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Review

Whistleblowers, Leaks, and the Media: The First Amendment and National Security

Paul Rosenzweig, Timothy J. McNulty, and Ellen Shearer (eds).
Chicago, IL: American Bar Association, 2015. 296pp.

Heidi Kitrosser*

In 2000, President Bill Clinton vetoed a bill that would have criminalized all unauthorized leaks of classified information.¹ In his veto message, Clinton agreed that “unauthorized disclosures can be extraordinarily harmful to United States national security interests and that far too many disclosures occur.” But the bill failed, in his view, to balance national security interests with “the rights of citizens to receive the information necessary for democracy to work.” The bill threatened to chill even “appropriate public discussion [or] press briefings” by Government officials. Similarly, it could have “restrain[ed] the ability of former government officials to teach, write, or engage in any activity aimed at building public understanding of complex issues.” Clinton called these risks “unnecessary and inappropriate in a society built on freedom of expression and the consent of the governed,”

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and “particularly inadvisable in a context in which the range of classified materials is so extensive.”²

Clinton’s remarkable veto statement captures much of what is difficult about crafting and enforcing policies to protect national security information. And there are many complications beyond those mentioned by Clinton. For example, experts across the political spectrum long have agreed that the “range of classified materials is so extensive” due partly to rampant over-classification.³ Yet commentators disagree over the bearing, if any, that over-classification should have on the treatment accorded persons who leak classified information.⁴ More so, classified information releases can take wildly varying forms, ranging from classic espionage or spying, to blowing the whistle on illegal government programs to the press, to press publication of such information. The 1917 Espionage Act, which is the government’s most significant tool for prosecuting unauthorized classified information releases, effectively lumps these three very different types of offenses together. While this and other aspects of the Espionage Act have been widely criticized on Capitol Hill and elsewhere, the provisions of the Act usually invoked to prosecute classified information leaks have remained largely unchanged since 1917. Indeed, those provisions “predate not only technological advancements that render many of the statute’s distinctions superfluous, but also the very concept of ‘classification’ that undergirds national security information today.”⁵

Into this messy but deeply important state of affairs comes *Whistleblowers, Leaks, and the Media: The First Amendment and National Security* (hereinafter *WL&M*), a collection of essays published by The American Bar Association. *WL&M* is co-edited by Timothy J. McNulty, a journalist and a lecturer at Northwestern’s Medill School who also co-directs the school’s National Security Journalism Initiative, Paul Rosenzweig, a homeland security consultant and former official in the Department of Homeland Security, and Ellen Shearer, a journalist and professor at the Medill School and a co-director of the school’s National Security Journalism Initiative. This impressive group of editors has assembled an equally distinguished collection of authors. Among the authors are attorneys and consultants from private, governmental, and non-profit practices whose fields include media law and policy, national security law and policy, information law and policy, and whistleblower defense law and policy. The authors also include national security journalists and professors of media, law, and national security.

WL&M begins with an introductory chapter by the editors. Thirteen substantive chapters follow, each comprising an essay by a different author or pair of co-authors. The chapters cover a dizzying array of topics. They include: the statutory and administrative tools available to investigate and punish leakers and the long and tortured history of those tools; free speech and free press issues raised by anti-leak investigations and punishments; federal whistleblower protection laws and policies; the processes and legal authorities that comprise the classification system; the federal law governing the use of classified information in criminal prosecutions; a comparative study of law and policy trends on information access and whistleblower protection in several nations with an emphasis on the United Kingdom; and the opportunities and challenges that the era of “Big Data” and “Smart Data” pose for journalists and law enforcement officials alike.

As this topic summary suggests, the essays in *WL&M* convey a great deal of foundational information. In this, the book easily fulfills the mission that the editors set out for themselves in the introductory chapter: “to provide an easily accessible introduction to the law and policy relating to national security, whistleblowers, and leaks to the media.”⁶ Yet *WL&M* should appeal not just to newcomers, but also to experts in the field of national security information law and policy. The book’s sheer breadth of coverage ensures that even experts will discover new informational nooks and crannies within the larger field.

Beyond the wealth of information offered, *WL&M* is filled with thoughtful and diverse views on law and policy. For example, authors in several different chapters evaluate the policy wisdom and constitutional validity of existing and proposed anti-leak statutes and investigative tools. More fundamentally, a number of authors consider the value and dangers of leaking classified information. The last two chapters address these basic normative questions most directly. They are called, respectively, “The Consequences of Leaks: The Erosion of Security,” and “The Consequences of Leaks: Greater Transparency.”

In putting these core normative questions front and center, the final chapters bring *WL&M* full circle. The book’s editors acknowledged the centrality of these questions in their introductory chapter, observing that “[w]e all want to be safe,” and “[w]e all want a government that is transparent and accountable.”⁷ The deep difficulty, and the project of *WL&M*, is in how to reconcile these desires. Whatever else we do to strike that balance, it is essential, in a democracy, that we talk about it widely and often. In this, the editors are right on the mark when they say that “at its core, the discussion and even tensions in this

book are emblematic of the value of competing ideas—legal analyses of a living, breathing aspect of a functioning democracy.”⁸

NOTES

1. Statement by the President on the Veto of HR 4392, Nov. 6, 2000. The bill would have criminalized all knowing leaks or attempted leaks of classified information from persons authorized to receive the information to persons without such authorization. Intelligence Authorization Act for Fiscal Year 2001, 106th Cong. § 303 (2000), <https://www.govtrack.us/congress/bills/106/hr4392>.
2. Statement by the President, *supra* n. See also Edward R. McNicholas, *U.S. Efforts to Change Leak Laws*, in Paul Rosenzweig, Timothy J. McNulty, and Ellen Shearer (eds) *Whistleblowers, Leaks, and the Media: The First Amendment and National Security* 49–51 (American Bar Association, 2014) (discussing proposed bill and Clinton’s veto of it).
3. See, for example, Heidi Kitrosser, *Reclaiming Accountability* 62–63 (The University of Chicago Press, 2015) (citing sources).
4. Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Development and a Closer Look at the Feasibility of Protecting Leakers*, 56 *Wm & Mary L Rev* 1221, 1239–40, 1247 (2015) (citing competing views).
5. Stephen I. Vladeck, *Prosecuting Leaks Under U.S. Law*, in Rosenzweig, et al., (eds) *Whistleblowers, Leaks, and the Media* 30–35 (cited in 2n).
6. Paul Rosenzweig, Timothy J. McNulty, and Ellen Shearer, *The Fundamental Tension: An Introduction*, in Rosenzweig, et al., (eds) *Whistleblowers, Leaks, and the Media* 8 (cited in 2n).
7. *Ibid.*, 2n.
8. *Ibid.*