

You Must Remember This, A Leak is Still a Leak

by Michael Curtis



Scooter Libby

When I use a word, said the Washington, D.C. lawyer and former official, it means just what I choose it to mean, neither more nor less. Consider what's in a name? That which we call a "leak" does not smell as sweet as the word "give" for James Comey, former Director of the FBI. Clarification of terminology in the endlessly running serio-comedy in which James Comey has been one of the leading participants concerning alleged Russian intervention in the 2016 presidential election appears too recondite for him and some other Washington officials even for terms seemingly obvious such as "classification" and "collusion."

It is understandable and appropriate there are sharp

differences on conclusions of events in the Washington chessboard of politics. On one hand, the House of Representatives Intelligence Committee on April 27, 2018 reported it found no evidence that the Trump 2016 presidential campaign had “colluded” with Russia, though Russians had tried to sow discord through cyber attacks and social media. On the other hand, opponents of the Trump administration refer to the Report as superficial and “just a wreck.”

Many issues remain in evaluation of events in U.S. politics of 2016-7, but a particularly intriguing one concerns the memos of private conversations, January 2017 to April 11, 2017, between Comey, FBI Director September 2013-May 2017, and President Donald Trump, now the subject of heated legal and political controversy.

It has long been true that in the U.S., as in other countries, there is a symbiotic relationship between journalists and politicians and public officials who use journalists for political advantage, and reward them by leaks and collusion, thus offering opportunities for media scoops or political advantage. An early example in the U.S. was that of Benjamin Franklin when he was postmaster of Philadelphia. He was dismissed from his post in January 1774 for “pernicious activity.” He had seen and leaked official letters written by Thomas Hutchinson, British General of Massachusetts about the sending of troops. Franklin circulated the letters which were then published by John Adams in the *Boston Gazette*. Franklin admitted his role in the leaking.

More recently, leakers have told a tale too well. A major scandal was the leak in 1972 by “Deep Throat” on the activity of the Nixon Administration at the Watergate Hotel in D.C., to *Washington Post* journalists Carl Bernstein and Bob Woodward. Another was the leak by Daniel Ellsberg in June 1971 of the Pentagon Papers, critical of the Department of Defense report on U.S. troops in Vietnam, 1945-67.

U.S. politics has been influenced by master leakers, Julian Assange with 400,000 classified military documents in November 2010 shared with the *New York Times* and *The Guardian*, and Edward Snowden, former intelligence contractor and CIA employee who in 2013 leaked classified details of a secret NSA program to the *Washington Post*. Leakage continues. The Panama Papers scandal in 2015-6 with more than 11 million documents on how wealthy individuals used tax havens for financial benefit, and with links to 12 current or former heads of state and government The Paradise Papers with 13 million confidential documents were linked to German newspapers in November 2017.

This relationship, disclosure by officials to the media directly or indirectly, is meaningful, if not central, in the case of Comey. A major issue involves his disclosure to his friend of seven memos, four of which were marked "confidential," and two marked "secret." Comey asked the friend Daniel Richman, Professor of Law at Columbia University and former federal prosecutor in New York, to share the contents of some of them, primarily that of February 14, 2017 with the media, which Richman did to the *New York Times*. Comey had sent Richman a copy of a two page memo and asked him to get the substance of it out to the media. The exact motives for this procedure are still not completely clear, but a stated reason by Comey is that he wanted his memos released because he thought this might promote the appointment of a Special Counsel for the Russian investigation, which in fact it did.

A number of significant legal as well as political issues are raised. The first is the nature of the act of disclosure, whether it was a "leak" of government property, or was it "given," the word preferred by Comey. Related to this is the question of whether Comey did not follow the specific rules about FBI employment as a public official. Among those rules are provisions that release of any information or material

acquired during official employment to unauthorized individuals without prior official authorization by the FBI is prohibited.

Comey had agreed to FBI rules that forbids without written approval the release of information "that relates to any sensitive operational details or the substantive merits of any ongoing or open investigation or case." The broad general issue is whether Comey had the right to disclose or "leak" confidential conversation, whether it came from an official document or private papers as he claimed.

Comey didn't consider the memos as part of an FBI file, but rather as a personal "aide de memoire." He had made two copies of the memos, one put in his personal safe at home. and the other left with the FBI that would have access to it.

A third issue is the type of information released by Comey. Unauthorized disclosure of classified information is a violation of the law. On this point, on whether the released memos contain "classified" information, disagreement exists. The Inspector General of the Department of Justice, Michael Horowitz, is conducting a general review of the problem and exact definition, especially regarding national security, and standards for classifying material as well as of compliance with FBI policy.

Comey also disclosed information, four memos to his "legal team." One of them was Patrick J. Fitzgerald, with whom Comey was linked in a previous case of leaking.

In December 2003 Comey was Deputy Attorney General and, acting after AG John Ashcroft has recused himself, from the case, appointed Fitzgerald, former head Federal Prosecutor in Chicago, with full plenary power as a Special Counsel to investigate leaks of information in the case involving the identity of Valerie Plame, a CIA "operative." Fitzgerald, who may fairly be regarded as an overzealous and politically

motivated prosecutor, led a Federal Grand Jury to indict I. Lewis "Scooter" Libby, a prominent Washington lawyer, and chief of staff to Vice President Dick Cheney.

The issue had begun with President George Bush's State of the Union address in January 2003, justifying U.S. military action in Iraq and claiming that Saddam Hussein was trying to buy yellowcake uranium in Niger. However, Joseph Wilson, former envoy and husband of Valerie Plame, in an article in *New York Times* on July 6, 2003 criticized the war in Iraq, and said he found no evidence that the allegations about the uranium were true. A few days later on July 14, 2003, syndicate columnist Robert Novak published a column discussing the issue and disclosing Plame's name as a CIA "operative."

Libby was convicted on March 6, 2007 on four felony counts of perjury, lying to the FBI and to a Federal Grand Jury, obstructing an investigation into the leak of Plame's identity as an "operative." Libby was disbarred from his profession as a lawyer, fined \$250,000, and sentenced to 30 months prison. This sentence was commuted by President Bush in June 2007, but he did not get a full pardon. However, on April 13, 2018 President Trump issued a pardon for "Scooter" Libby who had been "treated unfairly" by the Special Prosecutor and the judicial system.

The criminal investigation was supposed to focus on unauthorized disclosure of classified information about Plame's identity. Joseph Wilson accused the U.S. administration of leaking her identity to punish him for his political criticism. Special Counsel Fitzgerald argued, among other matters, that Libby had lied concerning the disclosure of a covert intelligence's officer's identity. But Libby was not the leaker, and in fact Plame's identity was made public first by Robert Novak and then by Bob Woodward.

Injustice was done to Libby. The real leaker was Richard Armitage, then Deputy Secretary of State, who was never

charged for releasing classified information, but who later acknowledged his responsibility. Moreover, later revelations showed two other things: many other people in D.C. knew that Plame worked in some capacity for CIA; and the leak of her name did not affect any CIA operation or cause any national security harm.

Scooter Libby had undergone a miscarriage of justice. In the present Comey case the game's afoot. Judicial inquiry will assess whether the material he disclosed, gave or leaked, was personal, an "aide-memoire" as he claims or official material and not to be disclosed. As with Fitzgerald the problem for Comey is whether he has preserved the independence of the judicial system from political machinations. It still remains unknown who first leaked official information including about the anti-Trump "dossier," that was used to some extent, if not wholly, to obtain a surveillance warrant for a former Trump aide. Notwithstanding, we do not need highly skilled detectives or Washington lawyers to uncover who funded the dossier.