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On Journalists' Claims for Immunity From Legal Accountability

By Jack Goldsmith

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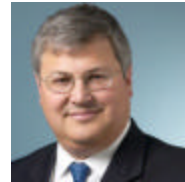
I think I am unusual among former government officials in arguing that the publication of national security secrets can promote democracy and good government. Such publications are often costly, sometimes very costly, to national security – more so than is generally realized. But as I wrote in *Power and Constraint*, “it does not follow that the media’s pursuit of government secrets is bad for American society, or even for national security, all things considered.” I explained:

The reason is that there are serious harms—including harms to national security—from excessive government secrecy. “Wartime heightens the case for secrecy because the value of security is at its peak,” notes Barton Gellman. “But secrecy is never more damaging to self-government than in wartime, because making war is the very paradigm of political choice,” and the “life-and-death stakes give equal urgency to the project of holding our leaders accountable for their use of power.” When the executive branch acts in the secret world it defines for itself, it makes more mistakes than usual, and the mistakes are harder to correct because the normal checking functions of the government cannot operate. The media and other vehicles of unauthorized information disclosure are a corrective to the necessary but unfortunate secrecy of war and intelligence operations. Many of the sensational media disclosures of the past decade revealed mistakes or abuses that led Congress and the courts and executive insiders to change government war policy. These accountability mechanisms would not have worked nearly as well if the press had not been in the shadows reporting how the government was fighting the war. And even when the press didn’t uncover secrets, fear of leaks caused national security officials to think twice about what they do, and deterred them from doing things they shouldn’t.

Although I believe the press serves an invaluable role in the super-secretive Forever War, I do not think that the press itself is or should be immune from accountability, and I never cease to be

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amazed by the arguments for non-accountability under law made on its behalf. Some of those arguments can be found in a WP op-ed [www.washingtonpost.com/opinions/eric-holder-still-has-wrongs-to-right-before-he-leaves-office/2014/10/29/607982ca-5e08-11e4-8b9e-2ccdac31a031_story.html] last week by David A. Schulz, a First Amendment lawyer and co-director of the Media Freedom and Information Access Clinic at Yale Law School. Schulz argues (my emphasis) that various actions taken by Attorney General Holder have “*undermined* reporter-source communications” and “*damage[ed]* for years to come the media’s ability to uncover and report on government missteps.”

Before we get to the arguments in support of this claim, let’s first consider why it is false. Yes, in the face of unprecedented disclosures of secrets, the Justice Department has pursued with middling success an unprecedented number of leak prosecutions, and has in a few start-and-go instances subpoenaed national security reporters for information about their sources. But no journalist or newspaper has been prosecuted even though many have published information in violation 18 USC 798 [www.law.cornell.edu/uscode/text/18/798]; and indeed it is now hard to imagine that this law will ever be enforced against the press [www.lawfareblog.com/2013/12/extraordinary-u-s-press-freedom-to-report-classified-information/]. Moreover, as the avalanche of national security secrets in recent years makes plain, journalists’ communications with sources have definitely not been undermined, and the media’s ability to uncover and report government missteps has not been damaged. I have no doubt that DOJ actions have in some instances chilled some officials from talking to journalists and thus have in those respects made it somewhat harder for journalists to get information. But this is not the only determinant of the publication of secrets. Others determinants include the practical elimination of criminal liability for journalists; the digitalization of national security information; and the expansion and globalization of U.S. national security reporting, all of which make it much easier for secrets to flow out. When one considers the entire system and the regular cascade of national security secrets that flows to the public, Schulz’s hyperbole collapses.

His other claims don’t fare much better. Schulz berates Holder for “den[ying] that any ‘reporter’s privilege’ exists.” The so-called reporter’s privilege is a journalistic fantasy. If it existed, it would protect journalists from compelled disclosure of information about sources in connection with prosecutions of persons who allegedly violated criminal laws. But the privilege does not exist. As Judge Traxler correctly wrote in a precedent-packed opinion [legaltimes.typepad.com/files/sterling-ruling.pdf] that denied such a privilege to NYT reporter James Risen: “There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source.” Journalists and their supporters have been pushing for years for a statutory reporter’s privilege, and perhaps Congress will one day pass one for certain communications with journalists. But until Congress so acts, federal law clearly allows the government in good faith to subpoena information from journalists related to an alleged crime in the rare case where the Justice Department’s high internal bar is satisfied and the government has the courage to issue and enforce the subpoena.

A court’s ability to subpoena information in such rare cases is the main, and probably only, practical legal accountability check on national security journalists. Nonetheless, journalists and

their supporters – who of course maintain that every institution they cover must be accountable (including accountability before the law) – also insist on immunizing themselves from even the indirect accountability of having to disclose information in a criminal trial of an alleged lawbreaker.

The reason why they insist this is even more revealing. Schulz writes:

Without some legal protection for reporters' communications, essential sources of information inevitably will dry up. This truth was well understood by one of Holder's predecessors as attorney general — Robert Jackson — who in 1941 refused to release FBI reports to Congress because disclosure “would be of serious prejudice to the future usefulness of the” FBI. As he explained, some of the most valuable information obtained by the FBI “can only be obtained upon a pledge not to disclose its sources.” The same is true for news sources. The government may not like leaks about the Department of Veterans Affairs or CIA secret prisons, but our democracy depends on whistleblowers who will often talk to reporters only “upon a pledge not to disclose” their sources.

So we should give journalists immunity from revealing secret information because, by analogy to the FBI keeping information from Congress, journalists' information “can only be obtained upon a pledge not to disclose its sources.” Of course no journalist would use this logic to justify the FBI – or any government agency – keeping information from Congress or the public. Indeed, journalists scoff whenever the government argues that the publication of national security information damages relationships with those to whom it promised secrecy (and makes much harder potential future relationships). And yet as Schulz makes plain, this is the precise argument journalists use for immunity from disclosing sources. The argument that perfect secrecy is necessary for either the press or the government to function properly is a large exaggeration, as events of the last decade have made plain.

Journalists play a vital role in our democracy in reporting national security secrets. But the value in this reporting is not absolute. There are other competing values, including national security, secrecy, and the enforcement of duly enacted criminal laws. These competing values have often given way since 9/11 to the value of reporting secrets to the public, and the norms and legal constraints on journalists are much looser now than a dozen years ago. But the law still allows journalists to be subpoenaed to disclose their sources in certain cases. Journalists and their supporters want to go further and receive immunity from all legal accountability in reporting national security secrets – a position that journalists would tolerate in no other context.

