The War: The Record and the U.S.

Freund: On 'Prior Restraint'

By PAUL A. FREUND

CAMBRIDGE, Mass.—Everything secret degenerates, was Lord Acton's warning. Sunlight is the most powerful of disinfectants, was Justice Brandeis' admonition. But concrete issues of disclosure and secrecy have a way of making even the most ardent libertarians see that the right to know is not one-dimensional, all warp and no woof. Brandeis himself was the intellectual father of a legal right of privacy.

The press itself has not spurned the shelter of the copyright law or legal protection against the pirating of news stories by competitors; and the media are not insensitive to the value of preserving the confidentiality of their sources of information. In the long run, it is perceived, the business of serving the public boldly and zealously may require some protective shelter along the way.

Surely, however, the position is very different in the business of government? Not entirely. The framers of the Constitution scrupulously maintained the secrecy of their deliberations in the convention of 1787. Madison's notes, the best record, were not published until his death, forty years later. Secrecy, it is fair to suppose, promoted free and candid debate within the convention, and vitally encouraged the shifts in voting, the great compromises, calculated ambiguities and deliberate lacunae that made possible in the end a masterful charter. I sometimes wonder irreverently whether we would have had a Constitution at all if the convention had been reported by daily columnists (affectionately called by Charles Evans Hughes the daily calumnists).

The original Constitution contained no guarantee of freedom of speech, save for members of Congress, and none for the press. When the first Congress proposed the First Amendment, the Senate, it is worth remembering, sat in secrecy. For five years the Senate held its debates behind closed doors. Believing in the liberty of the press, at the same time the members believed it right to shield their own discussions from the public and disclose only the final actions taken.

These early precedents, conscientiously inspired as they were, are not cited as models for our day. The point is, on the contrary, that we cannot find ready-made directions for our particular problems of secrecy and disclosure simply by marching to the uncertain trumpets of the Founding Fathers.

The beginning of wisdom is to recognize that there are honest issues to be resolved, and that the critical questions are who shall decide those issues, by what standards and by what procedures. The original understanding of the First Amendment was probably the Blackstonian view that a publisher was not to be subjected to "previous restraint"—that is, precensorship—but would be liable civilly or criminally for a publication that violated the law, whether of defamation or incitement to crime or disclosure of state secrets. Although we have long since recognized limits on prosecution as well, our legal tradition has special reupgnance toward prior restraint.

At first blush the distinction may seem absurd, even perverse. If a writer can be imprisoned for publishing the unpublishable, why not subject him to the preventive thrust of an injunction, which simply warns him that publication will bring on punishment for contempt of the court's decree? The question is paradoxical only because it assumes the illegal nature of the publication. In a very clear case there would be no reason to withhold an injunction, the most tolerant judge would doubtless restrain the publication of secret troop movements in time of war, or of draft judicial opinions in a pending lawsuit.

But the general rules are made for the marginal, debatable cases, and in this gray area procedural differences become crucial. In an injunction suit the judge sits without a jury, and the right to a jury trial on all the issues was a hard-won victory for the press against the state, going back to Peter Zenger's case in New York in 1735. There is a further procedural point. If a person publishes in violation of an injunction while the case is being tried or appealed, he is automatically guilty of contempt, even though he ultimately succeeds in having the injunction set aside; in a criminal case, on the other hand, the publisher can gamble on his ultimate vindication, for if he is acquitted he escapes all penalty. In the marginal case, prior restraint could amount to an overkill.

Risk for risk, the law has opted for underkill in duels over publication. That is the meaning and the message behind the seeming technicalities of the law on prior restraint.

The law's preoccupation with the procedural aspects of liberty at the litigation stage suggests that some comparable concern be shown at the earlier stages. The drama of the Pentagon papers, regardless of the immediate outcome, could have its greatest impact by stimulating a full-dress examination of our security classification procedures and the scope of executive privilege in relation to Congress. There, too, the central issue is one of overkill protective of the Government.

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