Democracy Can't Function Without Secrecy

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Abstract

The list runs from Benedict Arnold, whose frustrated ambition led him to offer defense plans to the British during the Revolution; to Julius Rosenberg, whose ideology drove him to provide details of atomic-bomb design to the Soviet Union; to Robert Hanssen, Aldrich Ames and John Walker, who betrayed their country for money and disclosed information that cost the lives of American spies. The U.S. government provides funds to the nominees of both parties for transition planning. Since such conversations are financed by the government, it's hardly plausible to claim they are conducted without authority from the government.\n

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Full Text

The promiscuous release of classified information that preceded and accompanied the resignation of Mike Flynn as national security adviser makes it almost quaint to recall a time when the World War II slogan "loose lips sink ships" was taken seriously.

Much has happened to erode standards regarding national secrets. Oddly, those standards seem to have remained intact when it comes to giving sensitive information secretly to an adversary of the United States. The list runs from Benedict Arnold, whose frustrated ambition led him to offer defense plans to the British during the Revolution; to Julius Rosenberg, whose ideology drove him to provide details of atomic-bomb design to the Soviet Union; to Robert Hanssen, Aldrich Ames and John Walker, who betrayed their country for money and disclosed information that cost the lives of American spies. Whether or not their actions met the legal definition of treason (and only Arnold's did), they generally are regarded as traitors.

Yet when secrets are released to the public under some claim of principle, outrage is muted to say the least. Sometimes, as with the Pentagon Papers leaked by Daniel Ellsberg in 1971, the potential damage might have been overstated and the secrecy unwarranted. But in other cases the damage was comparable to the injury inflicted by outright espionage.

Take the New York Times's disclosure in 2006 that after 9/11 the U.S. government had been monitoring international funds transfers through the Swift system, used by banks world-wide. By tracking cash flows to terrorists, the program had helped frustrate numerous plots and catch their organizers. Its disclosure by the Times was a serious blow to counterterrorism efforts. Although this monitoring program was entirely lawful, the newspaper and its reporters justified the exposure with two assertions: that the public had a right to know about it, and the account was "above all else an interesting yarn," as one of the reporters put it.

"The right to know" is a trope so often repeated, it may come as a surprise that the Constitution mentions no such right. That omission is hardly surprising given the circumstances in which the Constitution was drafted in 1787 -- with doors and windows closed even in the stifling summer heat to prevent deliberations from being overheard, and with the delegates sworn to secrecy. Although the Constitution directs the chambers of Congress to keep and publish a journal of their proceedings, it excepts from the publication requirement "such Parts as may in their Judgment require Secrecy."

The choice to disclose matters that public officials have determined should remain secret is often a singularly antidemocratic act. Public officials are elected -- or appointed by those elected -- to pursue policies for which they answer to the voters at large. Those who disclose national secrets assert a right to override these democratic outcomes.

There are also criminal statutes that bear on such disclosures. Debate over high-profile missteps -- David Petraeus and Hillary Clinton come to mind -- has made those laws familiar. They range from the misdemeanor of putting classified information in a nonsecure location, to felony statutes carrying penalties up to 10 years for disclosing classified information about communications activities of the United States, such as surveillance of foreign diplomats.

Some violations of the law are hard to deter, given the asserted motive. Bradley (now Chelsea) Manning and Edward Snowden claim their systematic disclosures served a higher interest by promoting a necessary debate about the propriety of government conduct and secrecy.

The most recent leaks of confidential information, however, seem to come from decidedly different motives. Consider Mr. Flynn's situation. It has been disclosed that U.S. intelligence agencies taped conversations last year between Mr. Flynn and the Russian ambassador. After Mr. Flynn falsely denied to the vice president and the FBI that he had discussed sanctions with the ambassador, Sally Yates, then acting attorney general, warned the White House that Mr. Flynn was opening himself up to Russian blackmail. Making all of this public seems designed principally to damage Mr. Flynn.

The propriety of his having been questioned at all by the FBI is open to serious doubt. Some suggest that a discussion of sanctions with the Russian ambassador might have violated the Logan Act, which bars unauthorized negotiation with any foreign government in a dispute with the U.S.

The Logan Act was passed in 1799 and has never successfully prosecuted, but even a technical violation here is doubtful. When the conversations in question took place, even if some were before the election, Mr. Flynn was consulting with Donald Trump on what national security policies he would follow. The U.S. government provides funds to the nominees of both parties for transition planning. Since such conversations are financed by the government, it's hardly plausible to claim they are conducted without authority from the government.

Leaks like the ones about Mr. Flynn -- not to mention of conversations between President Trump and the leaders of Mexico and Australia -- have an obvious source: a small group within the bureaucracy who have no higher cause to which they can appeal. They ought to be identifiable easily enough. Using a grand jury to investigate and prosecute one or two such people could have a salutary effect. That might bring us closer to a time when "loose lips sink ships" had some purchase.

Mr. Mukasey served as U.S. attorney general (2007-09) and a U.S. district judge (1988-2006).

Credit: By Michael B. Mukasey

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