

Keeping It Secret

By G. Warren Nutter

CHARLOTTESVILLE, Va. — One extreme seems, alas, to call forth another. And so, in the wake of Watergate, guardians of the press are shouting that "the perils of secrecy far outweigh its advantages." What, we must ask, can they mean by that? Are there to be no state secrets?

A troopship sails into waters infested by the enemy. Should its hour of departure, speed and bearing be printed in the shipping news? Or a flight of bombers takes off for enemy territory. Should its time over target be broadcast in advance?

Should we publish everything we know about designing and producing nuclear weapons? The blueprints for our best ballistic missile? The plans for defending NATO? The target list for our strategic nuclear forces? The latest cryptanalytic successes? Our fallback positions in SALT?

Surely there are legitimate state secrets, and just as surely there must be a legitimate authority to identify and keep them. That responsibility devolves first and foremost on the President, whom our Constitution designates as Commander in Chief of the armed forces and chief executive in the realm of foreign as well as domestic affairs. He cannot escape the responsibility and should not seek to. We may imagine what fate would befall a President who by careless discharge of responsibility or by dereliction of duty permitted critical state secrets to fall into the hands of a potential enemy.

There is no point in debating whether or not to have state secrets, as if secrecy is either good or evil, one or the other. The issue is rather how much secrecy to have, and the initial answer is that some is essential.

That much being clear, what does it mean to proclaim that freedom of the press is inviolate? State secrets do not violate freedom of the press any more than legislative power violates executive power, or vice versa. It is the genius of our system that no right or power is absolutely supreme.

Rights do come in conflict with one another, and those conflicts are worked out through inherently countervailing

forces, including the judicial process.

The working of checks and balances also causes bounds to be set on rights. Nobody will dispute Justice Holmes' proposition that freedom of speech does not convey the right to shout "fire!" in a crowded theater—or his basic principle that a clear and present danger is the only ground for curbing free speech. Is it not equivalent to assert that freedom of the press does not convey the right to publish the battle order of the day?

But, guardians of the press will cry, give the secret makers an inch and they'll take a mile: Government officials are bound to abuse the right of keeping state secrets. Perhaps so, but that is where checks and balances come in: to safeguard against abuse of power.

The power of the press to combat abusive secrecy is formidable. There is no cause for undue modesty in this regard on the part of members of the fourth estate. Rather, they might well reflect on the enormity of their power, on the temptations for abuse, and on the consequent wisdom of self-denying ordinances.

What overriding purpose, they might ask themselves, is served by publishing, on the eve of SALT negotiations with the Soviet Union, the U.S. fallback positions known to have been contained in a decision of the National Security Council? What overriding purpose is served by publishing the Pentagon Papers verbatim? Why were certain volumes not published?

The excessive zeal of agents charged with protecting state secrets prevented our courts from addressing these issues in the Ellsberg case. The limits to freedom of the press required by national security therefore remain to be defined. Guardians of the press might well seize the opportunity to set their own bounds, but they cannot do so by persisting in the self-righteous and indefensible attitude that freedom of the press is absolutely absolute.

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