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“Leaking about Donald Trump in the Age of False News”

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Rumors of a Russian connection with the Trump administration continue to proliferate and leaks from the intelligence agencies show no signs of stopping. The Trump administration responds with accusations of its own; most recently, that Trump was illegally wire-tapped on the orders of President Barack Obama. We are far from the bottom of any of this, so it is difficult to write about allegations of improper relations between the Trump team and Russian President Vladimir Putin’s Russia with any certainty, let alone with the historian’s preferred tool of hindsight. In fact, I write knowing that this essay is already almost surely out of date.¹

Still, whatever details end up emerging from the swirl of suspicion, the *form* of the controversy is not as unprecedented as we might imagine. The key evidence is classified, cloistered within the secretive national security branches of the government. What the media and the public know has been released in partial form. In January 2017, allegations of Russian interference in the U.S. presidential election were issued in a declassified intelligence report.² In February, National Security Advisor Michal Flynn was forced to resign after the *Washington Post* and *New York Times* reported that Flynn had lied about his exchanges with the Russian ambassador in late December. The stories were based on leaks of counterintelligence information about the nature of the conversations—the *Post* story was based on nine anonymous official sources.³ Last Wednesday, Justice Department officials told the *Washington Post* that Attorney-General Jeff Sessions had

¹ This essay was written on Monday, 6 March 2017.

² Masha Gessen, “Russia, Trump and Flawed Intelligence,” *New York Review of Books*, 9 January 2017; Zack Beauchamp, “The Key findings from the US intelligence report on the Russia Hack, decoded,” *Vox*, 6 January 2017.

³ “As Flynn falls under growing pressure over Russia contacts, Trump remains silent,” *Washington Post*, 12 February 2017; “Flynn’s Swift Downfall,” *Washington Post*, 14 February 2017; “Flynn is Said to Have Talked to Russians About Sanctions Before Trump Took Office,” *New York Times*, 9 February 2017.

spoken twice with Russia's Ambassador to the U.S. during 2016, contradicting Sessions's earlier testimony during his confirmation hearings.⁴ In all of these cases, and many more, we are learning about the existence of classified information through leaks or partial declassification; but the evidence itself remains classified. This is a familiar feature of politics since World War II. Meanwhile, the Trump administration's hostility to leakers is similarly familiar, for in this regard he really is acting presidentially, with a fixation on "fake news" as an idiosyncratic flourish. (Though one that is not, it is worth pointing out, very far removed from the critique of the 'liberal media' so central to the Republican playbook since the time of Nixon and Agnew).

So while history may be no guide to the specifics of the scandal, it can help us think through its structure. Leaks are essential to the coverage of the national security branches of the state; they provide a key means for the public to learn about otherwise secret activity being conducted by its government. But they are also a limited and insufficient mechanism to inform the public—for the press and the public to rely on them uncritically is to risk making serious mistakes and seriously distorting public discourse. Leaked information plays a role in unearthing scandals, but it is important to be clear about the limitations of leaks. From our perspective in the middle of an unfolding drama, we can turn to history for some lessons.

History's first lesson is that leaks are a ubiquitous, structural feature of American political culture. Because we fixate on the most shocking leaks, we tend to think of them as exceptional breaches of secrecy, and we tend to interpret them in highly partisan terms. Leakers that support our side we treat as noble whistleblowers; leakers that undermine our side we treat as pathological and treacherous. There is little principle to be found. Think here of WikiLeaks founder Julian Assange's remarkable transformation in the eyes of Republican pundits—in 2011, he was a traitor worthy of assassination; 5 short years later he was seen as a hero for exposing Hillary Clinton and the Democrats.⁵

In reality, leaks are omnipresent in American political culture, and have been since the rise of state secrecy in the 1940s. *New York Times* Washington correspondent Max Frankel captured the process in his deposition in the Pentagon Papers case in the early 1970s: "practically everything that our government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same government, by the congress and the press in one continuing round of professional and social contacts, and cooperative and competitive exchanges of information." *Washington Post* editor Ben Bradlee agreed, noting that the "executive branch...normally, regularly, routinely and purposefully makes classified information available to reporters and editors in Washington."⁶ Leaks, in other words, are not unusual. Frankel called the trade in secrets the "coin" of modern journalism; by the 1980s, according to a Harvard

⁴ "Sessions met with Russian envoy twice last year, encounters he later did not disclose," *Washington Post*, 1 March 2017.

⁵ "How Julian Assange evolved from pariah to paragon," *Washington Post*, 4 January 2017.

⁶ "Security Classification as a Problem in the Congressional Role in Foreign Policy," Foreign Affairs Division, Legislative Reference Service, December 1971, 22-23

study, 42% of federal policymakers had leaked information to journalists; by 2013, Columbia Law Professor David Pozen observed that the “United States government leaks like a sieve.”⁷

And in the context of what everyone acknowledges is a runaway classification system, in which far too much information is declared secret and shielded from the public, leaks play an important role in informing public debate about the operations of the government. As legal scholar Seth Kreimer has argued, leaks play an important role in the “ecology of transparency”—they often provide the first glimpse of a problem, the details of which can then be ferreted out by government investigation, congressional inquiry, or the filing of Freedom of Information Act requests. Kreimer provides many examples of issues that first came to light through leaks—abuses at Guantanamo Bay, warrantless surveillance and wiretapping, the existence of a network of CIA “black sites.”⁸ Such leaks can play an important role in both revealing and pre-empting potential government misconduct. On January 25, the *New York Times* published the leaked draft of an Executive Order that would have reestablished the black sites; in light of public criticism, the Trump administration distanced itself from the draft.⁹

Of course, we have no way of knowing how seriously this draft memo was being debated, or how credibly to take the Trump administration’s subsequent denials of its authenticity. This reminds us of a second feature of leaks—while leaks might be necessary to provide insight into the secretive operations of the state, they are also a flawed mechanism for informing the public. Most basically, this is because they are difficult to verify or assess. (Leaked documents of clear provenance are a partial exception, though even they often lack necessary context).

To deal with this problem, there has always been a tendency to try to assess leaks based on the identity and motivations of the leaker. Whether we applaud or condemn them, we imagine most leakers to be solitary dissidents, speaking out against the political structure. We want, therefore, to assess their personal motivations. For this reason, there is a long history of interest in the psychological health of leakers; it was no accident that Richard Nixon organized ‘the plumbers’ to break into Daniel Ellsberg’s psychiatrist’s office, or that Edward Snowden was accused of narcissism.¹⁰

In reality, it is difficult to assess the intentions of leakers, even when we know a great deal about them. The little-known case of Colonel John Nickerson illustrates this point. In 1957, Nickerson was the first American charged under the Espionage Act for leaking state secrets – in an effort to scuttle a rival weapons development

⁷ Elie Abel, *Leaking: Who Does It? Who Benefits? At What Cost?* (New York: Priority Press Publications, 1987), 34, 62; David E. Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review* 127:2 (December 2013): 512–635. <http://harvardlawreview.org/2013/12/the-leaky-leviathan-why-the-government-condemns-and-condones-unlawful-disclosures-of-information/>.

⁸ Seth Kreimer, “The Freedom of Information Act and the Ecology of Transparency,” *University of Pennsylvania Journal of Constitutional Law* 10:5 (2008): 1040. <http://scholarship.law.upenn.edu/jcl/vol10/iss5/2>.

⁹ Charlie Savage, “Trump Poised to Lift Ban on C.I.A. ‘Black Site’ Prisons,” *New York Times*, 25 January 2017; Trevor Timm, “Flynn resignation shows leaks under Trump are working. Keep ‘em coming,” *Columbia Journalism Review*, 14 February 2017.

¹⁰ Jeffrey Toobin, “Edward Snowden Is No Hero,” *New Yorker*, 10 June 2013.

program and win funding for his own missile program, he had disclosed the classified results of Army missile tests. Nickerson saw himself as both a brave whistleblower, informing the public about incompetence and corruption in the awarding of defense contracts, and as a self-interested player, risking national secrets for personal advancement. (In his words, he was “one of a new-breed of missile-men politicians engaged in a lone-wolf operation to sell new weapons projects to the government.”¹¹) There was, in other words, no clear line distinguishing his personal political agenda from his desire to inform the public. And this is typical; leaks are always a way of conducting politics by other means. We should adjudicate leaks according to what we learn from them, not according to the motivations of the leakers, even when we can identify them.

And normally, of course, we do not know the identity of the leakers – this is the case in today’s leaks. The act of leaking classified information is, under the draconian provisions of the Espionage Act, illegal (think here of Obama’s “war on whistle-blowers”). Those who wish to leak information contrary to the wishes of the administration risk real reprisals: beyond the threat of prison, even the leak of non-classified information can result in firing, demotion, and other sanctions.¹² As a result, most leaks are issued anonymously, a necessity to avoid prosecution. But the anonymity of most leaks simultaneously creates the potential for government leakers to manipulate the press to pursue their own agenda.

Such agendas can take two forms. First, leaks can be part of a coordinated effort by an administration to pursue a policy or political goal. Leaks can be a way of floating trial balloons, or shifting public debate.¹³ When combined with the ability of the administration to partially declassify secret information, they can be a powerful tool. The textbook case here, of course, is the leaked and selectively declassified “evidence” of Weapons of Mass Destruction (WMD) in the lead-up to the 2003 Iraq War, which was uncritically reproduced by the press and which made the case for war seem far stronger than it was.¹⁴

Even leaks that are closer to what we might think of as pure whistleblowing often have a very particular political agenda that may run parallel to the public’s right to know, but is rarely identical to it. The textbook example here is Mark Felt, or Deep Throat, who helped blow the whistle on Watergate to try to wrest control of his FBI away from Nixon’s White House and to gain retribution for having been passed over as FBI Director. Based on his access to ongoing government investigations, Felt fed important information to the reporters Bob Woodward and Carl Bernstein, which helped them keep the Watergate story alive in the press. But based on Felt’s leaks, as well as other partial leaks from the government investigation, Woodward and Bernstein were unable to crack the story before the November election. (Also worth remembering: they made

¹¹ Sam Lebovic, “The Forgotten 1957 Trial That Explains Our Country’s Bizarre Whistleblower Laws,” *Politico Magazine*, 27 March 2016.

¹² Daniel Ellsberg, “Secrecy and National Security Whistleblowing,” *Social Research: An International Quarterly* 77:3 (Fall 2010): 773-804.

¹³ Pozen, “Leaky Leviathan”; Douglass Cater, *The Fourth Branch of Government* (Cambridge: Houghton Mifflin, 1959).

¹⁴ Sam Lebovic, “Limited War in the Age of Total Media” in Beth Bailey and Richard Immerman, eds., *Understanding the Wars in Iraq and Afghanistan* (New York: New York University Press, 2015).

occasional, and entirely understandable, errors in their early coverage, which served to misinform the public.)¹⁵

And seen in a broader context, it is significant that Felt had little interest in informing journalists about illegal activities conducted by the FBI—his interests were exposing the White House, nothing more. The public benefitted from this intra-governmental conflict insofar as it learned about Watergate, but other illegal conduct went unexposed. For instance, the massive illegalities of the FBI's COINTELPRO program, in which the FBI monitored, intimidated and harassed a generation of activists, never leaked out in these years. They only came to light when activists broke into FBI offices in Media, Pennsylvania and stole documents, which revealed the name of the program for the first time.¹⁶ The lesson is clear—leaks can work to inform the public, but they are dependent on the agenda of the leaker. Not everything leaks.

The example of Watergate provides a final historical lesson—leaks are an insufficient mechanism for resolving scandals. There is a mythological version of the Watergate story, promoted by the book and film *All the President's Men*, in which Woodward and Bernstein single-handedly brought down Nixon by cultivating leakers.¹⁷ Like all myths, there is some truth here, but much is missing—in this case, the fact that Woodward and Bernstein's reporting had stalled by October 1972. The next month, Nixon, unharmed, swept to easy reelection at the polls. It then took over a year of congressional investigations to produce the evidence that would lead to Nixon's resignation. (The film version of *All the President's Men* tries to get around the anticlimactic end of its story, with the young reporters increasingly marginal to the action, by appending a montage of Nixon's fall to the movie's conclusion). It was Congressional investigations and criminal trials that unearthed evidence that the White House had tried to cover-up the Watergate burglary and that discovered and then dislodged the White House tapes that provided the “smoking gun.”¹⁸

Anonymous leaks, in other words, are necessary for beginning a process of uncovering a scandal, but they are not capable of informing the public about the true meaning of the scandal. Leaks are a device for beginning a debate, a way to open a process of information gathering and investigation and adjudication. Whether or not Republicans in Congress will agree to establish independent investigations remains unclear—their political calculus seems to shift by the hour. But it is surely what is needed to clarify the true story.

¹⁵ Max Holland, *Leak: Why Mark Felt Became Deep Throat* (Lawrence: University of Kansas Press, 2012); Beverley Gage, “Deep Throat, Watergate and the Bureaucratic Politics of the FBI,” *Journal of Policy History* 24:2 (2013): 157-183, DOI: <https://doi.org/10.1017/S0898030612000012>; Sam Lebovic, *Free Speech and Unfree News: The Paradox of Press Freedom in America* (Cambridge: Harvard University Press, 2016), 203-208.

¹⁶ Betty Medsger, *The Burglary: The Discovery of J. Edgar Hoover's Secret FBI* (New York: Alfred Knopf, 2014).

¹⁷ Carl Bernstein and Bob Woodward, *All the President's Men: The Greatest Reporting Story of All Time* (New York: Simon and Schuster, 1974).

¹⁸ Edward Jay Epstein, “Did the Press Uncover Watergate?” *Commentary*, 1 July 1974; Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (New York: W. W. Norton, 1990); Lebovic, *Free Speech and Unfree News*, 203-208; Michael Schudson, *Watergate in American Memory: How We Remember, Forget, and Reconstruct the Past* (New York: Basic Books, 1992).

In the meantime, while it is necessary to rely on leaks to keep the story alive, we should be wary of placing too much faith in anonymously sourced stories. Leaks are necessary, but they are also deeply problematic. A press reliant on leaked sources opens itself up to manipulation by government sources: either directly, *à la* WMD; or indirectly, by creating a culture of insider access that undermines press independence. And the rise of hyper-partisan media has created another problem, for it seems likely that the cycle of assertions without evidence is only heightening partisan rancor. Within the polarized echo-chambers of the current news-cycle, allegations only fan pre-existing assumptions. Trump supporters dismiss such stories as ‘fake news’ and as evidence of a conspiracy of liberal media elites and Washington insiders designed to undermine a democratically elected president. Trump’s opponents, trusting the processes of the media and the expertise of the national security state, see in the allegations proof of his deep illegitimacy. News stories alone, no matter how many anonymous sources are cited, seem unlikely to transform these beliefs.

Indeed, the entire affair reflects deep problems in the structure of American political debate. Competing sections of the government issue statements with little evidence; as a public we are asked to trust them. This is much closer to eighteenth-century court intrigue than it is to the ideal of democratically informed public, rationally parsing competing claims according to the evidence. Meanwhile, the allegations and counter-allegations distract from much needed debate about the development and implementation of policy matters of real importance: the environment, the economy, immigration, foreign policy, health care, minority rights. Chaotic public debate is not politically neutral. It can provide a cover for the delay of much needed policy (something the Republicans learned from pollster and political consultant Frank Luntz when they began disputing the science on climate change in the 1990s). And it can provide a veil for apparently technocratic administrative governance that has real consequences.

So regardless of the outcome of this particular scandal, we need to do more to encourage the flow of information to the public, and to restore faith in democratic dialogue. Government needs to become more accountable. In the short-term, if it has nothing to hide, the Trump administration needs to become more transparent about matters ranging from tax-returns to conflicts of interest. More importantly, the veil of state secrecy needs to be rolled back to allow for on-the-record disclosures of information pertaining to national security. In the long-run, the classification system needs to be reformed to consider the public’s right to know. Similarly, as Yochai Benkler has proposed, the whistleblower laws need to be amended to allow for the leaking of national security information if leakers do so with a reasonable belief that they are exposing government wrong-doing.¹⁹ In the medium-term, as we continue to rely on illegal leaks to learn about government activity, protections for anonymous sources need to be improved. News outlets are already developing technological fixes to protect their sources. A federal law protecting journalists from being forced to name their sources would also help information flow to the public.²⁰

¹⁹ Yochai Benkler, “A Public Accountability Defense for National Security Leakers and Whistleblowers,” *Harvard Law and Policy Review* 8 (2014).

²⁰ Heidi Kitrosser, “Free Speech aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information,” *Journal of National Security Law & Policy* 6:2 (2013): 409-446; Geoffrey R. Stone, “Why We Need a Federal Reporter’s Privilege,” *Hofstra Law Review* 34 (2005); Jason M. Shepard, *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (El Paso: LFB Scholarly Pub LLC, 2011).

None of this is to comment either way as to how history will ultimately judge the Russian connection, or the media's reporting on it. Perhaps, in the long-run, this essay will seem an abstract and naive reaction to the unfolding of a serious scandal (in which case, excuse these notes as missives from the world's tiniest and most marginal echo-chamber—historians interested in the structure of American political discourse). It all depends, of course, on what actually happened between the Trump team and the Russians, and what we learn from much-needed government investigations. Perhaps all of the smoke indicates a raging fire; perhaps the bellows of a scandal-hungry news media have artificially inflamed things. It should go without saying that when public officials lie to the public, they should resign; if they break the law, if they commit perjury, they should be charged. But trial-by-media has always been a difficult way to get to the bottom of such matters. And in today's hyper-partisan, hyper-classified information environment, it's harder than ever.

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