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Free Speech in War & Peace:

The argument for elasticity of America's favorite liberty

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Contents

Introduction..... 3

Overview..... 3

Part I..... 4

History 4

Examples Of Failure..... 5

Introduction To Prior Restraint..... 7

Prior Restraint Applied..... 8

Part II..... 9

The Executive Branch’s Censorship Precedent 9

As A Matter Of Public Policy 10

Judicially Approved Elasticity 11

Is Strict Scrutiny Even Applicable: Alternative Arguments 12

The Augmenting Factor: Judicial Deference 14

Part III..... 15

Opposing Views..... 15

Conclusion 15

INTRODUCTION

The United States of America has always struggled with the balance, the exact striking point whereat lie the constitutional balance between civil liberties and national security. Perhaps it is because these notions are mutually dependent desires—for without a secure nation, an individual's liberties are moot; perhaps it is because these notions are most evidently personified in opposing political parties—note the Bush administrations “you're with us or against us ...” rhetoric which was arguably targeted at liberal Democrats;¹ perhaps it is simply the distance between two ideals that seem so often to be at odds end. From the Cold War era's “Better dead than red” to the Global War on Terror's “You are for us or with the terrorists,”² there is something so fundamentally angst ridden and divisive in the restriction of civil liberties, in particular freedom of speech, for the cause of national security. However, the American ideal of free speech shall be neither absolute nor inelastic, most notably in times of war. Any speech, publication, or other discourse from privileged individuals which therein discloses national security information deleterious to the wage of war must be priorly restrained as a matter of force protection and public policy.

OVERVIEW

To effectively delineate the often amorphous, this argument puts forth the Executive Branch's capability and necessity to exercise censorship during times of congressionally authorized war for speech content which:

1. Divulges force protection information, classified or unclassified, relating to United States or coalition troop concentrations, locations, or dispositions including, but not limited to:
 - a. Media embeds or military “ride-a-longs”;
 - b. The interview of formerly privileged or extensively learned military strategists or commentators which therein provides “ground truth,” conjecture, and/or scenario based information regarding activities that are or may be occurring in the theater of conflict;
2. Will disclose any United States counterterrorism capability or tradecraft deemed to negatively impact the United States' ability to protect intelligence or project military force.

Equally important is the opposite side of the threshold—the protected speech. The argumentation set forth herein is not justifying the encroachment on purely political speech, political dissent, satire, anti-war protest, or other general criticisms of the government or like official. The critical distinction in this admitted penumbra is to shield that speech which is so fundamental to the American notion of governance while protecting and preserving the ability of intelligence and military services to fully affect their mission without increased operational risk.

¹ *Bush says it is time for Action* (ABC News Broadcast 6 November 2001).

² Geoffrey Stone. *PERILOUS TIMES: FREE SPEECH IN WARTIME* 4 (W.W. Norton) (2004).

Part I of this thesis constructs the baseline for the subsequent argumentation and therein articulates historical failures pursuant to the Executive Branch's inability to exercise prior restraint of the outlined speech; moreover, this section also introduces the concept of prior restraint and the application thereof; part II sets forth the three-prong argument to justify prior restraint of this type including the augmenting factor of judicial deference; and part III articulates the principle criticisms of such argument.

The fundamental purpose of this thesis is conceived in the notion that if the United States must go to war, it must do so with the desire to win; it must seek to preserve every military benefit and mitigate the loss of life and destruction of collateral assets. To accomplish this, certain advantages must be preserved—most notably in the intelligence field. It makes neither tactical nor pragmatic sense to give the opposing force information which thereafter can be levied against the United States and cause undue loss of life, destroyed infrastructure, and international ostracization.

PART I

HISTORY

The 1st Amendment of the United States Constitution:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*³

“The First Amendment has endured more than 200 years without substantial alterations and negation. The most notable periods of government [alteration], which are few, involve sedition acts and wartime censorship.”⁴ 80% of the United States' history is that of peacetime,⁵ but during times of war certain desires of peacetime become necessities; the protection of intelligence and tradecraft is pinnacle of these desires which transcend from important during times of peace to imperative during times of war.

Currently, the United States is engaged in two theaters of war and military resources are at or near capacity.⁶ In the years since al-Qa'ida's attack on September 11th, 2001, disclosure of military and intelligence information has hampered the efforts of the United States and its coalition partners to both bring tier I al-Qa'ida personalities to justice and to transform Iraq and Afghanistan from failed nation-states to sustainable allies. Because the protection of such information is no longer just important, it is now imperative, the Executive Branch must take efforts as outlined herein to prevent disclosures which jeopardize national security or operational capabilities of military units engaged with the enemies of the United States.

³ U.S. CONST. amend I.

⁴ *The First Amendment in History*, Mar. 25, 2010, <http://www.illinoisfirstamendmentcenter.com/history.php>.

⁵ Stone, *supra*, at 5.

⁶ Seelke, Skelton, Chairman, and Committee House Armed Services: Afghanistan Assessment, 111th Cong. (*Congressional Testimony*).

EXAMPLES OF FAILURE

If experience teaches slowly and at the cost of mistakes, let the United States learn from encroachments which have jeopardized national security. In *New York Times Co. v. United States* in 1971, commonly referred to as the Pentagon Papers case, the Nixon administration sought to enjoin the *New York Times* from publishing excerpts from a top-secret Department of Defense document illustrating the United States' involvement in the Vietnam War.⁷ To be certain, this was information classified as top-secret and thereafter illegally distributed to the *New York Times*. As a Top Secret document, it was determined by the original classifying authority, designated by senior military officials, that information contained in that document had the propensity to cause grave danger if released; it was thereafter illegally released and given to the *New York Times*. Through the government's vacated injunction, the *New York Times* was able to print this information without regard to the Department of Defense's categorization of "Top Secret" and completely disregard all potential effects. Justice Black articulated in his opinion that the First Amendment operates in absolute superiority: there is "no role for governmental restraint on the press."⁸ Though the ramification of that disclosure can only be speculated, the premise that freedom of speech, or in this case press, is an absolute right has been largely modified by *New York Times*' progeny.⁹

In 1979, a magazine known as *The Progressive* was temporarily enjoined from publishing information which could be utilized to make a hydrogen bomb.¹⁰ The article entitled "The H-Bomb Secret: How we got it, why we're telling it" purports to give the "recipe" for the creation of a hydrogen bomb.¹¹ *The Progressive* was preliminarily enjoined, but because the information was released in a circumvented fashion, the government conceded the injunction to be moot and withdrew. The information was thereafter published. To be certain, enemies of the United States want this information. When taken in light of the current engagement with al-Qa'ida, the United States has a sworn enemy who actively seeks "to enhance their capabilities to conduct effective mass-casualty chemical, biological, radiological, and nuclear (CBRN) attacks."¹² It simply is not of sound judgment to assist al-Qa'ida in any way when the designated foreign terrorist organization already possesses "at least a crude capability to use [CBRN weapons]."¹³

In early 2003, Fox News media correspondent Geraldo Rivera was imbedded with the 101st Airborne Division of the United States army as it engaged the Iraqi army in active operations.¹⁴ During a live broadcast from Iraq, Rivera discussed an upcoming operation, the exact time of attack, and drew a map in the sand as to illustrate the unit's position.¹⁵ Although Rivera was subsequently removed from the theater of operations, he jeopardized the mission and operational security which

⁷ See *New York Times Co. v. United States* 403 U.S. 713, 714 (1971).

⁸ *Id.* at 720.

⁹ See generally, *Freedman v. State of Maryland*, 380 U.S. 51, 54 (1965); *Milwaukee Police Association v. Jones*, 192 F.3d 742, 749 (7th Cir. 1999); *Snepp v. United States*, 444 U.S. 507, 510 (1980).

¹⁰ See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), dismissed without opinion, 610 F.2d 819 (7th Cir. 1979).

¹¹ See Howard Morland, *The H-Bomb Secret: How we got it, why we're telling it*, PROGRESSIVE, Nov 1979, at 3.

¹² Homeland Security Information Update: Al Qa'ida Chemical, Biological, Radiological, and Nuclear Threat and Basic Countermeasures," *Information Bulletin* 03-003, (National Infrastructure Protection Center. Feb. 12, 2003).

¹³ *Id.* § Homeland Security Information Update.

¹⁴ See, e.g., David Carr, *Pentagon Says Geraldo Rivera Will Be Removed From Iraq*, N.Y. TIMES (Apr. 1, 2003). <http://www.nytimes.com/2003/04/01/international/worldspecial/01MEDI.html?pagewanted=1>.

¹⁵ *Id.* at § War on Terror.

military units rely on to give them the edge and prevent unneeded contact with opposing forces and casualties.

Later in 2003, the *Washington Post* published a Robert D. Novak article entitled “Mission to Niger.”¹⁶ The purpose of the article was to draw into question Iraq’s purchase of weapon’s grade uranium. In doing so, however, Novak disclosed the true identity of a non-official cover Central Intelligence Agency (CIA) operative: “Valerie Plame [Wilson] is an agency operative on weapons of mass destruction.”¹⁷ How Novak or the *Washington Post* gleaned this information is superfluous; the publication of this information in broad reaching media was completely detrimental to the CIA’s mission, destroyed a CIA officer’s career, and could have resulted in the revealing of multiple human assets, partnerships, and networks overseas where individual rights or lives are not nearly as valued.

Throughout the most recent conflicts in Iraq and Afghanistan, a host of formerly privileged political, military, and intelligence insiders are now deciding to sell their “expert” analysis to mainstream media outlets. However, publications from those who were once privileged have a colossal propensity to jeopardize United States intelligence collection and military capabilities. Although these former insiders may not know the latest, most recent intelligence, their experienced opinions about current operations are almost always quite accurate. Moreover, intelligence and military capabilities simply do not evolve all that quickly and the disclosure renders once cutting edge technology useless.

For illustration, a recent ABC news episode aired an interview with Dwayne Day, a leading authority on satellite technology. Day commented that “Anytime you see a movie where the satellite acts like the Goodyear blimp, where it just hovers and takes pictures, you’re watching fantasy — things just do not work like that in real life. You do not get moving images from space.”¹⁸ The intelligence community and military both benefit from the perceived capabilities, the mystique of “big-brother.” Publishing information on what the intelligence and military communities cannot do is equally as damning as revealing the capabilities themselves. Later in the same article, prolific military analyst Mark Bowden informed ABC news that “The United States sent Delta Force to Colombia and Delta Force, coupled with the army surveillance units and the CIA and just about every other tool in the American arsenal [assisted] the Colombia forces” in the capture of Pablo Escobar.¹⁹ ABC news reported that “Escobar made a brief cell phone call to his family and American intelligence identified his voice and pinpointed his location.”²⁰ This one article illustrated the United States’ utilization of a completely undisclosed military unit, an active theater of operation for the CIA, and the United States’ backing of Columbian forces to expel Escobar. Most harmful, however, it disclosed the intelligence community’s ability to use cellular calls to identify and locate high value targets.

Contemporarily, the latter of these disclosures is quite possibly the costliest. The wide publication of the United States Intelligence Community’s ability to monitor, track, and target terrorists through their cellular devices is exemplar of what disclosures can do to hamper the United

¹⁶See Robert D. Novak, *Mission to Niger*. THE WASHINGTON POST, Mar. 26. 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html>.

¹⁷ *Id* § *Mission to Niger*.

¹⁸*Challenges of Hunting Bin Laden* (ABC Primetime News Broadcast 27 Sept. 2009).

¹⁹ *Id* § *Challenges of Hunting Bin Laden*.

²⁰ *Id* § *Challenges of Hunting Bin Laden*.

States' ability to wage a war. The aforementioned ABC news article is just one of many which revealed information on the United States Intelligence Community's ability to use cell phones to target terrorists. This has proven incredibly costly. Per Deputy U.S. Attorney General Eric Holder, "[Usama] Bin Laden was able to determine that [the United States military] knew he was using cell phones and satellite technology to communicate with his subordinates, and once that info became public, he ceased to communicate with his co-workers in that way."²¹ Also after this disclosure, the Taliban systematically began destroying all cellular towers in Afghanistan which caused a colossal political backlash from the Afghan populous towards the American military presence in Afghanistan.²² Pursuant to the inability of coalition forces to capture or kill Usama Bin Laden (hereinafter UBL), he was able to be the mastermind for an incredibly lethal plan to simultaneously destroy ten airliners over the Pacific Ocean which was disrupted by British and American intelligence services at the eleventh hour—²³ he still actively positions himself as the figurehead of al-Qa'ida and calls for mass murder and the destruction of Western culture and ideals around the world.

The aforementioned examples illustrate the types of speech or discourse that should be priorly restrained, especially during times of congressionally approved war. At best, these examples do not further political ideologies, protected personal agendas, or serve any public good; at worst, they provide an incredible handicap for intelligence and military services and have most definitely resulted in coalition casualties and hindrance to the wage of war on terror.

INTRODUCTION TO PRIOR RESTRAINT

This thesis puts forth the notion that government, in particular the Executive Branch, should priorly restrain any speech, publication, or other discourse from privileged individuals which therein discloses national security information deleterious to the wage of war; however, what is prior restraint in the current context?

Prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."²⁴ Moreover, governmental action constitutes prior restraint when it is directed to suppressing speech because of its content before the speech is communicated; it may take the form of "orders prohibiting publication or broadcast of specific information or systems of administrative preclearance that give public authorities power to bar publication or presentation of material."²⁵ Prior restraint of expression is permissible if the restrained speech allegedly poses a grave threat to a critical government interest or to a constitutional right; in such a situation; however, the restraint must be narrowly drawn and be the least restrictive means available.²⁶ It is not, however, necessarily unconstitutional.²⁷

For comparison, penal actions for lawfully obtained, truthful speech, as opposed to priorly restrained speech, already requires the highest form of state interest to sustain its validity, and the state must demonstrate that its punitive action is necessary to further the state interest asserted. It follows

²¹ *Id* § Challenges of Hunting Bin Laden.

²² See, e.g., Megha Bahree, *Taliban Tele-Terror*, *Forbes*, Apr. 21, 2008, at 36.

²³ See, e.g., *Terror in the Skies*. National Review, Sept. 11, 2006, at 20.

²⁴ *Alexander v. United States*, 509 U.S. 113, 550 (1993).

²⁵ *In re G. & A. Books, Inc.*, 770 F.2d 288, 296 (2d Cir. 1985).

²⁶ See *County Sec. Agency v. Ohio Dept. of Commerce*, 296 F.3d 477, 785 (6th Cir. 2002).

²⁷ See, e.g., *Freedman v. State of Maryland*, 380 U.S. 51, 736 (1965).

then that exercising prior restraint has an even higher standard. The *Levine* Court indicated prior restraint may be upheld only if the Government establishes that the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, the order is narrowly drawn, and that less restrictive alternatives are not available.

“The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”²⁸ “A criminal penalty or a judgment ... is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.”²⁹ To contrast, "a prior restraint has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."³⁰

There is, however, a conflicting standard of application to national security matters. First, as the District of Columbia Circuit Court indicated in 2007, “[t]here is no first amendment right to support terrorists.”³¹ And Second, it could be argued that the already well accepted reduced 1st Amendment standard for government personnel through express and implied nondisclosure agreements may apply to all those with sensitive information.³² It is only consistent to ensure that all those who avail themselves to such subject matter be subjected to the same procedural safeguards as “official” government employees. The premise of the standard surely is not to restrict government personnel because they are bad people; it is to protect the information they have and the nature of the work they do. If others with privileged information avail themselves to that type of speech they too should be subjected to the same standard when the results are nearly identical and deleterious.

PRIOR RESTRAINT APPLIED

For years, the accepted measure of restraint on freedom of speech and press was the doctrine of “clear and present danger” articulated by Justice Oliver Wendell Holmes.³³

The question in every case is whether the words are used in such circumstances and are of such a nature as to cause a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight.³⁴

Note that Justice Holmes, a relative absolutist regarding 1st Amendment protections and one of the founding fathers of this notion, still believed a slight modification needs to exist, “as long as men

²⁸ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

²⁹ *Id.* at 560.

³⁰ *Tunick v. Safir*, 209 F.3d 67, 94 (2d Cir. 2000).

³¹ *Islamic American Relief Agency v. Unidentified FBI Agents*, 477 F.3d 728, 735 (D.C. Cir. 2007).

³² *See Snapp v. United States*, 444 U.S. 507, 516 (1980).

³³ *Schenck v. United States*, 249 U.S. 47, 51 (1919).

³⁴ *Id.* at 51.

fight.”³⁵ The Clear and Present Danger Doctrine was later modified in *Brandenburg v. Ohio* wherein “imminent unlawful action” was the refined litmus test.³⁶ Still national security issues have been the historical exception as illustrated in *Near v Minnesota*: prior restraints are to be unconstitutional, except in extremely limited circumstances such as national security issues.³⁷

PART II

THE EXECUTIVE BRANCH’S CENSORSHIP PRECEDENT

The United States has a prevalent history of censoring speech during times of war; the notion of sacrificing some liberties during times of armed conflict is neither novel nor avant-garde. Right or wrong, it is said that “[t]he Constitution has not greatly bothered any wartime president.”³⁸ Arguably, however, the Executive Branch has only exercised wartime censorship six times throughout history.³⁹ First, at the end of the 18th century when the United States was on the verge of war with France, Congress enacted the Sedition Act of 1798 which made it a crime for any person to publish or utter any disloyal statement against the government of the United States, the Congress, or the President with the intent to bring them into “contempt or disrepute.”⁴⁰

In the 19th century, during the Civil War, President Lincoln suspended the writ of habeas corpus.⁴¹ Furthermore, arrests were made for speech critical of the administration, the war, draft, or Emancipation Proclamation. Later, during World War I, the government prosecuted approximately 2000 individuals for their opposition to the war and draft; they were convicted under the Espionage Act of 1917 and the Sedition Act of 1918—incarceration terms ranged from ten to twenty years.⁴² Twenty-five years after World War I, 120,000 individuals of Japanese descent were interned pursuant to the attack on Pearl Harbor and the United States’ entrance into World War II.⁴³ Furthermore, President Roosevelt sought to stifle criticism of war effort by prosecuting, denaturalizing, or deporting American-based fascists.⁴⁴ The theme remained during the Cold War and Vietnam War: Joseph McCarthy’s House of Un-American Activities Committee and the crackdown on anti-war protestors, flag burners and draft card destroyers, respectively.

Notice the delineation between what the United States has already established a precedent for and the premise of this thesis. The argument herein does not go so far as to quash political dissent, satire, or criticisms of the administration or war effort; the argument herein only ventures out to establish that speech or discourse which must be priorly restrained to in-fact assist, or at least not detract, from the war effort. The latter is not to protect political careers; it is to protect the war fighter.

³⁵ *Id.* at 51.

³⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

³⁷ *See, e.g., Near v. Minnesota*, 283 U.S. 697, 716 (1931).

³⁸ William Rehnquist, *ALL LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 223 (First Vintage Books 1998).

³⁹ *See* Geoffrey Stone, *Perilous Times: Free Speech in Wartime* 5-6 (W.W. Norton) (2004).

⁴⁰ *See Id.* at 5.

⁴¹ *See Id.* at 5.

⁴² *See Id.* at 138.

⁴³ *See Id.* at 28.

⁴⁴ *See Id.* at 314.

Moreover, “those who scare peace-loving people with phantoms of lost liberty ... only aid terrorists—for they erode national unity and diminish resolve. They give ammunition to America's enemies and pause to America's friends.”⁴⁵

AS A MATTER OF PUBLIC POLICY

The gravamen of the argument contained herein is that the need of national security, as a matter of public policy, outweighs the constitutional firmity derived from the 1st Amendment at particular moments in time. Addressed above is the notion of Executive Branch precedent to achieve wartime needs of censorship. Perhaps precedent alone is worthy enough to priorly restrain speech during times of war, but can this notion pass a fundamental peacetime-derived test, strict scrutiny? Consequentially, if the aforementioned prior restraint cannot pass the peacetime-derived strict scrutiny test, can a wartime shift of priorities alter this conclusion?

Strict scrutiny is the standard applied to suspect restrictions of fundamental rights in due-process analysis. “Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.”⁴⁶ Logically then, the argument contained herein seeks to place a restriction of the 1st Amendment’s freedom of speech provision, a fundamental constitutional right; accordingly, strict scrutiny must be satisfied. “A prior restraint on free speech is permitted only in exceptional cases such as war, obscenity, and incitements to acts of violence and the overthrow by force of orderly government”; these are acknowledged as compelling state interests.⁴⁷ The final two factors in the strict scrutiny test are: any restriction must be narrowly tailored and be the least stringent method to effect the result.⁴⁸

Commencing the three-prong analysis is the applicability of a legitimate state interest: It is generally accepted, as outlined above, that war and national security are compelling state interests. Both *Near* and *Schenck* acknowledge this assertion as well as a host of other holdings.⁴⁹ Despite a minority split in cases such as the aforementioned *Pentagon Papers Case* and perhaps a strict interpretation of the *Brandenburg* “imminent unlawful action” schema, the general consensus is that freedom of speech does not operate in a vacuum and must be balanced with other compelling state interests.⁵⁰ Even in the very absolutist *Brandenburg* per curium opinion, there seems to be a small opening for alteration for times of “declared war.”⁵¹

Second, would the exercise of priorly restraining free speech which therein discloses national security information deleterious to the wage of war be narrowly tailored enough? In a prima facie sense, this may indeed fail; however, when expressly stricken to the types of speech outlined above (i.e. force protection issues, tradecraft disclosures, etc.) the test should be satisfied. The *Near* Court saw that “publication...of [the] number or location of troops” to be narrowly tailored.⁵² Through

⁴⁵ Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11*, (Century Foundation Press, 2002).

⁴⁶ 16A AM. JUR. 2D *Constitutional Law* § 473 (2010).

⁴⁷ 16A AM. JUR. 2D *Constitutional Law* § 403 (2010).

⁴⁸ *See Id.* § 403.

⁴⁹ *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Schenck v. United States* 249 U.S. 47, 51 (1919).

⁵⁰ *See Snapp v. United States*, 444 U.S. 507, 516 (1980); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444, 452 (1969).

⁵² *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

analogy then, unit dispositions and capabilities should lay in the same logic. This would be as narrowly tailored as reasonably possible; surely the government cannot be expected to list verbatim the very things it wishes to keep from the eye of the enemy. In similar vein, the D.C. Circuit in 1983 held that “restrictions on the speech of [former] government employees” to be narrowly drawn and constitutional to “further the substantial government interest in protecting national security.”⁵³ This latter case forwards this thesis in its efforts to regulate formerly privileged individuals from publishing or orating on national security issues which therein may divulge sensitive information.

Last in the strict scrutiny analysis, is this regulation the least restrictive tool to achieve the desired ends? Yes, prior restraint is necessary because ex post facto punishment frustrates the entire purpose of this regulation—keeping information from the opposing force. There is no other alternative to achieve the same effect.

The one alleged caveat would be that during times of peace there is arguably no opposing force to keep the information from; however, this logic fails to consider the ever-present counterintelligence threat from China, Iran, Russia, and other developing countries.⁵⁴ Notwithstanding, the Executive Branch and Congress can decide that the United States is “at war” for one purpose and “at peace” for another and it may use the same words broadly in one context and narrowly in another.⁵⁵ In addition to the virtually omnipotent power of Congress to authorize such actions, the *Aris Gloves Court* in 1970 held that the “mere cessation of hostilities does not necessarily terminate war power, and war powers continue past the end of hostilities and into that period during which evils which gave rise to hostilities are sought to be remedied.”⁵⁶ Because there is such limited value on the speech which is herein argued to be regulated, it is pragmatically sound to regulate this information during times of war and peace if such regulation can indeed pass strict scrutiny.

When looking at the aforementioned sections, the argument is this: there is a longstanding executive precedent for the censorship of information deleterious to a congressionally approved war effort; moreover, the proposed prior restraint could feasibly pass a peacetime strict scrutiny standard as a narrowly tailored and compelling state interest. Addressed below, however, is the notion that if the aforementioned prior restraint fails a peacetime-derived strict scrutiny test, it may be saved by a shifting balance during times of war.

JUDICIALLY APPROVED ELASTICITY

Much judicial history strikes the balance between civil liberties, most notably freedom of speech, and national security more to the side of civil liberties. This exact striking point notwithstanding, there is almost always a conspicuously acknowledged exception to absolutist notions of civil liberties—national security. As the fourth longest serving Supreme Court Justice William Rehnquist articulated, "The laws will not be silent in time of war, but they will speak with a somewhat

⁵³ *McGehee v. Casey*, 718 F.2d 1137, 1142 (D.C. Cir. 1983).

⁵⁴ See Mikhail Tsyppkin, *Russia's Failure*, JOURNAL OF DEMOCRACY, July, 2006 at 72-85.

⁵⁵ *Lee v. Madigan*, 358 U.S. 228, 231 (1959).

⁵⁶ *Aris Gloves Inc. v. United States*, 420 F.2d 1386, 1391 (2nd Cir. 1970).

different voice.”⁵⁷ Rehnquist believed in a striking point that had elasticity; he believed when a nation is at war, the balance between freedom and order should “tilt in favor of order.”⁵⁸

What are the carved out exceptions to freedom of speech? The *Schenck* Court found that “when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁵⁹ The *Near* Court applied this notion to actual acts: “No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”⁶⁰ Within the scope of *Schenck* and *Near*, one express contention of this thesis is forwarded: the government should be able to priorly restrain speech which details United States or coalition troop concentrations, locations, or dispositions. This standard should allow for the prior restraint of Rivera’s media ride-a-long and subsequent live broadcast, the prior restraint of Novak’s disclosure of an active CIA case officer, and the censorship of ABC News’ interview with Day and Bowden which therein revealed a classified military unit and the United States’ backing of the Columbian Army. If aforementioned are expressly covered by the above opinions, then through analogy and application the former military expert or media organization which gleans intelligence tradecraft and thereafter seeks to publish such information should also be enjoined. Surely the premise of *Schenck* and *Near* is to protect the United States’ ability to wage a successful war; accordingly, actions which can be factually stated as having a material and deleterious effect to the wage of war should be censored when there is such a limited value to their mere existence.

In 1941, Judge Frankfurter accurately acknowledged this particular dilemma in his *Bridges v. California* dissent; that being, if the United States does not take action to secure the American way of life during times of war there will be no civil liberties to protect in times of peace: “Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights.”⁶¹ Clearly this could be argued as a gross oversimplification of the issue and akin to “Red or Dead” or “You’re either for us or for the terrorists”;⁶² yet it is fundamentally true—the balance must shift during times of war if the United States is even to have civil liberties during times of peace.

IS STRICT SCRUTINY EVEN APPLICABLE: ALTERNATIVE ARGUMENTS

Perhaps strict scrutiny is not even applicable to this application. The D.C. Circuit in 2003 and again in 2007 held that there is no 1st Amendment right to support terrorists.⁶³ This notion was furthered by the 9th Circuit in 2005 when the defendant unpersuasively argued there is a 1st Amendment right to financially support a foreign terrorist organization.⁶⁴ The Court therein held that this support was “not anything close to pure speech” and “donations to designated foreign terrorist

⁵⁷ William Rehnquist, *ALL LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (First Vintage Books 1998).

⁵⁸ *Id.* at 225.

⁵⁹ *Schenck v. United States* 249 U.S. 47, 51 (1919).

⁶⁰ *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

⁶¹ *Bridges v. State of California*. 314 U.S. 252, 279 (1941).

⁶² Geoffrey Stone. *PERILOUS TIMES: FREE SPEECH IN WARTIME* 4 (W.W. Norton) (2004).

⁶³ *See, e.g., Holy Land Foundation for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003); *Islamic American Relief Agency v. Unidentified FBI Agents*, 477 F.3d 728, 735 (D.C. Cir. 2007).

⁶⁴ *See United States v. Afshari*, 412 F.3d 1071, 1075 (9th Cir. 2005).

organizations are not akin to donations to domestic political parties or candidates.”⁶⁵ The premise in each of these cases is that there is no 1st Amendment implication to the support of terrorism; therefore, there can be no strict scrutiny test for prior restraint. Arguably, a fundamental difference in the position of this thesis and the premise of these cases rests in the idea of intent. The notion of this thesis is to priorly restrain information which will likely be published or disclosed by a self-serving individual, not a culpable actor volitionally assisting a terrorist organization; however, despite the intent, the results are exactly the same—a terrorist organization gleans material support for their operations against the United States and coalition forces.

Second, there is some precedent that prior restraint of speech of previously privileged employees through the use of express or implied nondisclosure agreements is constitutionally valid. In *National Federation of Federal Employees v United States*, the court found constitutional the government’s mandate for preapproval and review before former employees who had access to sensitive-compartmentalized-information publish or disclose fiction or nonfiction related to that access.⁶⁶ This upheld the notion set forth in *Marchetti* wherein the 4th Circuit acknowledged that even without a nondisclosure agreement there was an implied secrecy agreement to protect undisclosed classified information as a compelling state interest.⁶⁷ This unique need to protect national security information was originally outlined by the Supreme Court in *Snepp*; therein, the Court held that “even in absence of an express agreement[,] the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activity that in other contexts might be protected by the First Amendment.”⁶⁸ In *Snepp*, the Court implies that the idea of CIA emplacing “reasonable restrictions on employee activity” is not indeed prior restraint.⁶⁹ The court imposes, what appears to be, a reasonableness standard—a rational basis test. The rational basis test is one of the lower judicial review applications and strikes a surprising deference to the Executive Branch. In doing such, the Court almost implies a different paradigm for national security cases.

In acknowledging the aforementioned alternatives, if government employees with previous access to sensitive-compartmentalized-information⁷⁰ (hereinafter SCI) are priorly restrained from publishing fiction or nonfiction related to their clearance, perhaps even without an official nondisclosure agreement, it is only logical that all those with previous access to classified information or those able to provide highly valuable assessments which could reveal information causing similar harm also be priorly restrained under an implied secrecy agreement. The medium is no more important than the result and the result is the same in both instances of disclosure—a terrorist organization gleaning material support for their operations against the United States and coalition forces. Accordingly, this argument sets forth a notion that an implied secrecy oath should apply to all formerly privileged individuals regardless of whether they had access to regular Secret information or Top Secret information in an SCI environment.

⁶⁵ *Id.* at 1074.

⁶⁶ *See* *National Federation of Federal Employees v. United States*, 695 F. Supp. 1196, 1197 (D.D.C. 1988).

⁶⁷ *See* *Marchetti v. United States*, 47 F.3d 1175,1178 (9th Cir. 1995).

⁶⁸ *Snepp v. United States*, 444 U.S. 507, 516 (1980).

⁶⁹ *Id.* at 509.

⁷⁰ *The term SCI refers to methods of handling certain types of classified information that relate to specific national-security topics or programs whose existence may not be publicly acknowledged, or the sensitive nature of which requires special handling.*

THE AUGMENTING FACTOR: JUDICIAL DEFERENCE

In *Federalist* No. 64, it appears that John Jay foresaw this exact scenario; a time when the United States was at war with a foreign enemy was never closer to memory than on March 5th, 1788 and neither was the idea that the Congress and the Judiciary would do more to interfere with the wage of war than assist. *Federalist* No. 64 notes that the President be “able to manage the business of intelligence as prudence may suggest.”⁷¹ Later, Alexander Hamilton, in *Federalist* No. 78, identified that the executive “holds the sword of the community,” while “the judiciary, on the contrary has no influence over ... the sword”⁷²

Absent few outliers, such as the progeny of the earlier cited *Marchetti* case wherein the 4th Circuit held that the government cannot invoke the secrecy agreement to suppress publication of information unless the trial judge finds the information to be not *just* classified, but properly classified under the relevant executive order.⁷³ Outside of this, however, there is a strong deference to Executive Branch in intelligence and military affairs. In *United States v Reynolds*, the Supreme Court held:

the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.⁷⁴

Note the hierarchical importance of military secrets as stated by the Executive Branch over privileges of disclosure; to effect, it is the greater-good principle at work.

Generals wage wars, not justices. “Judges are generalists who typically have not studied, trained, or obtained practical experience in national security matters.”⁷⁵ The Constitution commits to the executive and to congress the exercise of war power, it has necessarily given them wide scope for exercise of discretion in determining nature and extent of threatened injury or danger and in selection of means for resisting it.⁷⁶ In the interpretation of national security measures, the courts must assume that the purpose of the Chief Executive and Congress was to allow for the greatest possible accommodation between liberties of the citizen and exigencies of war.⁷⁷

Judiciary deference is the augmenting factor because of its broad application to any of the aforementioned methodologies to reach the conclusion of this thesis. Simply, the Judiciary must give all possible deference to Executive actions and/or Congressional legislation which either protects military/intelligence secrets or seeks to preserve some tactical advantage, especially during times of congressional approved war. The Court may do this in any of the forms outlined above: the Court may simply allow unimpeded executive action as is the precedent for other periods of history; the courts

⁷¹ John Jay. “Federalist #64,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).

⁷² Alexander Hamilton, “Federalist #78,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).

⁷³ See *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1366 (4th Cir.1975).

⁷⁴ *United States v Reynolds*, 345 U.S. 1, 11 (1953).

⁷⁵ Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361, 1362 (2009).

⁷⁶ See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

⁷⁷ See *Ex parte Mitsuye Endo*, 323 U.S. 283, 300 (1944).

may find this deference in the form of an elasticity between civil liberties and national security endured during times of war; or, the courts may reason that for the arguments set forth above it is prudent to allow prior restraint as all elements of strict scrutiny are satisfactorily met.

PART III

OPPOSING VIEWS

There are and there have been theories and holdings that challenge the notions set forth in this thesis. Some opposing views are illustrated above in the outlined “failures” wherein free-speech trumped national security and led to deleterious results or the exponentially increased propensity for such deleterious results. Many of those decisions come pursuant to an absolutist notion of 1st Amendment applications. Those holdings notwithstanding, a common academic criticism of this thesis is known as the “ratchet-effect.”⁷⁸ In this criticism, most articulately set forth in Robert Brigg’s *Crisis and Leviathan*, authors argue that after each major crisis or conflict during which civil liberties are modified the intrusions on civil liberties never recede to its pre-crisis levels. History, however, has shown this argument without merit. Admittedly there have been infractions of civil liberties which were allegedly over reactions; the internment of Japanese-Americans and perhaps Lincoln’s suspension of habeas corpus are notable examples of strong executive actions that leave questions as to their righteousness. However, in each of these examples and countless others the status-quo was returned after the conflict ended; moreover, as argued, the censorship of the herein outlined speech may indeed meet the stringent strict scrutiny test as a permanent, compelling state interest.

The second major criticism of the notions set forth in this thesis lie in the notion of “chilled” civil liberties. The Supreme Court in *Nebraska Press Associations v. Stuart* held that “if ... threat of criminal or civil sanctions after publication chills speech, prior restraint freezes it at least for the time.”⁷⁹ This Court found that “barriers to prior restraint remain high and the presumption against its use continues intact”;⁸⁰ however, the facts are starkly disparate from that fact pattern put forth in this thesis. In *Nebraska Press Associations*, the plaintiff sought to restrain the news media from publishing or broadcasting accounts of confessions or admissions made by defendant to law enforcement officers or third parties, except members of the press, and other facts “strongly implicative” of the defendant. The gravity of harm when comparing a sole individual’s procedural rights is wholly subjacent to the wide reaching implications of national security; this distinction thereby limits the broader application of *Nebraska Press Associations*.

CONCLUSION

The thesis herein establishes a threefold argument in which the Executive Branch can root their ability to effectively censor all speech, publication, or other discourse from privileged individuals which therein discloses national security information deleterious to the wage of war. As outlined, this ability may be founded in an already established executive precedent to exercise prior restraint during times of war, an independently approved legitimate and compelling state interest which satisfies strict

⁷⁸ Christopher Grandy, *Crisis and Leviathan — Critical Episodes in the Growth of American Government*, JOURNAL OF ECONOMIC LITERATURE, Jun. 1991, at 620.

⁷⁹ *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558 (1976).

⁸⁰ *Id.* at 570.

scrutiny standards or a modified strict scrutiny test during times of war as the balance shifts from civil liberties to national security. Regardless of the methodology for which censorship is established, judicial deference to the Executive Branch must be maintained in the sui generis environment of national security.

The Business of intelligence might be compared to the assembly of a jigsaw puzzle, and—depending upon which pieces are in the public domain or have been compromised by leaks or enemy espionage—it is often difficult to be certain whether the disclosure of a given piece of the overall “puzzle” will do serious harm.⁸¹

It is because of this maxim that due diligence must be taken to protect military/intelligence tradecraft and secrets; the only way to accomplish this purpose is through prior restraint of such speech or discourse which may disclose such information.

⁸¹ Robert F. Turner, In Brief, THE CONSTITUTIONAL FOUNDATION FOR FACT DEFERENCE IN NATIONAL SECURITY CASES. 95 Va. L. Rev. 96 (2009).