirmation of the Stewart formulation by five Justices in *Nebraska Press,* in which congressional authorization was not an issue. But see 427 U.S. at 562 (opinion of the Court) (by Burger, C.J., writing) (adopting lower standard for assessing validity of prior restraint).

95. New York Times Co. v. United States, 403 U.S. 713, 732-40 (1971) (White, J., joined by Stewart, J., concurring); id. at 718-19 (Black, J., concurring); id. at 720-22 (Douglas, J., concurring); id. at 742-47 (Marshall, J., concurring).

96. Niemotko v. Maryland, 340 U.S. 268, 271 (1951); see also Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969).

97. 380 U.S. 51 (1965).

98. *Freedman* involved a Maryland film censorship system regulating obscenity. Under the Maryland procedure, film exhibitors were required to obtain a censor's approval prior to exhibiting any film. The burden of initiating an appeal from an erroneous denial of permission rested upon the exhibitor, and could take several months to complete. Although *Freedman* involved film censorship regulating obscenity, its holding concerning minimum safeguards has been regarded as applicable to any administrative censorship system. E.g., L. Tribe, supra note 52, at 734-35. See Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975).

99. 380 U.S. at 58.

100. Id. at 58-59.

101. Id. at 59.

102. Id. at 58.

prior restraint, the state must either provide immediate appellate review or stay the execution of the court order pending its appeal.[103]

B. *Regulation of Public Employees' Speech*

The Supreme Court has found that the peculiar needs of certain "special environments," including government working places, may justify speech restraints that would be impermissible in other contexts.[104] Accordingly, regulations of public employees' speech are subject to a different constitutional standard from that applied to other government-imposed restrictions of speech.[105]

For many years, government employers were thought to act without constitutional restraint in regulating the speech of their employees. Invoking a distinction between "rights" and "privileges," courts reasoned that government-bestowed "privileges," which could be denied altogether, could similarly be conditioned upon relinquishment of a constitutional right.[106] Among the "privileges" whose availability could be so conditioned was government

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103. Blount v. Rizzi, 400 U.S. 410, 420-22 (1971).

These procedural safeguards mark the minimum necessary to validate a prior restraint, see Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 562 (1975), and may not always be sufficient to counteract its objectionable effects. Most of the safeguards were identified by the Court in cases involving the regulation of obscenity, where the first amendment interests at stake generally are not substantial. See text accompanying notes 85-86 supra. See also New York Times Co. v. United States, 403 U.S. 713, 726 footnote (1971) (Brennan, J., dissenting). Significantly, the Court has indicated that greater safeguards may be necessary where the speech regulated is more topical than that subject to regulation under a commercial film censorship scheme. See Freedman v. Maryland, 380 U.S. 51, 60-61 (1965). Additionally, the Court has indicated that a valid prior restraint must both provide the minimum procedural safeguards mandated by *Freedman* and "fit within one of the narrowly defined exceptions to the prohibition against prior restraints." Southeastern Proms., Ltd. v. Conrad, 420 U.S. 546, 559 (1975). Although the Court did not indicate what it meant by the latter part of this two-pronged test, several of the Justices who joined in the majority opinion in *Southeastern Proms.* joined in an opinion in *Nebraska Press* one year later, in which they expressed the view that prior restraints are permissible only with respect to obscenity, "fighting words," and speech that threatens military security. See 427 U.S. at 590-93 (Brennan, J., joined by Stewart & Marshall, J.J., concurring). These three categories of speech correspond to the three examples of "exceptional cases" in which, the Court suggested in Near v. Minnesota, 283 U.S. 697, 716 (1931), a prior restraint might be permissible. See note 48 and accompanying text supra.

104. See text accompanying notes 112-20 infra. Other "special environments" in which the Court has allowed the government to curtail speech to a greater extent than is otherwise permissible include prisons, Pell v. Procunier, 417 U.S. 817 (1974), public schools, Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969), and military bases, Parker v. Levy, 417 U.S. 733 (1974).

105. Cf. Morales v. Schmidt, 489 F.2d 1335 (7th Cir. 1973) (constitutional limitations upon government actions differ depending upon government's role in particular case).

106. See L. Tribe, supra note 52, at 509-10. As a member of the Supreme Judicial Court of Massachusetts, Justice Holmes rendered the classic statement of this doctrine. Sustaining the dismissal of a public officer for engaging in political activity, Justice Holmes stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

For a comprehensive discussion of the development and eventual decline of the "right-privilege" distinction, see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

employment.[107] In recent years, however, the Supreme Court has consistently rejected this theory[108] and has been particularly responsive to claims that public-employment conditions infringe first amendment rights.[109]

In *Pickering v. Board of Education*,[110] the Supreme Court removed any doubt about the continuing viability of the right-privilege distinction as a basis for imposing upon public employment conditions that restrict free expression. In invalidating the dismissal of a public-school teacher for publishing a letter, critical of the Board of Education, in a local newspaper, the Court "unequivocally rejected" the theory that, because public employment can be denied altogether, it may be conditioned upon relinquishment of constitutional rights.[111] Significantly, the Court did not hold that public employees enjoy precisely the same first amendment rights as other citizens. Rather, it found that the government, as an employer, has an interest in "promoting the efficiency of the public services it performs through its employees,"[112] and that this interest justifies reasonable restrictions upon the speech of public employees. The court indicated that, in order for a restriction upon public employees' speech to survive constitutional scrutiny, it must satisfy a two-part test.[113]

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107. See McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). One rationale that has been offered for the application of the right-privilege distinction to public employment is that acceptance of public employment was deemed a voluntary acquiescence in incidental restrictions on one's constitutional rights, since a prospective public employee could avoid these limitations by obtaining comparable employment in the private sector. Note, The Nonpartisan Freedom of Expression of Public Employees, 76 Mich. L. Rev. 365, 366 (1977). The expansion of the public work force in recent years, together with the government's increased assumption of functions traditionally undertaken by the private sector, have substantially eroded this basis for applying the right-privilege distinction to public employment. See id. at 365 n.1.

108. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected"). See also Perry v. Sindermann, 408 U.S. 593, 597 (1972); Garrity v. New Jersey, 385 U.S. 493, 500 (1967); accord, Meehan v. Macy, 392 F.2d 822, 832 (D.C. Cir. 1968), modified, 425 F.2d 469 (1968), aff'd en banc, 425 F.2d 472 (1969).

Even before the Court's rejection of the "right-privilege" distinction, the harsh consequences flowing from its use were mitigated somewhat by development of the "unconstitutional conditions" doctrine. Under this doctrine, the government may not grant a privilege subject to a condition that violates an explicit constitutional guarantee, such as frecdom of speech. See Van Alstyne, supra note 106, at 1445-46.

109. E.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—*especially, his interest in freedom of speech*") (emphasis added). See also Elrod v. Burns, 427 U.S. 347, 358 n.11 (1976). Nevertheless, the district court in *Snepp* based its judgment in part on the finding that Snepp "knew that employment by the Government was a privilege—not a right. . . . " United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978), aff'd in part and rev'd in part, 595 F.2d 926 (4th Cir. 1979), trial court judgment reinstated, 444 U.S. 507 (1980), reh. denied, 445 U.S. 972 (1980).

110. 391 U.S. 563 (1968).

111. Id. at 568.

112. Id.

113. The Court declined to articulate a general standard for determining when a restriction of public employees' speech is constitutional, in view of the enormous variety of situations in which the issue might arise. Id. at 569. It did, however, describe the general analysis courts should apply. See id. at 569-70.

First, the government must establish that the restriction is necessary to prevent actual impairment of the efficient operation of the services it performs as an employer.[114] The government may demonstrate actual impairment either by producing factual evidence that an employee's speech caused actual harm to its interests[115] or by establishing that the peculiar needs of the work environment are such that an employee's speech is per se harmful.[116] In

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114. Id. at 568-73. The Court indicated that factors relevant to establishing a governmental interest justifying imposition of a speech restraint depend to a great extent upon the peculiar needs of individual public agencies, and that it may be permissible to restrict public criticism of a superior by her subordinate in situations where "the relationship between superior and subordinate is of such a personal and intimate nature" that such criticism "would seriously undermine the effectiveness of the working relationship between them." Id. at 570 n.3.

For cases applying the actual-harm requirement, see Holodnak v. Avco Corp., 514 F.2d 285, 290 (2d Cir.), cert. denied, 423 U.S. 892 (1975); Tygrett v. Washington, 543 F.2d 840, 847-50 (D.C. Cir. 1974); Muir v. County Council of Sussex County, 393 F. Supp. 915, 933 (D. Del. 1975). Post-*Pickering* cases in which the government successfully established that an employee's speech impaired its interests as an employer frequently have involved one of the following situations:

(a) The employee's speech demonstrated incompetence or lack of qualifications for her position. E.g., Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976) (dismissal of professor because of false statements upheld because his reckless falsehood demonstrated lack of character and intellectual integrity required of tenured professor); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971) (dismissal of Legal Aid Society attorney because of public comments made by him upheld since his expression demonstrated inability and unwillingness to implement the Society's policies). Dismissal on this ground is said to be justified because "the sanction is not an improper censuring of the content of the speech but a proper dismissal of one who has shown . . . herself unable to perform a job." Comment, supra note 25, at 677; see Pickering v. Board of Educ., 391 U.S. 563, 573 n.5 (1968).

(b) The employee's speech demonstrates an inability or unwillingness to conform to desired behavior in a situation where the workplace requires tact or similar characteristics. See, e.g., Smith v. United States, 502 F.2d 512 (5th Cir. 1974) (clinical psychologist at Veterans Administration Hospital fired for wearing "peace" pin while giving therapy to veterans in need of emotional rehabilitation during Vietnam War).

(c) The employee's speech undermines effective working relationships with co-workers or superiors. E.g., Pickering v. Board of Educ., 391 U.S. 563, 570 n.3 (1968); Sprague v. Fitzpatrick, 546 F.2d 560, 565 (3rd Cir. 1976), cert. denied, 431 U.S. 937 (1977) (dismissal of Assistant District Attorney for publicly challenging District Attorney upheld because statement "completely undermined" effective employment relationship between "employee-speaker and employer-target"); Leslie v. Philadelphia 1976 Bicentennial Corp., 343 F. Supp. 768, 777 (E.D. Pa. 1972), aff'd, 478 F.2d 1398 (3rd Cir. 1973) (employee's dismissal for publicly charging superiors with racism upheld, in part, because statements precluded effective working relationships with superiors, and employee's duties "required a high degree of cooperation and loyalty with her coworkers and supervisors"). See Muir v. County Council of Sussex County, 393 F. Supp. 915, 933 (D. Del. 1975). One commentator has observed that courts have been inclined to enforce the duty of loyalty in cases involving sensitive or high-level positions, Note, supra note 107, at 388, and that this inclination may create considerable tension between the government's interest in efficient operation and the public's interest in discovering official improprieties; high-level officials have a duty of loyalty that might be breached by public criticism of their superiors, yet also have a unique opportunity to discover irregularities, and, in view of their public trust, a desire to disclose the improprieties they discover. Id. at 392.

115. See Pickering v. Board of Educ., 391 U.S. at 570 (school board produced no evidence at trial supporting allegations that Pickering's letter had harmed relationships among members of public school system).

116. See id. at 571. The Court felt that Pickering's employment relationships with the School Board were "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." Id. at 570. Cf. Leslie v. Philadelphia 1976 Bicentennial Corp., 343 F. Supp. 768 (E.D. Pa. 1972) (upholding

Pickering itself, the Court held that the teacher's dismissal for criticizing his superiors could not be supported by the government's interests as an employer.[117] The Court found that the school board had neither produced factual evidence that Pickering's speech had actually impaired the operation of the school system[118] nor established that Pickering's public statements were per se detrimental to the school system's interests.[119]

If the government successfully establishes that a speech restriction is necessary to prevent actual harm to its interests as an employer, the court must balance these interests against countervailing first amendment interests.[120] Since restriction of the publisher's speech was not adequately supported by the school board's interests as an employer, there was no need to apply the balancing test to Pickering itself. The Court indicated in dictum, however, the nature of the first amendment interests that should be weighed against the government's interests as an employer. The employee has an interest in engaging in expression with the freedom she would enjoy as an ordinary citizen.[121] In addition, the public has an interest in receiving communication from government employees.[122] When the subject matter of the communication pertains to the operation of government services, the public interest is particularly strong: the expression concerns matters of "public importance," and thus lies at the "core" of the first amendment's protection.[123] Moreover, the contribution of government employees to public dis-

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dismissal of public affairs coordinator for publicly charging employers with racism; dismissed employee had been hired to foster good relations with black community), aff'd, 478 F.2d 1398 (3rd Cir. 1973).

An exception to the "actual harm" requirement may exist with respect to statements that were "knowingly or recklessly false." See 391 U.S. at 583 (White, J., concurring in part and dissenting in part). But see id. at 574 n.6 (Court did not rule out possibility that "a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment").

117. 391 U.S. at 568-71.

118. Id. at 570.

119. Id. at 570, 571.

120. Id. at 568, 573. The Court's adoption of an ad hoc balancing test has been criticized because it "forces public employees and their supervisors to guess how courts will balance in any given case, with a likely chilling effect upon the exercise of the freedom of expression by these employees." Note, supra note 107, at 370 n.25. Drawing heavily upon the work of Professor Emerson, this commentator noted that an ad hoc balancing test "contains no hard core of doctrine to guide a court in reaching a decision in any particular case." Id. In addition, the factual determinations that a court must make when applying a balancing test are "so difficult and time-consuming that they are unsuitable for the judicial process." Id. Finally, the test provides inadequate notice, since "no factual situation is definitely protected until the Supreme Court so decides." Id. See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 913-14 (1963).

121. 391 U.S. at 568, 574.

122. Id. at 573.

123. Id. This view rests upon the premise that some areas of human concern are more important for first amendment purposes than others. See Young v. American Mini Theatres, 427 U.S. 50 (1976) (plurality opinion by Stevens, J.). Generally, political speech is thought to lie at the "core" of the first amendment's protection. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The position that the first amendment is particularly protective of "political speech" reflects a functional approach based upon the view that the first amendment is primarily concerned with speech the exercise of which promotes the goal of self-government in a democratic

cussion of matters concerning the operation of government agencies is especially valuable, since they are "the members of [the] community most likely to have informed and definite opinions" on the subject.[124]

The Supreme Court's analysis in *Pickering* left at least two important questions for resolution by the lower courts. First, the Court did not indicate what degree of relationship between an employee's speech and impairment of the government's interests must be established to satisfy the first part of the *Pickering* test. Most lower courts interpreting *Pickering,* however, have required that the government establish material and substantial impairment of its interests.[125]

In addition, because the Court did not find that suppression of Pickering's speech was supported by the school board's interests, its application of the constitutional test it announced provides little guidance as to how courts should determine whether a speech restriction affecting an employee's interest is valid when interests are established on both sides of the balancing scale.[126] Lower courts applying *Pickering* in such a situation have indicated that the outcome of the test announced by the Court is frequently determined without ever reaching the balancing part of the test. These courts have avoided the process of balancing competing interests by first seeking to determine whether the full extent of a particular restriction is supported by the government's interests as an employer.[127] Thus, once the government establishes that its

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society. See Meiklejohn, Free Speech and its Relation to Self-Government (1948) (arguing that speech relating to "public" issues—speech the exercise of which promotes informed self-government—must be wholly immune from regulation).

124. 391 U.S. at 572. The public's interest in receiving information about government operations from public employees is particularly strong when the subject matter of the communication concerns official improprieties. Effective self-government in a system of representative democracy cannot be realized unless the public's right to receive "at least enough government information to check abuse of power" is rigorously protected. Comment, First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information, 68 Calif. L. Rev. 83, 90 (1980). See also Arnett v. Kennedy, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting) (stressing importance of assuring public employees of their rights to "inform the public of abuses of power and of the misconduct of their superiors").

Several cases applying *Pickering* have explicitly considered the public's interest in receiving employees' communications in determining whether the speech restriction is valid. See, e.g., Hanneman v. Breier, 528 F.2d 750, 755 (7th Cir. 1976); Kiiskila v. Nichols, 433 F.2d 745, 748-49 (7th Cir. 1970); Meehan v. Macy, 392 F.2d 822, 837 (D.C. Cir. 1968), modified, 425 F.2d 469 (1968), vacated per curiam, 425 F.2d 472 (1969); Haurilak v. Kelley, 425 F. Supp. 626, 630 (D. Conn. 1977).

125. See, e.g., Mabey v. Reagan, 537 F.2d 1036, 1047-50 (9th Cir. 1976); Smith v. United States, 502 F.2d 512, 517 (5th Cir. 1974); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973) (en banc), cert. denied, 417 U.S. 908 (1974).

126. One aspect of this problem is the Court's failure to assign weights to the various interests it identified as relevant to the balancing test. See Note, supra note 107, at 370.

In addition to these two issues, The Court also left for future clarification the question of what degree of causation between an employee's speech and the government's conduct restricting it must be established by an employee claiming violation of her first amendment rights. See id. This issue is not explored in this Comment, since it will not ordinarily arise in litigation challenging enforcement of CIA secrecy agreements. For example, there was no question in *Snepp* that the CIA's enforcement of Snepp's secrecy agreement by imposition of a constructive trust was caused by Snepp's unreviewed publication of *Decent Interval.*

127. See, e.g., Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971), discussed in text accompanying notes 128-30 infra. See also Alderman v. Philadelphia Hous. Auth., 496 F.2d 164, 173-74 (3rd Cir.), cert. denied, 419 U.S. 844 (1974).

interests will be actually and substantially harmed by an employee's communication, it must show that the particular restriction is the least restrictive means available to protect its interests.

The Fifth Circuit applied this analysis in *Hobbs v. Thompson.*[128] In *Hobbs,* city firefighters challenged a municipal ordinance that forbade them from taking an active part in elections and was applied to require them to remove candidate bumper stickers from their cars. Although the court acknowledged the city's interest in proscribing active partisan activity by its employees, it found that the ordinance provisions "sweep too broadly and proscribe a great deal of political activity which is unrelated to the effective workings of the fire department."[129] The court concluded that the ordinance was more restrictive than necessary and declared that this finding precluded the need to balance the competing interests.[130]

Least-restrictive-means analysis does not altogether eliminate the need to engage in "balancing" of interests under *Pickering.* A restraint that satisfies the least-restrictive-means test may nonetheless be invalid, if the government interest is insignificant, and the first amendment interests are substantial. For example, in *Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center,*[131] the United States District Court for the Eastern District of Pennsylvania invalidated the firing of a nurse, because it was not supported by a governmental interest sufficient to outweigh her first amendment interests. The plaintiff had resigned her position as a nurse in a state hospital after criticizing its operation to her superiors.[132] She repeated her criticisms to news reporters, who published them after she began working in another state facility.[133] She was dismissed from her new position on the grounds that her presence provoked anxiety among the nursing staff, who were troubled by her published remarks.[134] The court concluded that the government's interest in

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128. 448 F.2d 456 (5th Cir. 1971).

129. Id. at 471.

130. Id. at 473. This analysis follows logically from the Supreme Court's renunciation of the right-privilege distinction in *Pickering.* Under *Pickering,* employees enjoy the same rights respecting speech as other citizens, except to the extent that their expression would cause substantial harm to the government's interests as an employer. This principle sets definite limits upon the government's power to curtail its employees' speech. See text accompanying notes 110-14 supra. This reasoning appears to have supported the Fifth Circuit's decision in *Hobbs.* See 448 F.2d at 474-75.

Even before *Pickering* was decided, the Supreme Court applied the first amendment principle of "narrowness" to restraints upon the speech of public employees. In Shelton v. Tucker, 364 U.S. 479 (1960), the Supreme Court struck down an Arkansas statute compelling each teacher, as a condition of employment in a public school, to file an affidavit annually, listing every organization with which she had been affiliated within the previous five years. Although the Court found the State's interest in investigating the competence of prospective teachers substantial, and the inquiry into associational ties relevant to such investigation, it was troubled by the overbreadth of the requirement. Many of the associational ties the teachers were asked to disclose "could have no possible bearing upon the teacher's occupational competence or fitness." See id. at 488.

131. 356 F. Supp. 500 (E.D. Pa. 1973).

132. Id. at 503.

133. Id.

134. Id. at 503-04, 506-08.

creating a tranquil and efficient atmosphere among the nursing staff was insufficient to justify dismissing an employee for exercising her right to "add to the dialogue that the First Amendment was designed to foster and protect."[135]

C. *Prior Restraints of Public Employees' Speech*

Snepp involved a prior restraint in the context of government employment.[136] *Pickering,* and the vast majority of cases applying it,[137] involved speech restraints upon public employees that were enforced through imposition of a subsequent penalty, such as dismissal. Additionally, the functional analysis developed to assess the validity of prior restraints has not dealt specifically with prior restraints imposed upon public employees. *Snepp* thus presents the question of how the functional analysis and the *Pickering* test operate together in a case involving a prior restraint of public employees' speech.

The *Pickering* test, in addition to determining what speech may constitutionally be suppressed, may be read to govern the means that may be employed to regulate public employees' speech.[138] Since *Pickering* permits the government to impose upon its employees speech restraints that are impermissible in other contexts,[139] it may be read to authorize some prior restraints upon public employees' speech that would not survive scrutiny under a functional analysis. Alternatively, since *Pickering* involved a speech restriction in the form of subsequent punishment, it may be read as leaving intact traditional prior-restraint analysis as applied to public employees.[140] As a practical matter, the outcome of a constitutional assessment should rarely be affected by the choice between these two approaches, since prior-restraint analysis and the *Pickering* test bear a close resemblance. To be upheld under the functional analysis, a prior restraint must operate in a manner that avoids excessive and unnecessary infringement of expression.[141] Similarly, *Pickering*

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135. Id. at 508. See also Waters v. Peterson, 495 F.2d 91, 98 (D.C. Cir. 1973) (government's interest in providing tranquil atmosphere for employees' cafeteria insufficient to override right of employees to protest outside cafeteria; governmental interest could not be protected without effecting substantial curtailment of protest activities).

In cases upholding employee speech restrictions under the *Pickering* test, courts have often stressed the limited nature of the restraint, and its direct relation to promoting the government's interests as an employer. E.g., Smith v. United States, 502 F.2d 512 (5th Cir. 1974) (government can prohibit clinical psychologist from wearing peace button, which would directly impair his effective counseling of emotionally unstable patients; psychologist free to wear button anywhere other than psychotherapeutic ward). See also Alderman v. Philadelphia Hous. Auth., 496 F.2d 164, 171-72 (3rd Cir.), cert. denied, 419 U.S. 844 (1974).

136. See text accompanying notes 157-58 infra.

137. See Comment, supra note 25, at 689.

138. For example, applying the least restrictive means part of *Pickering* analysis, a court might conclude that dismissal as a means of regulating an employee's speech is more restrictive than transferring her to another department, where her speech would not impair the effective operation of the government's services.

139. See text accompanying notes 104-05 & 112 supra.

140. See Comment, supra note 25, at 689.

141. See text accompanying notes 75-76 & 92 supra.

includes least-restrictive-means analysis, also serving to minimize overbreadth.[142] Thus, it is unlikely that a prior restraint will be valid under *Pickering* unless it also satisfies the prior-restraint test.

Nevertheless, in some situations the two analyses may diverge. Prior-restraint analysis posits certain minimum requirements that do not vary according to the relative strength of the opposing interests,[143] while *Pickering* imposes no minimum requirements, allowing the extent of permissible restraint to vary with the strength and nature of the government's interests. In some cases, therefore, *Pickering* might permit prior restraints that lack the minimum safeguards that prior-restraint analysis mandates.[144]

The few lower court cases involving both prior restraints and the *Pickering* test are less than clear in their implications for the interrelationship of the two doctrines. For example, in *Alderman v. Philadelphia Housing Authority*,[145] the Third Circuit began its analysis of a prior restraint affecting public employees by citing the traditional presumption against the validity of prior restraints and reviewing prior-restraint doctrine,[146] but later acknowledged that a governmental agency may have a greater interest in regulating the speech of its employees than that of the populace at large.[147] The court explicitly invalidated the restriction on the basis of prior-restraint doctrine,[148] but suggested that in some instances a prior restraint upon the speech of public employees might be justified.[149] Applying both prior restraint doctrine and the analysis used in cases involving public employees' speech, the court indicated that such a restraint would be upheld if the suppression standard were narrowly tailored to avoid restricting speech whose suppression is not supported by a "'compelling' justification."[150] The court did not, however, seem to regard the government's general interest in promoting the efficiency of the services it performs through its employees as sufficiently "compelling" to justify a narrowly tailored prior restraint; the one example the court offered of a circumstance in which a prior restraint upon public employees'

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142. See text accompanying notes 126-29 supra.

143. See text accompanying notes 95-103 supra.

144. In United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), the Fourth Circuit analyzed the CIA secrecy agreement under the apparent assumption that the government's interests as an employer could "outweigh" the employee's right to be free from regulation by a prior restraint that lacks the minimum safeguards mandated by Freedman v. Maryland, 380 U.S. 51 (1965). See text accompanying notes 97-102 supra. Although the court cited *Freedman* in support of its holding that the CIA procedure would be constitutional only if it provided both a prompt decision by the CIA censor and judicial review of adverse determinations, it found that the sensitive nature of the government's interests jusitified placing the burden upon CIA employees to challenge deletions. 466 F.2d at 1317.

145. 496 F.2d 164 (3rd Cir.), cert. denied, 419 U.S. 844 (1974).

Employees of the Philadelphia Housing Authority (PHA) were directed to refrain from engaging in "any" discussion regarding an upcoming election among PHA tenants. 496 F.2d at 165.

146. See id. at 168-70.

147. Id. at 174.

148. Id. at 173 & n.57.

149. Id. at 173-74.

150. Id. at 173-74 & n.57.

speech would be justified was "when the nation 'is at war.'"[151] This example is drawn from traditional prior restraint analysis.[152] Thus, *Alderman* does not directly support the position that the government's interests as an employer may justify a prior restraint that would not otherwise survive constitutional scrutiny under a functional analysis.

While its reasoning was somewhat unclear, the *Alderman* court would appear to limit application of *Pickering* analysis to the determination whether suppression of public employees' speech is justified by the government's interests as an employer, as well as the determination of the substantive scope of speech whose suppression is supported by this interest. Traditional prior restraint analysis, unaltered by the *Pickering* test, would be applied to determine whether such suppression can be effectuated by means of the prior restraint actually imposed.[153]

This unarticulated result is proper and should be adopted explicitly. Historically, prior restraints have always been singled out for special treatment under the first amendment. Few areas in first amendment law have been marked by as much consistency as the courts' treatment of prior restraint "as a unique and free-standing doctrine that affords special protection where it applies and imparts its own presumption against constitutionality."[154] In fact, scholars agree that the first amendment was adopted primarily to abolish restraints imposed prior to speech.[155] *Pickering* should not be read to overrule implicitly such well-established doctrine. Moreover, no policy supports extension of the *Pickering* rationale to prior restraints, since different criteria have typically been employed in evaluating the standard for suppression on the one hand, and the means of suppression on the other.[156]

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151. Id. at 173 n.59.

152. See, e.g., Near v. Minnesota, 283 U.S. 697, 716 (1931).

153. Although not a public-employment case, Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973), supports this approach. In *Baughman,* the Fourth Circuit invalidated a prior restraint affecting students at a public school. Like public working places, schools are a "special environment," whose peculiar needs may justify reasonable restraints upon the speech of students. See note 104 supra. Although the Fourth Circuit interpreted the "reasonableness" test applicable to public schools to permit a "reasonable prior restraint," see id. at 1351, it measured the restraint's "reasonableness" by applying traditional prior restraint analysis. The court twice stated that prior restraints bear a heavy presumption against their constitutional validity, id. at 1348, 1350, and overturned the particular restraint at issue because the procedure for suppression lacked narrowly drawn criteria, as well as the minimal safeguards mandated by *Freedman.* See id. at 1350.

In suggesting that the needs of the government in the "special environments" of public schools and working places may justify prior restraints, the courts in both *Baughman* and *Alderman* seemed to mean simply that these interests justify suppression of speech, which may be effected by an *otherwise constitutional* prior restraint. Thus *Pickering* merely supplies the test for determining what the prior restraint doctrine generally assumes: that the government has an interest justifying suppression of speech. See Barnett, supra note 49, at 543 (doctrine of prior restraint focuses on method of restraint, avoiding consideration of substantive scope of protected speech).

154. Barnett, supra note 49, at 542. See also text accompanying notes 36, 47-49 supra.

155. See note 57 supra.

156. The generalization that prior restraint analysis is concerned with the means of regulation, avoiding consideration of the substantive scope of speech that may be suppressed, see note 151 supra, is subject to some qualification. In New York Times Co. v. United States, 403 U.S. 713

III. The CIA Prepublication Review Procedure

The constitutionality of the CIA prior-approval procedure must be determined in accordance with both *Pickering* and prior restraint analysis. *Pickering* will determine whether the CIA's interests as an employer justify imposing some restraint upon its employees' speech and, if so, whether the CIA criteria for suppression are constitutionally permissible.[157] Prior restraint analysis must be applied to determine whether the CIA may protect its interests by the prepublication review procedure upheld in *Snepp*.[158]

A. *The CIA Suppression Standard*

The CIA secrecy agreement requires submission of all intended publications containing "information or material relating to the Agency, its activities, or intelligence activities generally," and states that it is "established Agency policy" to refuse approval for any material submitted.[159] Although the permissibility of the CIA suppression standard was not at issue in *Snepp*,[160] the Supreme Court upheld the secrecy agreement on the assumption that it authorized the CIA to deny approval with respect to material whose disclosure would be "harmful" or "detrimental" to national security interests.[161] As Justice Stevens noted in dissent,[162] it is unclear whether the Court

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(1971), several Justices indicated that a prior restraint could not be imposed against the press absent a showing of "direct, immediate, and irreparable damage" to a vital interest. Id. at 730 (Stewart, J., joined by White, J., concurring); id. at 726-27 (Brennan, J., concurring). See note 94 supra. The Court indicated that publication of material that did not satisfy this prior restraint suppression standard might nevertheless be punished after publication. E.g., id. at 737 (White, J., joined by Stewart, J., concurring). Thus, while the question whether particular speech may be regulated at all may not, strictly speaking, be part of prior restraint analysis, the determination whether speech that can be regulated may be restrained in advance of publication might entail application of a suppression standard. For example, in the context of prior restraints affecting public employees, *Pickering* analysis would be applied to determine the substantive scope of speech that may be suppressed by any means, while prior restraint analysis would require a stricter suppression standard if a prior restraint were employed. For discussion of limitations upon the relevance of the *New York Times* standard, see note 94 supra.

157. See note 153 and accompanying text supra. The discussion of the constitutionality of the CIA suppression standard is coucerned with the question whether particular expression of CIA employees may be regulated at all, regardless of the means used to effect suppression. Thus, the question whether the CIA suppression criteria satisfy a suppression staudard that is peculiarly applicable to prior restraiuts, see notes 59, 94 & 156 supra, is not addressed in the text of this section. But see note 173 infra.

158. See notes 153-55 and accompanying text supra.

159. For full text of agreement, see note 4 supra.

160. Since the CIA did uot contend that *Decent Interval* disclosed information that the agency could have suppressed, see text accompanying note 10 supra, the Court was not asked to consider the propriety of the CIA suppression standard. Rather, *Snepp* presented the question whether the CIA prepublication review requirement can be cnforced agaiust the author of an unreviewed book that discloses no information that the Agency could have suppressed. Nevertheless, in sustaining the validity of the prepublication review requirement, the Court reasoned that the procedure was necessary to ensure suppression of "harmful" information, see 444 U.S. at 511-12, thus implicitly approving the suppression standard embodied in the term "harmful." See text accompanying notes 159-90 infra, for discussion of the suppression standard approved in *Snepp*.

161. See 444 U.S. at 511-12.

162. See id. at 521 n.11. (Stevens, J., dissenting).

intended this suppression standard to encompass only classified information, or all information, whether classified or unclassified, whose disclosure could be "harmful" to national security.[163] Although the Court appeared to acknowledge the right of CIA employees to publish unclassified material, it also indicated that prepublication review of unclassified material was necessary to afford the Agency an opportunity to suppress material whose disclosure would be "harmful",[164] which suggests that the "harmful" standard may encompass some unclassified information.[165] While the language of the Court's opinion thus lends itself to two different interpretations, the view that it authorizes suppression of only classified information, and that prepublication review of unclassified information is deemed necessary only to isolate suppressible classified information, is both more plausible and less subject to constitutional objection than the view that it authorizes suppression of unclassified material whose disclosure would be "harmful."

Pursuant to executive order, the CIA is required to classify all information within its control the disclosure of which could be reasonably expected to cause any damage to national security.[166] Since the Agency is accorded substantial discretion in determining whether information poses a sufficient threat to national security to warrant classification,[167] the assertion that it must be permitted to suppress some unclassified information because its

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163. At one point in his dissenting opinion, Justice Stevens stated that the majority seemed to approve suppression of "'harmful' but unclassified information," id. at 522; earlier, however, he wrote that, despite the ambiguity in the majority's reference to "'harmful' as opposed to 'classified' information," he did "not understand the Court to imply that the Government could obtain an injunction against the publication of unclassified information." Id. at 521 n.11. *Snepp* has been interpreted to authorize suppression of any material, classified or not, the disclosure of which could be "harmful," Note, supra note 94, at 459, and has also been interpreted to authorize suppression of classified information only. See Agee v. CIA, 500 F. Supp. 506, 508 (D.D.C. 1980).

164. 444 U.S. at 512 & 513 n.8. The Court noted that the government "does not deny—as a general principle—Snepp's right to publish unclassified information," Id. at 511, and stated that "[i]f in fact information is unclassified or in the public domain, neither the CIA nor foreign intelligence agencies would be concerned." Id. at 513 n.8.

165. Alternatively, this passage can be read to state that CIA employees should submit material they *believe* to be unclassified to ensure that classified information is not inadvertently disclosed by employees less familiar with the classification of information than the Agency officials who review their publications.

166. Although the specific classification system is periodically revised, the criteria for classification generally specify a classification level applicable to particular information, depending upon the quantum of damage to national security that would result from its disclosure. For example, under the executive order presently in effect, "Top Secret" classification status is accorded to information the disclosure of which could reasonably be expected to cause "exceptionally grave damage to the national security," Exec. Order No. 12065, § 1-102, 43 Fed. Reg. 28,950 (1978) (President Carter); "secret" status is accorded information the disclosure of which could reasonably be expected to cause "serious damage to the national security," Id. § 1-103; and "confidential" denotes information the disclosure of which could reasonably be expected to cause "identifiable damage to the national security," Id. § 1-104.

Since information is classified according to whether its disclosure would harm national security, it appears likely that the Supreme Court in *Snepp* was referring specifically to classified information when it spoke of information whose disclosure would be "harmful" to national security. See text accompanying note 162 supra.

167. See M. Halperin & D. Hoffman, supra note 94, at 33.

disclosure would be "harmful" to national security would be clearly untenable.[168] Moreover, the CIA did not contend in *Snepp* that it should be able to suppress unclassified information.[169] It would be unreasonable to assume that the Supreme Court meant to authorize suppression of unclassified information when the government itself was satisfied that its interests were sufficiently protected by suppression of classified information.[170]

In addition, significant constitutional problems attend the view that *Snepp* authorizes suppression of unclassified information. Under *Pickering*, the CIA may not suppress its employees' speech unless it establishes that the expression would cause actual harm to the Agency's interests as an employer.[171] The various functions performed by the CIA—from intelligence gathering and analysis to covert operations—share the common objective of protecting national security interests.[172] A significant aspect of the CIA's general interest in protecting national security is protecting intelligence-gathering activities conducted in the interests of national security.[173] In order to

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168. A possible exception to this reasoning might arise with respect to information that a CIA employee obtained in the course of her employment, and that was not classified either as a result of operational oversight, or for the sole reason that it was never reduced to a form in which it could have been classified prior to the employee's own publication. Although none of the *Snepp* courts addressed this possibility, this concern may have motivated the Supreme Court's finding that the CIA must be able to review unclassified publications to identify harmful material. See 444 U.S. at 512, 513 n.8. If this concern did, indeed, supply the rationale for the Court's finding, the "harmful" standard authorized in *Snepp* may be understood to encompass "classifiable" information. The adoption of this standard would represent a departure from the suppression standard in effect prior to *Snepp*. In 1975, the Fourth Circuit held that the first amendment limits the CIA's right to deny publication approval to material that both is classifiable and has in fact been officially classified prior to the Agency's disapproval determination. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir.), cert. denied, 421 U.S. 992, reh. denied, 422 U.S. 1049 (1975). See text accompanying notes 191-93 infra. Since the court in *Knopf* erected presumptions favoring the conclusion that classifiable information was in fact classified, see notes 194-95 and accompanying text infra, the "classifiable" standard would represent a relatively insignificant departure from the *Knopf* standard. For discussion of problems associated with use of "classifiable" as a suppression standard, see text accompanying notes 189-90, 198-204 infra.

169. See 444 U.S. at 510; id. at 522 (Stevens, J., dissenting). See also text accompanying note 10 supra.

170. The dissent in *Snepp* noted that the CIA "limited its censorship power to preventing the disclosure of 'classified' information." 444 U.S. at 522 (Stevens, J., dissenting).

171. See text accompanying note 114 supra.

172. See 50 U.S.C. § 403 (1976) (establishment of Central Intelligence Agency). Section 403(d) provides that the Director of Central Intelligence shall coordinate activities "in the interest of national security."

173. This interest received substantial attention from all three courts in *Snepp*. See 444 U.S. at 512-13; 595 F.2d at 935; 456 F. Supp. at 179-80. However, the courts focused more upon the CIA's need to project an image of control over this type of disclosure than on its need actually to prevent disclosure. The Supreme Court found that by "flouting" his secrecy agreement, Snepp had weakened the CIA's reputation as an organization capable of controlling unauthorized disclosures hy its employees, and that enforcement of Snepp's agreement was necessary to restore the confidence of foreign sources in the Agency's ability to maintain such control. 444 U.S. at 512-13. In enforcing Snepp's secrecy agreement on this basis, the Court failed to analyze closely the extent to which the government's interests justify suppression, as it had done in *Pickering*. See notes 115-19 and accompanying text supra. The concern of foreign sources with the CIA's ability to ensure secrecy is directed specifieally toward the Agency's ability to prevent disclosures that compromise them. Under *Pickering*, the CIA's interest in addressing that concern may not be invoked to support suppression of speech that does not threaten this interest. See note 130 and

gather intelligence effectively, the CIA relies heavily upon information it receives from individuals and cooperative intelligence services operating in foreign countries.[174] The continued availability of these foreign sources may depend upon the Agency's ability to guarantee the secrecy of information whose disclosure would subject foreign sources to discovery and consequent endangerment.[175] Thus, the CIA's interest in promoting the efficiency of the

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text accompanying notes 127-30 supra. Thus, the need to prevent disclosure of information that exposes confidential sources to discovery does not justify enforcement of a system that suppresses more speech than necessary to protect this concern. See 444 U.S. at 516-17 (Stevens, J., dissenting). This is not to suggest that the CIA's enforcement of secrecy requirements that are unrelated to disclosures affecting foreign sources will not affect their perception of the CIA's ability to guarantee the secrecy of information that does concern them. However, under least restrictive means analysis, the government may not assert that it can enforce regulation of material the suppression of which is not supportable by the Agency's interests as an employer to project an image of control, particularly since that image can be preserved under a system authorizing suppression only of information that may, constitutionally, be suppressed. Cf. Note, supra note 107, at 387 (although efficient operation of government function may require loyalty and discipline on the part of employees, the constitutionality of a rule or order restricting speech itself must be determined under *Pickering* before an employee's disobedience of it may be subject to sanctions). Moreover, to the extent that the CIA's general reputation for enforcing confidentiality affects its reputation with respect to confidential sources in particular, the Agency's interests may be better served by using a more narrowly circumscribed method of secrecy control. As the scope of material subject to secrecy broadens, the risk that the conditions for secrecy will be breached is also magnified; as such breaches increase, the CIA's general reputation for being able to enforce its method of secrecy control is correspondingly diminished. Cf. New York Times Co. v. United States, 403 U.S. 713, 729 (Stewart, J., joined by White, concurring) (effectiveness of secrecy control impaired by overclassification, which produces system likely to be "disregarded by the cynical or careless").

An additional problem with the Court's analysis is that it based its decision to enforce Snepp's secrecy agreement upon uncritical acceptance of the CIA's assertion that the unreviewed publication of *Decent Interval* had harmed the Agency's intelligence-gathering functions. In support of its finding that Snepp had "irreparably harmed" these functions, see 444 U.S. at 513, the Court quoted with approval the trial testimony of Admiral Stansfield Turner, then Director of Central Intelligence, that Snepp's book "and others like it" had caused several foreign sources to discontinue working with the CIA for fear that their confidences would not be adequately protected. See id. at 512-13. At trial, Admiral Turner stated that this result was not caused exclusively by Snepp, see Brief for Defendant-Appellant at 13, United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), and Snepp was precluded from asking Admiral Turner whether particular sources had stopped working with the CIA as a direct result of Snepp's publication. See 444 U.S. at 523 n.12 (Stevens, J., dissenting). As Justice Stevens noted in dissent, it is by no means clear whether Snepp's publication caused the harm described by Admiral Turner. 444 U.S. at 522-23 & nn.12 & 13. Admiral Turner's assertions of harm are clearly inadequate to satisfy the showing of material, substantial, and actual harm required by *Pickering*. See text accompanying note 114 supra.

The Supreme Court's determination to enforce Snepp's secrecy agreement on the basis of Admiral Turner's speculations of harm is surprising not only as a departure from *Pickering* analysis, but also in light of the fact that the procedure upheld is a prior restraint. See text accompanying note 205 infra. In recent prior restraint cases, the Supreme Court has emphasized that the government must establish harm with certainty to obtain a prior restraint, and has emphatically rejected the government's attempts to obtain a prior restraint based upon assertions that grave harm will result if publication is not restrained. See Nebraska Press Association v. Stuart, 427 U.S. 539, 569 (1976) (opinion of the Court by Burger, C.J.); id. at 571 (Powell, J., concurring); id. at 591-92 (Brennan, J., joined by Stewart & Marshall, J.J., concurring); New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J., concurring); id. at 726-27 (Brennan, J., concurring).

174. See 444 U.S. at 512.

175. See id. at 512-13.

services it performs may support suppressing communications that would harm national security generally,[176] and, as a specific aspect of that harm, would expose foreign sources to risks.[177]

Pickering requires that the government affirmatively establish that an employee's speech will cause or has caused actual harm to its interests; a mere assertion of harm is insufficient.[178] However, if *Snepp* were read to authorize suppression of unclassified information, it would then permit suppression upon such an assertion by the CIA. In explaining the need for prepublication review of unclassified material, the Supreme Court stated that such extensive review would permit the CIA, "with its broader understanding of what may expose classified information and confidential sources," to identify information that is "harmful" to "vital national interests."[179] If *Snepp* is taken to authorize suppression of unclassified information that is "harmful" to national security, this passage could be interpreted as framing the suppression standard merely in terms of what the CIA asserts to be harmful.[180] Such a departure from *Pickering* would not be justifiable on the grounds that greater deference should be accorded to the government's judgment in matters pertaining to national security. In cases involving imposition of sanctions for revealing material whose disclosure assertedly threatens national security, the Supreme Court has consistently refused to accept as determinative the govern-

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176. See text accompanying note 172 supra.

177. This basis for suppression is more clearly related to the CIA's interest in "promoting the efficiency of the public services it performs," Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), than any other basis relating to national security. The CIA's enabling legislation focuses upon the Agency's intelligence-gathering functions, and expressly charges the Director of Central Intelligence with responsibility "for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3) (1976). William Colby, former Director of Central Intelligence, has proposed that a CIA employee should be subject to penalties for leaking confidential information only if she discloses secret intelligence sources and tecbniques, "defined narrowly to include only those matters which would be vulnerable to termination or frustration by a foreign power if disclosed." Hearings before the Subcomm. on Secrecy and Disclosure, Senate Select Comm. on Intelligence, 95th Cong., 2d Sess. 53, 90 (1978).

The CIA's interest in preventing disclosure of confidential foreign sources does not justify a suppression standard broader than "classified information." See text accompanying notes 166-68 supra. Material the disclosure of which would pose this danger would certainly be classified by tbe CIA. See Snepp v. United States, 444 U.S. 507, 523 n.12 (Stevens, J., dissenting); United States v. Snepp, 456 F. Supp. 176, 179 (E.D. Va. 1978); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1368 (4th Cir.), cert. denied, 421 U.S. 992, reh. denied, 422 U.S. 1049 (1975). The executive order on classification that is presently in effect specifically lists intelligence sources and methods as information subject to classification. Exec. Order No. 12065, §§ 1-301(c), 1-303, 43 Fed. Reg. 28,949, 28,950-51 (1978).

An additional interest supporting regulation of CIA employees' speech relates to the CIA's ability to obtain and utilize classified information; in the course of performing its various functions, the CIA generates and uses information that is required to be classified pursuant to executive order. See note 166 supra. The current executive order on classification requires that agencies using classified information must ensure its secrecy. Id. § 4-103. Thus, for the CIA to use the classified information it needs to perform its statutory duties, it must adopt procedures that ensure the confidentiality of such material.

178. See text accompanying notes 114-19 supra.

179. 444 U.S. at 511-12.

180. Cf. 444 U.S. at 522 (Stevens, J., dissenting) (criticizing Court's suggestion that the CIA may suppress unclassified information "on the basis of its opinion tbat publication may be . . . 'identified as harmful'").

ment's assertions that disclosure caused or would cause harm to national security, and has required instead that the government affirmatively establish the threat or occurrence of such harm.[181]

The constitutional problems posed by interpreting *Snepp* to allow suppression of unclassified material are not altogether avoided by limiting the suppression standard to classified information. Use of "classification" as a suppression standard[182] may be overly restrictive under the *Pickering* test.[183]

As the Supreme Court indicated in *New York Times Co. v. United States*,[184] the classification of a document is hardly conclusive of its threat to national security.[185] Abundant opportunities exist for "overclassification" of materials whose threat to national security is dubious.[186] Under executive

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181. See note 185 infra.

182. Essentially this standard was adopted in United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). In *Marchetti,* the Fourth Circuit held that the first amendment limits the CIA's authority to suppress intended publications to material that is classified and has not yet been officially disclosed. Id. at 1313. The court refused to allow CIA employees denied publication approval to challenge the propriety of the classification itself, basing this conclusion on two considerations. First, it found that the CIA's process of classification is "part of the executive function beyond the scope of judicial review," since it relates to the conduct of foreign relations and national defense, "which the Constitution entrusts to the President." Id. at 1317. Second, it found that courts are "ill-cquipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." Id. at 1318. The decision to disallow judicial review of classification determinations was subsequently overruled in a sequel to *Marchetti,* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992, reh. denied, 422 U.S. 1049 (1975). See note 193 infra.

183. See notes 127-30 and accompanying text supra.

184. 403 U.S. 713 (1971).

185. Although the government sought to prevent the further publication of information, some of which was classified "Top Secret-Sensitive," see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 591-92 (1976) (Brennan, J., concurring), in *New York Times,* several Justices found that the government had failed to establish a sufficient threat to national security to warrant imposition of a prior restraint. See id. at 719 (Black, J., joined by Douglas, J., concurring); id. at 725-26 (Brennan, J., concurring); id. at 730 (Stewart, J., joined by White, J., concurring). Similarly, in prosecutions for violations of the Espionage Act, 18 U.S.C. §§ 793, 794 (1976), courts have held that classification of information is not determinative of whether its disclosure would or did harm national security. Rather, such harm has been held to be a question of fact for the jury. See, e.g., Gorin v. United States, 312 U.S. 19, 31-32 (1940); United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965); United States v. Soblen, 301 F.2d 236, 239 n.2 (2d Cir.), cert. denied, 370 U.S. 944 (1962). Cf. Comment, *United States v. Marchetti* and *Alfred A. Knopf, Inc. v. Colby:* Secrecy 2; First Amendment O, 3 Hastings Const. L. Q. 1073, 1091 (1976) (CIA secrecy agreement should be interpreted to require government to establish actual damage to national security and not merely that publication would disclose classificd information).

Perhaps the most cogent presentation of the objection to using classification as a criterion for suppression can be found in Judge J. Skelly Wright's dissent from the decision that upheld a district court's injunction against further publication of the Pentagon Papers by the Washington Post:

> With the sweep of a rubber stamp labelled "top secret," the executive department seeks to abridge the freedom of the press. It has offered no more. We are asked to turn our backs on the First Amendment simply because certain officials have labelled material as unfit for the American people and the people of the world. Surely, we must demand more. To allow a government to suppress free speech simply through a system of bureaucratic classification would sell our heritage, far, far too cheaply.

United States v. Washington Post Co., 446 F.2d 1322, 1326 (D.C. Cir.) (Wright, J., dissenting), rev'd sub. nom. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

186. The extent of overclassification by executive officials has becn well documented. See, e.g., H.R. Rep. No. 93-221, 93rd Cong., 1st Sess. 32-38 (1973); Note, supra note 94, at 496.

order, authority to classify documents has been delegated to thousands of agency officials.[187] CIA employees with authority to classify documents exercise substantial discretion in determining how to apply the classification criteria.[188] Where there is any doubt about the classifiability of an item, the CIA's interests dictate erring on the side of overclassification. In addition, the CIA is authorized to classify much material that does not, in itself, merit classification status. Under the procedure of derivative classification, any document containing information from a classified document must itself be classified.[189] Furthermore, every page of a bound document must be stamped with the classification level of the most sensitive information in the document. Thus, an official copying a single sentence from a document containing one item of "Top Secret" information must classify every page of the new document "Top Secret," even if the transferred sentence does not disclose information that is classified in any degree.[190]

These difficulties are alleviated if the suppression standard approved in *Snepp* is understood to be qualified by the requirement that information subject to suppression must be *properly* classified. This interpretation of

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187. See M. Halperin & D. Hoffman, supra note 94, at 42.

188. See id. at 33. Recent executive orders on classification have included various provisions designed to minimize overclassification. For example, President Carter's executive order provides that doubt respecting the appropriate classification level of information should be resolved in favor of the less restrictive designation, and doubt whether information should be classified at all should be resolved against classification. Exec. Order No. 12065, § 1-101, 43 Fed. Reg. 28,949, 28,950 (July 3, 1978). President Nixon's order authorized administrative reprimand for repeated abuse of classification authority, Exec. Order No. 11652, § 13, 3 C.F.R. 339 (Mar. 10, 1972), and President Carter's order authorizes administrative sanctions for willful classification of material not properly classifiable. Exec. Order No. 12065, § 5-502, 43 Fed. Reg. 28,949, 28,961 (July 3, 1978). Both orders provide for downgrading and declassification of classified information. See Exec. Order No. 11652, §§ 4-5, 3 C.F.R. 339 (Mar. 10, 1972); Exec. Order No. 12065, § 3, 43 Fed. Reg. 28,949, 28,954-57 (July 3, 1978).

189. See M. Halperin & D. Hoffman, supra note 94, at 42.

190. Id. President Carter's executive order requires classifying officials to indicate which portions of a classified document are classified, so that unclassified portions may be freely excerpted. Exec. Order No. 12065, § 1-504, 43 Fed. Reg. 28,949 (July 3, 1978). President Nixon's executive order contained a similar provision. Exec. Order No. 11652, § 4(A), 3 C.F.R. 339 (Mar. 10, 1972). Thus, the process of derivative classification need be applied only with respect to documents classified without following this procedure.

The overbreadth of classification as a suppression standard is further demonstrated by comparing the rights of CIA employees under this standard with the rights of ordinary citizens under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). The FOIA entitles citizens to obtain and publish any information within the control of federal agencies upon request, unless it is specifically exempted from mandatory disclosure. Id. §§ 552(a)(6)(A), (b). The only material that a federal agency can refuse to produce on national security grounds that is not specifically exempted from disclosure by another statute is information that is both classifiable and "in fact properly classified." Id. § 552(b)(A), (b). When a citizen requests information that is in fact classified, the agency is required to review the requested material to determine whether it is properly classified, and must release information that no longer merits classified status. Id. § 552(a)(6)(A)(i). See M. Halperin & D. Hoffman, supra note 94, at 49. Segregable portions of a classified document that are not exempt in themselves must be released. Id. Additionally, the FOIA entitles citizens to seek judicial review *de novo* of classification determinations, and places the burden upon the agency to sustain the propriety of a challenged classification. 5 U.S.C. § 552(a)(4)(B) (1976). See also Conference Report No. 93-1200, 93rd Cong., 2d Sess. 8-9 (1974). If "classified information" were the suppression standard utilized under the CIA procedure, CIA

Snepp is consistent with previous case law, which the Supreme Court did not purport to overrule. In *Alfred A. Knopf, Inc. v. Colby*,[191] the Fourth Circuit held that the CIA could constitutionally suppress only information that is found to be both classified and classifiable pursuant to executive order.[192] This standard allowed CIA employees to challenge in court the propriety of a suppressed item's classification.[193] In defining the scope of judicial review, however, the Fourth Circuit established several presumptions favoring the conclusion that deleted material satisfied the applicable suppression standard.[194] The difficulty of overcoming these presumptions may allow the CIA

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employees could be denied permission to publish information that another citizen may obtain for the asking and publish without restraint under the FOIA procedure. Since ordinary citizens enjoy greater speech rights with respect to classified information than do CIA employees, the greater restrictions affecting the latter must be justified by interests unique to the CIA's status as an employer. See text accompanying notes 104 & 112 supra. However, the national security exemption in FOIA is designed to protect the same interest as that supporting suppression under the CIA procedure. See text accompanying note 176 supra. Since both the FOIA disclosure exemption and the CIA suppression standard are designed to prevent disclosure of material the revelation of which would harm national security, the comparison of the two standards suggests that the latter is unnecessarily broad.

191. 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992, reh. denied, 422 U.S. 1049 (1975).

192. Id. at 1367. The court made clear that it intended this standard to parallel the FOIA exemption standard, which allows agencies to withhold information that is "properly classified" pursuant to executive order, see note 190 supra. 509 F.2d at 1367. The court also held that material could not be suppressed, even though properly classified, if it had already been officially disclosed. Id. at 1370.

Since the government did not seek a broader suppression standard in *Snepp* than that upheld in *Knopf*, it is unlikely that the Supreme Court intended to overturn the *Knopf* standard and replace it with the broader standard of "classified" information. Additionally, it would be unreasonable for the Court to authorize suppression of improperly classified information in order to protect national security, particularly since access to such material is afforded to all citizens by the Freedom of Information Act, 5 U.S.C. § 552 (1978). See note 190 supra. These considerations weigh against interpreting *Snepp* to overrule, implicitly and in dictum, the suppression standard approved in *Knopf*.

193. This aspect of the Fourth Circuit's holding overruled its earlier decision in *Marchetti*, where it had limited judicial review to the questions whether a deleted item was in fact classified and whether it disclosed information already part of the public domain. See United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). See also note 182 supra. At the time *Marchetti* was decided, the Freedom of Information Act permitted agencies to withhold from the public information that was required by executive order to be kept secret in the interest of national security, and was interpreted to provide no means to challenge denials based upon improper classification. EPA v. Mink, 410 U.S. 73 (1973). In 1974, Congress amended the Act to allow citizens to obtain classified material that no longer merits classification, and to obtain judicial review of the propriety of classification of information withheld under the FOIA procedure. In the light of these amendments, the Fourth Circuit concluded in *Knopf* that CIA employees should enjoy the right to obtain judicial review of the classification of deleted items under the prior-approval procedure. Otherwise, CIA employees would be "denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish." 509 F.2d at 1367. See note 190 supra.

194. Under the *Knopf* opinion, the CIA may establish that material satisfies the suppression standard by showing that it contains information that is classifiable in any degree and is contained in a document bearing a classification stamp. 509 F.2d at 1368. The court established a "presumption of regularity" in the discharge of a classifying officer's duties, which requires the conclusion, absent affirmative proof to the contrary, that all information within a classified document was in fact classified at the time the legend was affixed to the document. Id. This presumption makes it unnecessary for the government to establish that it has ever in fact classified a particular item of information contained in a classified document.

to effectively prevent disclosure of material merely by asserting that it was properly classified.[195] Thus, the suppression standard authorized in *Knopf* may result in suppression of some material that does not actually threaten national security.[196] In addition, since material whose disclosure could be reasonably expected to cause any degree of damage to national security may be properly classified,[197] the *Knopf* standard may authorize suppression of some material the disclosure of which threatens harm that is either remote or merely conjectural. This violates the *Pickering* requirement that substantial and actual harm be demonstrated by the government in support of restrictions imposed upon its employees' speech.[198] The *Knopf* standard further departs from *Pickering* by failing to require that national security interests be weighed against first amendment interests.[199] This departure is especially significant

195. For example, by not requiring the government to establish that it has ever in fact classified information it sought to prevent from publication, see note 194 supra, *Knopf* may allow CIA censors to make ad hoc classifications of material after reading it in a manuscript submitted for prepublication review. Additionally, the court's discussion of the "classifiable" part of the *Knopf* standard suggests that minimal judicial scrutiny will be afforded when the propriety of a classification is challenged. Although its discussion focused more upon the type of showing necessary to establish that deleted items were in fact classified than on the nature of proof necessary to establish that they were classifiable, the court did indicate that testimony of CIA officials respecting the classifiability of an item would be highly persuasive, see 509 F.2d at 1369, and suggested that CIA employees had a more appropriate and effective avenue of review of classifiability within the Executive Branch than by judicial review. Id. at 1369-70.

196. Additionally, since the level of judicial review of classification accorded to CIA employees under the *Knopf* standard is substantially lower than the level of judicial review of classification accorded under the Freedom of Information Act, compare notes 194-95 and accompanying text supra with note 190 supra, the *Knopf* standard produces an anomalous result: a citizen denied access to classified information under the FOIA, see note 190 supra, can obtain a higher level of judicial review respecting the information's classification than that afforded CIA employees who are denied publication approval under the procedure upheld in *Snepp*. Yet citizens seeking classified information under FOIA have only a statutory right to obtain such information, while CIA employees seeking permission to publish information they already possess have a constitutional interest in publishing without prior restraint.

197. See note 166 supra.

198. Under recent executive orders, the requirement of substantial harm might be satisfied with respect to material that is properly classified either "Secret" or "Top Secret," which denote information the disclosure of which could cause "serious" or "grave" damage to national security, respectively. The "substantiality" issue is raised primarily with respect to "confidential" information, whose disclosure could cause any degree of damage to national security. See Exec. Order No. 11652, §§ 1(A), (B), (C), 3 C.F.R. 339 (Mar. 10, 1972) (President Nixon); Exec. Order No. 12065, §§ 1-102, 1-103, 1-104, 43 Fed. Reg. 28,949 (July 3, 1978) (President Carter).

The question whether the disclosure of properly classified information would cause actual harm was a greater problem under President Nixon's executive order than under President Carter's. Under the former, information could be classified if its disclosure "could reasonably be expected to cause exceptionally grave damage to the national security." Exec. Order No. 11652, § 1(A), 3 C.F.R. 339 (Mar. 10, 1972). President Carter's order provides that information may not be classified in any degree unless its disclosure could be expected to cause "at least identifiable damage" to national security. Exec. Order No. 12065, § 1-302, 43 Fed. Reg. 28,949 (July 3, 1978). Although material properly classified pursuant to President Carter's order thus may satisfy the actual-harm element of the *Pickering* test, the comparison with President Nixon's order suggests that using "properly classified" as a suppression standard is undesirable, since the classification criteria themselves may change every few years. While disclosure of information that is properly classified pursuant to the current executive order on classification reasonably may be deemed to threaten actual harm, a future order by another administration may eliminate the "identifiable damage" provision.

199. See M. Halperin & D. Hoffman, supra note 94, at 33. President Carter's executive order on classification may be interpreted in a manner that avoids this problem. Section 3-303 of the order provides that information that continues to satisfy the classification criteria should be

because information relating to CIA functions is of public importance,[200] and thus lies at the core of the first amendment's protection.[201] Free and unhindered debate on matters of foreign policy and national defense has been recognized as an integral part of the system of self-government protected by the first amendment.[202] CIA employees are the members of the community most likely to have informed opinions about the Agency's conduct.[203] Thus, their ability to publish material concerning the CIA is essential to the public's capacity to become an enlightened body, capable of creating effective restraints against ill-conceived executive policies in the conduct of foreign affairs.[204]

B. *Prepublication Review as a Means of Regulation*

The CIA prepublication review procedure falls squarely within the standard definition of an administrative system of prior restraint in that it "undertakes to prevent future publication [of all speech in the area regulated] without advanee approval."[205] The validity of the procedure depends upon whether a system of prior restraint is the least restrictive means of protecting the CIA's interests[206] and, if so, whether the particular prior-restraint system it employs operates in a constitutional manner.[207]

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declassified when situations arise where "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." It may be possible for a CIA employee denied permission to publish classified material to invoke this provision, and claim that the information she seeks to disclose should be declassified since the public-interest value in disclosure outweighs the damage publication would cause. This procedure might satisfy the balancing requirement of *Pickering* under a "properly classified" standard, since CIA employees could challenge the propriety of classifications that do not take adequate account of the public value of a communication. Nevertheless, a future administration may eliminate this provision; thus, whether "properly classified" is a constitutional suppression standard under the *Pickering* test will depend upon the features of the particular classification order in effect. See note 198 supra.

200. See Comment, supra note 185, at 1085. See also In re Halkin, 598 F.2d 176 (D.C. Cir. 1979).

201. See Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

202. See New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring); id. at 724 (Douglas, J., concurring); Emerson, Legal Foundations of the Right to Know, 1976 Wash. U.L.Q. 1, 17. Even executive orders on classification have acknowledged the public interest in receiving information concerning the conduct of national-security functions. See, e.g., Exec. Order No. 11652 (Preamble), 3 C.F.R. 339 (Mar. 10, 1972) (President Nixon).

203. Pickering v. Board of Educ., 391 U.S. 563, 572 (1968).

204. See New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry"); see also M. Halperin & D. Hoffman, supra note 94, at 134.

The public's interest in receiving communications from CIA employees was ignored by all of the courts involved in both the *Marchetti* and *Snepp* litigations. The Fourth Circuit in *Knopf* stated that Marchetti had "effectively relinquished his First Amendment rights" by entering into the secrecy agreement, as well as "the confidential employment relationship." 509 U.S. at 1370. As one writer has noted, "the court's analysis is fatally incomplete without consideration of the secrecy agreement's arguable invasion of the public's first amendment rights to know about government operations." Comment, supra note 25, at 702.

205. See Emerson, supra note 37, at 655.

206. See text accompanying note 76 supra.

207. See text accomanying notes 90, 95-103 supra.

The CIA claimed in *Snepp* that prepublication review was necessary to provide the Agency the opportunity to identify and suppress material whose disclosure would harm national security.[208] Moreover, the CIA asserted that prepublication review was necessary to assure foreign intelligence sources of the CIA's ability to maintain confidentiality.[209] The CIA's ability to offer such assurances is important, because the government's formulation of policy in the areas of national security and foreign affairs relies heavily upon intelligence gathered from foreign sources.[210] The CIA's interest in projecting an image of control over its employees' disclosure of sensitive information does not, however, provide justification for the particular means of secrecy control the CIA presently uses, since rigorous enforcement of a system of subsequent punishment for disclosures of foreign sources' confidences could serve as the necessary assurance of the CIA's ability to maintain confidentiality.[211] By contrast, the government's interest in preventing publication of material whose very disclosure would harm national security may support limited use of a prior restraint. In some situations, disclosure may result in virtually certain, grave, and irreparable harm to national security.[212] The government's interest in preventing such harm may not be served adequately under a system of subsequent punishment, which is a significantly less effective deterrent than prior restraint.[213] Thus, the least restrictive means of adequately preventing certain, grave, and irreparable harm to national security may be a system of prior restraint.[214] In addition, this interest may justify some form of prepublication review of material that could cause substantial, irreparable harm to national security, since the government cannot restrain, in advance of publication, material of which it does not have notice prior to communication.[215]

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208. The Supreme Court found this argument persuasive, on the ground that CIA employees may lack the ability to identify harmful information themselves. See 444 U.S. at 512, 513 n.8. But see note 269 infra.

209. See note 173 and text accompanying notes 173-75 supra.

210. See 444 U.S. at 512 n.7.

211. For criticism of the Supreme Court's analysis of the CIA's interest in projecting an image of control over its employees' disclosures, see note 173 supra.

212. Cf. New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (prior restraint justified to suppress information "that would set in motion a nuclear holocaust," or "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea").

213. See note 63 supra.

214. See text accompanying notes 87-94 supra.

215. This situation recently arose when the government, learning of *The Progressive* magazine's plan to publish an article revealing details of hydrogen bomb construction, obtained a preliminary injunction against publication. Another magazine, however, published the same information before the government was able to obtain an injunction. See United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), motion to reconsider denied, 486 F. Supp. 5 (W.D. Wis.), appeal dismissed without opinion, 610 F.2d 819 (7th Cir. 1979). The Atomic Energy Act authorizes the Attorney General to seek injunctions against the disclosure of atomic energy secrets, 42 U.S.C. § 2280 (1978), but as the *Progressive* case demonstrates, does not ensure that the government will learn of intended publication in time to obtain an injunction.

Nevertheless, the particular system of prior restraint upheld in *Snepp* operates in an unconstitutional manner. Apart from the basic problem that the CIA procedure permits suppression of a substantial amount of information that does not satisfy the "certain, grave and irreparable" standard,[216] a functional analysis suggests that the procedure operates in an "unnccessarily stifling" manner.[217] The CIA procedure subjects to official scrutiny a broad range of communication, including clearly protected, as well as borderline, expression.[218] Morcover, the procedure is likely to induce self-censorship, deterring much communication the government cannot constitutionally suppress. For example, many oral "publications" (which the CIA considers to be subject to prepublication review[219]) may have relevance only in the context of a particular conversation. In such a case, it would be wholly impracticable for a speaker to seek permission to express herself on the point in question.[220] Even if she sought and obtained approval, the communication would meanwhile have lost its relevance. Even where it is possible to obtain approval without altogether sacrificing the timely nature of communication, CIA employees may decide to forego the expression rather than undertake the burdensome process of seeking approval.[221] Employees who do decide to submit

216. In New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam), several Justices found that the government had not established that publication of the Pentagon Papers would surely cause direct, immediate, and irreparable harm to national security, see id. at 730 (Stewart, J., joined by White, J., concurring); id. at 726-27 (Brennan, J., concurring), even though they contained material classified "Top Secret." See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 591-92 (1976) (Brennan, J., concurring). Under *Snepp,* the CIA may suppress information classified in any degree. See text accompanying notes 163-70 supra. *A fortiori,* information classified at levels below "Top Secret" would not satisfy the prior restraint standard endorsed by Justices Brennan, Stewart and White. See note 166 supra.

217. See text accompanying notes 58, 75-76 supra.

218. See text accompanying note I59 supra. See also text accompanying notes 69-70 supra.

219. In September, 1979, the Deputy Director of Central Intelligence promulgated a regulation setting forth policy and procedures governing the submission and review of "nonofficial publications and oral presentations" by current and former employees. Public Affairs Headquarters Reg. 6-2. This regulation, purporting to interpret secrecy agreements already in effect, stated that current and former CIA employees must obtain written authorization for "all writings and scripts or outlines of oral presentations intended for nonofficial publication, including works of fiction, which make any mention of intelligence data or activities, or contain data which may be based upon information classified pursuant to law or Executive order." Id. § 6-2(b)(2). The regulation defines "publication" as "communicating information to one or more persons." Id. at accompanying note.

220. The CIA's requirement of prior approval precludes spontaneity in an employee's expression about CIA activities or intelligence activities generally, since a deviation in the actual communication from the approved "outline," see note 219 supra, could constitute a violation of the prior-approval requirement. In response to this problem, a federal district judge recently modified an injunction ordering a former CIA employee to comply with his secrecy agreement, so that the injunction would not require prior approval of extemporaneous oral remarks that consist solely of personal views on matters of public concern and do not disclose or refer to classified information. Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980).

221. Because failure to seek prior approval may, in itself, subject a CIA employee to sanctions, CIA employees may be unwilling to risk the consequences of spontaneous expression even in the context of private communications with friends or colleagues. CIA employees are directed to report colleagues who they believe intend to violate the terms of their secrecy agreement. Public Affairs Headquarters Reg. § 6-2 (c)(3). Frank Snepp's plan to publish *Decent Interval* without obtaining prior approval was discovered by the CIA through Snepp's girlfriend, in whom he confided, unaware that she was "spying" on him for the CIA. See Wash. Post, Sept. 15, 1980, at B11.

intended publications for prior approval may also exercise some degree of presubmission self-censorship, in anticipation of the CIA censor's response to the publication.[222] Furthermore, censorship authority is vested in administrative officials charged with protecting the interests that are the CIA's concern, and who are therefore likely to err on the side of suppression with respect to information the dangerousness of which is doubtful.[223]

The procedure by which the CIA's prior-approval regime is enforced is also inimical to first amendment values. As *Snepp* demonstrates, potentially severe sanctions exist for mere failure to obtain the CIA's approval prior to publication.[224] The question of an employee's right to publish unreviewed material is irrelevant in an enforcement proceeding; noncompliance with the prior-approval requirement is the sole issue for determination.[225] The possibility of judicial enforcement of the secrecy agreement by injunction subjects CIA employees to the further threat of a contempt proceeding for future publications, in which the constitutionally protected nature of the publication may not be asserted as a defense.[226] In addition, enforcement of the secrecy agreement is subject to deliberate abuse by the CIA. The CIA has conceded in congressional hearings that it has selectively enforced the prior-approval requirement against authors of books that are critical of the Agency.[227]

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222. This risk is particularly great when an employee contemplates writing a manuscript that is critical of the CIA. See Snepp v. United States, 444 U.S. 507, 526 n.17 (1980) (Stevens, J., dissenting). Anticipation of the Agency's response to such criticism may induce an employee to soften her criticism to prevent "retaliatory" deletions. See note 230 infra. See also note 71 supra; Comment, supra note 16, at 416.

223. See text accompanying note 72 supra. Unlike the obscenity procedure upheld in *Kingsley,* see text accompanying notes 77-82 supra, the CIA censorship scheme is directed at regulation of speech the protected nature of which cannot be ascertained with certainty in advance of communication. See text accompanying notes 67, 83-84 supra. Moreover, CIA censorship is subject to deliberate abuse of discretion. See note 230 and accompanying text infra.

224. See text accompanying note 26 supra.

225. See text accompanying notes 61-66 supra.

226. In addition to imposing a constructive trust on Snepp's profits from *Decent Interval,* the Supreme Court upheld the district court's injunction ordering Snepp to submit all future writings concerning the CIA to the Agency for prepublication clearance. See text accompanying note 26 supra. Similar injunctions have been imposed on Victor Marchetti, see United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), and Phillip Agee, see Agee v. CIA, 500 F. Supp. 506, 509 (D.D.C. 1980). Disobedience of such injunctions may, in itself, result in a contempt conviction. See Note, Rule 26(c) Protective Orders and The First Amendment, 80 Colum. L. Rev. 1645, 1646 n.11 (1980).

227. Wash. Post, Apr. 6, 1980, at A 10. Although Snepp raised a selective-enforcement defense, his argument was rejected by both lower courts, and was not discussed by the Supreme Court. See United States v. Snepp, 456 F. Supp. 176, 181 (E.D. Va. 1978); United States v. Snepp, 595 F.2d 926, 933 (4th Cir. 1979). Subsequent to *Snepp,* another federal district court refused to grant the CIA's request for a constructive trust on the profits realized from sales of an uncleared publication by Phillip Agee, which disclosed highly classified information. Agee v. CIA, 500 F. Supp. 506 (D.D.C. 1980). The court based this decision upon evidence that the CIA has selectively enforced its prior-review requirement, suing authors of four of the five books listed in an Agency memorandum as "more critical of the Agency," while bringing no suits against authors of "less critical" books that had, concededly, been published without clearance. Id. In response to public criticism of its selective enforcement practices, the Justice Department has adopted guidelines establishing conditions under which it would prosecute former and current government employees who violate their secrecy agreements. N.Y. Times, Dec. 4, 1980, at 2.

Finally, the CIA prepublication review system lacks the minimum safeguards designed to counteract the detrimental effects of prior restraints. The Supreme Court has required that delegation of censorship power to administrative officials be statutorily limited by narrowly drawn and definite standards for suppression in order to prevent abuse of censorship discretion.[228] The CIA procedure, however, is not authorized by any statute,[229] let alone one

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228. See text accompanying note 96 supra.

229. The Supreme Court has held that administrative schemes impinging on constitutional rights are impermissible unless they have been specifically authorized by Congress or the President. For example, in Greene v. McElroy, 360 U.S. 474 (1959), the Court struck down a military security-clearance program, established by the Department of Defense, that permitted dismissal of employees who presented a security threat without providing them an opportunity to confront witnesses and rebut evidence against them. The Court indicated that the constitutional merits of a constitutionally sensitive administrative scheme will not be considered absent explicit presidential or congressional authorization, which "cannot be assumed by acquiescence or nonaction." Id. at 507. The Court reasoned that explicit authorization was necessary to ensure that "decisions of great constitutional import" were a product of "careful and purposeful consideration" by responsible lawmakers, and not "relegated by default" to administrators not authorized to make them. Id. See also Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); United States v. Robel, 389 U.S. 258, 276-78 (1967) (Brennan, J., concurring). While *Greene v. McElroy* requires either presidential or congressional authorization for constitutionally sensitive administrative schemes, it is doubtful whether presidential authorization would be sufficient if the administrative procedure involved a prior restraint, since the Supreme Court has indicated that explicit congressional authorization is necessary to the validity of a prior restraint. See note 95 and accompanying text supra.

In both *Snepp* and *Marchetti,* the CIA argued that its prepublication review procedure was authorized by the provision of its enabling legislation charging the Director of Central Intelligence with responsibility for "protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403(d)(3) (1978). In *Greene v. McElroy,* the government relied upon similar enabling statutes and other provisions as authorization for the Defense Department's security procedure, but the Court found that these provisions were not sufficiently explicit to authorize the particular challenged procedure. See 360 U.S. at 504. Nevertheless, the Fourth Circuit found that the CIA prepublication review procedure was adequately supported by § 403(d)(3) in both *Snepp,* see 595 F.2d at 932, and *Marchetti,* see 466 F.2d at 1316, and the Supreme Court found that "Snepp's agreement is an 'entirely appropriate' exercise of the CIA Director's duty to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"

Although Congress has not authorized the particular procedure upheld in *Snepp,* it has enacted several statutes that punish the disclosure of certain types of sensitive information. E.g., 18 U.S.C. § 793 (1978) (gathering, communicating, and losing national defense information); 18 U.S.C. § 794 (1978) (espionage); 18 U.S.C. §§ 795, 796, 797 (1978) & 50 U.S.C. App. § 781 (1976) (photographing and sketching defense installations); 18 U.S.C. § 798 (1976) (disclosure of cryptographic information); 18 U.S.C. § 799 (1976) (disclosure of NASA information); 18 U.S.C. § 952 (1976) (disclosure of diplomatic codes); 50 U.S.C. § 783(b) (1978) (disclosure of classified information to foreign agents); 42 U.S.C. §§ 2275-2277 (1978) (disclosure of atomic energy information). In addition, Congress has authorized the use of prior restraints against disclosure of one limited category of information. 42 U.S.C. § 2280 (1976) (authorizing Attorney General to seek injunctions against disclosure of atomic energy information). These statutes demonstrate that Congress has carefully considered the government's need to prevent disclosure of certain categories of information, and has chosen to protect this need by use of subsequent punishment except in one limited situation. Furthermore, Congress has expressly rejected presidential efforts to implement a system of prior restraint analogous to the procedure upheld in *Snepp.* After considered debate, Congress rejected President Wilson's proposal that the executive be allowed to censor publication of certain defense information in wartime. See New York Times Co. v. United States, 403 U.S. 713, 746-47 (1971) (Marshall, J., concurring); Edgar & Schmidt, The Espionage Statutes and Publication of Defense Information, 73 Colum. L. Rev. 929, 941, 946 (1973). In the fall of 1977, President Carter made available for public comment a draft executive order on national security information, which contained a provision authorizing agencies to require the

that limits CIA censorship discretion within constitutional bounds.[230] Moreover, contrary to the mandate of *Freedman v. Maryland*,[231] the CIA system fails to ensure judicial superintendence either by participation in the initial determination or by review of adverse determinations within a short, specified period.[232] The burden of initiating an appeal rests upon the employee who is denied publication approval.[233] Substantial time may elapse before an employee improperly denied approval ultimately vindicates her right to publish

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signing of secrecy agreements as a precondition to access to government information. See Hearings Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Freedom of Information Act, 95th Cong., 1st Sess. 465 (1977). That provision was sharply criticized by members of Congress, see, e.g., 123 Cong. Rec. H33705 (daily ed., Oct. 13, 1977) (remarks of Congressman Preyer), and was deleted from the executive order ultimately issued. Exec. Order No. 12065, 43 Fed. Reg. 28,949 (July 3, 1978).

Had the Supreme Court followed its earlier decisions in *Greene* and *New York Times,* it would have refused to consider the merits of the CIA prepublication review procedure since it was not explicitly authorized by Congress. However, even if the procedure were congressionally authorized, the Court would still be bound to consider its constitutional merits. See New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J., concurring); Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978). This Comment addresses the question whether the CIA procedure would be constitutionally permissible were it authorized by Congress. For more extensive discussions of the issue of appropriate authorization, see Comment, supra note 25, at 693-98; Note, supra note 94, at 461-67.

230. The extent of abuse of the CIA's censorship discretion is illustrated by the CIA's deletions from Victor Marchetti's book. See note 9 supra. After Marchetti submitted a manuscript to the CIA foir prepublication review, the Agency denied publication permission with respect to 339 items. In pretrial negotiations with Marchetti's lawyers, the CIA released all but 114 items, and later another 57 items. Among the items in Marchetti's manuscript for which the CIA initially withheld approval were the following: "Henry Kissinger, the single most powerful man at the 40 Committee meeting on Chile," and, referring to a National Security Council briefing by Richard Helms, "His otherwise flawless performance was marred only by his mispronunciation of 'Malagasy' . . . when referring to the young republic." Plaintiff's Memorandum of Points and Authorities in Support of their Motion for Summary Judgment at , McGehee v. Turner, No. 78-2407 (D.D.C. , 19). The former General Counsel of the CIA who was involved in the review of Marchetti's book later wrote that the CIA had decided to "list all classified items consistent with the language of the injunction [ordering Marchetti to comply with his secrecy agreement, see note 226 supra], with the view that at a later date, possibly at trial, CIA would withdraw on the softer items." Id. at 26.

231. 380 U.S. 51 (1965). See text accompanying notes 100-02 supra.

232. In *Marchetti,* the Fourth Circuit held that the CIA must respond to a request for publication approval within 30 days, and that Marchetti was entitled to judicial review of adverse determinations, but did not require expedited procedures for review. 466 F.2d at 1317. Although the CIA has accepted the thirty-day limitation, it requires authors who have been directed to delete material to submit their revisions to the Agency for final approval. Public Affairs Headquarters Reg. 6-2(b)(6), (7), Sept. 27, 1979. Thus, the initial review procedure may take longer than thirty days. Delays attending judicial review of CIA deletions are even more substantial. For example, Victor Marchetti lost three years litigating deletions from his manuscript before finally proceeding with publication. See Note, supra note 94, at 489 n.179. Such delays are particularly offensive to first amendment values in the context of publications that involve political speech. In this area, a restraint of "even a day or two" is an intolerable infringement of first amendment freedoms. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968) (quoting A Quantity of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting)).

233. See Marchetti v. United States, 466 F.2d 1309, 1317 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). The Supreme Court in *Snepp* believed that the CIA bears the burden of seeking an injunction against publication of items an employee does not voluntarily agree to delete. 444 U.S. at 513 n.9.

the deleted items.[234] These delays, together with the limited scope of judicial review afforded CIA employees who challenge deletions,[235] lend an effect of finality to the CIA's initial determination, regardless of its propriety.[236]

IV. A Less Restrictive Alternative

While the CIA prepublication review procedure is a constitutionally impermissible means of enforcing the government interests it was designed to protect,[237] the CIA's interests as an employer do support suppression of some communication by employees,[238] and, as the preceding discussion suggests, suppression of certain information may be effected by appropriately limited use of prior restraint.[239] The government's interests justify suppression of speech that threatens actual and substantial harm to national security,[240] when the threatened harm outweighs the first amendment value of the expression,[241] by regulation that is the least restrictive means available.[242] Where the government's interests cannot be adequately protected by use of subsequent punishment, a prior restraint may be used if it affords the minimum safeguards the Supreme Court has required for its use,[243] and otherwise satisfies the functional-analysis test.[244]

A constitutionally acceptable procedure for protecting the CIA's interests could be created by combining appropriately limited use of prior restraints with more extensive use of criminal statutes. Primary reliance for protecting the CIA's interests would be placed upon enforcement of criminal statutes.[245] Since the government interest justifying suppression is the protection of national security,[246] least restrictive means analysis requires that suppression be strictly limited to communications that would cause substantial and actual

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234. See note 232 supra.

235. See notes 194-95 and accompanying text supra.

236. See text accompanying notes 99-100 supra.

237. Some question might arise whether the presence of the contract, in which CIA employees agree to submit publications for prior approval, see text accompanying note 1 supra, affects the constitutionality of the procedure. However, since signing the contract is a condition of employment with the CIA, the contractual obligation itself is subject to constitutional limitations upon public employment conditions that restrict speech. See text accompanying notes 106-09 supra.

238. See text accompanying notes 176-77 supra.

239. See text accompanying notes 212-15 supra.

240. See text accompanying note 176 supra.

241. See text accompanying notes 120, 131-35 supra.

242. See text accompanying notes 127-30 supra.

243. See text accompanying notes 95-103 supra.

244. See text accompanying notes 76-94 supra.

245. Former Director of Central Intelligence William Colby has testified that the secrecy needs of the CIA could be adequately protected by a system of subsequent punishment. Hearings before the Subcommittee on Secrecy and Disclosure, Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 54, 90 (1978).

246. See text accompanying note 176 supra.

harm to national security.[247] To avoid the overbreadth inherent in use of broad criteria such as "classified information"[248] or "information whose disclosure would cause actual harm to national security,"[249] these statutes would restrict publication of narrowly defined categories of information, such as weapons-design information, or information revealing the identities of secret agents still in the field.[250] These criteria for suppression would reflect a

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247. See text accompanying notes 127-30 supra; cf. Note, supra note 107, at 385 (under *Pickering* test, public-employee speech restrictions "should extend only so far as is clearly required for the job").

In general, it is desirable for statutes proscribing communication of national-defense-related information to maintain a distinction between communications emanating from public employees and similar communications by other citizens, as some existing statutes do. Compare, e.g., 50 U.S.C. § 783(b) (1976) (proscribing communication of classified information by government employee to agent of foreign government) with 18 U.S.C. § 794(a) (1976) (proscribing communications by any person of national-defense-related information for espionage purposes). For purposes of determining whether a speech restraint is constitutional, the Supreme Court has frequently distinguished between regulations affecting "insiders," government employees who are in a position to leak information they obtain by virtue of their employement, and "outsiders," who obtain such information from insiders. See, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 & n.12 (1978). See generally Note, supra note 124. The Supreme Court's treatment of regulations affecting expression of public employees, see text accompanying notes 104-05 supra, reflects the recognition that unique considerations obtain with respect to such regulation, in view of the special public trust reposed in government officials. On the one hand, this trust may give rise to a duty to act responsibly in preserving confidentiality of information the disclosure of which would harm national interests. See Snepp v. United States, 444 U.S. 507, 510-11 (per curiam), reh. denied, 445 U.S. 972 (1980). On the other hand, the public trust reposed in government officials may give rise to a duty to disclose information concerning the operation of government that is useful to democratic self-government, such as exposure of official misconduct. See Note, supra note 107, at 392 & n.108. See also Edgar & Schmidt, supra note 229, at 1084-85.

248. See text accompanying notes 182-90 supra.

249. See note 251 infra.

250. See M. Halperin & D. Hoffman, supra note 94, at 10; Note, supra note 94, at 497.

Some existing criminal statutes proscribe communication of narrowly defined categories of especially sensitive classified information, such as information relating to diplomatic codes, 18 U.S.C. § 952 (1976), atomic energy, 42 U.S.C. §§ 2271-81 (1976), and cryptographic information, 18 U.S.C. § 798 (1976). Other statutes proscribe communication of a broad range of defense-related information, or "classified" information. Most of the latter are explicitly limited to communications motivated by "spying" purposes. See, e.g., 18 U.S.C. § 794 (1976) (proscribing communication of information "relating to the national defense" if the communication is made "with intent or reason to believe that [the information] is to be used to the injury of the United States or to the advantage of a foreign nation"); 50 U.S.C. § 783(b) (1976) (proscribing communication by government employees of classified information to foreign agents and members of Communist organizations). The breadth of these two provision may be justifiable since communication is punishable only when motivated by intent to injure the United States or aid a foreign nation. These statutes essentially proscribe spying *conduct,* rather than speech as such. Generally, more intrusive government regulation with respect to conduct is permitted, even when it involves speech, than with respect to "pure" speech. See T. Emerson, supra note 120, at 917; Note, supra note 94, at 495-96 & n.214. Moreover, communication motivated by a desire to aid foreign enemies has little value as a contribution to public debate. See id. In contrast, disclosures of national-defense-related information for nonespionage purposes may contribute to public understanding of governmental policy; as such, they have substantial first amendment value. See Edgar & Schmidt, supra note 229, at 1085.

Two ambiguously drafted provisions of the Espionage Act may be interpreted to proscribe communication of national-defense-related information without intent to injure the United States or aid another country. Sections 793(d) and (e) prohibit wilful communication of information "relating to the national defense" by persons who have "reason to believe [the information]

considered legislative judgment that specific classes of information pose a threat to national security substantial enough to justify suppression.[251]

Pickering requires that the government demonstrate actual harm to its interests.[252] In most cases, the government should be required either to produce factual evidence of harm or to establish that disclosure of a particular item is *per se* harmful. With certain limited categories of information, however, it may be appropriate to create statutory presumptions of actual harm. This may be desirable where disclosure of a class of information is *per se* detrimental yet the harmfulness of particular items in the class is difficult to establish. For example, disclosure of information regarding the design of advanced atomic weapons[253] would aid foreign governments' development of nuclear weapons, but the secrecy with which other governments conduct such developments would make it difficult for the government to establish that the disclosure has produced this effect. Moreover, requiring the government to

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could be used to the injury of the United States or to the advantage of any foreign nation" to persons "not entitled to receive it." 18 U.S.C. §§ 793(d), (e) (1976). These provisions also make it a crime to retain such information. Id. This statute has been sharply criticized for its potential breadth and ambiguity. See Edgar & Schmidt, supra note 229, at 1000. While §§ 793(d) and (e) can be read to proscribe communications of defense-related information by government employees for nonespionage purposes, Congress has assumed that the Espionage Act as a whole authorizes penalties only for revelations motivated by an intent to injure the United States. See, e.g., House Comm. on the Judiciary, Enhancing Further the Security of the United States by Preventing Disclosures of Information Concerning the Cryptographic Systems and the Communication Intelligence Activities of the United States, H.R. Rep. No. 1895, 81st Cong., 2d Sess. (1950). However, neither judicial interpretation nor legislative history sheds light on the precise scope of §§ 793(d) and (e) intended by Congress. See Edgar & Schmidt, supra note 229, at 1000. Professors Edgar and Schmidt conclude that "the broad literal meaning of the subsections is almost certainly unconstitutionally vague and overbroad," and that courts may have to declare them uneonstitutional since neither legislative history nor the language of the statute provides authority for a particular narrow reading. Id.

251. This contrasts significantly with the effect of using broad criteria for suppression, such as "classified information," or "information whose disclosure would damage national security." See text accompanying note 249 supra. Using "classified information" as a suppression standard is unsatisfactory both because of the substantial problem of overclassification, see text accompanying notes 182-90 supra, and because the criteria for classification are subject to change, see notes 198 & 199 supra. While the criteria for classification may represent an acceptable suppression standard under one executive order, a future administration may change the criteria at any time by issuing a new order on classification. See id. These effects could be avoided to some extent by requiriug the government to prove that actual harm resulted from disclosure of classified information, cf. United States v. Drummond, 354 F.2d 132, 151 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966) (jury question whether classified documents relate to national defense); Comment, supra note 185, at 1099-1100 (injury to national security must follow from disclosure of classified documents to convict). However, even use of "actual harm to national security" as the criminal standard may be unsatisfactory. Because of its generality, prosecutions under this standard would require the government to proceed on a case-by-case basis to establish the nature of harm that resulted from disclosure. Courts may lack sufficient expertise to assess the validity of the government's assertions regarding the national security threat posed by disclosure. In contrast, this is the type of determination the legislative process is well suited to make, with the assistance of government witnesses. See Note, supra note 94, at 497 & n.223. Guided by a legislative determination that disclosure of narrowly defined categories of information would pose a threat to national security, courts would be in a much better position to consider whether a particular disclosure caused the requisite degree of harm to national security to warrant punishment.

252. See text accompanying note 114 supra.

253. See 42 U.S.C. §§ 2274, 2277 (1976).

produce evidence establishing the nature of harm expected to result in such a sensitive area could expose national security interests to further risks.[254]

Under *Pickering,* government employees' speech may not be suppressed, even if it threatens material and substantial impairment of the government's interests, when the first amendment value of the speech outweighs the harm produced.[255] Accordingly, public employees prosecuted for disclosing information should be allowed to raise the defense that the value of their disclosure as a contribution to public debate exceeded the harm it caused to national security.[256]

While the proposed system of subsequent punishment would deter most publications that fall within the ambit of the statutory proscriptions, the impersonal threat of a statute is unlikely to deter all publications dangerous to national security.[257] Where the threat to national security is grave, certain, and irreparable, it may be permissible to restrain publication in advance.[258] Thus, the proposed system of subsequent punishment may be complemented by limited use of congressionally authorized[259] injunctions against such disclosures. Congress has already authorized the use of an injunction against the disclosure of atomic energy secrets.[260] Any further authorization of injunctions[261] should be similarly circumscribed, so that they are available against disclosures of only strictly limited categories of information, whose threat to national security is such that an injunction is the least restrictive means available of adequately protecting the government's interest.[262] In addition, when the government seeks an injunction pursuant to such legislative authorization, courts should be required to consider whether the threat to national

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254. Congress has recently passed legislation that minimizes this risk. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980). Prior to this legislation's passage, the government was frequently faced with the dilemma posed by the necessity of having to reveal highly sensitive information to make its case in prosecutions for violations of espionage and other laws relating to protection of national security. This legislation establishes procedures for ensuring the confidentiality of classified information used in the course of a criminal trial, including use of protective orders, *in camera* pretrial hearings to determine the admissibility of classified information in advance of trial, and substitutions for the classified information, such as a summary of the relevant portions, which enables the defendant to prepare her case. In view of this legislation, there should be few situations in which the government should not be required affirmatively to establish actual harm. In most cases it will be much easier for the CIA to develop evidence of actual harm than for an employee affirmatively to prove that actual harm did not result.

255. See text accompanying notes 240-41 supra.

256. See Edgar & Schmidt, supra note 229, at 1085. To some extent, a statutory proscription of speech can be expected to reflect a legislative balancing of the harm threatened by speech against first amendment considerations. See text accompanying note 251 supra. Nevertheless, no legislative judgment can anticipate the variety of situations in which disclosure may take place, and unforeseen exceptions may arise to a generally valid legislative judgment that disclosure of certain information will produce considerably more harm to national security than public enlightenment. See M. Halperin & D. Hoffman, supra note 94, at 72.

257. See text accompanying note 63 supra.

258. See text accompanying notes 87-94 supra.

259. See note 229 and text accompanying note 95 supra.

260. 42 U.S.C. § 2280 (1976).

261. The fact that Congress has only authorized injunctions in one situation may well indicate that they are not warranted in other situations. See note 229 supra.

262. See text accompanying notes 87-94 supra.

security posed by publication outweighs the first amendment value of publication.[263]

Cases in which the threat to national security is such that an injunction is both authorized and warranted may escape the governmcnt's attention until the material is already in print.[264] Thus, adequate protection of national security interests may require that the government have notice of communications subject to injunction in advance of their intended publication. This interest could be protected by authorizing the CIA to require its employecs to submit in advance of publication any intended communication that is subject to injunction. In order to obviate the dangers associated with censorship programs, CIA employees should not be punished for failure to submit material that could not be constitutionally suppressed. However, failure to provide any sanctions for noncompliance would substantially undermine the CIA's interest in receiving advance notice of intended publications. The least restrictive means of protecting the CIA's intercsts might be to authorize a penalty for failure to submit publications that are later proved in an enforcement proceeding to fall within the ambit of expression that could have been enjoined, if the author reasonably should have known that her publication required submission. Thus, CIA employees could raise the nonsupprcssible nature of disclosed information as a defense to prosecutions for failure to submit the material for approval. At the same time, the threat of punishment beyond that associated with violation of a subsequent-punishment statute[265] would encourage employees to comply with the CIA procedure.[266]

A system that penalizes failure to comply with the prior-submission requirement only when the publication could have been enjoined would free CIA employees from unnecessary regulation of speech prior to its communication.[267] There may be some degree of overbreadth, however, since the threat of sanctions for nonsubmission might induce CIA employees to submit some publications that could not be suppressed. Still, this may be tolcrable, since it ensures that the CIA has advance notice of all material that could be restrained prior to publication,[268] and in any event, overbreadth would be

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263. See M. Halperin & D. Hoffman, supra note 94, at 80; see also note 256 supra.

264. See note 215 and accompanying text supra.

265. Publication of any information that is subject to injunction would also be proscribed by criminal statute. Cf. Atomic Energy Act, 42 U.S.C. § 2280 (1976) (authorizing injunction against disclosure of atomic energy information, the communication of which is also prohibited by several criminal statutes).

266. CIA employees would be free, of course, voluntarily to submit any proposed manuscripts to the Agency for guidance in identifying information that might be subject to regulation by criminal statute. Any effort to make such "consultation" mandatory could constitute an unconstitutional prior restraint, however, even if the CIA lacked actual censorship authority. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 688 (1968) (evils attending prior restraint present under licensing system that had power to classify, but not suppress, certain films); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66-67 (1963) (system of "informal censorship" that worked by exhortation and advice sufficiently inhibited expression to constitute unconstitutional prior restraint).

267. See text accompanying notes 69-70 supra.

268. Since employees would be punished only for nonsubmission of material that could arguably be restrained, see text accompanying note 265 supra, the proposed procedure would

minimal, since any CIA employee who has been accorded access to material sensitive enough for Congress to have authorized its injunction is likely to be well trained in identifying material that is subject to the prior-submission requirement.[269]

Under the proposed procedure, the burden would be placed upon the CIA to seek a judicial injunction; thus, the Agency would have to justify with particularity any restraint it sought to impose. The process of seeking a restraining order would deter the CIA from frivolous, harassing, or unwarranted efforts to restrain publication, much as the burden of initiating a prosecution for a violation of a subsequent-punishment statute deters government officials from seeking imposition of penalties for speech whose unprotected nature is doubtful.[270]

Furthermore, no valid final restraint would be imposed without a judicial determination that the speech is unprotected and may be suppressed in advance of publication; mere denial of permission to publish by an administrative official would not create an enforceable bar to publication.[271] Rather, a valid restraint could be imposed only by a judge who would be sensitive to first amendment considerations as well as national security interests, and who would be required to balance these interests in arriving at a decision whether to grant the government an injunction.[272] Consistent with *Freeman,* any interim restraint should be "limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."[273] In addition, the procedure should provide for both a brief, limited period in which the CIA may seek an injunction if it seeks one at all,[274] and expedited judicial determination and appellate review.[275] Requiring the CIA to act within a short, specified period would remove any pall that might otherwise hang over an author because of the continuing threat of an injunction at some point in the publication process.

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avoid the problem of subjecting to official scrutiny clearly protected speech, as well as borderline and unprotected communication. See note 70 supra.

269. The current executive order on classification requires agencies that originate or handle classified information to establish a program to familiarize employees who have access to classified information with the various provisions of the executive order itself, and all implementing directives. Exec. Order No. 12065 § 5-404(d), 43 Fed. Reg. 28,949 (1978) (President Carter). Since training CIA employees to identify classified information themselves is a less restrictive means of ensuring that classified information is not inadvertently disclosed than requiring prepublication review, the latter method may be constitutionally unsound. See text accompanying note 76 supra. Cf. Snepp v. United States, 444 U.S. 507, 512 (per curiam) (prepublication review necessary since CIA censor can identify harmful material which employee, relying on own judgment, might not recognize as detrimental), reh. denied, 445 U.S. 972 (1980).

270. See text accompanying note 73 supra.

271. See text accompanying note 99 supra.

272. See text accompanying note 263 supra.

273. 380 U.S. at 59; see text accompanying note 101 supra.

274. The Freedom of Information Act procedure suggests that the government should need no more than ten days to make this determination. Under the FOIA, when the government receives a request for classified information, it must determine within ten days whether the threat to national security posed by disclosure of the requested information justifies withholding it. 5 U.S.C. § 552(a)(6)(A)(i) (1976). See note 190 supra.

275. See text accompanying note 103 supra.

CONCLUSION

In *Snepp v. United States,* the Supreme Court failed to consider fully the first amendment implications of the CIA prior-approval system it upheld. Consequently, the decision is highly problematical. First, it is vague with respect to the scope of information the CIA may validly suppress. While the opinion may be read to authorize suppression of any information whose disclosure the CIA deems "harmful" in any degree, the better reading would limit suppression to properly classified information. Second, in upholding this system of prior restraint, *Snepp* represents a significant departure from venerable doctrine under which prior restraints are valid only in the most exceptional circumstances, or where the specific dangers associated with this form of suppression are absent.

An analysis of the law governing prior restraints and that governing the first amendment rights of public employees points the way to a means of protecting the CIA's legitimate interests in secrecy that is both clear and consistent with first amendment principles. Primary reliance for protecting the CIA's interests should be shifted from prior restraints to enforcement of criminal statutes, narrowly drawn to allow suppression only of communications that would cause substantial and actual harm to national security. The use of prior restraints may be tolerable in some unusual circumstances, but in any event should be limited to cases where the threat to national security is grave, certain, and irreparable and outweighs the countervailing first amendment interests, and where the system of prior restraint is the least restrictive means of serving the interest in secrecy and is surrounded by appropriate procedural safeguards. Under such a system, as elaborated in this Comment, the legitimate national-security interests of the CIA can be adequately served without unnecessary injury to the first amendment.

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