

The Leakers Who Exposed Gen. Flynn's Lie Committed Serious — and Wholly Justified — Felonies

The Intercept

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PRESIDENT TRUMP'S NATIONAL security adviser, Gen. Michael Flynn, was forced to resign on Monday night as a result of getting caught lying about whether he discussed sanctions in a December telephone call with a Russian diplomat. The only reason the public learned about Flynn's lie is because someone inside the U.S. government violated the criminal law by leaking the contents of Flynn's intercepted communications.

In the spectrum of crimes involving the leaking of classified information, publicly revealing the contents of SIGINT — signals intelligence — is one of the most serious felonies. Journalists (and all other nongovernmental citizens) can be prosecuted under federal law for disclosing classified information only under the narrowest circumstances; reflecting how serious SIGINT is considered to be, one of those circumstances includes leaking the contents of intercepted communications, as defined this way by 18 § 798 of the U.S. Code:

Whoever knowingly and willfully communicates ... or otherwise makes available to an unauthorized person, or publishes ... any classified information ... obtained by the processes of communication intelligence from the communications of any foreign government ... shall be fined under this title or imprisoned not more than ten years, or both.

That Flynn lied about what he said to Russian Ambassador Sergey Kislyak was first revealed by Washington Post columnist David Ignatius, who has built his career on repeating what his CIA sources tell him. In his January 12 column, Ignatius wrote: "According to a senior U.S. government official, Flynn phoned Russian Ambassador Sergey Kislyak several times on Dec. 29, the day the Obama administration announced the expulsion of 35 Russian officials as well as other measures in retaliation for the hacking."

That "senior U.S. government official" committed a serious felony by leaking to Ignatius the communication activities of Flynn. Similar and even more extreme crimes were committed by what the Washington Post called "nine current and former officials, who were in senior positions at multiple agencies at the time of the calls," who told the paper for its February 9 article that "Flynn privately discussed U.S. sanctions against Russia with that country's ambassador to the United States during the month before President Trump took office, contrary to public assertions by Trump officials." The New York Times, also citing anonymous U.S. officials, provided even more details about the contents of Flynn's telephone calls.

That all of these officials committed major crimes can hardly be disputed. In January, CNN reported that Flynn's calls with the Russians "were captured by routine U.S. eavesdropping targeting the Russian diplomats." That means that the contents of those calls were "obtained

by the processes of communication intelligence from the communications of [a] foreign government," which in turn means that anyone who discloses them — or reports them to the public — is guilty of a felony under the statute.

Yet very few people are calling for a criminal investigation or the prosecution of these leakers, nor demanding the leakers step forward and "face the music" — for very good reason: The officials leaking this information acted justifiably, despite the fact that they violated the law. That's because the leaks revealed that a high government official, Gen. Flynn, blatantly lied to the public about a material matter — his conversations with Russian diplomats — and the public has the absolute right to know this.

This episode underscores a critical point: The mere fact that an act is illegal does not mean it is unjust or even deserving of punishment. Oftentimes, the most just acts are precisely the ones that the law prohibits.

That's particularly true of whistleblowers — i.e., those who reveal information the law makes it a crime to reveal, when doing so is the only way to demonstrate to the public that powerful officials are acting wrongfully or deceitfully. In those cases, we should cheer those who do it even though they are undertaking exactly those actions that the criminal law prohibits.

This Flynn episode underscores another critical point: The motives of leakers are irrelevant. It's very possible — indeed, likely — that the leakers here were not acting with benevolent motives. Nobody with a straight face can claim that lying to the public is regarded in official Washington as some sort of mortal sin; if anything, the contrary is true: It's seen as a job requirement.

Moreover, Gen. Flynn has many enemies throughout the intelligence and defense community. The same is true, of course, of Donald Trump; recall that just a few weeks ago, Democratic Sen. Chuck Schumer warned Trump that he was being "really dumb" to criticize the intelligence community because "they have six ways from Sunday at getting back at you."

It's very possible — I'd say likely — that the motive here was vindictive rather than noble. Whatever else is true, this is a case where the intelligence community, through strategic (and illegal) leaks, destroyed one of its primary adversaries in the Trump White House.

But no matter. What matters is not the motive of the leaker but the effects of the leak. Any leak that results in the exposure of high-level wrongdoing — as this one did — should be praised, not scorned and punished.

IT IS, OF COURSE, bizarre to watch this principle now so widely celebrated. Over the last eight years, President Obama implemented the most vindictive and aggressive war on whistleblowers in all of U.S. history. As Leonard Downie, one of the editors at the Washington Post during the Watergate investigation, put it in a special report: "The [Obama] administration's war on leaks and other efforts to control information are the most aggressive I've seen since the Nixon administration."

Obama's War on Whistleblowers

The president has been accused of allowing the Stuxnet leaks to help in the election, but his overarching policy has been extraordinarily tough on whistleblowing.

PETER VAN BUREN JUN. 12, 2012 3:30 PM

It's hard to put into words how strange it is to watch the very same people — from both parties, across the ideological spectrum — who called for the heads of Edward Snowden, Chelsea Manning, Tom Drake, and so many other Obama-era leakers today heap praise on those who leaked the highly sensitive, classified SIGINT information that brought down Gen. Flynn.

It's even more surreal to watch Democrats act as though lying to the public is some grave firing offense when President Obama's top national security official, James Clapper, got caught red-handed not only lying to the public but also to Congress — about a domestic surveillance program that courts ruled was illegal. And despite the fact that lying to Congress is a felony, he kept his job until the very last day of the Obama presidency.

WAR STORIES MILITARY ANALYSIS JUNE 11 2013 12:44 PM

Slate

Fire James Clapper

The Director of National Intelligence lied to Congress about NSA surveillance. What else will he lie about?



By Fred Kaplan

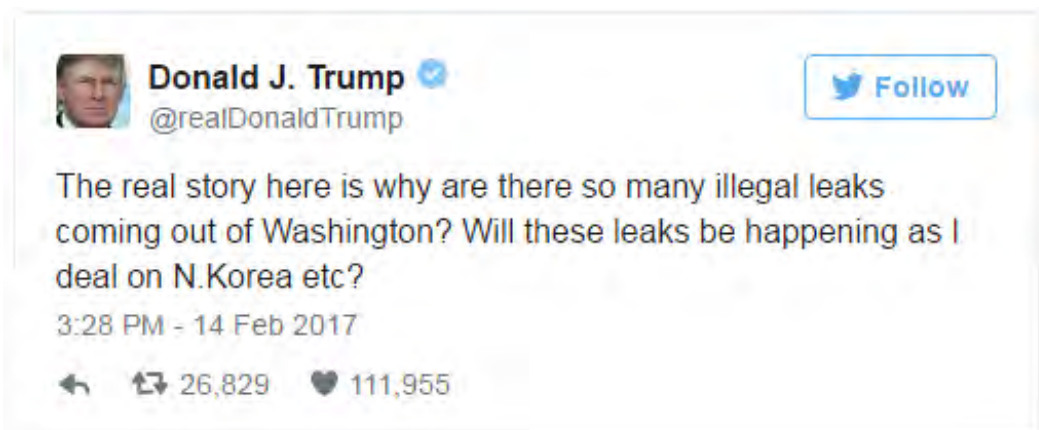


Director of National Intelligence James Clapper

Photo by Win McNamee/Getty Images

But this is how political power and the addled partisan brain in D.C. functions. Those in power always regard leaks as a heinous crime, while those out of power regard them as a noble act. They seamlessly shift sides as their position in D.C. changes.

Indeed, while Democrats have suddenly re-discovered the virtues of illegal leaking, Trump-supporting Republicans are insisting that the only thing that matters is rooting out the criminal leakers. Fox News host Steve Doocy and right-wing radio host Laura Ingraham today both demanded to know why the leakers weren't being hunted, while congressional Republicans are vowing investigations to find the leakers. And Trump himself today — echoing Obama-era Democrats — said that “the real story” isn't the lies told by his national security adviser but rather the fact that someone leaked information exposing them:



But this is just the tawdry, craven game of Washington. People with no actual beliefs shamelessly take diametrically opposite views on fundamental political questions based exclusively on whether it helps or hurts their leaders. Thus, the very same Democrats who just three months ago viewed illegal leaking as a grave sin today view it as an act of heroic #Resistance.

What matters far more than this lowly and empty game-playing is the principle that is so vividly apparent here. Given the extreme secrecy powers that have arisen under the war on terror, one of the very few ways that the public has left for learning about what its government officials do is illegal leaking. As Trevor Timm notes, numerous leaks have already achieved great good in the three short weeks that Trump has been president.

Leaks are illegal and hated by those in power (and their followers) precisely because political officials want to hide evidence of their own wrongdoing, and want to be able to lie to the public with impunity and without detection. That's the same reason the rest of us should celebrate such illegal leaks and protect those who undertake them, often at great risk to their own interests, so that we can be informed about the real actions of those who wield the greatest power. That principle does not change based upon which political party controls the White House.

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From the creation of The Intercept during the Obama presidency through to today under Trump, a central principle of The Intercept — a key reason it was created — was to enable whistleblowing and report on leaks in the public interest. As our pinned article on our front page says: “If You See Something, Leak Something,” with instructions on how to do that as safely as possible.