

Raising the Wall of Secrecy in Japan

– the State Secrecy Law of 2013

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I. Introduction

Japan's national Diet adopted a comprehensive state secrecy law on December 6, 2013.¹ Expanded state secrecy power is emblematic of the broad political agenda of Prime Minister Shinzo Abe and his allies. The central theme of their proposals for constitutional revision is increased state authority and reduced protection for individual rights. By granting the state essentially unreviewable power to remove information from public view, the new secrecy law represents a major step in achieving this goal.

The Abe Cabinet first published a summary of its proposed state secrecy bill on September 3, 2013. This summary and the secrecy bill that followed were roundly condemned by news organizations, lawyers and human rights groups, ad hoc groups of intellectuals and other concerned citizens. Throughout the three-month period preceding Diet passage, major newspapers and other media organizations carried articles and interviews with prominent individuals attacking the bill nearly every day. The bill was also sharply criticized by international organizations including Human Rights Watch², the International PEN Club,³ the Open Society Justice Initiative⁴ and others. It was even attacked in statements by two different United Nations rapporteurs.⁵ Critics complained that the bill would grant the state too much power to conceal its actions.

But Prime Minister Abe and his colleagues stood firm. He and other leaders of Japan's Liberal Democratic Party (LDP) have sought expanded government secrecy powers for at least three decades. When they secured control of stable majorities in both houses of the Diet in 2013, the historic moment arrived. Their commitment was reinforced by the constant support

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1 "Specially Designated Secrets Protection Act"

2 "Japan: Amend 'Special Secrets' Bill to Protect Public Interest—Overbroad Power to Classify Secrets, Criminalize Leakers," November 25, 2013, <http://www.hrw.org/news/2013/11/25/japan-amend-special-secrets-bill-protect-public-interest>

3 "Statement on the Japanese Government's 'Designated Secrets Bill' by John Ralston Saul, PEN International President (nd), <http://www.pen-international.org/newsitems/statement-on-the-japanese-governments-designated-secrets-bill-by-john-ralston-saul-pen-international-president/>

4 "Japan's New State Secrecy Law Threatens Public Accountability," December 6, 2013, <http://www.opensocietyfoundations.org/press-releases/japans-new-state-secrecy-law-threatens-public-accountability>

5 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14017&LangID=E>.
<http://www.japantimes.co.jp/news/2013/12/03/national/u-n-human-rights-chief-joins-chorus-urging-secrecy-law-safeguards/#.UtJHyGQW1Kk>

of the United States government, which has long demanded that Japan adopt tighter secrecy protections.

The new law grants all major government agencies the power to designate a broad range of information as secret and imposes heavy criminal penalties on government officials and others who leak such information and on journalists and others who use “inappropriate” means to persuade them to do so.

This article will examine the expected operation of the new law, the vigorous debate that led to its adoption, and the likely impacts the new secrecy regime will have on the people’s right to know about the actions of government.

II. Overview of the “Specially Designated Secrets” Protection Law

II. 1. Authority

Article 3 provides that the heads of administrative agencies hold the designation power. The work of selecting information to be classified secret may be delegated to subordinates, however agency heads will hold final authority. Article 2 prescribes the list of agency heads with this power. They include all Cabinet ministers and the heads of other significant government agencies, including the Imperial Household Agency, the National Board of Audit and others. It appears to include all ministries and other major administrative bodies. Agency heads also have the power to declassify information. (Article 4(7))

II. 2. Range of Information Covered

Article 3 defines the secrecy power: “Heads of administrative agencies shall designate as ‘Specially Designated Secrets’ (*tokutei himitsu*) 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 (*rōei*) would bring the risk of severe damage to national security.”⁶ Thus, the statute appears to set out four separate requirements for designated information: 1) it must be non-public, 2) related to the work of the designating agency,⁷ 3) any release must present a risk of severe damage to national security, and 4) the information must come within one of the categories listed in the “appendix.”

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. “Defense” is accompanied by the longest list, with ten subcategories. The real scope of each sub-category will be determined by administrative regulation and practice. The apparent intention of the law’s drafters was to provide administrative agencies with maximum flexibility when selecting specific items of information to designate as secret. (The original list proposed

6 This language is followed by a proviso concerning the application of standards set by the Prime Minister after considering the opinions of an advisory committee.

7 This appears to mean, for example, that the Minister of Agriculture has no authority to designate information concerning the operation of weapons systems aboard military aircraft, while the Minister of Defense has no authority to designate information concerning potentially dangerous chemicals used by farmers.

by the Cabinet was actually adorned with several “et ceteras” to underscore the potentially broad scope of secret information; they were deleted before passage by the House of Representatives on November 26.)

II. 3 Topics of Special Interest

Speculation concerning controversial issues that may be pulled under the specially designated secret blanket has focused on three topics: the Fukushima nuclear incident, conflict over U.S. military base expansion in Okinawa, and activities of the public security police.⁸

Many have expressed the fear that the new secrecy power will be used to conceal information concerning the ongoing nuclear disaster at Fukushima. In October, the Fukushima Prefectural Assembly unanimously adopted a resolution opposing the secrecy bill. This action was especially pointed because ruling coalition party members (LDP and Komeito) hold a majority of assembly seats.⁹ In a television interview broadcast on September 18, an assistant to the Prime Minister named Yosuke Isozaki declared that information related to the ongoing nuclear disaster would not be declared secret under the law.¹⁰ After further consideration, however, the government appeared to change its position. According to a wire service report, “Masako Mori, state minister in charge of the bill, said a security plan at a nuclear power plant could be labeled as a special secret, but not details about the spread of radioactive substances.”¹¹

Another area of special concern is the potential application to police investigations. Japan’s notorious public security police (*kōan keisatsu*) exercise broad powers in investigations of potential terrorists, political activists and other perceived threats to the state. A 2010 leak of police documents showed random surveillance of Muslim residents, compilation of personal information and lists of “terrorist suspects.”¹² Such documents will surely come within the ambit of the new secrecy law. Accordingly, the leaker and possibly news reporters who uncovered this material are potential candidates for prosecution. Another well-known example of abuse of this power concerns peace activists arrested and detained for extended periods as the Koizumi administration deployed Self-Defense Forces to Iraq in 2004. The term “terrorism” is not defined in the law, but at least one very powerful LDP politician has publicly expressed a very broad understanding of the term.¹³

One of the most sensitive topics concerns potential application of the new secrecy power to conceal details of U.S. military operations and proposed base expansion in Okinawa. As the primary home of U.S. military forces in Japan, Okinawa is the natural repository for a great volume of legitimate military secrets. However, there is a well-documented history of

8 Cabinet Minister Mori has stated that information concerning other subjects of great public interest, such as the Trans-Pacific Partnership (TPP) economic agreement currently being negotiated behind closed doors with the United States and other countries, could be designated as secrets.

9 *Tokyo Shimbun*, Nov. 10, p. 3.

10 *Isozaki shushō hosakan, tokutei himitsu hogo hōan “genpatsu jōhō wa taishō narazu”* (Prime Minister Assistant Isozaki, Specially Designated Secrets SDS, “nuclear power information won’t be covered”) 2013/9/19 1:32 <http://www.nikkei.com/article/DGXNZO59891960Z10C13A9PP8000/>

11 “Japan’s lower house passes controversial secrecy law bill,” *Kyodo*, Nov. 26, 2013. <http://english.kyodonews.jp/news/2013/11/258532.html>

12 See Shojiro Sakaguchi, “Japan’s Designated Secrets Protection Law Would Foreclose Criticisms of the Government,” at <http://www.japanfocus.org/-Sakaguchi-Shojiro/4051> and David McNeill, “Muslims in shock over police “terror” leak,” *Japan Times*, Nov. 9, 2010.

13 See text accompanying n.82, *infra*.

consistent government deception over critical aspects of the U.S. military presence, including secret agreements (*mitsuyaku*) to conceal large payments to the U.S. government related to the reversion of Okinawa to Japan in 1972 and the introduction of nuclear weapons into Okinawa contrary to repeated government denials and Japan's "three non-nuclear principles."¹⁴ Among other problems related to the U.S. military presence, Okinawans have recently learned of the dumping of dioxins and other harmful substances near military bases.¹⁵ Regarding the highly controversial plan to build a new 1800 meter US military runway into the pristine subtropical Oura Bay in northern Okinawa, Tokyo Shimbun reporters recently discovered that Japan's Ministry of Defense concealed information concerning the presence of endangered species near the proposed construction site.¹⁶ Okinawans have vigorously opposed this project¹⁷ and have good reason to suspect that information concerning base expansion will be concealed behind the new veil of "specially designated secrets."

II. 4. Standards

Article 18 requires the government to adopt standards addressing classification, declassification, and security clearances related to designated secrets. The goal is to promote consistent application among administrative agencies. The Prime Minister is empowered to set these standards but in doing so he is required to consult an advisory committee composed of individuals knowledgeable on the issues of "the protection of information concerning national security, the disclosure of information held by administrative agencies, and the management of public records."¹⁸ The Prime Minister is also required to submit an annual report to this committee and consider its recommendations.¹⁹ The first meeting of this "conference to review information retention" (*jōhō hozon shimon kaigi*) was held on January 17, 2014. The Board was composed of seven non-government members. Critics complain that only one of the seven is known to have opposed the bill.²⁰ The chairperson is Tsuneo Watanabe, the 87-year old head of the conservative Yomiuri Group, the world's biggest newspaper publisher. Although open government advocates are likely to see the creation of this body as a positive step, they will also stress that it is advisory only and that it has no authority to issue binding standards or to review or recommend action on specific cases.²¹ Presumably, the Prime Minister could request such action, but this is not mentioned in the text of the law.

The Prime Minister is further empowered to review the exercise of the secrecy power by administrative agencies and to order improvements. (*kaizen subeki mune no shiji*) (Article

14 For details, see Gavan McCormack and Satoko Norimatsu, *Resistant Islands – Okinawa Confronts Japan and the United States* (Rowman and Littlefield, 2012), esp. pp. 55–62.

15 See, e.g., Jon Mitchell, "Okinawa Dumpsite Offers Proof of Agent Orange: Experts Say," *The Asia-Pacific Journal*, Issue 38, No. 1, Sept. 23, 2013, at www.japanfocus.org/-Jon-Mitchell/3998, and other writings of Jon Mitchell on this subject.

16 *Tokyo Shimbun*, Dec. 22, 2013.

17 See Gavan McCormack, "The Front Line in the Struggle for Democracy in Japan – Nago City, Okinawa," *The Asia-Pacific Journal*, Vol. 12, Issue 4, No. 3, January 27, 2014, <http://www.japanfocus.org/-Gavan-McCormack/4068> and McCormack and Norimatsu, *supra* n. 14.

18 Art. 18(2).

19 Art. 18(3).

20 This appointee is Tsutomu Shimizu, an attorney and vociferous critic of the bill.

21 See, e.g., Yuichi Kaido, *mō reijū wa shinai to ketsui se yo* ("Decide that we will not blindly follow any more"), *Sekai*, Feb. 2014, pp. 44–45.

18.4)

II. 5. Secrecy Duration and Preservation of Historic Records

Article 4 provides that agencies can make initial secrecy designations effective up to five years and sets rules governing extensions. The initial period can be extended by further increments of up to five years each, to a maximum of thirty years. Extension beyond thirty years requires Cabinet approval. However, extensions beyond sixty years are allowed only for information that comes within seven categories specified in the statute, including such matters as secret codes, information concerning “human information sources,” weapons, and others. These rules were the subject of significant debate, as critics of the original government bill complained that this structure allowed information to be kept secret indefinitely.

One question of intense interest to open government proponents concerns the fate of formerly secret information after the classification period has expired. Article 4(7) requires agencies to promptly declassify information when there is no longer a need to maintain secrecy. At that point, decisions to preserve, destroy, or transfer information to the National Archives are governed by the Public Records Act regime. Article 8(2) of that Act requires agencies to obtain the approval of the Prime Minister prior to destroying administrative records.²² Article 4(6) of the secrecy law applies the same treatment in cases where extension requests are denied by the Cabinet. Unlike U.S. federal law, there is no provision allowing for public comment prior to record destruction.

An investigation by Yukiko Miki of Information Access Clearinghouse Japan²³ revealed that, in exercising secrecy powers provided by a 2001 revision to the Self-Defense Forces law, the Ministry of Defense followed a routine practice of simply destroying “defense secrets” after the information was no longer needed, thus eliminating any record of its actions. Her discovery was picked up by the news media. It seems likely that Miki’s work was the catalyst that prodded the law’s drafters to include the declassification and historic record preservation procedures described above.²⁴

II. 6. Review of Agency Secrecy Designations

The draft bill approved by the Cabinet on October 25 did not provide for any government body with authority to review designations by agency heads. Pointing to this deficiency, critics put forward the American “Information Security Oversight Office” (ISOO)²⁵ as the prime

22 An English translation of the Public Records Act is available here: http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=04&id=2114

23 <http://www.clearing-house.org>. Miki’s blog is perhaps the most authoritative running commentary of open government developments in Japan. (Available in Japanese on this website.)

24 Miki had begun researching the secrecy issue more than three years earlier with a series of pointed information disclosure requests. Among the pearls she uncovered were Ministry of Defense documents that showed officials had systematically destroyed defense secrets once the information was no longer needed. During the five-year period from 2006 through 2011, approximately 55,000 records were designated “defense secrets” under the 2001 Self-Defense Forces Law. Government records showed that 34,000 of these records were destroyed once they reached the end of their fixed secrecy period. In sharp contrast, the records revealed that only a single formerly secret record had been de-classified for potential release to the public.

25 www.archives.gov/isoo

example of a third party review panel.²⁶ They also cited the “Tshwane Principles,” which call for creation of “independent oversight bodies.” (Principles Nos. 31 – 35.)²⁷ This criticism appears to have had some impact. Although the law does not mandate the appointment of the kind of independent body envisioned by the Tshwane drafters, the original government bill was revised to mention the possibility of such a body and in Diet testimony the Prime Minister expressed the hope that one would be created.²⁸ (Abe rejected requests to include mandatory language in the law.)

In addition to the standards committee described above, it is expected that the government will create three other oversight bodies. Unlike the standards committee, however, these bodies will all be entirely composed of government officials. Preparatory work for the launch of these committees commenced on December 13. On that date the government established a secrecy law implementation office headed by Masaki Nouke, a Cabinet Office official who had been deeply involved in drafting the secrecy bill. Presumably this office will coordinate the launch of all new bodies with responsibilities related to the law and the drafting of Cabinet orders (*seirei*) and other regulations.

One body, tentatively called the “preservation oversight committee” (*hozen kanshi iinkai*) is expected to be composed of the most senior bureaucrats from the defense, foreign affairs, and other key ministries along with police officials and other senior bureaucrats. This group is intended to review secrecy designations and act as a check on abuse of the secrecy power.²⁹

A separate body, presently known as the “independent office to examine public records” (*dokuritsu kōbunsho kansatsu shitsu*), is expected to be charged with implementing the Prime Minister’s power to review whether specific government records of no present use should be destroyed or transferred to the national archives for preservation.

There is no suggestion that any of these bodies will be subject to even minimal transparency rules. For the Japanese people and other observers, these entities will operate in the dark. Moreover, no provision of the law suggests there will be any procedure enabling citizens to request the declassification of any specific document, in the manner of the “mandatory declassification procedure” of the ISOO.

III. Enforcement

III. 1 Criminal Liability for Government Officials and Others Who Commit Unauthorized Leaks

Several pre-existing Japanese statutes provide for criminal prosecutions of persons re-

26 Japanese television and print reporters appeared at the Washington, D.C. offices of the ISOO and were rewarded with interviews with Director John Fitzpatrick, who extolled the virtues of his agency. See, e.g., *Mainichi Shimbun*, Nov. 18, 2013, p. 1.

27 The Global Principles on National Security and the Right to Information, <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

28 See text accompanying n. 81, *infra*.

29 A Japan Times report provided this gentle understatement: “critics question whether it will have a credible third-party nature.” Ayako Mie, “Government to promulgate new secrets law quickly,” *Japan Times*, Dec. 12, 2013. There is no “third party nature” at all. After describing this structure, one commentator made the wry comment that “they’re supposed to check each other, but won’t they just approve each other’s actions?”

sponsible for unauthorized leaks of secret government information. Among them, it is sometimes said that 2001 revisions to the Self-Defense Law, which established a new category called “defense secrets” (*bōei himitsu*) provided the model for the 2013 law. The 2001 law imposes maximum imprisonment of five years per violation. But the Self-Defense Agency law protects only information designated by the Minister of Defense and necessary to Japan’s defense. As described above, the 2013 law dramatically expands these boundaries, granting power to all major government agencies and extending its application to much broader categories of information.

Article 23 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.³⁰ Other provisions provide lesser terms for individuals found to instigate, conspire or otherwise be connected to prohibited leaks.³¹

The law does not excuse whistleblowers who uncover corruption, threats to public health or the environment, or otherwise act to serve a public interest.³² Unauthorized disclosure of any material labeled “specially designated secret,” for whatever reason, is a violation of the law. Moreover, in future prosecutions, the government would not be required to prove that the release caused any actual injury to a government interest.

There has been a flurry of discussion over whether the government would be required to disclose the secrets at the heart of a criminal prosecution to the defense. The flat statement in Article 23 suggests that courts are not empowered to inquire whether an agency head acted properly in designating information. However, among the October revisions to the original government bill, Article 10 was changed to require heads of administrative agencies to disclose designated information when necessary.³³

III. 2. Potential Criminal Liability for News Reporters and Others Who Instigate Unauthorized Leaks

Article 25 also threatens prosecution of anyone accused of “soliciting” or “coercing” 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.

Leaders of LDP coalition partner Komeito were especially disturbed by this aspect of the bill and successfully lobbied for the insertion of potentially exculpatory language. Their in-

30 Sandra Coliver shows that, other than 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. <http://www.theguardian.com/commentisfree/2013/jun/26/edward-snowden-espionage-act-charges>

31 The Japanese term used here for “release” or “leak” is *rōei*. It does not carry any implication that information be delivered to a foreign government or any other special requirement. It simply means that information is delivered to a person unauthorized to receive it and therefore clearly applies to any release of information to a news reporter, neutral researcher, member of the parliament or any other person unauthorized to receive it.

32 As discussed below, the “Tshwane Principles” attracted sharp attention from opponents to the bill. See, e.g., *Tokyo Shimbun*, Nov. 17, 2013, column by Meiji University Professor Takamine Kawashima.

33 It is worth bearing in mind that agency heads are required to declassify information once secrecy is no longer warranted.

sistence 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.”

Some news reports suggested that LDP leaders had made a significant concession here, but legal experts like Kenji Yamagishi, the president of Japan’s national bar association scoffed, immediately responding that “Freedom of reporting has already been prescribed so including that line again doesn’t have any meaning.”³⁴

Mr. Yamagishi and everyone else who has studied law in Japan knows that rights to freedom of speech and the press are guaranteed by Constitution Article 21. The significance of Article 22(1) of the secrecy law is questionable. Although the Constitution *guarantees* freedom of the press, the secrecy law appears to 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.³⁵

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*). But this language leaves many questions unanswered. First, the term “public interest” is undefined. Future prosecutors and courts may apply “public interest” standards which are quite different from the standards understood by news reporters and ordinary Japanese. Second, no one can predict potential interpretations of the phrase “extremely inappropriate means.” Asked to explain this phrase, Minister Mori referred to the Nishiyama case. (see below) Third, it is unclear whether the term “publishing and reporting industries” may include free-lance writers, members of civil society organizations, bloggers and others who are not employed by traditional entities. It would apparently not include 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.

IV. Legal Protections for State Secrets Prior to the “Specially Designated Secrets” Protection Law

One of the most powerful arguments made by opponents of the secrecy law is simply that state secrets were already adequately protected by existing Japanese law. This is especially true of secrets that may have originated with the United States. Such information has been

34 “Japanese Public Cries Foul Over Secrets Protection Bill,” <http://blogs.wsj.com/japanrealtime/2013/10/10/japanese-public-cries-foul-over-secrets-protection-bill/>

35 The constitutional supremacy clause is found in Japan Constitution Article 98. Regarding the Supreme Court’s poor record in protecting individual rights, see 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).

protected by two special statutes in effect since the early Cold War era.

The primary statute protecting state secrets is the 1947 National Government Employees Law, which applies to all employees of the national government and imposes imprisonment of up to one year for the unauthorized release of secrets learned through their employment.³⁶ This is the statute that was applied in the 1970s prosecution of the Mainichi news reporter Takichi Nishiyama and his informant in the Ministry of Foreign Affairs.

The postwar military occupation of Japan was brought to an end pursuant to the San Francisco Peace Treaty, signed on September 8, 1951. On the same day, representatives of the United States and Japan also signed the “Security Treaty Between the United States and Japan,” which confirmed the continued presence of American military forces in Japan and granted them extraordinary privileges.³⁷ In the words of Professor Kenneth Pyle, the 1951 security treaty “preserved many of the occupation prerogatives of the U.S. military, and in effect rendered Japan a military satellite of the United States.”³⁸ Pursuant to Article 6 of this security treaty, on May 7, 1952, the Diet adopted a special criminal statute which imposes imprisonment of up to ten years for acts related to the unauthorized release of U.S. military secrets.³⁹

At the insistence of the U.S. government, which demanded that Japan create a military force and play a more active role in security matters, representatives of the two countries signed the US-Japan Mutual Defense Assistance Agreement on March 8, 1954. Two months later the Diet adopted another special statute intended to protect U.S. military secrets. This statute applies to secret information related to equipment provided by the U.S. to Japan.⁴⁰ (It is generally known in Japan as the “MDA Secrecy Protection Law”) These two laws remain in place. They were unaffected by the 2013 secrecy statute.

The Diet made a major addition to this structure in the aftermath of the 9/11 Incident in 2001 with adoption of revisions to the Self-Defense Forces law that created a new category of “defense secrets.” (*bōei himitsu*) Article 96(2) of this law empowers the Minister of Defense to designate information he determines to be “especially necessary to be made secret for Japan’s defense.” The unauthorized release of such information is subject to prosecution with a maximum penalty of five years imprisonment.⁴¹

In order to better manage Japan’s stock of secrets, in 2009 the Aso administration adopted regulations which created a new administrative category titled “special management secrets” (*tokubetsu kanri himitsu*) and established a security clearance system to apply to individuals who handle state secrets. These standards were intended to unify practice throughout the

36 Law No. 120 of 1947. Article 100 of the National Public Employees Law imposes a duty on all national government employees to protect government secrets. Article 111 of that law mandates punishment of up to one year imprisonment for persons found to have instigated or acted as an accessory to violations of that duty. In 1978, the Supreme Court of Japan upheld a verdict finding Mainichi News reporter Takichi Nishiyama guilty of violating Article 111 by using improper means to entice a government employee to disclose confidential information. An English translation of the statute is available at http://ssl.jinji.go.jp/en/recomme/rl_npsa.pdf

37 Text available at http://avalon.law.yale.edu/20th_century/japan001.asp

38 Kenneth B. Pyle, *The Japanese Question* (2nd Ed.) (The AEI Press, 1996), p. 27. This treaty was replaced by the U.S.-Japan Security Treaty concluded in 1960.

39 Law No. 138 of 1952.

40 Law No. 166 of 1954, June 9, 1954. 日米相互防衛援助協定等に伴う秘密保護法

41 The text of the Self-Defense Forces Act is available on the Japanese E-gov website <http://law.e-gov.go.jp/> in Japanese, but the government does not presently offer an English translation online.

government. Individual ministries and other agencies have long applied their own standards. For example, the Ministry of Foreign Affairs is said to apply a three-tier standard (top secret, secret, confidential) based on the American model.⁴² The 2009 regulations helped prepare the ground for the 2013 state secrecy law.⁴³ Some writers have suggested that “special management secrets” will simply be converted to “specially designated secrets” under the new law.

V. Diet Deliberations

V. 1. The Battle Is Joined

Prime Minister Shinzo Abe took office on December 26, 2012, following the LDP’s landslide victory in elections to Japan’s House of Representatives (the “Lower House”). When elections to the House of Councilors (the “Upper House”) were held on July 21, 2013, the LDP registered a similar victory, adding thirty seats and thus securing a majority together with its coalition partner Komeito. These election results moved the ruling coalition into a position with the power to pass any legislation it desires, with the dominant LDP setting the agenda.

The Abe administration moved quickly, publishing a summary of its proposal for a new secrecy regime while memories of summer holidays were fresh. The September 3 announcement invited comments from the public, holding the comment period open for two weeks.⁴⁴ Many critics complained the comment period was much too brief. Nonetheless, the announcement triggered a big response. Government data shows that it received more than 86,000 comments, with almost 70,000 (77 %) opposed to the bill.⁴⁵ It does not appear, however, that the overwhelmingly negative response had any effect on the government plan.

Among the commenters was popular actress and model Norika Fujiwara. In a September 13 blog entry she exhorted her fans to oppose the secrecy bill, expressing the fear that it might bring about the end to democracy in Japan. Her message was especially notable because it violated a taboo against entertainers expressing political opinions, especially when they contradict the government.⁴⁶

Although Japan’s Constitution allocates the legislative power to the parliament (Diet), Japan’s MPs (Diet members) are rarely engaged in proposing, drafting, or otherwise significantly developing the text of legislation. Instead, nearly all bills are drafted by the administrative of-

42 In Diet testimony, the Minister of Foreign Affairs has said that his ministry classifies millions of records secret every year. Kenta Yamada, *seifu no jōhō impei kōzō to shimin to no kairi* (“The Structure of Government Cover-ups and Its Distance from the People”) *Sekai*, Jan. 2014, p. 92. Yamada speculates that all of those records will become “specially designated secrets” under the new law. *Id.* Yamada also repeats the well-known story that bureaucrats only reveal major secrets to ministers they trust. *Id.*

43 There is a useful discussion at Joji Shishido, *tokutei himitsu hogohō no kakushin* (“The core of the specially designated secrets protection act”), *Sekai*, Dec. 2013, pp. 82–83. Shishido is a constitutional law specialist on the faculty of the University of Tokyo.

44 Comments were solicited through a government website. See <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=060130903&Mode=0>

45 These numbers are from the official government report on comments received, available here: <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=060130903&Mode=2> (accessed January 22, 2014). See also Shishido, *Sekai*, n.43, p. 83, and “UPDATE: Diet enacts state secrets law despite widespread protests,” the *Asahi Shimbun*, December 06, 2013 (English version).

46 *Asahi Shimbun*, Sept. 19, 2013, p.4. See also Magdalena Osumi, “Fujiwara breaks TV taboo, slams secrets bill,” *Japan Times*, Sept. 19, 2013

fices of government. Cabinet approval is the final step before these government bills are submitted to the Diet for final review and passage into law.

As the dominant party in the government and in both houses of the Diet, the LDP was in position to both oversee drafting of the secrecy bill and to control parliamentary proceedings. It quickly became clear that Diet hearings were pro forma only. Government representatives would duly submit to questioning but their responses would shed little light on how their vaguely worded statute would be implemented. Moreover, they clearly would not seriously entertain opposition party proposals for significant change or otherwise negotiate details of the bill on the Diet floor.

V. 2. Secrecy Opponents in the News Media and in the Streets

All participants understood that if the bill were to be significantly altered or even blocked, this would have to be the result of pressure applied outside the walls of the Diet building rather than within. Thus, even in floor debate, Diet members addressed their words more to television cameras than to their opponents. Meanwhile, critics sought to create bargaining power through constant criticism in the news media and on the streets; their only hope to stop the legislative juggernaut was by demonstrating to ruling coalition leaders that passage of this law would cost the government too much in terms of popular support. To the extent that significant negotiations did take place, they were conducted by representatives of the ruling coalition and members of like-minded nationalistic splinter parties in meeting rooms and dining tables away from the Diet floor.

Japan's national bar association expressed "strong opposition" to the bill in opinions issued on September 12 and again on September 26, after the public comment period had closed.⁴⁷ The Japan Civil Liberties Union, a citizens group founded in 1947, the year Japan's Constitution took effect, first announced its formal opposition on September 17 and followed with a series of well-attended "emergency gatherings" (*kinkyū shūkai*) featuring writers and activists who spoke out against bill.⁴⁸

Meanwhile, ad hoc groups of writers and intellectuals were formed to fire broadside attacks. A group of constitutional law professors led by an elite group of 24 scholars issued their declaration against the bill on October 11.⁴⁹ By October 29, the declaration had attracted 265 signatures.⁵⁰ A separate and much lengthier statement was issued by experts in the law of crimes and criminal procedure.⁵¹ Many more such statements would follow.

Ordinary people also began to express their opposition to the secrecy bill with signs and banners as they marched through the streets. Sometimes they would have to share this public stage with others. For example, anti-nuclear demonstrators had begun to stage regular Friday

47 <http://www.nichibenren.or.jp/news/year/2013.html>

48 <http://www.jclu.org>

49 See 2013年10月11日 [呼びかけ人] (24人) [賛同人] (10月27日現在, 118人) http://blog.goo.ne.jp/liveinpeace_925/e/2801775253d3d00f630fd94d3168c4be and 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) <http://www.asahi.com/articles/TKY201310280264.html>.

50 秘密保護法案 265人反対 憲法の3原則侵害 (東京新聞) <http://www.tokyo-np.co.jp/article/politics/news/CK2013102902000154.html>

51 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。 <http://www.ourplanet-tv.org/files/131029keiji.pdf>

afternoon assemblies on the sidewalks across the street from the Prime Minister's Office soon after the extent of the nuclear contamination caused by the March 2011 Fukushima meltdowns became generally known. On Friday, October 26, the Mainichi reported on an early evening "changing of the guard." When it came time for late afternoon anti-nuclear demonstrators to go home, they were replaced by the anti-secrecy cohort. According to the Mainichi, anti-secrecy demonstrators had begun to appear before the Prime Minister's Office on October 21 and continued every evening that week.⁵²

Many more demonstrations would be organized in Tokyo and around the country. One veteran activist lawyer wrote that in his experience of more than thirty years fighting proposed legislation that would restrict individual liberties such as wiretapping and criminal conspiracy bills, "the movement against the Specially Designated Secrecy Law is the biggest popular uprising since the 1960 demonstrations against the US-Japan Security Treaty."⁵³ Alongside labor unions and established anti-war groups, new citizen groups were formed such as the "STOP the Anti-Secrecy Bill Network" led by attorneys and journalists as well as members of established anti-war groups. Internet websites were used to put out key messages and information on public demonstrations.⁵⁴

The Cabinet approved the full text of a secrecy bill on the morning of Friday, October 25 and submitted the bill to the Diet. That day Prime Minister Shinzo Abe appeared before a plenary session of the Diet House of Representatives and explained that he sought passage of both the secrecy bill and a separate bill to create a "National Security Council." The Japan PEN Club chose this day to release its declaration against the bill, as did national organizations of magazine and book publishers and the federation of newspaper employees.⁵⁵

In front page coverage in its evening editions, the Mainichi informed readers that the key issues for Diet debate included "the possibility of information control (*jōhō tōsei*) through broad interpretation of the scope of designated secrets" and "the definition of 'appropriate newsgathering' which will not be a subject of punishment."⁵⁶ At a press conference that day, Chief Cabinet Secretary Yoshihide Suga explained the need for these laws. "Fears of information leaks are rising," he said. "And sharing of information with foreign governments takes place on the presumption that the information is protected, so establishing laws to preserve secrets is a critical issue."⁵⁷

The special session of the Diet was scheduled to continue until December 6. The secrecy and national security council bills were the most prominent items on the agenda. LDP leaders were determined to push both bills through the Diet on time and intact. The goal of opposition parties and anti-secrecy demonstrators was to block adoption of the bill until time ran out on December 6.

As if to underscore the total futility of their position, representatives of the DPJ, the main

52 *Mainichi Shimbun*, Oct. 26, 2013.

53 Yuichi Kaido, *mō reijū wa shinai to ketsui se yo* ("Decide that we will not blindly follow any more") *Sekai*, Feb. 2014, p. 42, 43. Massive street demonstrations in 1960 caused the cancellation of a planned visit by U.S. President Dwight Eisenhower and led to the fall of the Cabinet of Prime Minister Nobusuke Kishi, primary founder of the LDP and grandfather of Shinzo Abe.

54 See, e.g., <http://www.himituho.com/>.

55 *Mainichi Shimbun*, Oct. 26, 2013.

56 *Mainichi Shimbun*, Oct. 25, 2013 (eve. ed.), p.1

57 *Id.*

opposition party, proposed a bill of their own on the same day, this one directed not at expanding government secrecy power but reducing it. The DPJ bill would reform Japan's information disclosure law to render it a more effective tool of government transparency.⁵⁸ This was the same bill the DPJ had placed before the Diet in 2011 while they held the reins of power. Their bill did not pass then. It would surely not pass now.

V. 3. Diet Hearings

The essence of the hearings was simply that Diet members, including opposition party members, were provided the opportunity to make statements and ask questions of government representatives and those representatives were required to be present to respond. Both ruling and opposition party members were allowed to call a limited number of expert witnesses. The Prime Minister and other LDP spokespersons would often cite the number of hours devoted to these parliamentary deliberations as evidence of their commitment to the democratic process.⁵⁹

The LDP managed parliamentary discussion with a firm hand. First, party leaders created a “Special Committee on National Security Protection” to focus on the bill. This enabled the Diet to take action on other matters in parallel, while the special committee punched its clock to accumulate a respectable number of hours of floor deliberations. In a second clever and perhaps cynical ploy, on September 17 the Prime Minister appointed a young female Cabinet member to serve as the government's representative in the Diet debates. At the time of her appointment as government spokesperson on the secrecy bill, Masako Mori held the position of Cabinet minister charged with food safety and other consumer issues and measures to address Japan's low birth rate and to promote gender equality.⁶⁰ She had no authority related to national security or other matters likely to be designated as national secrets. Her lack of relevant knowledge and experience was reflected in her Diet testimony, which largely amounted to quoting language from the bill and pronouncing simple denials that application of the law would result in any undesirable effect on the free press or the people's right to know. According to news accounts, her statements were sometimes contradicted by other Cabinet ministers and by Cabinet Office officials who had worked on the draft legislation.⁶¹

The primary agency responsible for drafting the bill is a department within the Cabinet bureaucracy called the “Cabinet Information Investigation Office” (*naikaku jōhō chōsa shitsu*). Accordingly, Chief Cabinet Secretary Suga was the most appropriate cabinet officer to respond to legislators' questions. Opposition party members repeatedly demanded that he appear to respond to questions about the secrecy bill, to no avail. Suga had a far more important role to play in the Diet. The Abe administration's repeated justification for the new secrecy law was its claimed necessity to the functioning of the proposed National Security Council. As Chief Cabinet Secretary, Suga would be one of the key members of the Council. The Prime Minister had naturally selected Suga to present the government's case for the NSC to the Diet.

Mr. Suga is the head of the Cabinet Office, the core executive office of the government and is generally thought to be the second most important official in the government. Placing

58 「国民の知る権利」を保障する観点から情報公開法改正案を衆院に提出, Nov. 25, 2013. <http://www.dpj.or.jp/article/103425/>

59 Yamada, *supra* n.42, describes parliamentary hearings at p. 86.

60 http://www.kantei.go.jp/jp/96_abe/meibo/daijin/mori_masako.html (viewed on January 24, 2014).

61 「代役」森氏立て*Tokyo Shimbun*, Nov. 17, 2013, 2. This article provides several specific examples.

him before angry opposition party members to defend the controversial secrecy bill, whose passage was a foregone conclusion, would be a very poor use of his time. Prime Minister Abe was in a great hurry to pass both the secrecy bill and the Japan NSC bill. The perfect solution was to draft the youthful and photogenic Ms. Mori to serve as the government's face on the highly controversial secrecy bill. When questioned about this suspicious tactic, government officials explained that she was selected because she is an attorney and is therefore familiar with legal matters.⁶²

V. 4. Negotiations on a Revised Bill

In mid-November, as the desultory Diet proceedings continued, LDP leaders began secret negotiations with representatives of splinter parties. It was cosmetically important for the ruling coalition to attract support from one or more opposition parties in order to deflect the inevitable criticism that it had railroaded the bill through the Diet without considering outside opinion. One likely partner was the highly nationalistic Japan Restoration Party, (*isshin no kai*, "JRP") which was formed in 2012 and secured 54 seats in December 2012 elections for the Lower House. According to news reports, discussions with the JRP began on November 12. Another likely partner was "Your Party," (*minna no tō*), an LDP offshoot formed in 2009, that won 18 seats in those elections. Negotiations with Your Party began on November 15, with a dinner meeting attended by Prime Minister Abe and the head of Your Party, his friend Yoshimi Watanabe. (Like the Prime Minister, Mr. Watanabe is the son of a former LDP Cabinet Minister.)

Progress came fast. Newspapers began to report the details of potential agreement on revisions to the bills on November 18.⁶³ On November 19, Mr. Watanabe announced that the ruling coalition had accepted most Your Party proposals and there was no reason for further opposition to the government. Some writers portrayed this "deal" as the result of a sham negotiation, with the parties in virtual agreement from the beginning.⁶⁴ By the following day, newspapers were providing readers with simple box analyses of the positions of the ruling coalition and various opposition parties and predicting imminent agreement with Your Party and the JRP.⁶⁵

As for the JRP, November 21 news reports indicated that it too had reached agreement with the ruling coalition.⁶⁶ But this deal would come at a price. News accounts also indicated that the JRP might also split over the issue.⁶⁷

As these secret negotiations progressed, the special Diet committee heard the testimony of four non-government expert witnesses on November 19. They included open government activist Yukiko Miki, who drilled Dietmembers on the basics of government transparency, starting with the critical importance of the people's right to know. She implored them to scrap

62 *Id.*

63 *Tokyo Shimbun*, Nov. 18, 2013, p. 2.

64 *Mainichi Shimbun*, Nov. 20, 2013, p. 5. Watanabe's action would lead to a split of Your Party.

65 *Mainichi Shimbun*, Nov. 20, 2013, p. 3.

66 *Mainichi Shimbun*, Nov. 21, 2013.

67 *Mainichi Shimbun*, Nov. 22, 2013, p. 5.

the government bill and start over.⁶⁸

Outside the Diet building, demonstrators continued to gather in the thousands to rally against the bill. An especially large demonstration was organized on the night of November 20, with demonstrators gathering in Hibiya Park and then marching up through the Kasumigaseki District to the Diet buildings at the top of the hill, where opposition party politicians greeted them as they passed by.⁶⁹ Rallies also continued around the country.⁷⁰

V. 5. More Voices Struggle to Be Heard

If there was any doubt about the superfluous nature of the Diet hearings, they were now erased. As these secret negotiations took place, in Diet committee hearings Minister Mori refused to provide substantive responses to questions from opposition Diet members on the ground that “if I comment on specific matters, it may have some effect on revision negotiations.”⁷¹ Under these circumstances, opposition Diet members questioned whether the hearings had any meaning at all.⁷²

As the Prime Minister’s deputy held her questioners at bay, the government conducted business as usual. On November 20, Prime Minister Abe entertained the newly appointed U.S. Ambassador Caroline Kennedy at a lunch held at his official residence.⁷³ Ambassador Kennedy had attracted a crowd of thousands the day before to witness her passage in an elegant horse-drawn carriage on the way to her inaugural audience with the Emperor.

After his lunch meeting with the Ambassador, Mr. Abe would dash over to the Diet building to confer with his Diet management team and make a brief appearance on the Diet floor.

Also on November 20, as the Prime Minister and Ambassador dined, a gathering of many of Japan’s most renowned writers took place a short distance away. Popular writer and television commentator Soichiro Tawara spoke on behalf of many colleagues when he said “[T]here is no clear definition for what will be made secret. In the end, the bureaucrats will decide, arbitrarily making secrets.” He and others railed against the threat to Japan’s free press posed by potential prosecutions for inciting or conspiring to produce the leak of secret information. Aging movie star Bunta Sugawara also appeared at this event and declared that this law forced him to think about how the Japanese suffered during the war years due to the loss of a free press.⁷⁴

Other speakers at this event tied the secrecy law proposal to the LDP’s demand for a thorough rewriting of Japan’s Constitution.⁷⁵ University of Tokyo philosophy professor Tetsuya

68 「管理, 公開の法整備を」 *Tokyo Shimbun*, Nov. 20, 2013, p. 6.

69 The author observed this procession. See Kiyoshi Takenaka, “Thousands protest against tough new official secrets law in Japan,” Nov. 21, 2013. <http://www.reuters.com/article/2013/11/22/us-japan-secrets-idUSBRE9AL04420131122>.

70 For example, the Hiroshima edition of the *Mainichi* reported an anti-secrecy bill demonstration held at the site of the Atomic Bomb Dome attended by about 350 persons. *Mainichi Shimbun*, Nov. 22, 2013, Hiroshima ed. The Ishikawa edition of the *Mainichi* reported a similar demonstration in front of the JR Toyama Station on the same day attended by about 280 persons. *Mainichi Shimbun*, Nov. 22, 2013, Ishikawa ed.

71 *Tokyo Shimbun*, Nov. 21, 2013, p. 6.

72 *Id.*

73 *Mainichi Shimbun*, Nov. 21, 2013.

74 *Tokyo Shimbun*, Nov. 21, 2013, p. 31.

75 *Tokyo Shimbun*, Nov. 21, 2013, p. 29.

Takahashi explained how the secrecy bill was one element of a much broader plan by LDP leaders to limit constitutional rights. In Takahashi's words,

The great difference between the current Constitution and the LDP revision plan is that the LDP plan is not based on 'natural rights' by which all people have human rights when they are born. According to the LDP, the state led by the *tennō* and a unique culture exist prior to the people. Their thinking is 'top-down.' They think people's human rights only exist when they are recognized by the state....⁷⁶

Takahashi expressed his belief that Prime Minister Abe sought to achieve the substance of his constitutional revision plans by enacting a series of statutes like the secrecy bill. The hurdle to revising the constitution itself might be too high,⁷⁷ but by expanding government secrecy powers, changing the government interpretation of Constitution Article 9 and other actions, Abe could achieve his desired result: a stronger state and weaker individual rights.

That night a meager gathering of twenty or so onlookers stamped their feet in the cold in the open area in front of aging Shimbashi station, a commuting hub for thousands of Tokyo office workers. They had stopped on their way home to catch a glimpse of the nominal leader of opposition to the secrecy bill.⁷⁸ The Democratic Party of Japan had controlled the government for three years under three separate prime ministers until they were banished by Shinzo Abe and the LDP in a landslide in December 2012. The DPJ's current leader, Banri Kaeda, was his party's fourth choice. He was elected DPJ president only *after* the party had been dismissed by the voters. Now he stood in the cold, calling on his countrymen to remember the importance of the people's right to know and freedom of the press. Mr. Kaeda suffered no illusion that he could stop Shinzo Abe and his secrecy bill. But maybe one day there would be another election and a different result.

In haggling with the ruling coalition, JRP negotiators were hanging tough. They continued to demand that the bill explicitly require the creation of an independent monitoring body. But time was running out. In order to meet the Prime Minister's deadline of December 6, the ruling coalition would have to move the bill out of the House of Representatives and into the House of Councilors soon. LDP leaders were adamant. They ended negotiations with the JRP and finalized a revised bill which did *not require* such an independent body. On Monday, November 25 the revised bill was revealed to the world. A series of cosmetic changes were enough to keep Yoshimi Watanabe and most of his Your Party colleagues on board. Opposition party members would have little time to study the bill or offer any comment because a vote was called the following day.⁷⁹

76 *Id.*

77 Constitution Article 96 requires that amendments be supported by a two-thirds vote of each House of the Diet and then be approved by a national referendum. 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. <http://www.japanfocus.org/-Lawrence-Repeta/3969>

78 *Mainichi Shimbun*, Nov. 21, 2013.

79 Yasuhiko Tajima, *minshushugi no dodai ga kuzusareru-kono kuni no jōhō/genron no yukue* ("The foundations of democracy will be destroyed – the future of information and discourse in Japan"), *Sekai*,

When the Prime Minister made a brief appearance before the Lower House on voting day he was asked to respond to United Nations Rapporteur for Free Speech Frank LaRue's declaration that the bill was a threat to whistleblowers and journalists. Abe said that Mr. LaRue did not understand the bill. The government of Japan would explain to the UN that there was no such threat.⁸⁰ Abe was also pressed again on the issue of third party monitoring bodies in questioning by Japan Restoration Party representative Hiroshi Yamada. Abe repeated that in his opinion such bodies should be established, but he did not agree that the law should be amended to require such action.⁸¹

The bill was approved that night by both the special committee and a House of Representatives plenary session. The votes of the ruling coalition were supplemented by most Your Party Diet members. JRP members boycotted the vote and a few Your Party members voted against. The bill was sent to the Upper House the following morning, where committee hearings formally commenced on Thursday, November 28.

As if management of the Diet bill was proceeding too smoothly to suit his tastes, the pug-nacious Liberal Democratic Party Secretary-General Shigeru Ishiba revealed his opinion that public demonstrations against the bill had gone too far. In a blog entry published on November 29, he wrote that "I think the strategy of merely shouting one's opinions at the top of one's lungs is not so fundamentally different from an act of terrorism."⁸²

"Counterterrorism" is one of the categories of information that can be classified as "specially designated secrets." Was the LDP secretary general suggesting that citizens carrying signs and shouting chants in orderly processions to protest government policies were appropriate targets of police terrorism investigations? If so, records of those investigations could surely become state secrets.

Anyone who has observed a street protest in Japan in recent years knows that they are probably the most peaceful demonstrations anywhere. Marchers are closely managed by the police. They are limited to only one traffic lane and are required to stop at every red traffic signal.⁸³

The House of Representatives is the more important of the two branches of the Diet. If a bill passed by this House is rejected by the House of Councilors, it can nonetheless be passed into law by a second vote in the Lower House. In the fall of 2013, the ruling coalition enjoyed comfortable majorities in both Houses, so with the successful Lower House vote on November 26, the bill's fate was sealed. Nonetheless, ruling coalition leaders went through the motions in Upper House proceedings.

Jan. 2014, p. 82.

80 *Mainichi Shimbun*, Nov. 27, 2013, p. 5.

81 *Mainichi Shimbun*, Nov. 27, 2013, p. 3.

82 Ayako Mie, "Secrecy law protests 'act of terrorism': LDP secretary-general," Dec. 1, 2013, *Japan Times*, <http://www.japantimes.co.jp/news/2013/12/01/national/secrecy-law-protests-act-of-terrorism-ldp-secretary-general/#.UuHj7GSmoy4>

83 See e.g., "Japan's illiberal secrecy law—The threat of merely screaming," December 3, 2013, in which the author notes that "Public demonstrations in Japan are some of the free world's most orderly and also some of the most heavily policed." <http://www.economist.com/blogs/banyan/2013/12/japan-s-illiberal-secrecy-law>

During an appearance before the Diet on December 5, Prime Minister Abe responded to the news that U.N Human Rights High Commissioner Navi Pillay had joined the chorus of opponents to his secrecy bill. In a press conference in Geneva on December 2, Pillay had said the Prime Minister “should not rush through the law without first putting in proper safeguards for access of information and freedom of expression as guaranteed in Japan’s Constitution and international human rights law.”⁸⁴ According to Abe, after Japanese emissaries visited Ms. Pillay to explain the bill, she changed her mind.⁸⁵

LDP leaders ignored or rejected all procedural and substantive motions by opposition party members and staged a vote on the evening of December 6, the final day of the extraordinary Diet session.⁸⁶ The bill passed unchanged and became the law of Japan.

Demonstrators made a last valiant effort on the night of December 6, with more than ten thousand people surrounding the Diet and yelling out their opposition to the bill. In their morning newspapers the next day, readers would find photos of the victor and the vanquished – a smiling Prime Minister and irate crowds of people holding signs demanding that the bill be stopped.

VI. The Secrecy Law as an Element of the LDP Agenda

Shouting the slogan that “Japan is a paradise for spies,” defense hawks in the LDP have loudly demanded a tougher secrecy law at least since the early 1980s.⁸⁷ In the most famous battle over state secrecy prior to 2013, the Diet considered an extensive state secrecy bill in the late Cold War era, during the administration of Prime Minister Yasuhiro Nakasone. This proposal was submitted to the Diet on June 6, 1985, following deliberations by advisory committees, including one chaired by former Prime Minister Nobusuke Kishi, Shinzo Abe’s grandfather. At the time, Kishi was 87 years old.

The 1985 proposal touched off a firestorm of protests, speeches, declarations by intellectual groups and other opposition, much like the outburst we saw in 2013. In the face of this severe opposition, the bill was allowed to expire with the end of a Diet session on December 20, 1985. Nakasone and other LDP leaders of the time continued to call for expanded secrecy

84 http://ajw.asahi.com/article/behind_news/politics/AJ201312030069

85 This is from the record of the Diet debate. A google search does not reveal confirmation of Mr. Abe’s claim.

86 “UPDATE: Diet enacts state secrets law despite widespread protests,” *Asahi Shimbun*, Dec. 06, 2013. (English version) A DPJ leader published an insider’s account of the futile efforts of opposition members to extend the brief Upper House proceedings. See Tetsuro Fukuyama, *sono toki kokkai de nani ga okottaka* (What was it that just happened at the Diet?), *Sekai*, Feb. 2014, p. 54.

87 See Lawrence Repeta, “More Openness or More Secrecy? Early Struggles of Japan’s Information Disclosure Movement,” *Meiji Law Journal*, Vol. 19, Mar. 2012, p. 39. The hawkish former Defense Minister Yuriko Koike repeated this nonsensical charge in an English essay published in the Japan Times during the height of the 2013 secrecy bill debate. Yuriko Koike, “Abe’s security bill aims to shutter ‘spy’s paradise,’” Nov. 8, 2013. As evidence of the need for stronger secrecy protections, she actually wrote “For example, Japanese newspapers always report when, where, and with whom the prime minister met for dinner in the following day’s editions.” *Id.*

protection, but no major bill was submitted to the Diet until the 2001 revision to the Self-Defense Forces Act.

The demand for greater government secrecy powers is an obvious adjunct to the LDP's longstanding demand for fundamental constitutional change designed to enhance state power and limit individual rights.⁸⁸ When it acts in secret, the state is accountable only to itself. The people cannot complain about or even express opinion concerning matters that are hidden from them. To the extent the secrecy regime is effective, the people will know only what the state wants them to know.

VII. The Search for International Standards

The Global Principles on National Security and the Right to Information (the “Tshwane Principles”) were released in South Africa on June 12, 2013. According to a statement by the Open Society Justice Initiative, the Principles “are based on international (including regional) and national law, standards, good practices, and the writings of experts...[T]hese Principles were drafted by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative.”⁸⁹ The Tshwane Principles provide the most comprehensive and detailed guide to balancing government secrecy needs against the people's right to know presently available. Unfortunately, these Principles were ignored by the Abe administration.

Despite the two-year period and broad scope of participation, it does not appear that Japanese policymakers either participated in the discussion or studied the Principles at all prior to release of the bill summary on September 3. The first significant commentary in Japan's news media occurred in October. NGOs quickly went to work to produce Japanese translations, but this was too late to have significant impact on the legislation. When Prime Minister Abe was asked about the Principles at an Upper House hearing on November 20, he responded that this was nothing more than the opinion of a specific citizens group and did not represent an international standard.⁹⁰

A very different kind of “international standard” did have a big impact in Japan. Everyone involved in the secrecy bill negotiations was aware of the prosecution of the Manning and Snowden cases from the United States. Bradley Manning was found guilty and given a prison sentence of 35 years in August. Edward Snowden departed from the United States to avoid a similar fate. Abe administration spokespeople repeatedly said that the new secrecy bill, featuring a potential ten-year prison term per violation, was needed to enable Japan to share information with “foreign governments.”

88 Lawrence Repeta, “Japan's Democracy at Risk – The LDP's Most Dangerous Proposals for Constitutional Change,” *The Asia-Pacific Journal*, Vol. 11, Issue 28, No. 3, July 22, 2013. Available at <http://www.japanfocus.org/-Lawrence-Repeta/3969>

89 <http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

90 *Tokyo Shimbun*, Nov. 21, 2013, p. 6.

Behind the scenes, the U.S. government has applied constant pressure for tighter secrecy protections for years. According to news reports, the issue had taken prominence in 2007 during Abe's first turn as prime minister at "2 plus 2" meetings held in May of that year. Abe had already proposed an American-style national security council during his first term, but was unable to pass legislation. American pressure had been renewed at 2 plus 2 meetings held in 2013 and perhaps on other occasions. In a September 2013 interview with the *Asahi Shimbun*, former U.S. Director of National Intelligence Dennis Blair declared that Japan's laws protecting secrecy are "extremely weak" and should be strengthened.⁹¹ This approach matches U.S. policy in other parts of the world.⁹²

Except for their response to this pressure from the U.S. government, there does not appear to be any evidence that Japan's policymakers considered international standards when they crafted the 2013 secrecy law.

VIII. The Impact on Freedom of the Press

In 2009 a highly respected reporter for Japan's primary news wire service, Masakatsu Ohta, conducted a series of interviews with retired senior officials of the Ministry of Foreign Affairs concerning the "secret agreements" (*mitsuyaku*) allowing the entry of U.S. naval vessels into Japanese ports 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 was invaluable. His interviews confirmed that the government had lied to the Japanese people about nuclear weapons policy for decades.

After his article based on these 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 a violation of the National Public Employees Law."⁹³ 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.

Mr. Ohta was not prosecuted, but he described the unease and perhaps fear that followed such a direct threat from a high government official. No one knows how often this scenario has occurred in the past or will be repeated in the future.

As described in the foregoing pages, countless Japanese writers and intellectuals have expressed great fear regarding the impact of the secrecy law on news reporters and other writers. Even before appearance of the secrecy law, Japan's news organizations had developed a reputation for excessive reliance on government news sources and hesitancy to criticize senior officials.

91 *Asahi Shimbun*, Oct. 6, 2013, p. 1.

92 See, e.g., Alasdair Roberts, *Blacked Out – Government Secrecy in the Information Age* (Cambridge University Press, 2006), chapter 6, esp. pp. 127–134.

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

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.”⁹⁴ 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.”⁹⁵

Japanese media law experts like Professors Yasuhiko Tajima of Sophia University and Kenta Yamada of Senshu University have sounded frightening alarms. 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 journalists,” 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. This will accelerate the transformation of news organizations into public relations agencies of the government.”⁹⁶

Tajima predicts that public discourse on issues touched by the secrecy law will atrophy; the law will “root out and destroy” fundamental values of democracy.

In evaluating the secrecy law, Professor Yamada instructs us to first consider the very weak state of the right to know in Japan. His comments resonate with those of foreign experts. For him, the secrecy law reinforces 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.”⁹⁷

The idea that the news media plays a critical role in constitutional democracies by informing the voting public on matters of common interest has been enthusiastically endorsed by Japan’s constitutional scholars and sometimes by its courts. Although Japan’s Supreme Court has never ruled that any agency of government has actually violated press freedoms or unconstitutionally thwarted the exercise of the right to free expression by anyone, including the news media, it has declared that the media serves the interest of a constitutional “right to know.”⁹⁸

94 Freedom House, “2012 Freedom of the Press Data,” available at <http://www.freedomhouse.org/report-types/freedom-press/2012/japan>.

95 Laurie Anne Freeman, *Closing the Shop – Information Cartels and Japan’s Mass Media* (Princeton University Press, 2000), at 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. pp. 45–52, (Transview, 2013) (Japanese only).

96 Tajima, *supra* n. 79, p. 81.

97 Yamada, *supra* n. 42, p. 90.

98 E.g., see the Court’s decision in the “Hakata Film Case,” Decision of the Supreme Court, November 26, 1969 (Grand Bench). For a detailed description of the Hakata case in English, see Lawrence W. Beer,

Japan's institutional press has also laid claim to this constitutional role, as in the following declaration by the newspaper association:

The 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. Member newspapers resolve to retain their role as the fittest standard-bearers in this regard.⁹⁹

In the new world of "Specially Designated Secrets" Japan's news media will face new challenges in their efforts to serve this grand mission.

Freedom of Expression in Japan (Kodansha, 1984), at 296.

99 This is part of a much longer declaration of the key characteristics and duties of a free press. See <http://www.pressnet.or.jp/english/about/canon/>, The Canon of Journalism (*sic*) (Adopted on June 21, 2000).