Blaszczak Ruling's Broad View Of Property May Trouble Press

By **Eugene Ingoglia and Rebecca Delfiner** (July 6, 2020)

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One man received an actual draft report from a government agency, used it in the normal course of his work, and might receive a Pulitzer; another man received some information related to an upcoming proposal by a government agency, used it in the normal course of his work, and was convicted for stealing government information and sentenced to 36 months' imprisonment.

After a recent federal appellate decision in New York, the decision about how to treat the disclosure of government information, and information about what the government may do, rests in the hands of your local federal prosecutor.

Theft of Government Property

Theft of government property under Title 18 of the U.S. Code, Section 641 occurs when (1) the property, a thing of value, belongs to the U.S. government, (2) someone stole the property by taking/using it without authorization, (3) the person who took or disclosed the information acted knowingly and willingly, with the intent to deprive the government of the use and benefit of the property, and (4) the property was worth more than $1,000.

The analysis is sensible and easy to understand when it is aimed at physical property — for example, stealing plastic pallets from the U.S. Postal Service[1] or fraudulently obtaining tax refund checks[2] deprives the government of the use of those pallets or funds.

When the property at issue is government information, the analysis is more complicated. A majority in the U.S. Court of Appeals for the Second Circuit believes that property or a thing of value should be interpreted broadly to include the intangible.[3]

According to the Second Circuit's dicta in U.S. v. Girard, if amusement is a thing of value in the context of gambling, sexual intercourse is a thing of value in the context of bribery, and the testimony of a witness is a thing of value in the context of witness tampering,[4] then the scope of government property susceptible to theft under Section 641 is no less broad.

A vocal minority in the circuit disagrees, opining recently that not all intangible information falls within the scope of the statute.[5] Where the government interest at issue is regulatory, and the government agency can fulfill its regulatory mission "regardless of whether information as to the substance or timing of a planned regulation remains confidential," U.S. Circuit Judge Amalya Kearse determined that such information was not a thing of value within the scope of Section 641.[6]

Nevertheless, prosecutors have taken a broad view, charging defendants with theft of government property for using a government computer and copier to prepare materials for a private ballroom dance group,[7] for copying Federal Deposit Insurance Corporation-insured banks' living wills,[8] and for a political intelligence consultant's learning and disclosing to his clients his view about CMS deliberations regarding Medicare reimbursement rates.[9]

Government Property in the Blaszczak Case

The U.S. v. Blaszczak decision in particular should keep potential government sources and reporters awake at night. Blaszczak was a political intelligence analyst whose job it was to decode the sometimes-byzantine workings of one of the country's largest federal agencies, the Centers for Medicare & Medicaid Services, for his clients.

CMS decisions have wide-ranging consequences for millions of Americans and directly impact the cost of health care. As a result, there is substantial public interest in what CMS does, how it does it, and what it might do next. At trial, CMS witnesses testified that part of the agency's process was communicating with the public and the health care industry about its decisions and plans, including before those plans were final.

But prosecutors charged and a jury convicted Blaszczak for talking to colleagues at CMS and elsewhere, and then predicting to his clients based on what he understood was being deliberated within CMS, that CMS likely would propose a particular change to Medicare reimbursements rates, as part of its upcoming proposed rules that were scheduled to be issued to the public.

They also convicted one of Blaszczak's contacts at CMS, who prosecutors alleged was the source of his information, and two of Blaszczak's clients, whose hedge fund traded after receiving information from Blaszczak.

The prosecutors claimed that the information Blaszczak learned, though not classified, was confidential predecisional information and that Blaszczak's learning of and disclosing it was theft. The Second Circuit, in upholding the conviction, held that an unauthorized disclosure "by definition interferes with the agency's right to exclude the public from accessing such information."[10]

Implications of the Blaszczak Decision for Journalists

Contrast what the government characterized as criminal disclosure of predecisional information in Blaszczak to some of the recent media disclosures of actual documents containing internal plans within health care-related government agencies.

On March 9, Time published information from a classified intelligence report, disclosed by two government officials who had seen the report, which warned that the country was not prepared for a global pandemic.[11]

According to the Time article, the administration postponed the release of the report and cancelled the Feb. 12 hearing where it was supposed to be delivered and declassified. The government information was revealed outside the government, apparently without authorization.

On May 4, The Washington Post published and reported on a draft government report, branded with the Centers for Disease Control and Prevention logo, projecting a surge of Covid-19 cases in May.[12] Like the prosecution's description of the information at issue in Blaszczak, the report disclosed to The Washington Post was information prepared by people in the government but not yet formally issued by the government, coming from a government agency.

As described in an article published by Politico on May 7, the Associated Press obtained a

17-page report from the CDC that provided guidance for localities on how to reopen after the pandemic, that was, according to the article, "never [supposed to] see the light of day."[13] The AP obtained the report from a federal official who, according to the report, was not authorized to release it.

Unlike in the Blaszczak case, in each of the examples above, the government information disclosed took the form of an actual written draft report.

If the Second Circuit majority in Blaszczak is right that a political consultant's reporting of what he believed the government was going to include in an upcoming proposed rule is sufficient to constitute theft of government property, it is not hard to imagine that the apparent unauthorized disclosure of actual written draft reports also could be charged as such a theft.

Prosecution of Government Sources or Journalists?

Although Section 641 has not been used to charge journalists, it has been used as the basis for charges against individuals within the government who disclosed information to reporters.[14] But the Second Circuit's expansive view of what constitutes property is broad enough even to cover examples of reporting similar to those described in the previous section.

Indeed, most disclosures by government sources to reporters of policy steps being proposed or considered involve government information that the government would prefer to keep confidential, are disclosed without official authorization, and are received by reporters who know they are receiving information that was not authorized for disclosure.

On their face, the required elements needed to prove a violation of Section 641 appear to be satisfied, and the only thing preventing prosecution of such disclosures appears to be prosecutorial discretion.

But doesn't the First Amendment protect journalists and sources from prosecution? Not as much as you might think. In Branzburg v. Hayes, the U.S. Supreme Court explained that reporters can be prosecuted under "criminal statutes of general applicability" and "laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed."[15]

In fact, most of the protections offered by the First Amendment in the context of a free press have been enforced not by the courts, but by state shield laws, and by executive deference — in other words, the executive historically has chosen not to pursue its criminal powers in areas where they come close to potentially impeding on the operation of a free press.

This is demonstrated by Section 1664 of the now archived U.S. Attorneys' Manual, which explained:

[T]he Criminal Division believes that it is inappropriate to bring a prosecution under 18 U.S.C. § 641 when: (1) the subject of the theft is intangible property, i.e., government information owned by, or under the care, custody, or control of the United States [and] (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public.[16]

The manual further explained that this

policy [wa]s designed to protect members of the press from the threat of being prosecuted for theft or receipt of stolen property when, motivated primarily by the interest in public dissemination thereof, they publish[ed] information owned by or under the custody of the government.[17]

The manual's inclusion of this language in its former guidance indicates that the U.S. Department of Justice views as possible the prosecution of reporters under Section 641, but it — at least at one point — had chosen as a matter of policy not to bring such cases.

So, isn't it the case that prosecutors, in their discretion, will choose to hold their fire and not charge sources or reporters with theft of government information? Maybe not. The current version of the Justice Manual — which replaced the U.S. Attorney's Manual in 2018 — notably does not include the protective language quoted above from the prior version.[18] The apparent removal of this written policy should concern reporters.

Indeed, at least one federal judge has recognized the possibility that a newspaper reporter can be prosecuted under Section 641. In United States v. Jeter, the defendant delivered carbon transcripts of grand jury testimony to the grand jury targets.[19]

The U.S. Court of Appeals for the Sixth Circuit concluded that the defendant violated Section 641 because the information included in the carbon transcripts was "a thing of value … that the United States rightfully desired to keep in its exclusive possession."[20]

In response to the Sixth Circuit's ruling, a dissenting judge expressed this concern:

under the Court's view, the improper release of all confidential judicial information — including judicial opinions, votes and panel assignments — would constitute theft of government property … The Court establishes no limiting principle [and] … [a] newspaper reporter would apparently go to jail if she finds out by stealth in advance what panel of the Sixth Circuit will hear a case or when an opinion will be released or what it will hold.[21]

Conclusion

Section 641, as interpreted by the Second Circuit, is so broad that it can capture the printing habits of a ballroom dancer, the predictions of future government action by a political intelligence analyst or anyone else who wants to disclose information the government would rather keep secret.

Its potential uses to a creative prosecutor are similarly broad, and, if the Second Circuit is right, there is no legal bar preventing its application even to those involved in some of the journalism we are seeing from day to day.

After all, as Supreme Court Justice Robert Jackson once stated:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous … [and] he choose[s] his defendants. It is in this realm-in which the prosecutor … selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies … and the real crime becomes that of being unpopular with the predominant or governing group [and] being attached to the wrong political views.[22]

Prosecutors already have stretched Section 641 to create a criminal conviction where a

traditional insider trading theory failed in Blaszczak. Is it really inconceivable that a criminal prosecution of a reporter's source for revealing information the government preferred to keep secret — or of a reporter or publication for reporting it — may be next?

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[1] Lee v. United States, Nos. 18-cv-1675(VB), 14-cr-94(VB), 2018 WL 4759789, Memorandum Opinion & Order (S.D.N.Y. Oct. 2, 2018).

[2] Kogan v. United States, Nos. 13-cr-171(PAC), 17-cv-4965(PAC), 2018 WL 1474372, Opinion and Order (S.D.N.Y. Mar. 23, 2018).

[3] United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979).

[4] Id.

[5] United States v. Blaszczak, 947 F.3d 19 (Kearse, J. dissenting).

[6] Id. at 47. The recent holding from the Supreme Court in Kelly v. United States lends weight to Judge Kearse's dissent. In overturning Bridget Anne Kelly's and William Baroni's convictions for wire fraud and federal-program fraud, both of which "target fraudulent schemes for obtaining property" the Court held that the definition of "property" in the statutes does not extend to "the regulatory rights of 'allocation, exclusion, and control,'" which are "a quintessential exercise of regulatory power." No. 18-1059, slip op. at 1, 8-10 (May 7, 2020).

[7] United States v. Collins, 56 F.3d 1416 (D.C. 1995) (overturned on appeal for lack of interference with government functioning).

[8] United States v. Aytes, 18-cr-132(SJ)(RJM), 2019 WL 5579485, at *2 (E.D.N.Y. Oct. 29, 2019) (granting acquittal on a rule 29 motion because the FDIC did not pay for the living wills and their being copied caused no deprivation).

[9] United States v. Blaszczak, 947 F.3d 19 (conviction upheld on appeal; motion to seek Supreme Court review expected).

[10] Id. at 38.

[11] John Walcott, The Trump Administration Is Stalling an Intel Report That Warns the U.S. Isn't Ready for a Global Pandemic, Time, Mar. 9, 2020, https://time.com/5799765/intelligence-report-pandemic-dangers/.

[12] William Wan et al., Draft Report predicts covid-19 cases will reach 200,000 a day by

June 1, The Washington Post, May 4, 2020, https://www.washingtonpost.com/health/government-report-predicts-covid-19-cases-will-reach-200000-a-day-by-june-1/2020/05/04/02fe743e-8e27-11ea-a9c0-73b93422d691_story.html; Draft government report projecting a surge of covid-19, The Washington Post, May 4, 2020, https://www.washingtonpost.com/context/draft-government-report-projecting-a-surge-of-covid-19-cases/2b35321d-3977-41f5-9a78-50da7cafbe06/?itid=lk_inline_manual_1.

[13] Administration shelves CDC guidance to reopening country, Associated Press, May 7, 2020, https://www.politico.com/news/2020/05/07/admin-shelves-cdc-guide-to-reopening-country-242008.

[14] See Criminal Complaint, United States v. Snowden, No. 1:13CR265 (CMH) (E.D. Va. June 14, 2013) (charging a NSA contractor with violating section 641 when he leaked top-secret documents relating to certain NSA data-collection programs to The Guardian and Washington Post); see also United States v. Morrison, 844 F.2d 1057 (4th Cir. 1988) (finding that a U.S. Navy Analyst violated section 641 when he provided a news publication with three pages of background material from a classified report about a Soviet base where an explosion had occurred, as well as classified satellite photos of a Soviet carrier under construction).

[15] 408 U.S. 665, 682–83 (1972); see also Cohen v. Cowls Media Co., 501 U.S. 663, 670 (1991) ("Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

[16] https://www.justice.gov/archives/jm/criminal-resource-manual-1664-protection-government-property-theft-government-information.

[17] Id.

[18] Justice Manual,9-13.400(C).

[19] 775 F.2d 670, 673 (6th Cir. 1985).

[20] Id. at 682.

[21] Id. at 684 (Merritt, J., dissenting).

[22] Robert H. Jackson, The Federal Prosecutor, 24 J. Am. Jud. Soc'y 18 (1940) (address at Conference of United States Attorneys, Washington, D.C., April 1, 1940).