

South Dakota Newspapers  
"We the People"  
January 25, 2023

"The Constitution and Government Classification of Secrets"

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Questions surrounding news that President Joe Biden and former Vice President Mike Pence have disclosed possession of classified documents in their homes justify interruption of this column's weekly focus on landmark Supreme Court rulings. Curious readers have asked about the constitutional, legal and historical foundations of government authority to classify documents.

First things first. Let's not confuse the voluntary and cooperative disclosure of possession of classified documents by the Biden and Pence camps with the deceit and obstruction that characterized former President Donald Trump's efforts to undermine the Justice Department's investigation of his secretive possession of classified documents at his home in Mar-a-lago. In the scheme of things, at least this far, Biden and Pence are apples to apples, while Biden and Pence are apples to Trump's oranges.

The U.S. Supreme Court has said little about the constitutional authority to govern classification of documents, but what it has said points to executive control of the secrecy system by virtue of the president's role as Commander in Chief of the military. Yet, questions abound. The Constitution is silent on the repository of authority to classify documents. Secrecy in a democracy, moreover, is guaranteed to be a source of enduring contention.

Nobody disputes the necessity of secrecy in the affairs of state. John Jay, who possessed as much knowledge about foreign affairs as any of his founding colleagues, wrote in Federalist No. 64: "So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects." The only provision in the Constitution that addresses secrecy is found in Article 1, section 5, which grants to Congress, if it wishes, authority to keep its own proceedings secret.

In the 1790s, the Federalists—the party of Washington, Hamilton and Adams—interpreted the Constitution as it applied to foreign affairs as authority for executive secrecy when it came to negotiations and matters of intelligence. There was, however, a clear understanding in the first decade of American politics that the principle of "comity" between the president and Congress required presidential permission from Congress to withhold information from the citizenry. That practice worked efficiently, and the conflicts that arose typically reflected, not interbranch disputes, but rather the demands of aggrieved citizens who feared suppression of information.

The demands of democracy and the principles of self-governance were not to be denied. Democracy encouraged the principle of disclosure. From the beginning, our founders embraced the belief that disclosure and transparency represented the best remedies for resolving policy disputes. James Madison, chief architect of the Constitution, spoke for the generation that conceived the republic: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance," he wrote, "and a people who mean to

be their own Governors must arm themselves with the power which knowledge gives."

Historic conflicts between secrecy and publicity have erupted most prominently during times of war when both principles have been urged with urgency. In wartime, governmental calculations are inspired by fears of espionage. Control of information is vital. But the fact of war focuses the citizenry; fear of death and the goal of survival become paramount. Because Americans are not, to borrow from Thoreau, mere "lumps of clay," but rather thinking, reasoning creatures, they prefer the light of knowledge to the impotence of darkness and demand information that empowers them to judge official strategies and decisions of war.

Until World War II, the United States did not have a formal classification system. Presidents, generals and admirals protected military secrets in a variety of ways. In World War I, General Pershing, headquartered in France, instituted the markings of "Secret, Confidential and For Official Circulation Only," in imitation of his French and British allies. For its part, Congress decided against passage of a statute that would have made it a crime to communicate national defense information that "might" be useful to the enemy.

President Franklin D. Roosevelt drew order from the chaos that surrounded questions of handling secrets when he recognized the threat posed by the espionage capabilities of the Germans and Russians, then united by the Hitler-Stalin pact. On March 22, 1940, Roosevelt issued an executive order creating a military classification system. FDR, who preferred to avoid assertions of inherent executive power, invoked as authority a 1938 statute that empowered the president to prohibit the creation of maps, photographs or sketches of vital "installations or equipment." The

test, FDR explained, "is what the Commander in Chief of the Army and Navy thinks it would be harmful to the defense of this country to give out." This test, he added, was what would be shared with the public, since congressional committees were already receiving this information in executive session.

This practice of executive determination of what might be shared with the citizenry has been adopted by presidents of both parties. With the assumption by America of global responsibility for maintaining peace and security against international aggression, the concept of national defense has become an ever-expanding net. The result is classification, in various categories, of roughly 50 million documents. And counting.