

Japan's 2013 State Secrecy Act -- The Abe Administration's Threat to News Reporting 2013年日本の特定秘密保護法 安部政権、報道に対する脅し

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The "Specially Designated Secrets Protection Law"¹ poses a severe threat to news reporting and press freedom in Japan. Government officials have not shied away from intimidating reporters in the past. The new law will grant them greater power to do so. Passage of the law fulfills a longstanding government objective to gain additional leverage over the news media. The new law could have a withering effect on news reporting and thus on the people's knowledge of the actions of their government.

Precedents

In 2009 a highly respected reporter for Japan's primary news wire service, Ohta Masakatsu, conducted a series of interviews with retired senior officials of the Ministry of Foreign Affairs concerning "secret agreements" (*mitsuyaku*) allowing the entry of U.S. naval vessels into Japanese ports and waters with nuclear weapons aboard. This is a matter of intense public interest, not only due to implications for Japan's national security but also because of the longstanding government policy of denial. Ohta's work confirmed that the government had lied to the Japanese people about nuclear weapons policy for decades.

After his article based on the interviews appeared, Ohta writes, "I was called in by a senior public official. I was told that even though my interviews were with retired officials, by questioning them and publishing their comments, I had committed the crime of

soliciting (*kyōsa*) a violation of the National Public Employees Law."² The officials' duty to maintain state secrets continued even after they left government service. If the reporter had not prodded them to talk, they might have remained silent.

Ohta was not prosecuted, but he still feels the unease and perhaps fear that followed such a direct threat from a high government official.

Like every Japanese journalist, Ohta was well aware of the infamous Nishiyama case in which another reporter for a mainstream news organization was arrested, tried, and convicted for a similar "crime." *Mainichi Shimbun* reporter Nishiyama Takichi was arrested in April 1972 and charged with improperly soliciting the leak of a government secret.³ Nishiyama had received copies of a series of cables showing that when they negotiated the final terms of the return of Okinawa to Japanese control, American and Japanese representatives secretly agreed that Japan would shoulder approximately \$ 5 million in compensation for property damage. This disclosure directly contradicted the government's declared position that the United States was responsible for these payments.⁴

Citing the free press guarantee of Article 21 of Japan's Constitution, Tokyo District Court found him not guilty. (The foreign ministry official who leaked the information to Nishiyama was found guilty of violating her duty to protect state secrets as a government employee.) Nishiyama's acquittal, however, was overturned and on May 31, 1978, the Supreme

Court of Japan upheld the guilty verdict.⁵ The evidence showed that the reporter had taken advantage of a sexual liaison with the official in order to persuade her to provide the information. The Supreme Court decided that he had violated the fundamental rights of the official and his action was therefore outside the scope of the constitutionally protected freedom of the press. In the court's words, "Reporters do not hold the privilege to improperly violate the rights and freedoms of another in the name of news reporting."

In Japan there is no doubt. Reporters can be put in jail if prosecutors and courts decide their methods are inappropriate. The Nishiyama and Ohta stories show that the government already wielded significant power to intimidate reporters *prior to* passage of the 2013 secrecy law. Now it has more.

How the SDS Law Affects News Reporters - the Threat of Criminal Prosecution

Blocking Information at the Source

The 2013 state secrecy law will affect news reporting in two fundamental ways. First, inside information sources will be harder to find. Government officials and others who leak information labeled secret will risk prosecution and up to ten years in jail. They will think very carefully before sharing any potentially designated information with reporters. Second, news reporters themselves will face prosecution and up to five years in prison if government authorities judge their methods inappropriate. When they do make that big scoop, reporters and their employers will be obliged to weigh the risk of prosecution before they publish. Self-censorship is inevitable.

Article 23 of the Specially Designated Secrets Protection Law provides that government officials and authorized private contractors who leak specially designated secrets are liable for up to 10 years imprisonment and a maximum 10,000,000 yen fine.⁶ This is a very sharp

increase over pre-existing law, which mandates a maximum penalty of one year imprisonment.⁷

Declaring that Japan is a "haven for spies," rightwing politicians have loudly demanded the adoption of an "anti-spy law" for decades. In 2013 they produced something very different and far more menacing to Japan's democratic institutions. The 2013 law is not an "anti-spy law" which penalizes leaks of national security information to enemy agents; it is an anti-whistleblower law. This law penalizes leaks of information to anyone, including news reporters and anyone else without the required security clearance. Moreover, the 2013 law extends potential secrecy coverage to subject matter beyond the scope of national security that might be of interest to real spies.⁸

The law does not excuse whistleblowers who uncover corruption, threats to public health or the environment, or otherwise act to serve a public interest.⁹ Unauthorized disclosure of any material labeled "specially designated secret," for whatever reason, is a violation of the law. Moreover, in future prosecutions, the government will not be required to show that the release caused any actual injury to a government interest. The authority to prosecute even trivial matters is a clear mark of arbitrary power.

The Direct Threat Against Reporters

Article 25 of the Law also threatens prosecution of anyone accused of "soliciting" (or abetting, *kyōsa*) or "instigating" (or coercing, *sendō*) a leak or conspiring to cause the leak of designated information. These offenses are subject to a maximum five-year prison term. Potential violators of this rule include news reporters, actual foreign spies, members of the Diet or anyone else who employs some inappropriate means to persuade officials to release designated information.

The 1970s prosecution of Nishiyama Takichi is instructive. The secret information revealed as

the result of Nishiyama's work did not cause injury to Japan's national security or any other significant public interest. It *did* cause great embarrassment to the Sato Administration because it exposed government lies. In a democratic society, this is precisely the kind of information we rely on investigative journalists to uncover. If Japan's news media had more aggressively pursued the dangers created by the "nuclear power village," the word "Fukushima" might not have become global shorthand for nuclear meltdown.

In the Nishiyama case, Japan's government was caught in a lie. It responded with the most lethal weapon at its disposal: criminal prosecution. Democratic constitutions guarantee freedom of the press. In order to succeed, criminal prosecutions must overcome a strong presumption that the actions of reporters are protected.¹⁰

Nishiyama was charged with violation of Article 111 of the National Public Employees Law, which prohibits improper inducement of the leak of secret information by a government official. He was subject to a maximum penalty of one year in prison and a fine of 30,000 yen.¹¹ With passage of the "Specially Designated Secrets Act" in December 2013, the potential threat confronting news reporters has increased dramatically. It is this threat to freedom of the press and more broadly to people's right to know about government action that is the reason the secrecy bill was opposed by so many academics and organizations that seek to protect fundamental rights.

Opposition

The secrecy bill and the law itself have been opposed by numerous critics inside Japan and out. Perhaps the most damaging criticism has come from United Nations experts, including Frank Larue, the UN Rapporteur for Freedom of Speech.¹² Mr. Larue released a succinct summary of the central problem: "The draft bill

not only appears to establish very broad and vague grounds for secrecy but also includes serious threats to whistle-blowers and even journalists reporting on secrets."¹³ Mr. Larue stressed that government officials who expose wrongdoing should be protected and called for robust protection of journalists.¹⁴



November 2013 demonstrator opposes the secrecy bill

More generally, critics among international NGOs like Human Rights Watch¹⁵ and the Open Society Justice Initiative¹⁶ have pointed out specific shortcomings in the law, such as the lack of an independent review body and a "public interest override" that would protect whistleblowers who disclose information of great value to the public. The basic position of foreign critics is that the bill fails to meet recognized international standards, but many suggest that this could be fixed with a series of textual revisions.

The response of Japanese critics has been far more visceral, grounded as much in simple fear as in legal analysis. Formal declarations against the bill were published by numerous citizen groups, including Japan's national bar association,¹⁷ the Japan Civil Liberties Union (JCLU),¹⁸ and ad hoc groups of writers and intellectuals. Of special importance, a broad

attack was delivered by a group including hundreds of constitutional law professors. They were led by an elite core of 24 scholars that includes many of the most respected experts in Japan.¹⁹ A separate statement was issued by experts in the law of crimes and criminal procedure.²⁰ There were many more formal declarations of opposition. Meanwhile, ordinary people expressed opposition to the secrecy bill with numerous protest marches in Japan and around the country.

For the national bar association and the JCLU, among others, the starting point is that there was no need for this law at all. They say that pre-existing Japanese law was sufficient to protect state secrets. They foresee abuse of the new secrecy power through expansive interpretation of vague statutory terms and threats of criminal prosecution. They fear threats to fundamental rights, especially the chilling effect on journalism. Constitutional law professors argue that the broad secrecy powers conflict with the fundamental principles of Japan's Constitution. Like the national bar association and the JCLU, they oppose the law in its entirety.

If one side of the coin reads "secrecy," the other side is "transparency." Pointing to the weakness of Japan's information disclosure law and the general lack of transparency in government policymaking, many Japanese critics say that Japan's most pressing need is more transparency, not greater secrecy power.



December 5, 2013 Tokyo rally opposes the state secrets law

Japan's News Media as a "Watchdog"

Freedom of the press is guaranteed by the Constitution. Japan's Supreme Court has explained the constitutional role of the press as serving the people's "right to know".²¹ There is no doubt that the Japanese people rely very heavily on news organizations to learn of government actions. Japan's news industry has formally recognized its constitutional role:

[T]he public's right to know is a universal principle that sustains a democratic society. That right cannot be ensured without the existence of media, operating with the guarantee of freedom of speech and expression, while being totally committed to a high moral standard and fully independent.²²

But long before the appearance of the "Specially Designated Secrets Protection Law," Japan's mainstream news organizations had acquired a reputation for excessive reliance on government news sources and hesitancy to criticize senior officials. Foreign reporters assigned to Tokyo routinely express shock and disappointment at the use of press clubs (*kisha kurabu*) and other measures to manage the news.²³ According to Washington-based Freedom House, "major media outlets maintain cozy relationships with bureaucrats and politicians, resulting in an arrangement under which journalists are granted access in exchange for refraining from writing critical stories."²⁴ The author of a book-length study of Japan's mainstream news industry writes there is a "symbiotic relationship" between news organizations and their sources in which political elites shape the news and the press responds. She describes this as the "process by

which the flow of information in Japanese society is controlled and regulated."²⁵

Japanese media law experts like Professors Tajima Yasuhiko of Sophia University and Yamada Kenta of Senshu University believe the secrecy law will make this situation much worse. They see the 2013 secrecy law as an information control (*jōhō tōsei*) law that provides unlimited power for bureaucrats to conceal information as they please. In the new world of this secrecy law, Tajima writes that the people will only be able to learn the information government bureaucrats decide to give them. The constitutional "right to know" and the information disclosure law will operate, he says, only within the boundaries drawn by government bureaucrats.

"For news organizations and journalism," he writes, "the secrecy law imprints a stamp of approval on 'press release journalism' (*happyō hōdō*) the practice whereby they publish as news the information released by bureaucrats, as is, without assessment or commentary. This will accelerate the transformation of news organizations into public relations agencies of the government."²⁶

In evaluating the secrecy law, Professor Yamada suggests that we first consider the very weak state of the right to know in Japan. His comments resonate with those of foreign experts. For Yamada, the secrecy law reinforces and extends an existing structure in which the government already controls information flows and conceals critical information from the Japanese people. He writes that "[U]nder the heading of protecting the nation, officials will render the 2001 information disclosure law meaningless and will ignore the general rule that government information belongs to the people."²⁷

Does Qualifying Language Actually Protect Reporters?

Leaders of LDP coalition partner Komeito

requested changes to the original government draft intended to reduce the secrecy law's impact on news reporting. But their input proved to be of questionable value. The Komeito request led to the somewhat fantastic Article 22 (1), which reads, "[I]n the application of this law, there shall be no expanded interpretation that would lead to improper violation of the fundamental human rights of the people, and due care shall be shown for freedom of newsgathering and the press which contribute to the people's right to know."

Anyone who has studied law in Japan knows that rights to freedom of speech and the press are guaranteed by Constitution Article 21 and that it is the Constitution and *not* statutes passed by the Diet that constitutes the supreme law of the land.²⁸ Commenting on this language, the president of Japan's national bar association scoffed that "Freedom of reporting has already been prescribed so including that line again doesn't have any meaning."²⁹

The bigger problem with Article 22(1) is that it appears to actually undercut constitutional protection. Although the Constitution *guarantees* freedom of the press, the Komeito "improvement" to the original LDP proposal would ratchet down this protection to the simple requirement that state authorities show *due care* (*hairyo*) for such fundamental rights as they go about their business.³⁰

Article 22 (2) provides a second, somewhat more plausible safe harbor for investigative journalists. Key wording declares that "to the extent the newsgathering activities of persons engaged in the publishing or reporting industries exclusively seek to serve the public interest and do not violate the law or employ extremely inappropriate means" those newsgathering activities (*shuzai kōi*) will be deemed "legitimate" (*seitō na gyōmu*).

During Diet debate, the expression "extremely inappropriate means" became a focus of attention. How should we define this? Minister

Mori Masako, the government manager of Diet debate on the secrecy bill, cited the Nishiyama case as the prime example. This is little help. The meanings of "extremely inappropriate means" and other unclear expressions will be determined not by a government spokesperson like Minister Mori, but by future prosecutors who consider potential actions against reporters, and by the courts. Vague expressions like "extremely inappropriate means" constitute the proverbial "loaded gun" waiting to be used. There is no way to predict how zealous prosecutors may use this weapon.

Future news executives, lawyers and courts will also give careful consideration to other vague elements of Article 22(2) of the secrecy law. For example, they will consider the term "exclusively in the public interest." Prosecutors and courts may insist on a standard for the "public interest" which is quite different from the one understood by news reporters and ordinary people. The term "publishing and reporting industries" appears to exclude freelance writers, members of civil society organizations, bloggers and others who are not employed by traditional entities. This limitation seems to follow the precedent of Japan's press clubs and other exclusionary organizations. It surely excludes individual citizens who decide to make investigations of their own. Finally, most disturbing of all, the exclusion of newsgathering activities that "violate the law" suggests the authors of the secrecy law believe that *any* statute passed by the Diet has the power to strip reporters of constitutional protection.

Conclusion

The range of information covered by the Specially Designated Secrets Protection Law is broad. Reporters and publishers will have to tread lightly whenever they address issues related to national defense, diplomacy, anti-terrorism, and anti-espionage matters. And the potential scope of all of these areas and the

information labeled secret will be determined by government bureaucrats themselves. Reporters may have a hard time discerning the invisible lines drawn by bureaucrats. When warned, they will be advised to pull back. This is a weak formula for protection of a free press.

For more than five decades, the Liberal Democratic Party has been on record demanding constitutional change that will dilute protections for freedom of speech and of the press and other individual rights. Prime Minister Abe is an especially committed advocate of increased state power. He recently delivered a reminder of his four-square stance. At a Lower House Budget Committee session on February 3, Abe said that "the idea that the Constitution is intended to limit the power of the state is an old-fashioned view held at the time when a monarch was governing the country with absolute power."³¹

Constitutional revisions proposed by the LDP in 2012 specifically target freedom of speech and of the press.³² Article 21 of Japan's present Constitution makes the simple, powerful declaration that "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed." The LDP would add this proviso: "Notwithstanding the foregoing, engaging in activities with the purpose of damaging the public interest or public order, or associating with others for such purposes, shall not be recognized." The definition of "public interest or public order" will be left to government officials.

The fear of the 2013 secrecy law expressed by Japan's lawyers and constitutional scholars is rooted in their understanding of LDP hostility toward free speech and fundamental rights. Professor Tajima predicts dire effects from the Specially Designated Secrets Protection Law. He writes that public discourse on issues touched by the secrecy law will atrophy; that the law will "root out and destroy" fundamental values of democracy.³³ Professor Tajima writes

with the knowledge that this is the very goal embodied in the LDP proposals for constitutional change.

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Notes

* Unless otherwise indicated, all translations from Japanese are by the author.

¹ This statute, the *tokutei himitsu no hogo ni kansuru hōritsu*, was passed into law by the Diet on December 6, 2013.

² Ohta Masakatsu, *tokutei himitsu hogo hōan, janarizumu no kiki da* ("The Specially Designated Secrets Protection Law - This is a Crisis for Journalism") *Kochi Shimbun*, Nov. 7, 2013 (distributed by Kyodo News).

³ He was charged under Article 111 of the National Government Employees Law, which prohibits instigating or conspiring to produce a leak of secret information. An English translation of the statute (The National Public Service Act, Law No. 120 of 1947) is available [here](#) as a PDF.

⁴ Distracted by the sensational aspects of the case, news organizations did a poor job of focusing on the most important issue. Nishiyama had uncovered information of great value. He showed that the government was lying about the terms of the reversion of Okinawa from the US to Japan. Many years would pass before we would learn that Nishiyama's disclosure of a payment of approximately \$ 5 million was only the tip of a much larger iceberg. We now know that the U.S. demanded and received at least \$ 650 million in connection with the reversion. This was all concealed from the Japanese people. For details, see Gavan McCormack and Satoko Norimatsu, *Resistant Islands - Okinawa Confronts Japan and the United States* (Rowman and Littlefield, 2012), especially pp. 58-62.

⁵ Supreme Court, First Petty Bench, Decision of

May 31, 1978.

⁶ Sandra Coliver shows that, with the important exception of the United States, no major democracies impose such heavy penalties for secrecy violations. See "[US prosecution of Snowden and Manning exceeds international norms](#)," *The Guardian*, June 26, 2013.

⁷ See National Government Employees Law, note 3 *supra*. There are other specialized statutes that mandate greater penalties. Two statutes passed in the 1950's provide penalties of up to ten years in prison related to military secrets received from the United States. 2001 revisions to the Self-Defense Law impose maximum imprisonment of five years per violation for leaks of "defense secrets" (*bōei himitsu*) designated by authority of the Minister of Defense.

⁸ Article 3 of the law defines the secrecy power: "Heads of administrative agencies shall designate as 'Specially Designated Secrets' non-public information related to the work of their agencies which concerns matters listed in the appendix and is especially necessary to keep secret because release would bring the risk of severe damage to national security." The appendix lists four broad categories of information: defense, international relations, terrorism countermeasures, and spying on behalf of a foreign power (the statute uses the term "prevention of especially dangerous activities" for this category). These categories are not defined; instead they are described with lists of examples of the types of information covered. The scope of all categories will be decided by government officials.

⁹ Principles 37 - 47 of the "[The Global Principles on National Security and the Right to Information](#)" ("Tshwane Principles") provide a series of rules to protect "public interest disclosures by public personnel." There is no such concept in the Specially Designated

Secrets Protection Law.

¹⁰ American courts have long applied a "strict scrutiny" standard when examining government action that causes a restriction on fundamental rights. The courts of other major democracies have articulated a similar high standard of protection commonly known as the proportionality standard. The Supreme Court of Japan has yet to articulate a comparable rule of law to address such cases. See Craig Martin, "[The Japanese Constitution As Law and the Legitimacy of the Supreme Court's Constitutional Decisions: A Response to Matsui](#)," 88 *Wash. L. Rev.* 1527 (2011), and Lawrence Repeta, "Restricting Fundamental Rights in Japan - the Role of the Supreme Court," in Jeff Kingston (ed.) *Critical Issues in Contemporary Japan* (Routledge Curzon, 2013).

¹¹ The actual penalty issued by the Supreme Court was a suspended sentence of four months in prison.

¹² "[Japan: 'Special Secrets Bill threatens transparency' - UN independent experts](#)". See also [this article](#) at Japan Times.

¹³ Mr. Larue drew special attention to the penalties established by the law for the release of information, stressing that "government officials who, in good faith, release confidential information on violations of the law, or wrongdoing by public bodies, should be protected against legal sanctions." "Other individuals, including journalists and civil society representatives, who receive or disseminate classified information because they believe it is in the public interest, should also not be liable to any sanction unless they put individuals in an imminent situation of serious harm," he said. ([Click here for full text.](#))

¹⁴ *Id.*

¹⁵ "[Japan: Amend 'Special Secrets' Bill to Protect Public Interest -- Overbroad Power to Classify Secrets, Criminalize Leakers](#),"

November 25, 2013.

¹⁶ "Japan's New State Secrecy Law Threatens Public Accountability," December 6, 2013, See also, "Statement on the Japanese Government's 'Designated Secrets Bill' by John Ralston Saul, PEN International President (nd).

¹⁷ The Japan Federation of Bar Associations expressed "strong opposition" to the bill in opinions issued on September 12 and again on September 26. ([Click here for full text.](#))

¹⁸ The JCLU was founded in 1947, the year Japan's Constitution took effect. It first announced formal opposition to the secrecy bill on September 17 and followed by sponsoring a series of well-attended "emergency gatherings" (*kinkyu shukai*) featuring writers and activists who spoke out against bill.

¹⁹ The declaration appeared October 11. By October 29, it had attracted 265 signatures, ([Link here](#)). See, [秘密保護法案「憲法原理踏みにじる」 学者らが反対声明 \(朝日新聞\)](#), and [秘密保護法案 205人反対 憲法の3原則侵害 \(東京新聞\)](#)

²⁰ 秘密保護法の制定に反対する刑事法研究者の声明は以下に掲載されています。 ([For a PDF click here.](#))

²¹ See the Court's decision in the "Hakata Film Case," Decision of the Supreme Court, November 26, 1969 (Grand Bench). For a description of the Hakata case in English, see Lawrence W. Beer, *Freedom of Expression in Japan* (Kodansha, 1984), at 296.

²² This is part of a much longer declaration of the key characteristics and duties of a free press. See: [The Canon of Journalism](#) (*sic*) (Adopted on June 21, 2000).

²³ For a recent overview of Japan's news media and practices that enable government agencies and other powerful institutions to manage the news, see David McNeill, "Japan's Contemporary Media," in Jeff Kingston (ed.) *Critical Issues in Contemporary Japan* (Routledge, 2013).

²⁴ Freedom House, "[2012 Freedom of the Press Data.](#)"

²⁵ Laurie Anne Freeman, *Closing the Shop - Information Cartels and Japan's Mass Media* (Princeton University Press, 2000), pp.4-5. For a thorough analysis of numerous factors that restrain Japan's mainstream news media from criticizing the government, see Kenta Yamada, *3/11 to media ("3/11 and the Media")*, esp. 45-52, (Transview, 2013) (Japanese only).

²⁶ Yasuhiko Tajima, *minshushugi no dodai ga kuzusareru* ("The foundations of democracy will be destroyed - the future of information and discourse in Japan") *Sekai*, Dec. 2013, p. 81.

²⁷ Kenta Yamada, *seifu no impei kōzō to shimin to no kairi* ("The Structure of Government Cover-ups and Its Divergence from the People") *Sekai*, Dec. 2013, p. 90.

²⁸ Constitution Article 98 declares that the Constitution, not laws passed by the Diet, is the supreme law of Japan. Article 81 grants to the Supreme Court the final authority to determine the constitutionality of "any law, order, regulation of official act."

²⁹ "[Japanese Public Cries Foul Over Secrets Protection Bill](#)," WSJ.com

³⁰ Japan's Supreme Court has a very poor record as a defender of individual rights. See, e.g., Shigenori Matsui, "Why Is the Japanese Supreme Court So Conservative?" 88 Wash. L. Rev. 1375 (2011), and Lawrence Repeta, "Restricting Fundamental Rights in Japan - the Role of the Supreme Court," in Jeff Kingston (ed.) *Critical Issues in Contemporary Japan* (Routledge Curzon, 2013).

³¹ [Lawyer Group Charges Abe with Constitutional Ignorance](#) (English translation by the Japan Times.)

³² See generally Lawrence Repeta, "Japan's

Democracy at Risk - The LDP's Ten Most Dangerous Proposals for Constitutional Change," *The Asia-Pacific Journal*, Vol. 11, Issue 28, No. 3, July 15, 2013.

³³ Tajima, supra note 23.