29 May 1986

STAT

NOTE FOR: Director of Central Intelligence

3 JUN 1986

FROM: David P. Doherty
General Counsel

Attached per your request are:

(1) Justice White's entire concurring opinion in the Pentagon Papers case;

(2) Excerpts from the entire opinion which make reference to 18 U.S.C. 798; and

(3) The relevant Committee report.

Please let me know if you need anything further.

STAT

David P. Doherty

Attachments
as stated

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NEW YORK TIMES CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1873. Argued June 26, 1971—Decided June 30, 1971*

The United States, which brought these actions to enjoin publication in the New York Times and in the Washington Post of certain classified material, has not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

No. 1873, 444 F. 2d 544, reversed and remanded; No. 1885, — U. S. App. D. C. —, 446 F. 2d 1327, affirmed.

Alexander M. Bickel argued the cause for petitioner in No. 1873. With him on the brief were *William E. Hegarty* and *Lawrence J. McKay*.

Solicitor General Griswold argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Mardian* and *Daniel M. Friedman*.

William R. Glendon argued the cause for respondents in No. 1885. With him on the brief were *Roger A. Clark, Anthony F. Essaye, Leo P. Larkin, Jr.*, and *Stanley Godofsky*.

Briefs of *amici curiae* were filed by *Bob Eckhardt* and *Thomas I. Emerson* for Twenty-Seven Members of Congress; by *Norman Dorsen, Melvin L. Wulf, Burt Neuborne, Bruce J. Ennis, Osmond K. Fraenkel*, and *Marvin M. Karpatkin* for the American Civil Liberties Union; and by *Victor Rabinowitz* for the National Emergency Civil Liberties Committee.

*Together with No. 1885, *United States* v. *Washington Post Co. et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior re-

straints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest;[2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is

[2] The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times* litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in

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1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." *Id.*, at 2009.[4]

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[3] "Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment . . . ." 55 Cong. Rec. 2100.

[4] Senator Ashurst also urged that " 'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason." 55 Cong. Rec. 2005.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic sys-

[5] Title 18 U. S. C. § 797 provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[6] In relevant part 18 U. S. C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

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

tems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.[7] If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they

[7] The purport of 18 U. S. C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H. R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation was deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by nonemployees of the Government and to ease the Government's burden in obtaining convictions. See H. R. Rep. No. 1895, *supra*, at 2–5. The identical Senate Report, not cited in parallel in the text of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e) [8] makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no

[8] Section 793 (e) of 18 U. S. C. provides that:

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

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U. S. C. § 793 (g), added in 1950 (see 64 Stat. 1004; S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950)), provides that "[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

penalty for the unauthorized possessor unless demand for the documents was made.[9] "The dangers surrounding the unauthorized possession of such items are self-

[9] The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection.* The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such

evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin* v. *United States*, 312 U. S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous Court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activi-

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a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 8–9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that in prosecuting for communicating or withholding a "document" as contrasted with similar action with respect to "information" the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on *Gorin* v. *United States*, 312 U. S. 19 (1941). But that case arose under other parts of the predecessor to § 793, see 312 U. S., at 21–22—parts that imposed different intent standards not repeated in § 793 (d) or § 793 (e). Cf. 18 U. S. C. §§ 793 (a), (b), and (c). Also, from the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793 (e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

ties" and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.[10]

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585–586 (1952); see also *id.*, at 593–628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a news-

[10] Also relevant is 18 U. S. C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, of any information with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy . . . ."

the uniformed services who were hospital patients on the date of enactment had the right to elect retirement benefits computed in accordance with laws in existence prior to the Career Compensation Act, if such members were retired for physical disability during the 6 months immediately following the date of enactment.

Due to the fact that regulations required by other sections of title IV of the Career Compensation Act were not promulgated until after the 6-month period had expired, particularly insofar as they pertain to the payment of retired pay to non-Regular personnel, such persons were not able to exercise their election prior to the expiration date,

The proposed legislation, therefore, would extend the election date to December 31, 1950, but would not create any other new rights or benefits and, in all probability, will not enlarge the number of personnel entitled to the right of election.

While the exact number of persons affected by the proposed legislation is not known, the Department of Defense has indicated that there are approximately 200 individuals who may be adversely affected by failure to extend the election period for the proposed additional 6 months.

Thus early enactment of the proposed legislation will enable the Departments to retire certain personnel with an election which was originally contemplated under the Career Compensation Act.

Pending enactment of the proposed legislation, many personnel are being continued on full pay and, as a result, early enactment of the proposed legislation will undoubtedly result in a saving to the Government.

The Committee on Armed Services has been advised by the Department of Defense that it favors the proposed legislation, and it has likewise been advised that the Bureau of the Budget has been consulted and offers no objection to the proposed legislation.

CRYPTOGRAPHIC SYSTEMS AND COMMUNICATION INTELLIGENCE ACTIVITIES—PREVENTION OF DISCLOSURE OF INFORMATION

For text of Act see p. 159

Senate Report No. 111, Mar. 11, 1949 [To accompany S. 277]

House Report No. 1895, Apr. 6, 1950 [To accompany S. 277]

The House Report repeats in substance the Senate Report.

House Report No. 1895

THE Committee on the Judiciary, to whom was referred the bill (S. 277) to enhance 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, having

considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of this bill is to prevent the revelation of important information about the United States communication intelligence activities and United States codes and ciphers by persons who disclose such information without proper authority, and to prescribe penalties to those knowingly and willfully revealing such information.

GENERAL INFORMATION

This bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. It does not control in any way the free dissemination of information which might be transmitted by code or cipher. Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking. The reason for the latter prohibition is to prevent the indication to a foreign nation that we may have broken their code system.

At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting United States communication intelligence operations and all direct information about all United States codes and ciphers.

As the matter now stands, prevention of the disclosure of information of our cryptographic systems, exclusive of State Department codes, and of communication intelligence activities rests solely on the discretion, loyalty, and good judgment of numerous individuals. During the recent war there were many persons who acquired some information covered by this bill in the course of their duties. Most of these individuals are no longer connected with the services and are not now prohibited from making disclosures which can be most damaging to the security of the United States. They are subject to the temptations of personal gain and of publicity in making sensational disclosures of the personal information within the purview of this act.

The purpose of the bill is well summarized in the quotation from the Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor, which recommended, on page 253 of the report, that—

• • • effective steps be taken to insure that statutory or other restrictions do not operate to the benefit of an enemy or other forces inimical to the Nation's security and to the hampering of our own intelligence operations. With this in mind, the Congress should give serious study to, among other things, • • • legislation fully protecting the security of classified matter.

This bill is an attempt to provide just such legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree.

Earlier versions of this same bill (S. 805, 79th Cong.; S. 1019, 80th Cong.; and S. 2680, 80th Cong.) would have penalized the revelation or publication, not only of direct information about United States codes and ciphers themselves but of information transmitted in United States codes and ciphers. This provision is not included in the present version. Under the bill as now drafted there is no penalty for publishing the contents of United States Government communications (except, of course, those which reveal information in the categories directly protected by the bill itself). Even the texts of coded Government messages can be published without penalty as far as this bill is concerned, whether released for such publication by due authority of a Government department or passed out without authority or against orders by personnel of a department. In the latter case, of course, the Government personnel involved might be subject to punishment by administrative action but not, it is noted, under the provisions of this bill.

The bill, while carefully avoiding the infringement of civil liberties, extends the protected field covered by the extremely narrow act of June 10, 1933 (48 Stat. 122), the latter being of far too limited application to afford to certain highly secret Government activities the protection which they need. **The need for protection of this sort is best illustrated by an account of the very circumstances which surrounded the enactment of the act of June 10, 1933. In 1931 there had been published in the United States a book which gave a detailed account of United States successes in breaking Japanese diplomatic codes during the decade prior to publication.** In 1933 it was learned that the same author had already placed in the hands of his publishers the manuscript of another book which made further detailed revelations of United States success in the breaking of foreign diplomatic codes. Immediate action secured the passage by the Congress of the measure of June 10, which effectively stopped publication of the second book. Unfortunately, the first book had done, and continued to do, irreparable harm. **It had caused a** furor in Japanese Government circles, and Japanese diplomatic codes had been changed shortly after its appearance. The new codes were more complex and difficult to solve than the old ones, and throughout the years from then until World War II not only the Japanese diplomatic cryptographers but the military and naval cryptographers as well were obviously devoting more study to cryptography than they ever had before. In 1934 they introduced their first diplomatic machine cipher.

Year by year, their codes and ciphers improved progressively by radical steps, and United States cryptanalysts had more and more difficulty and required more and more time to break them. **It can be said that United States inability to decode the important Japanese military communications in the days immediately leading up to Pearl Harbor was directly ascribable to the state of code-security consciousness which the revelations of a decade earlier had forced on Japanese officialdom.**

ANALYSIS OF THE BILL

The bill would make it a crime, punishable by not more than $10,000 fine, or 10 years' imprisonment, or both, to knowingly and willfully reveal two categories of information, namely: (1) information which would nullify the efforts of United States communication intelligence agencies, and (2) information which would permit foreign governments to read the secret official communications of the United States. Information of the first category is covered by the following phrases (qualifying "information"):

*** * * concerning the nature, preparation, or use of any code, cipher, or cryptographic system of * * * any foreign government.**

*** * * concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by * * * any foreign government.**

*** * * concerning the communication intelligence activities of the United States or any foreign government.**

*** * * obtained by the processes of communication intelligence from the communications of any foreign government.**

Information of the second category is covered by inclusion of the words, "the United States or" in the first, second, and third of the phrases quoted above. The bill does not prohibit the publication or disclosure of United States Government messages in general.

In addition, it should be noted that the restrictions on disclosure apply only to the types of classified information defined in the phrases quoted above. The bill specifies that the classification must be in fact in the interests of national security.

RECOMMENDATIONS OF THE DEPARTMENTS

There are printed below, letters from the Secretary of Defense and from the Acting Secretary of the Navy to the Speaker of the House of Representatives recommending the enactment of this legislation:

THE SECRETARY OF DEFENSE,
Washington, December 31, 1948.

The honorable the SPEAKER OF THE HOUSE OF REPRESENTATIVES,
Washington, D. C.

DEAR MR. SPEAKER: Attached is a letter addressed to you by the Acting Secretary of the Navy recommending the enactment of a proposed draft of legislation, also attached, bearing the title "to enhance 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."

This legislation has been approved by me for inclusion in the National Military Establishment legislative program for the Eighty-first Congress, first session, and responsibility for handling it on behalf of the Establishment has been placed in the Department of the Navy.

Sincerely yours,

JAMES FORRESTAL.

NAVY DEPARTMENT,
Washington, December 23, 1948.

The honorable the SPEAKER OF THE HOUSE OF REPRESENTATIVES,
Washington, D. C.

DEAR MR. SPEAKER: There is transmitted herewith a draft of a proposed bill "to enhance 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."

The purpose of the proposed bill is to insure further the military security of the United States by providing that the unauthorized disclosure by any person of classified information concerning the cryptographic systems and the communication intelligence activities of the United States shall be a statutory offense.

During the war it was necessary to make a great many matters of a confidential nature accessible to a considerable number of service personnel and employees who have since been severed from their wartime duties and who may fail to safeguard official information which is within their knowledge. Existing laws do not adequately protect the security of information of this character and it is considered of utmost urgency and importance from the standpoint of national security that legislation be enacted which will fully protect the security of classified matter. The Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor recognized this fact and in its report recommended that Congress give serious study, among other things, "to legislation fully protecting the security of classified matter" (p. 253).

The proposed bill represents the combined views of the Army, Navy, Air Force, Central Intelligence Agency, and the Department of State, as to the legislation which is necessary to prevent the unauthorized disclosure of such classified information. The Navy Department is sponsoring this legislation on behalf of all of the foregoing organizations. The proposed bill is identical with S. 2680 (80th Cong., 2d sess.) as reported from the Armed Services Committee.

Earlier versions of the proposed legislation (S. 805, 79th Cong. and S. 1019, 80th Cong.) would have penalized the revelation or publication not only of direct information about United States codes and ciphers themselves but of information transmitted in United States codes and ciphers. This provision is not included in the present version.

The proposed bill extends the protected field covered by the extremely narrow act of June 10, 1933 (48 Stat. 122, 22 U. S. C. 815), which act is of far too limited application to afford to certain highly secret Government activities the protection which they need. The proposed legislation does not in any way control the free dissemination of information which might be transmitted by code or cipher unless the information has been obtained by clandestine interception and cryptanalysis.

At present, there are two acts affording limited protection to cryptographic information. These are the Espionage Act of 1917 (50 U. S. C. 31 et seq.), and the above-mentioned act of June 10, 1933. Under the Espionage Act, unauthorized revelation of information can be penalized only if it can be proved that the person making the revelation did so with the intent to injure the United States. Under the 1933 act, only diplomatic codes and messages transmitted in diplomatic codes are protected. The proposed legislation is designed to protect against publication or any other revelation, regardless of intent, of all important information affecting United States communication intelligence operations and all direct information about all United States codes and ciphers.

LEGISLATIVE HISTORY

The Navy Department, in conjunction with the Army, Air Force, Central Intelligence Agency, and the Department of State, strongly recommends the enactment of the proposed bill.

The Navy Department has been advised by the Bureau of the Budget that there is no objection to the submission of this proposed legislation to the Congress.

Sincerely yours,

W. JOHN KENNEY,
Acting Secretary of the Navy.

The Senate has amended the bill as recommended by the Departments by including in section 1 of the bill, the words "knowingly and willfully." The purpose of this amendment is to make it clear that it would not be an inadvertent, idle, indiscreet disclosure, but one which was made for the purpose prohibited.

The committee recommends that the bill, S. 277, as amended by the Senate, do pass.

ARMY AND NAVY NURSES — APPOINTMENTS

For text of Act see p. 160

Senate Report No. 1267, Apr. 19, 1950 [To accompany H. R. 5876]

House Report No. 1375, Oct. 10, 1949 [To accompany H. R. 5876]

The Senate Report repeats in substance the House Report.

Senate Report No. 1267

THE Committee on Armed Services, to whom was referred the bill (H. R. 5876) to amend the Army-Navy Nurses Act of 1947, to provide for additional appointments, and for other purposes, having considered the same, report favorably thereon with amendments, and recommend that the bill, as amended, do pass.

PURPOSE OF THE BILL

This bill proposes to reopen for a period of 1 year the integration program for the Regular Army Nurse Corps and the Women's Medical Specialist Corps of the Regular Army and to raise (also for a period of 1 year) the age limit for appointment in the Army and Navy Nurse Corps. It also effects a number of technical changes in the Army-Navy Nurses Act of 1947 which are rendered necessary because of the enactment of the Officer Personnel Procurement Act of 1947 and the Reserve Retirement Act of 1948.

EXPLANATION OF THE BILL

The majority of the provisions of this bill are of a technical nature and are best understood by referring to the section-by-section analysis, which follows. The most important substantive provision has to do with

MEMORANDUM FOR:

Other places in New York Times opinion where Section 798 is mentioned.

3 JUN 1986

Date

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

References to 18 U.S.C. 798

Douglas (concurring)

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U. S. C. § 793 (e) provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794 (b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*" the described material.[2] (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

[2] These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

Stewart (concurring)

720-721.

stewart (concurring)

truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is

729 - 730.

White (concurring)

thereafter do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." *Id.*, at 2009.[4]

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.[7] If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

3 (Footnote omitted)

[4] Senator Ashurst also urged that "'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason." 55 Cong. Rec. 2005.

5 (Footnote omitted)

6 (Footnote omitted)

[7] The purport of 18 U. S. C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H. R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation was deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by non-employees of the Government and to ease the Government's burden in obtaining convictions. See H. R. Rep. No. 1895, *supra*, at 2–5. The identical Senate Report, not cited in parallel in the text of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

733 - 737.

Marshall (concurring)

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship.[3] In that chapter, Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

3 (footnote omitted)

743-744.

Burger (dissenting)

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

752.

Blackmun (dissenting)

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.