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 newspaper Page 403 U. S. 741 from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.' " Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases, there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec.Order 10501 (1953), to classify documents and information. *See, e.g.,* 18 U.S.C. § 798; 50 U.S.C. § 783. [Footnote 5/1] Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether, in these particular cases, the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. *See In re Debs,* 158 U. S. 564, 158 U. S. 584(1895). The Government argues that, in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines v. Waterman S.S. Corp.,* 333 U. S. 103(1948); *Hirabayashi v. United States,* 320 U. S. 81, 320 U. S. 93 (1943); *United States v. Curtiss* Page 403 U. S. 742 *Wright Corp.,* 299 U. S. 304 (1936). [Footnote 5/2] And, in some situations, it may be that, under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if, when the Executive Branch has adequate authority granted by Congress to protect "national security," it can choose, instead, to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather

than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the Page 403 U. S. 743 moment do not justify a basic departure from the principles of our system of government.

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. [Footnote 5/3] In that chapter, Page 403 U. S. 744 Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus, it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already exiting power of the Government to act. *See Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime. *See* Z. Chafee & E. Re, Equity 935-954 (5th ed.1967); 1 H. Joyce, Injunctions §§ 580a (1909). Here, there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed, or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage, this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good faith prosecution could have been instituted under any statute could, however, be determined. Page 403 U. S. 745 At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U.S.C. § 793(e) that whoever, "having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . 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 . . . 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 . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U.S.C. § 793(e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793(e). He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history, and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. *But see* 103 Cong.Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. *See* my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful, it is not for this Court Page 403 U. S. 746 to redecide those issues -- to overrule Congress. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579 (1952).

On at least two occasions, Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917, during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both:*Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same."

55 Cong.Rec. 1763. Congress rejected this proposal after war against Germany had been declared, even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead, Page 403 U. S. 747 the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957, the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons."

In response to this problem, the Commission proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose

whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified."

Report of Commission on Government Security 619-620 (1957). After substantial floor discussion on the proposal, it was rejected. *See* 103 Cong.Rec. 10447-10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case, this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official, nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should Page 403 U. S. 748 be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

[Footnote 5/1]

See n.3, *infra.*

[Footnote 5/2]

But see Kent v. Dulles, 357 U. S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

[Footnote 5/3]

There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U.S.C. §§ 2161 through 2166, relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U.S.C. § 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U.S.C. § 2274, subsection (a), provides penalties for a person who "communicates, transmits, or discloses [restricted data] . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation. . . ."

Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United

States or to secure an advantage to any foreign nation. . . ." Other sections of Title 42 of the United States Code dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U.S.C. §§ 2276, 2277. Title 50 U.S.C.App. § 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and, indeed, Congress, in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U.S.C.App. § 1152(6). Title 50 U.S.C. § 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.