Why WikiLeaks Is Unlike the Pentagon Papers

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Everyone knows that Daniel Ellsberg leaked top-secret government documents about the Vietnam War. How many remember the ones he kept secret, or why?

By
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In 1971, Daniel Ellsberg decided to make available to the New York Times (and then to other newspapers) 43 volumes of the Pentagon Papers, the top- secret study prepared for the Department of Defense examining how and why the United States had become embroiled in the Vietnam conflict. But he made another critical decision as well. That was to keep confidential the remaining four volumes of the study describing the diplomatic efforts of the United States to resolve the war.

Not at all coincidentally, those were the volumes that the government most feared would be disclosed. In a secret brief filed with the Supreme Court, the U.S. government described the diplomatic volumes as including information about negotiations secretly conducted on its behalf by foreign nations including Canada, Poland, Italy and Norway. Included as well, according to the government, were "derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to nations or governments."

The diplomatic volumes were not published, even in part, for another dozen years. Mr. Ellsberg later explained his decision to keep them secret, according to Sanford Ungar's 1972 book "The Papers & The Papers," by saying, "I didn't want to get in the way of the diplomacy."

Julian Assange sure does. Can anyone doubt that he would have made those four volumes public on WikiLeaks regardless of their sensitivity? Or that he would have paid not even the slightest heed to the possibility that they might seriously compromise efforts to bring a speedier end to the war?

Mr. Ellsberg himself has recently denounced the "myth" of the "good" Pentagon Papers as opposed to the "bad" WikiLeaks. But the real myth is that the two disclosures are the same.

The Pentagon Papers revelations dealt with a discrete topic, the ever-increasing level of duplicity of our leaders over a score of years in increasing the nation's involvement in Vietnam while denying it. It revealed official wrongdoing or, at the least, a pervasive lack of candor by the government to its people.

WikiLeaks is different. It revels in the revelation of "secrets" simply because they are secret. It assaults the very notion of diplomacy that is not presented live on C-Span. It has sometimes served the public by its revelations but it also offers, at considerable potential price, a vast amount of material that discloses no abuses of power at all.

WikiLeaks founder Julian Assange at a press conference in Geneva Switzerland, Nov. 4. Associated Press

The recent release of a torrent of State Department documents is typical. Some, containing unflattering appraisals by American diplomats of foreign leaders of France, Germany, Italy, Libya and elsewhere, contain the very sort of diplomacy-destructive materials that Mr. Ellsberg withheld. Others—the revelation that Syria continued selling missiles to Hezbollah after explicitly promising America it would not do so, for example—provide a revealing glimpse of a world that few ever see. Taken as a whole, however, a leak of this elephantine magnitude, which appears to demonstrate no misconduct by the U.S., is difficult to defend on any basis other than WikiLeaks' general disdain for any secrecy at all.

Mr. Ellsberg understood that some government documents should remain secret, at least for some period of time. Mr. Assange views the very notion of government secrecy as totalitarian in nature. He has referred to his site as "an uncensorable system for untraceable document leaking and analysis."

But WikiLeaks offers no articles of its own, no context of any of the materials it discloses, and no analysis of them other than assertions in press releases or their equivalent. As Princeton historian Sean Wilentz told the Associated Press earlier this month, WikiLeaks seems rooted in a "simpleminded idea of secrecy and transparency," one that is "simply offended by any actions that are cloaked."

Ironically, this view of the world may aid Mr. Assange in avoiding criminal liability for his actions. The Justice Department is well aware that if it can prove that Mr. Assange induced someone in the government to provide him with genuinely secret information, it might be able to obtain an indictment under the Espionage Act based upon that sort of conspiratorial behavior. But the government might not succeed if it can indict based only upon a section of the Espionage Act relating to unauthorized communication or retention of documents.

Section 793 of the Espionage Act was adopted in 1917 before the Supreme Court had ever declared an act of Congress unconstitutional under the First Amendment. The statute has been well-described by former Supreme Court Justice John Marshall Harlan as "singularly oblique." Its language is

sweepingly overbroad, allowing prosecution of anyone who "willfully" retains or communicates information "relating to the national defense" he or she is not "authorized" to have with the knowledge that it "could" damage the United States or give "advantage" to a foreign nation.

On the face of the statute, it could not only permit the indictment of Mr. Assange but of journalists who actually report about or analyze diplomatic or defense topics. To this date, no journalist has ever been indicted under these provisions.

The Justice Department took the position that it could enforce the law against journalists in a case it commenced in 2006 (and later dropped) against two former officials of the American Israel Political Action Committee accused of orally telling an Israeli diplomat classified information they were told by a Defense Department employee. In that case, federal Judge T.S. Ellis III ruled that to obtain a conviction of individuals who had not worked for the government but had received information from individuals who had, prosecutors must prove that the defendant actually intended to harm the U.S. or to help an enemy. Judge Ellis intimated that unless the law were read in that defendant-protective manner, it would violate the First Amendment.

Under that reading of the legislation, if Mr. Assange were found to have communicated and retained the secret information with the intent to harm the United States—some of his statements can be so read—a conviction might be obtained. But if Mr. Assange were viewed as simply following his deeply held view that the secrets of government should be bared, notwithstanding the consequences, he might escape legal punishment.

Mr. Assange is no boon to American journalists. His activities have already doomed proposed federal shield-law legislation protecting journalists' use of confidential sources in the just-adjourned Congress. An indictment of him could be followed by the judicial articulation of far more speech-limiting legal principles than currently exist with respect to even the most responsible reporting about both diplomacy and defense. If he is not charged or is acquitted of whatever charges may be made, that may well lead to the adoption of new and dangerously restrictive legislation. In more than one way, Mr. Assange may yet have much to answer for.

Mr. Abrams, a senior partner in the firm of Cahill Gordon & Reindel LLP, represented the New York Times in the Pentagon Papers case.