

Is Julian Assange an International Version of Daniel Ellsberg and WikiLeaks the Modern Equivalent of the Pentagon Papers?

William H. Freivogel

History has placed the stamp of approval on the publication of the Pentagon Papers, the top-secret history of the Vietnam War. If WikiLeaks editor-in-chief Julian Assange is another Ellsberg, then it's possible the website's disclosures will be viewed over time as similarly in the public interest.

Ellsberg himself is ready to welcome Assange to the club, saying it is wrong to categorize the Pentagon Papers leaks as good and WikiLeaks bad. But Floyd Abrams, who represented *The New York Times* in the Pentagon Papers case, says he knows Daniel Ellsberg and that Julian Assange is no Daniel Ellsberg. Abrams pointed out in a *Wall Street Journal* op-ed article that there are important differences:

- Ellsberg withheld the diplomatic volumes that were part of the Pentagon Papers, while Assange has leaked thousands of diplomatic secrets;
- The Pentagon Papers disclosed U.S. government wrongdoing, while WikiLeaks has mostly shown that the U.S. position in secret is pretty much the same as in public;
- Ellsberg sought to right the direction of the country, while Assange seems to harbor ill will toward the United States.

But it is easy to forget that the situation was not clear-cut in the spring of 1971, when the *Times* began publication of the Pentagon Papers. Then the verdict was out on Ellsberg, the *Times*, and other news-

papers that published the papers. *Times* editors were warned by their own lawyers that they would go to jail if they published the documents.

Instead of trying to put *Times* reporters and editors in prison, the Nixon administration tried to halt publication, attacking the First Amendment at its strongest point, its protection against prior restraints on publication.

When the case moved to the Supreme Court, Solicitor General Erwin Griswold filed a secret brief listing 11 drop-dead secrets contained in the papers. The government claimed that disclosure could endanger the lives of intelligence agents and prolong the war, with the resulting death of thousands more soldiers and many prisoners of war.

Some of Griswold's claims are more alarming than the claims made about the WikiLeaks disclosures, and some are strikingly similar. One secret in the Pentagon Papers was the U.S. consideration of a nuclear response if the Chinese attacked Thailand. Another was a 1968 cable to Washington by then-ambassador Llewellyn C. Thompson making predictions about a Soviet response to mining

Haiphong harbor or on invading North Vietnam, Laos, or Cambodia.

In addition, the documents contained derogatory comments that would be offensive to allies such as South Korea, Thailand, and Australia. U.S. officials have similarly worried that U.S. allies would be embarrassed by the WikiLeaks revelations.

The Supreme Court ruled in 1971 that the government could not stop the newspapers from publishing the Pentagon Papers or any other national security secret unless, in Justice Potter Stewart's words, there was proof that disclosure would "surely result in direct, immediate, and irreparable damage to our nation or its people"—an almost impossibly high burden for the government.

Twenty years after the Pentagon Papers, Griswold wrote in the *Washington Post* that his warnings in the secret brief had proved hyperbolic. "I have never seen any trace of a threat to the national security from the publication," he wrote.

So, with the patina of history, the publication of the Pentagon Papers seems incontestably correct. The publication affected public opinion about the war, disclosed government lying, was upheld by the Supreme Court, and did no harm.

Court's Forgotten Warning

But it is often forgotten that Justices Stewart

and Byron White added in their Pentagon Papers' opinions that they "would have no difficulty in sustaining convictions" under the Espionage Act for publication of the papers. In other words, the government couldn't stop the presses, but it could throw the journalists in jail for running them.

No journalist ever has been charged under the Espionage Act, even though the language of the law is so broad that it would appear to encompass the possession and publication of classified information. Ellsberg was prosecuted under the Espionage Act and almost certainly would have been convicted; however, a judge dismissed the case because of prosecutorial misconduct surrounding a break-in at Ellsberg's psychiatrist's office by a White House "plumbers" unit seeking evidence to discredit Ellsberg.

Congress passed the Espionage Act in 1917 during the fearful times of World War I and prior to the dawn of First Amendment jurisprudence. At the time of passage, the Supreme Court had never declared a law unconstitutional for violating the First Amendment.

Abrams predicts that a prosecution of a professional journalist under the Espionage Act probably would violate the First Amendment as it has come to be interpreted in the past 90 years. But he's not sure that the First Amendment would protect Assange. He fears Assange could be the first self-proclaimed journalist who could be prosecuted successfully under the Espionage Act and that could open the door to prosecution of mainstream journalists.

Assange is a tempting prosecutorial target for both practical and legal reasons. Practically, it is easier to prosecute a colorful but disagreeable character like Assange than the editor of *The New York Times*. Legally, the Espionage Act has been interpreted to require prosecutors to prove that a person intended to harm the United States. Abrams told NPR in a recent interview that because of Assange's comments about the United States, he had "gone a long way down the road of talking himself into a possible violation



Supporters of WikiLeaks founder Julian Assange cheer outside Westminster Magistrates Court in London after he was given bail on December 14, 2010. Assange, wanted in Sweden for alleged sex crimes, is the target of U.S. fury over the release of secret diplomatic cables.

of the Espionage Act" by showing that he intended to harm the United States.

One key question of fact is the extent to which Assange directed the suspected leaker, U.S. Army Pvt. Bradley Manning, to obtain particular documents. If Assange directed Manning, then he could be complicit in Manning's wrongdoing.

Leakers Punished; Leakees Go Free

There is a bright line between the legal consequences for the government leakers versus journalistic leakees. The law punishes the government employee who has promised to keep classified information secret and then violates the promise by giving it to a reporter. But the law generally has protected the journalist who receives the leak and publishes it.

Mark S. Zaid, a Washington D.C. lawyer who handles national security cases, says the status of government whistleblower "offers absolutely no legal protection whatsoever and it doesn't excuse the conduct. The level to which someone is a whistleblower will have no impact on that person's potential liability," he says.

In a recent Espionage Act prosecution that has received little attention in the national press, the government has taken

an extremely strong position against whistleblowers who leak to the press. In January, the government arrested Jeffrey Sterling in a suburb of St. Louis on espionage charges for apparently leaking information to James Risen of the *Times*. Sterling reportedly provided information for a chapter of a book Risen wrote on the CIA detailing a botched intelligence operation against Iran's nuclear program.

In arguing that Sterling was so dangerous that he should be kept locked up until trial, the government maintained that a government employee who leaked to the press is more "pernicious" than a traitor who sells secrets to a foreign government. Leaking secrets to the press helps all potential enemies, while selling them helps only one potential enemy, the government argued. This argument runs counter to conventional view that Ellsberg is something of a hero while Aldrich Ames is a traitor.

Kathleen Clark, an expert on national security law at Washington University in St. Louis, worries that the government is trying to vilify Sterling to cut him off from likely legal allies in the press. And she wonders if the government has the same strategy planned for Assange.

Obama Prosecutes More Leakers Than Any President

The Obama administration has disappointed civil libertarians by filing more criminal prosecutions against leakers than any previous administration. In fact, Zaid says, it is more than all previous administrations combined. In addition to Sterling, the administration has prosecuted Pvt. Manning, former FBI linguist Shamai Leibowitz, former NSA contractor Thomas A. Drake, and former State Department contractor Stephen Kim.

But neither Zaid nor Gregg Leslie, the legal defense director for the Reporters Committee for Freedom of the Press, thinks that the increased number of prosecutions of leakers means that Obama is any more intent on prosecuting leakers than his predecessor, George W. Bush. The increase in the number of leak prosecutions is partly due to technology, Zaid says. It is easier to obtain information to leak and easier for the government to track the leak.

Ellsberg “took weeks to sneak out all of the Pentagon Papers and copy them and bring them back,” he said. By contrast, for Manning, or whoever obtained the WikiLeaks documents, “all he had to do was put a thumb drive into the computer and instantly download hundreds of thousands of documents.”

According to Zaid, the greatest threat to the press is not the record number of prosecutions of leakers, but the possibility of a prosecution of Assange for the WikiLeaks disclosures:

Prosecuting Assange would be a terrible policy mistake ... He’s not a journalist like you (the author). But he is an editor, he is a publisher. It would be different if there were any evidence that he was soliciting someone to obtain the information. But even that is slippery because there are journalists who say, ‘can you get me a particular document?’

On a Cambridge Porch

Abrams isn’t the only First Amendment lawyer who sees a big difference between Ellsberg and Assange. Mark Sableman, a media lawyer at Thompson Coburn in St. Louis, sees more differences than similarities between WikiLeaks and the Pentagon Papers.

“I think most people think of WikiLeaks as more of a real threat than the Pentagon Papers,” he wrote in an email correspondence.

The Pentagon Papers was history and the WikiLeaks concern current developments. The Pentagon Papers was leaked by an American former government employee; WikiLeaks seems like a renegade offshore organization open to anyone, even people deliberately seeking to harm the U.S. At least through today’s eyes, given Ellsberg’s historical respectability, WikiLeaks seems dangerous, unpredictable, uncontrollable.

Richard Dudman, a former *St. Louis Post-Dispatch* Washington bureau chief, is sympathetic to Assange’s disclosures. Dudman was himself involved in obtaining the Pentagon Papers. When the *Times* began running the papers, Dudman tried to figure out who might be leaking them. After putting out some feelers, Dudman got an anonymous call suggesting he send a reporter to a pay telephone in Cambridge, Massachusetts. Dudman sent the late Thomas Ottenad to the phone booth. From there Ottenad was directed to another phone and eventually to the back porch of a house where he found a stash of the papers, which he hurried to St. Louis where they were eventually published.

Dudman wrote recently,

I welcome the publication of the WikiLeaks papers as a breath of fresh air that tells us a lot more about foreign relations and foreign affairs than do the official statements, with their caution, concealment and frequent hypocrisy.

The disclosure of the Pentagon Papers revealed U.S. government lies. The disclosure of the NSA warrantless wiretaps in 2005 disclosed possible government illegality. Those justifications for publishing national security secrets are largely absent from the WikiLeaks disclosures. That raises the question of whether it is enough to say that the WikiLeaks disclosures are both fascinating and provide the American people with a lot more information about U.S. diplomacy than they had before.

Dudman says yes:

It makes no difference to me that the present leaks don’t reveal wrongdoing as did the Pentagon Papers. Both were important in widening public knowledge and understanding of vitally important matters. In both cases, that is sufficient justification.

Leila Nadya Sadat, a professor in international law at Washington University agrees.

I personally agree that the value of the information and its publication way outweighs the government’s interest in secrecy. I was appalled that the major reaction to the Iraq casualties (published by) WikiLeaks wasn’t distress at the number of deaths but outrage that the information was published. What does that say about our priorities?

William A. Babcock, a journalism ethics expert at Southern Illinois University Carbondale, sets a higher bar. “While the Pentagon Papers case focused on the historical conduct of the Vietnam War, the recent case focuses on an on-going conflict,” he wrote in an email.

As such, there is a much higher ethical bar to be cleared before publication, especially when publication might place current individuals in harm’s way. Instituting an ‘information dump’ of ongoing information of a sensitive nature without thoroughly vetting the content so that any named individuals are unlikely to be targeted by terrorists—this consti-

tutes to me reprehensible, unethical behavior...

WikiLeaks’ Impact on Mideast

As time has passed since the original WikiLeaks stories on diplomatic cables, the leaks appear to be less of an information dump than originally thought. Bill Keller, executive editor of the *Times*, wrote at length recently about the pains taken by his editors to vet the documents and to remove any names of people who might be endangered. Also, initial reports about a quarter of a million cables being released were greatly exaggerated. The number is closer to 10,000.

In addition, even though the diplomatic cables did not disclose U.S. government wrongdoing, they did show that U.S. diplomats were aware of Mideast corruption. The release of those cables may have played something of a role in the remarkable popular uprisings in Tunisia and Egypt.

In one cable published by WikiLeaks shortly before the Tunisian uprising, U.S. Ambassador Robert Godec wrote,

Whether it’s cash, services, land, property, or yes, even your yacht, President Ben Ali’s family is rumored to covet it and reportedly gets what it wants. Corruption... is the problem everyone knows about, but no one can publicly acknowledge.

Publication of those and other cables may not have toppled the Tunisian or Egyptian presidents, but they certainly worried another local despot. Muammar Qaddafi, who was revealed to have a “bodacious blond nurse” as a travel companion, remarked that WikiLeaks “publishes information written by lying ambassadors in order to create chaos.”

So, while WikiLeaks did not unearth U.S. government wrongdoing it helped reveal wrongdoing in the Mideast even more quickly than the Pentagon Papers affected the Vietnam War.

Discussion Questions

1. Does the press serve the national interest when it reports national security secrets like those contained in the Pentagon Papers and WikiLeaks?
2. Julian Assange calls himself a journalist though he makes no pretense of objectivity and seems to want to make the United States look bad by leaking potentially embarrassing secrets. Do you think he qualifies as a journalist?
3. Should professional journalists, such as those at the *New York Times*, be prosecuted for violating the Espionage Act when they print national security secrets such as those in the Pentagon Papers and WikiLeaks?
4. Was publication of the secrets in the Pentagon Papers more justified than the secrets in WikiLeaks because the Pentagon Papers showed that the White House and top government officials had not been truthful about the Vietnam War?


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