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Prosecuting the Press for Publishing Classified Information

Geoffrey R. Stone

For more than 215 years the United States has flourished in the absence of any federal legislation directly prohibiting the press from publishing government secrets. The absence of such legislation is no accident. It clearly fulfills the promise of the First Amendment: "Congress shall make no law . . . abridging the freedom . . . of the press."

Of course, the First Amendment is not an absolute. The press may be held accountable for publishing libel, obscenity, false advertising, and the like. As the Supreme Court observed more than sixty years ago, "such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Government secrets are something else entirely. There is nothing about matters labeled "government secrets" that inherently makes their dissemination "no essential part of any exposition of ideas" and of only "slight value as a step to truth." To the contrary, the publication of such information may be extraordinarily valuable to the proper functioning of a self-governing society. The very notion of punishing the press for publishing information because the government wants to keep that information secret runs counter to the most fundamental tenets of public accountability.

Of course, there are secrets and there are secrets. It may be helpful to distinguish three different types of secrets. First, there are what we might call "illegitimate" government secrets. What renders such secrets "illegitimate" is that their secrecy does not in any way further the public good. They are secret because someone in government is attempting to hide an embarrassing or damning truth from public scrutiny. We know from both human nature and common experience that government officials may sometimes try to shield from public view their misjudgments, incompetence, venality, cupidity, and corruption. To protect their own interests, such officials may assert that secrecy is essential to the national security. Needless to say, this is illegitimate in a self-governing society. It is vital in a constitutional democracy that such deception must be ferreted out and exposed.

Second, there are what we might call "legitimate but newsworthy" government secrets. The disclosure of some government secrets might

harm our national security, and the government certainly has a legitimate interest in preventing such harm. But the public disclosure of such secrets may *also* have salutary and substantial “value as a step to truth.” Indeed, this is often the case. For example, the publication of secret information that Army rifles routinely malfunction might be both harmful and beneficial to the national interest. That this publication might harm the national interest from one perspective does not preclude it from serving the national interest from another. Similarly, the publication of information that the security around our nuclear power plants is inadequate both threatens and serves the national interest. In such situations, which are quite common, it is often difficult to know with any confidence which effect predominates.

Third, there are what we might call “legitimate and *non*-newsworthy” government secrets. The public disclosure of such secrets might harm the national security but have only “slight value as a step to truth.” An example would be public disclosure that the government has broken the enemy’s code, where the disclosure serves no legitimate public interest. Of course, whether any particular disclosure actually furthers a legitimate public interest is often a matter of dispute, so it may be easier to define this category in the abstract than to apply it in practice.

A central challenge to a free society is to distinguish among these three types of secrets. In principle, the government should never be able to punish the publication of “illegitimate” secrets and should be able to punish the publication of “legitimate and *non*-newsworthy” secrets. The middle category, which is no doubt the largest, is also the most difficult to assess in terms of striking the proper balance. Moreover, this taxonomy is easier to state than to implement. When it comes to distinguishing among these three types of secrets in the real world, particularly in the context of criminal prosecutions of the press, the problems of complexity and vagueness can be overwhelming.

To provide reasonable guidance to the press, avoid chilling the publication of information that is important to the public interest, and limit the dangers of unchecked prosecutorial discretion, we need clear, simple rules. Such rules, by definition, will be imperfect. They will inevitably protect either too much or too little expression; they will inevitably protect either too much or too little secrecy. This is a dilemma.

This brings me back to the lessons of history. As I noted earlier, for more than 215 years the United States has resolved this dilemma by *not* prohibiting the press from publishing government secrets. Perhaps even more important, there has not been a single instance in the history of the United States in which the press’s publication of a “legitimate but newsworthy” government secret has gravely harmed the national interest. The lesson of this experience is that the best course for the United States is to refrain from prohibiting the press to publish “legitimate but newsworthy” government secrets. Although one can imagine hypotheticals in which such

a publication could seriously harm the national interest, more than two centuries of experience has proved that the threat of such prosecutions is unnecessary, and would do more harm than good.

For the government to wield the power to prosecute the press for such publications would give government officials enormous capacity to intimidate and threaten the press and thereby undermine its vital role in our democratic system. To grant government officials such authority would seriously jeopardize the ability and willingness of the press to expose to public scrutiny what *should* be exposed.

I return now to my third category of government secrets – those that are “legitimate and *non-newsworthy*.” The publication of these secrets could harm the national interest *without* contributing to informed public debate. Thus, in principle, the government should be able to prohibit the public disclosure of such secrets. The problem, though, is that it is not easy even to “know such secrets when we see them.” The very concept of “non-newsworthy” is elusive. Although that is a genuine difficulty, it is not necessarily an insurmountable obstacle. It should be possible reasonably to limit the uncertainty by clearly and narrowly defining precisely what is prohibited.

It may be useful in this regard to work backwards from the paradigm example of the government secret that should not be published. Suppose a newspaper publishes the fact that the United States has broken the al Qaeda code, and as a consequence the terrorists change their cipher. Suppose also that there is no legitimate public interest in the publication of this information. That is, the publication does not reveal any possible illegality, incompetence, venality, or misjudgment by government officials.

This example embodies two factors that might help define the scope of a constitutionally permissible criminal prohibition. First, the newspaper knew or was reckless in not knowing that the publication of this information would create a clear and imminent danger of a grave harm to the national security. Second, the newspaper knew or was reckless in not knowing that the publication of this information was “non-newsworthy.”

With these two elements in place, it might be possible to enact a carefully crafted law that addresses the most serious dangers to the national security, while at the same time protecting the freedom of the press and the compelling national interest in free and robust debate and discussion of matters of legitimate public concern.

But would it be good public policy to enact such a law? On balance, I think not. Once again, I return to the lessons of history. Even if such a law would be constitutional, I doubt it would be either necessary or wise. In 215 years of experience, the problem has never actually arisen. And even if some might disagree with that assessment, the number of instances about which there might be disagreement can easily be counted on one hand. This would be a law in search of a problem. This is never a sound basis for

legislation and certainly not in dealing with a freedom as precious as the freedom of the press. I remain convinced that the Congress had it right in 1917. Even a law drawn this narrowly would cause more mischief than it is worth. Some things are simply best left alone.

I do not in any way mean to suggest that the government has no legitimate interest in keeping military secrets. Certainly, it does. But the way to protect this interest is *not* by threatening to prosecute the press. It is, rather, by preserving the confidentiality of the information by implementing effective (and constitutionally permissible) regulations governing public employees who unlawfully leak such information. As the Yale constitutional scholar Alexander Bickel once observed, this is surely a “disorderly situation,” but it may be the best we can do. If we give the government too much power to punish the press, we risk too great a sacrifice of public debate; if we give the government too little power to control secrecy “at the source,” we risk too great a sacrifice of essential secrecy. The American solution has been to reconcile the irreconcilable values of secrecy and freedom by protecting an expansive right of the press to publish and a strong power of the government to prohibit leaks. The American solution may be unruly, but it has served the nation well.