

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 restraints [Page 403 U. S. 731](#) 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. [\[Footnote 4/1\]](#) 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. [Page 403 U. S. 732](#)

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; [\[Footnote 4/2\]](#) 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 [Page 403 U. S. 733](#) 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 [Page 403 U. S. 734](#) 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. [\[Footnote 4/3\]](#) 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. [\[Footnote 4/4\]](#)
[Page 403 U. S. 735](#)

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [\[Footnote 4/5\]](#) makes it a crime to publish certain photographs or drawings of military installations. Section 798, [\[Footnote 4/6\]](#) also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems [Page 403 U. S. 736](#) or communication intelligence activities of the United States, as well as any information obtained from communication intelligence operations. [\[Footnote 4/7\]](#) 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 [Page 403 U. S. 737](#) 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) [\[Footnote 4/8\]](#) 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 preexisting law provided no [Page 403 U. S. 738](#) penalty for the unauthorized possessor unless demand for the documents was made. [\[Footnote 4/9\]](#)

"The dangers surrounding the unauthorized possession of such items are self-evident, [Page 403 U. S. 739](#) 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](#), [312 U. S. 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 activities" [Page 403 U. S. 740](#) and to be consonant with due process. 312 U.S. at [312 U. S. 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. [\[Footnote 4/10\]](#)

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](#), [343 U. S. 585-586](#) (1952); *see also id.* at [343 U. S. 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.

[\[Footnote 4/1\]](#)

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](#), [395 U. S. 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.

[\[Footnote 4/2\]](#)

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."

[\[Footnote 4/3\]](#)

"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.

[\[Footnote 4/4\]](#)

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.

[\[Footnote 4/5\]](#)

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."

[\[Footnote 4/6\]](#)

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." [\[Footnote 4/7\]](#)

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 materiel 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).

[\[Footnote 4/8\]](#)

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. 239, 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." [\[Footnote 4/9\]](#)

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 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 [312 U. S. 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.

[\[Footnote 4/10\]](#)

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. . . ."