

LEAK PROSECUTIONS: ENFORCING SECRECY ASYMMETRY DOES NOT EQUATE TO RULE OF LAW

Matt Miller has a piece in the Daily Beast defending the Obama Administration's prosecutions of leakers. Now, as Josh Gerstein notes, Miller makes his work easier by cherry-picking which cases to discuss; he doesn't mention Thomas Drake, who was pretty clearly trying to expose waste and fraud (as well as the government's choice to spend more money to provide less privacy protection). And he doesn't mention Bradley Manning, who is alleged to have leaked at least some materials that expose war crimes and a lot more than expose abuse (though note, DOD, not DOJ, is prosecuting Manning).

But Miller's argument suffers from a much bigger problem. He operates under the assumption that the sole crux of legitimacy arises from a distinction between whistleblower and leaker that he presents as absolute.

To start with, that distinction isn't absolute (as Manning's case makes clear). But even with John Kiriakou, whom Miller does discuss, it's not absolute. Recall what Kiriakou was charged with: leaking the identity of a still covert officer involved in the torture program, being one of up to 23 people who leaked that Deuce Martinez—who was not covert—was involved in the torture program (though didn't do the torture), and lying to the CIA Publication Review Board about the classification of a surveillance technique details of which have been readily available for decades (and which seems to be related to the Secret PATRIOT GPS application targeting American citizens in probable violation of the Fourth Amendment). In other words, two people involved in an illegal program

and one technique that was probably improperly classified and since become another questionably legal executive branch spying technique.

But the entire investigation arose because defense attorneys with Top Secret clearance used the covert officer's name in a still-sealed filing about the abuse their client had suffered at the hand of the US, possibly—though we don't know—at the hand of the covert officer (because he is covert, the defense attorneys did not use the officer's name or picture with their client).

Now, I have no way of knowing (nor does Miller) Kiriakou's motive, and his case will probably end in a plea, meaning we'll never get to learn it at trial. But the very genesis of the case—the defense attorneys' attempts to learn who had tortured their clients so as to be able to adequately represent them—arises from the government's failure to prosecute anyone for torture and its insistence on withholding arguably relevant information from legal teams, presumably in part to prevent them from attaining any redress for that torture in courts.

So regardless of Kiriakou's motive, to argue for the legitimacy of his prosecution as events have transpired is to distract from the larger system in which the government uses secrecy to avoid legal consequences for its own crimes—regardless of what that does for justice.

And it's not just with Gitmo detainees' lawyers that the government has withheld information to prevent justice being done. It did that with al-Haramain, the Maher Arar suit, Jeppesen Dataplan—the list of times when the government has claimed something, even a widely known fact, is super duper secret just so it can't be sued or prosecuted is getting quite long and tired. And, of course, it continues to do it with the Anwar al-Awlaki killing, preferring inconsistent claims of Glomar and state secrets to full accounting not just of Awlaki's killing, but of the claims about Presidential power more

generally.

As it becomes clearer and clearer that the government, at times, wields claims of secrecy precisely to void the principle that says no man is above the law, it gets more and more cynical for the government to, at the same time, prosecute others for violating this asymmetrical system of secrecy.

All that's made worse, of course, with the rampant selective prosecution of leaks. We know that senior Administration officials have leaked SCI information; where are those prosecutions? We know that Leon Panetta personally supported the investigation that led to Kiriakou's charges, and yet faces no consequences for confirming on TV not just that the CIA uses inoculation programs as cover, but also that Pakistani doctor Shikal Afridi who did just that to get information on Osama bin Laden's compound was working for the CIA. John Brennan had or has a personal stake in both the Drake and Jeff Sterling prosecutions, but he blabs more than just about anyone in Washington, and he does it with impunity.

The Obama Administration's prosecution of leaks is not just about—in some cases—the criminalization of whistleblowing. It's about turning secrecy that should serve a purpose into an arbitrary exercise of asymmetrical Presidential power. In this world, secrecy seems to matter when it serves to insulate the Executive Branch—and power more generally—from accountability, but it doesn't matter when there's political gain to be had.

Which brings me to why the Plame leak is an inapt comparison to Kiriakou's alleged leaks. I won't defend Kiriakou for leaking a covert officer's identity, though I'd be a lot more upset if DOJ had prosecuted a single soul who put us in the torture business. But when Cheney ordered Libby to leak classified information—including, almost certainly, Plame's identity—to Judy Miller, he was engaging in just this kind of arbitrary abuse of secrecy that

rots the core of a democracy. And Libby didn't get prosecuted for leaking Plame's identity (ironically, at least in part because the current Criminal Division head Lanny Breuer managed to help Kiriakou avoid telling the grand jury information that strongly suggested Libby knew Plame was covert). He got prosecuted for lying to cover up the fact that this is what the Executive Branch does: leak highly classified information, for political gain, with impunity.

This Administration and the last have gotten more and more brazen about using asymmetrical control over secrecy to undercut the rule of law in this country, even while arguing that leaks to the public generally are worse than leaks to our sworn enemies. The government has, by its own actions, made a mockery of our system of classification. To then prosecute others under that system really corrupts our democracy.

Update: In an update to Gerstein's post, Miller admits that the Drake case is not so clear cut.