State Security as a Substantive Limitation on Freedom of the Press

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In order to provide its people with the security which they expect, a nation-state needs a certain amount of privacy. This means that public officials responsible for state security must conceal some of their affairs from members of the general public. Herein lies a dilemma. In a Western constitutional democracy strong claims are advanced on behalf of values other than state security. In the United States, these values are described legally as "First Amendment" freedoms: freedom of speech, of association, of religion, and of the press. Constitutional theorists speak of a right of the public to know what their Government is doing. Since the general public as a practical matter depends upon the press to keep it informed about the Government, it is here that the greatest potential for conflict between state security and human rights exists. A dramatic illustration of this confrontation was presented by the recent "Pentagon Papers" case[1]).

The facts of the case may be stated briefly. In mid-June 1971 the *New York Times* and the *Washington Post* began publishing selections and summaries of a secret 47 volume Pentagon study entitled "History of U.S. Decision Making Process on Viet Nam Policy". This study had been turned over to those newspapers by Daniel Ellsberg, a former government consultant and Pentagon official. The U.S. Government claimed that continued publication of the study would constitute a serious threat to state security, and it requested the newspapers to voluntarily cease publication. When they refused to do so, the Government requested federal courts in New York and Washington for injunctive relief to restrain further publication. The U.S.

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[1]) *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

Supreme Court granted certiorari in both cases and on 30 June 1971 in a brief *per curiam* opinion accompanied by six concurring[2]) and three[3]) dissenting opinions dismissed the Government's complaint, thus enabling the newspapers to resume publication of the material in question.

At first blush, the decision of the Court in the "Pentagon Papers" case would seem to represent a signal victory for civil liberty. However, it is important to note that the case was decided on the premise that the issuance of the injunctions by the lower courts represented a "prior restraint" on the publication of documents the content of which was true and at least arguably in the public interest. In U.S. law, "prior restraint" is a word of art which carries with it a unique flavor of disapprobation. Reacting against the English system of prior censorship, the men who founded the United States wrote into the First Amendment to the Constitution a provision prohibiting Congress from passing any law which abridges the freedom of the press. It was widely felt that, if subsequent punishment of publishers was sometimes proper, prior restraint was not. In time, the idea that the essence of freedom of the press consists in a protection of it from prior restraints became widely accepted as part of the received tradition of U.S. constitutional law.

Is it correct to say, therefore, that in the United States there is an absolute right to publish anything at least once? Or, under certain circumstances, does the Government have the right to set up a system of censorship which requires prior official approval before certain sensitive material may be made public? Since there are spirited opinions on both sides of these issues, a review of the authorities may be useful.

In the case of *Near* v. *Minnesota*[4]), the U.S. Supreme Court had to decide on the constitutionality of a statute which empowered the district attorney to ask a court to enjoin future publication of a newspaper deemed to be "obscene, malicious, scandalous and defamatory". In that case, a local Minnesota newspaper was criticising public officials for alleged dereliction of duty. A Minnesota judge found the newspaper to be a "public nuisance" within the meaning of the statute and enjoined further publication of it without his prior approval. In effect, the system there placed the district attorney and especially the judge in the role of prior censors. The U.S. Supreme Court held the statutory scheme to be an unconstitutional violation of First and Fourteenth Amendment guarantees, but in doing so the Court did not say that every form of prior restraint would violate the constitutional guarantee of freedom of the press.

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[2]) Justices Black, Douglas, Stewart, White, Marshall and Brennan.
[3]) Justices Harlan, Burger and Blackmun.
[4]) 283 U.S. 697 (1931).

By way of *dicta,* the Court in *Near* v. *Minnesota* suggested that prior restraint would be permissible if during wartime someone were to attempt to publish "the sailing dates of transports or the number and location of troops"[5]). Presumably, therefore, even without a statutory scheme authorizing the prior restraint, a U. S. court would be permitted to enjoin the proposed publication of troop movement information in wartime. Reasoning by way of analogy, if the conflict in Vietnam be regarded as a war — even though in international law no state of war exists between the United States and North Vietnam — and if the threatened publication of the "Pentagon Papers" be regarded as the cause of "grave and irreparable" injury to the public interest akin to that which would be caused by the publication of troop movement information, then a court could constitutionally enjoin the study even without express statutory authorization to do so.

The burden of proving such "direct, immediate and irreparable damage to the Nation or its people" is placed on the Government, however. In the "Pentagon Papers" case a majority of the U. S. Supreme Court felt that the Government had not met this heavy burden. In essence, this is the holding of *New York Times Co.* v. *United States.*

The real issue in the "Pentagon Papers" case is the subject of this article: When, if ever, does the Government have the right to prevent publication by the press of truthful information about government activities on state security grounds? This precise issue, although of the greatest importance, had never been litigated in the courts before the "Pentagon Papers" case.

One of the areas in which the security interests of a state are especially strong is foreign affairs. In the United States, as in other countries possessing a federated governmental structure, the conduct of foreign affairs is entrusted to the central Government. Although this power is divided between the President and Congress, as a practical matter the President has assumed the commanding and leading position in the formulation and execution of foreign policy. From time to time Congress and the Supreme Court have expressly recognized the unique executive function in this regard in a manner which sheds some light on the question of state security and free public inquiry.

In *United States* v. *Curtiss-Wright Export Co.*[6]), the U. S. Supreme Court explained that the powers of the federal government to conduct foreign affairs are not limited to those specifically enumerated in the Constitution, but are as broad as the attributes of external sovereignty:

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[5]) *Ibid.,* p. 716.
[6]) 299 U. S. 304 (1936).

"The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality [in accordance with] ... the law of nations" [7]).

The President, moreover, is singularly equipped to exercise them. He, more than Congress,

"has the better opportunity of knowing the conditions which prevail in foreign countries ... He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results" [8]).

Such judicial recognition of the need for executive secrecy has been coupled with an extreme reluctance by the courts to interfere with the President's conduct of foreign affairs. In *Chicago and Southern Airlines, Inc.* v. *Waterman Corp.* [9]), the U. S. Supreme Court, referring to the sensitive nature of foreign affairs and to the proper role of the judiciary in such matters, stated:

"The President ... has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts without the relevant information should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could acquire full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political department ... They are delicate, complex and involve large elements of prophecy ... They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibilities and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry ..." [10]).

Although the judiciary has been reluctant to interfere with the executive's conduct of foreign affairs, the same cannot be said about the press. Some-

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[7]) *Ibid.*, p. 318.

[8]) *Ibid.*, p. 320; emphasis added.

[9]) 333 U. S. 103 (1948).

[10]) *Ibid.*, p. 111. It is well established that a court will not compel the executive branch of the Government to reveal military secrets as part of the relevant evidence in a law suit. *United States* v. *Reynolds*, 345 U. S. 1 (1953) is the leading case on the state secrets privilege in the law of evidence. See generally McCormick, Evidence, Secs. 143–150 (1954).

times referred to as the "fourth branch of government" [11]), the press in the United States has traditionally conceived its function to be that of informing the public of what the Government is doing. The idea is that in a democracy like the United States the people are sovereign [12]). According to this theory, the organs of state government do not exist for themselves, but rather to serve the people. Since government is ultimately responsible to the people, the people have a right to know what their government is doing, even when it is conducting foreign affairs. The press, as the representative of the people in this process, needs to have access to the relevant facts and the government has a corresponding duty to supply it with these facts.

Such an extreme view of freedom of the press was taken by the late Justice Black in the "Pentagon Papers" case:

> [It was the intention of the Founding Fathers that the] "press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people" [13]).

In taking this position it is apparent that Black overlooked the fact that, by the very nature of things, newspapers inform not only the people but also the enemies of the people [14]). Those who are engaged in a balancing of interests should not ignore such an obvious truth. There are some things which the public does not have the right to know. Contingency military plans, diplomatic negotiations, details of weapons systems — all of these things must remain secret if the Government is to be able to function effectively and to serve its own people in the area of foreign affairs. It is not possible, therefore, to concur with Justice Black's judgment that "the guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic" [15]).

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[11]) Roger Hilsman, To Move A Nation (Garden City, N.Y. 1964), p. 9, considers that the press plays a role in the process of governance, including the shaping of foreign policy. As a reporter has explained, "We are the fourth estate, and it is our duty to monitor – to watch and interpret – what our government does". Bernard C. Cohen, The Press and Foreign Policy (Princeton, N. J. 1963), p. 34.

[12]) In *Afroyim* v. *Rusk*, 387 U.S. 253, 257 (1967) Justice Black deduced from this premise the conclusion that "the Government cannot sever its relationship to the people by taking away their citizenship".

[13]) 403 U.S. 713, 717 (1971).

[14]) During World War II a Chicago newspaper published information indicating that the U.S. Navy had cracked the Japanese code at the Battle of Midway. The Japanese promptly changed their code. See James Reston, The Artillery of the Press (N.Y. 1967), p. 38.

[15]) 403 U.S. 713, 719 (1971).

This, of course, suggests an even larger and more fundamental question: what is the proper function of the people and the press in the area of foreign affairs? Presumably no one is in favor of popular participation in the formulation and execution of foreign policy. To be sure, a wise President will encourage popular and Congressional support for his foreign policy. He would be well counseled to avoid any undertaking abroad which is likely to provoke serious and protracted opposition from large segments of the public at home. But there is no real possibility for the Government to seek popular consent prior to making foreign policy. Whether or not to mine North Vietnamese waters is not a fit subject for "uninhibited, robust and wide-open" discussion by the public.

At first blush this attitude seems to fly in the face of the principle of democracy. In theory, not only are the people sovereign but they also know best. A faith in democracy, so it could be argued, is also a faith in the ability of the people, when informed of the facts, to reach a sound judgment on issues of public policy. It is a belief that more than half the people are right more than half the time. But even while affirming its soundness with regard to domestic affairs, it is necessary to ask whether this theory is applicable to the conduct of foreign policy. Do the people have the facts which they need in order to form intelligent judgments about foreign policy issues[16])? Can the facts which flow across the desk of the Chief Executive be made public without creating an unacceptable risk to state security[17])? The answers to these questions would seem obvious, yet the questions themselves are seldom formulated and even more rarely discussed. In the United States there is a widespread feeling that the public has "a right to know". As Justice Douglas said in the "Pentagon Papers" case:

> "Secrecy in government is fundamentally anti-democratic, perpetrating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'open and robust debate'" [18]).

The reasoning behind this position is the belief, religiously held by those

[16]) It would also be useful to know what percentage of the voting public is really interested in foreign policy. Measures such as those advocated by James Reston, The Press, the President and Foreign Policy, 44 Foreign Affairs 553, 570–573 (1966), would probably stimulate public interest in foreign policy issues but they would not solve the problem of reconciling traditional democratic theories concerning popular participation in the foreign policy decision making process with the realities of contemporary practice.

[17]) In the opinion of a former CIA official, the disclosure of intelligence activities in the press constitutes a "clear national liability". William J. Barnds, Intelligence and Foreign Policy: Dilemmas of a Democracy, 47 Foreign Affairs 281, 292 (1969).

[18]) 403 U. S. 713, 724 (1971).

who have embraced the philosophy of secular humanism, that a maximization of the individual freedoms of speech, press and expression is necessary, *inter alia,* in order to (1) assure the fullest realization of human personality, and (2) find the truth[19]). As Justice O. W. Holmes once put it, "... the ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market"[20]).

The application of these sentiments to the formulation and execution of foreign policy is not easy. For example, in 1961 the U. S. Government was considering the possibility of supporting an armed invasion of Cuba by anti-Castro refugees. As is generally recognized now, the press had prior knowledge at the time of the plans of the Government to help mount such an invasion at the Bay of Pigs. According to James Reston,

> "some papers reported what was afoot, others didn't; but after the invasion failed, President Kennedy told Turner Catledge, then managing editor of the New York Times, that he wished the press had disclosed much more information than we [the press] had. In that event, he remarked, the American people might have forced cancellation of one of the most embarrassing American military and diplomatic adventures of the century"[21]).

It is impossible to know how, if at all, this statement of Kennedy influenced the publisher and editors of the New York Times when, ten years later, they decided to publish the state secrets given to them by Ellsberg. There is some evidence indicating that public officials in the United States intentionally disclose state secrets to the press in order to change foreign policy. It has been suggested that they do so not because they are disloyal, but rather because they are "deeply convinced that the nation [is] in peril"[22]).

One may admire such concern for the common good, but a thorough inquiry into the limits which state security imposes on freedom of the press cannot stop here. It is necessary to further determine whether the benefit which allegedly accrues to the nation as a result of the publication outweighs the obvious harm which such a wilful violation of state security causes to the conduct of foreign affairs[23]).

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[19]) See generally Thomas I. Emerson, Toward a General Theory of the First Amendment (New York 1966).

[20]) *Abrams* v. *United States,* 250 U. S. 616, 630 (1919).

[21]) Reston, The Artillery of the Press, *op. cit.* (note 14), pp. 30–31.

[22]) Hilsman, To Move a Nation, *op. cit.* (note 11), p. 10.

[23]) It has been suggested that publication of the "Pentagon Papers" made the CIA "look good". See Chester L. Cooper, The CIA and Decision-Making, 50 Foreign Affairs 223, 228 (1972).

Such a determination would involve a sifting of the facts in light of the values at stake. Not only would those who are engaged in such a balancing of interests be motivated by their own value judgments as to the relative weight to be given to the competing claims of state security and freedom of the press[24]), but they must also be concerned with the impact which the decision which they are about to make will have on certain other values.

As Justice Stewart has recognized,

> "... it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept" [25]).

To employ the phraseology sometimes used in relation to the exercise of First Amendment freedoms by the individual, the publication of state secrets tends to have a "chilling effect" on the conduct of foreign affairs. The foreign diplomat will be justifiably concerned about the possibility that future security breaches could embarras his government. Because of this, he might refuse to cooperate in a matter of great interest to the security-weak country.

Similar considerations are relevant where the secret information which is published contains the names of individuals. Under circumstances, such a publication could ruin the career of a public official. The things that a man says or writes are often used by his opponents to discredit him. If a public official charged with the duty of assisting in the formulation of foreign policy has to fear that the substance of his conversations with his colleagues or his advice to his superiors might some day appear in the press, it is probable that he will be less than completely candid in carrying out his commissions. It is clearly in the public interest to encourage frank and open communication between offices within the government[26]).

An additional factor which is relevant to the balancing of interests in this area is the impact which the intentional disclosure of state secrets inevitably must have on popular respect for law. In the United States there are several criminal statutes which prohibit the publication of military secrets[27]). No

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[24]) Justice Blackmun, for example, would approach the weighing process already convinced that there is a "broad right of the press to print and ... [a] very narrow right of the Government to prevent", 91 S. Ct. 2140, 2165 (1971).

[25]) 91 S. Ct. 2140, 2148 (1971).

[26]) Cf. Joseph W. Bishop, The Executive's Right to Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477, 487 (1957).

[27]) Title 18, U.S.C., Sections 797, 798, 793 (e), 794. See *New York Times Co.* v. *United States*, 91 S. Ct. 2140, 2152–2154 (1971).

one should be above the law, not even those who deliberately violate it in order to attract attention to their own cause. If it is wrong to punish the innocent, it is also an affront to community standards of justice to permit the guilty to remain unpunished. It is a traditional principle of natural law that unequals should not be treated equally. In the enforcement of the criminal law the people "are strongly inclined to rebel against a discriminatory treatment which they feel to be unreasonable, unjustified, and capricious"[28]). In order to reinforce the desire of the public to believe in the fairness and impartiality of the legal system, those who intentionally disclose state secrets should be punished. This will also serve to encourage the vast majority of the people to avoid the commission of crime and to continue along the path of cultural advancement.

Summary. Experience has shown that in the United States no one has a constitutional right to publish anything he wants at a time and place of his own choosing. While a literal reading of the First Amendment to the U. S. Constitution provides some support for an absolutist interpretation of the freedoms guaranteed therein, this position has never commanded a majority on the U. S. Supreme Court. Those who exercise their First Amendment rights may not do so in violation of the legally protected interests of others. Civil or criminal liability may attach to the publication of literature that is libelous, obscene, seditious or unduly obstructive of the administration of justice. In this regard, the case law provides no satisfactory basis for a workable distinction between "speech" and "conduct". Some types of speech, such as fighting words, are tantamount to a direct incitement to immediate and imminent violence and are not constitutionally protected. Certain types of conduct, like wearing arm bands as a form of political protest, enjoy constitutional protection. In every case it is necessary to weigh the social value which flows from the form of expression against the gravity, certainty and immediacy of the harm which the expression will cause to some legally protected interest.

It is clear that all law has the purpose of assuring the coexistence of interests which are worthy of legal protection. The conflicting interests with respect to the problem of disclosure of state secrets by the press are, on the one hand, the interest of the government in protecting its own people from unacceptable risks to the stability of the social, economic and political structure and, on the other hand, the interest of the press in obtaining and publishing information so that the people may intelligently evaluate the performance of the government. Although a consensus over purpose and

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[28]) Edgar Bodenheimer, Jurisprudence (Cambridge, Massachusetts 1967), p. 195.

values is not easy to obtain, an examination of these interests in light of the available legal authority indicates that state security forms a substantive limitation on freedom of the press. This limitation is especially strong in matters dealing with military and foreign policy. In these areas the government may impose a prior restraint on the publication of state secrets if it can show that such publication would cause a grave and irreparable injury to the public interest akin to that which would be caused by the publication of troop movement information in wartime. Even where the government cannot meet this heavy burden of proof, subsequent criminal prosecution of those responsible for the publication is constitutionally permissible.

As Roscoe Pound noted, there is a "social interest in the general security"[29]). Historically, every social group has felt the need to be secure against those forms of action and courses of conduct which threaten its existence. It is the highest duty of the state to provide its people with the protection they need so that they may be free in order to devote their energies to other more specialized social, economic and cultural activities. In a real sense, therefore, all of the human rights, including freedom of the press, can only be realized within the framework of a legal system in which the need for state security is recognized and respected by those inside and outside government service.

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