On classified documents, secrets, and double standards

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In the space of less than a year, FBI agents have recovered classified documents from the homes of the last two American presidents.

As he is now a private citizen, Donald Trump faces real legal danger for evidently violating, at a minimum, the Presidential Records Act after taking dozens of highly classified records with him after he left office. He and others who assisted him in taking and keeping the classified material may also face obstruction of justice charges.

Even lower level (but still very senior) government officials who have purloined classified documents for their own ends — former National Security Advisor Sandy Berger and General David Petreaus to name just two — rarely, if ever, face prison time for their offenses, in contrast to rank-and-file government employees or contractors guilty of similar misconduct.

In contrast, President Joe Biden will not be indicted, much less prosecuted, because of a 1973 Department of Justice Office of Legal Counsel opinion that categorically asserts, "The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions."

If that seems unfair, these are but a few of the many examples of the double standards and incongruities that are hallmarks of our federal system for creating, using, storing, and disposing of secret government documents.

Interestingly, the word "secrecy" appears only once in the Constitution — and not in Article II, which deals with the presidency. Instead, it appears in Article I, Section 5, Clause 3: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy…"

Congress was the original classification authority in the federal government. To this day, there is not a single word in Article II of the Constitution that permits the president or his designees to classify a single document. So what happened?

During the balance of the 18th and 19th centuries, Congress never asserted its authority in this area. Into that vacuum stepped successive presidents who claimed the ability to create, utilize, maintain, share, or destroy secret documents.

The real push for institutionalizing executive branch secrecy came just prior to World War I, through the enactment of the broad-ranging 1911 Defense Secrets Act. The new law handed out at least a year in jail and a $1,000 fine for those convicted of violating it.

By the time the United States entered the war against Germany in April 1917, the Navy, Army, State Department, Department of Justice, and Secret Service all engaged in surveillance and related operations that were kept from the public under a cloak of secrecy, made all the more fearsome through the passage of the Espionage Act.

From the end of the "Great War" onward, internal practices and procedures for creating and keeping secrets within the executive branch grew and evolved, with key help from the Supreme Court in a 1953 landmark case creating the "state secrets privilege." On only a few occasions has Congress even been involved in legislating any aspect of the national secrecy system, such as the Atomic Energy Act, National Security Agency Act, and the Classified Information Procedures Act.

Yet in these bills, Congress only ceded further ground to the executive branch in the area of deciding what is, or is not, classified information.

Even the major intelligence scandals uncovered by the Church Committee in the mid-1970s did not lead to congressional prohibitions on the misuse of the classification system to conceal waste, fraud, abuse, mismanagement, or criminality. That, too, was left in executive branch hands, via executive orders, the current version being EO 13526.

Ironically, as Politico reported last August, Biden's National Security Council was tasked to review how to better manage the nation's classified documents and reduce classification in the first place.

The reality is that the problem is too big, and too inherently political, to be left to the NSC or the executive branch. And this is not a problem that should be outsourced to a "blue ribbon panel" as so often happens in Washington. This is a problem that Congress needs to address head on via a joint select committee.

And while members of the House and Senate Intelligence committees should have nominal representation on such a committee, it must be chaired and largely populated with House and Senate members who have demonstrated, through legislative and oversight actions, they will not back down in the face of NSA, CIA, or FBI claims that any changes to the classification system will lead to the fall of the republic.

At a minimum, the classification system should be in statute, and it should apply to everyone from the president on down. Misusing the classification system to conceal agency or department failures (as NSA has) should be a felony.

To prevent overclassification of documents, the actual categories of information that can be classified should be extremely narrow and compliance subject to Government Accountability Office audits at least annually. This might even be a place where the use of artificial intelligence

in government information systems to monitor for and correct overclassification should be explored, and if viable, implemented.

Finally, to help eliminate the backlog of millions of historical documents sitting on government shelves or in digital repositories, Congress should include mandatory declassification requirements and deadlines in any classification management reform bills. In the case of the FBI alone, there are millions of pages of classified historical records that will never see the light of day absent a new push by Congress to get them into the public domain.

Is all of this a tall order in today's hyper-partisan Washington? Maybe. But as we've seen, the status quo on America's secret document mess is untenable. It's past time to make the system smaller and those who manage it truly legally accountable for its use—or misuse.

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