Falsifying history and repudiating democratic rights: Floyd Abrams' attack on WikiLeaks

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Floyd Abrams, who played a significant role nearly 40 years ago in the legal defense of the *New York Times*' publication of the Pentagon Papers, has endorsed the government's campaign against WikiLeaks and its editor Julian Assange with an intellectually dishonest column in the *Wall Street Journal*.

Entitled, "Why WikiLeaks Is Unlike the Pentagon Papers," Abrams' column, published Wednesday, claims that Assange's publication of leaked cables and exposure of government secrets bear no resemblance to the actions taken by Daniel Ellsberg in 1971. As drawn retrospectively by Abrams, Ellsberg was a paragon of political respectability, who took care that his exposure of 43 volumes of secret documents, which he had copied illegally while working as a RAND Corporation analyst, would not undermine US government diplomacy. Abrams backs this up by stressing that Ellsberg withheld four volumes that dealt with American diplomatic activity.

Assange, in contrast, lacks such scruples. "Can anyone doubt," writes Abrams, "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?"

Even before Abrams' column appeared, Ellsberg, now 79, forthrightly denounced attempts to counterpose the "good" exposures of the Pentagon Papers to the "bad" material released by WikiLeaks. This false distinction, Ellsberg has stated, is "just a cover for people who don't want to admit that they oppose any and all exposures of even the most misguided, secretive foreign policy. The truth is that EVERY attack now made on WikiLeaks and Julian Assange was made against me and the release of the Pentagon Papers at the time."

Ellsberg's position is not only principled. It also correctly identifies the political motivations of those who are now attacking Assange and participating in the international campaign of persecution and defamation directed against him. Abrams' reference to four volumes, out of 47, supposedly withheld by Ellsberg is a red herring that both falsifies and trivializes the legal and Constitutional issues that were fought out in June 1971.

As Abrams certainly knows, the US government, in its efforts to block the publication of the Pentagon Papers by the *New York Times* and the *Washington Post*, repeatedly claimed that the exposure of these documents would gravely undermine the conduct of American diplomacy. Anticipating all the present-day arguments made by the Obama administration and the corporate media, the Nixon administration declared that the government "cannot operate its foreign policy in the best interests of the American people if it cannot deal with foreign powers in a confidential way."

As reported in the *Times* on June 20, 1971, White House press secretary Ronald L. Ziegler insisted that confidentiality "'is the very essence of the foreign policy process' and that 'a government must be able to deal with other governments in a confidential way.' The press secretary also said that Presidential advisers must not be inhibited from submitting 'candid appraisals' of foreign policy options confronting the President. He asserted that officials would be reluctant 'to submit points of view if they thought the documents would be disclosed.'"

In this lengthy article, the *Times* also noted the objections of Secretary of State William P. Rogers, who "cited the inhibiting effects that he thought publication of top-secret materials might have on foreign governments dealing with the United States."

The *Times'* report included other denunciations of the publication of the Pentagon Papers. Senator Robert Dole, then a rising star in the Republican Party, declared that the *Times* had been "irresponsible, perhaps dangerously and destructively," in making the Papers public. Governor Ronald Reagan of California also condemned the *Times*.

Compared to present-day standards, their comments were relatively tame. But one politician quoted by the *Times*, Congressman Sam Stratton of New York, one of the arch-reactionaries of his day, struck a more modern-sounding note: "The publication of these documents and the attendant denigration of American leaders past and present represents at a critical time a massive injunction of aid and comfort to the enemy."

There are, however, no reports in the *New York Times* of any public figure calling for the assassination of either Ellsberg or the publisher of the newspaper.

In manufacturing a significant distinction between the Pentagon Papers and WikiLeaks, Abrams is not only seeking to legitimize the persecution and criminalization of Assange. He is also repudiating the core First Amendment principles of Free Speech that the *Times*, and he himself, vigorously defended in 1971.

As one reads the arguments made by the legal representatives of the *New York Times* before a New York district court and the Supreme Court in June of that year, as they argued against the demands of the Nixon administration for a restraining order to stop publication of the Pentagon Papers, one has the impression that this case was argued in another country, and even in another historical epoch.

In its efforts to obtain a restraining order against the *Times*, the Nixon administration did not merely claim that the publication of the Pentagon Papers would cause embarrassment; rather, it insisted that publication would cause immense damage to the national security of the United States and place countless lives in danger.

The case was first argued in a federal district court in New York on June 18, 1971, before Judge Murray Gurfein. He seemed receptive to the claims of the government. He asked "why a patriotic press should not be willing to subject these papers not to censorship of any kind, except from a limited security point of view. I wish you would answer that because it is troubling me."

Arguing on behalf of the *Times*, attorney Alexander Bickel took a position to which the newspaper adhered insistently as the legal battle unfolded. It was not sufficient for the government to assert a general danger to national security and the lives of citizens. It had to show, with

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extreme specificity, an obvious, immediate and unmistakable causal link between publication and the danger asserted—such as, for example, the harm that might befall soldiers on a troop-carrying vessel if the date and location of its departure were published.

The government countered with the claim that the danger to national security need not be obvious. As argued by US Attorney Whitney North Seymour, "Although it may not be obvious to the layman, to the trained intelligence man there are already disclosures which are harmful to the interests of the United States; that the international relations of the United States have already been impaired; and that we are not dealing with matters of closed history but matters which have a very current vitality and significance."

The *Times* defended its right to seek out and publish "secrets." In a scathing affidavit submitted to the District Court, its chief Washington correspondent, Max Frankel, wrote: "Without the use of 'secrets' … there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington… In the field of foreign affairs, only rarely does our government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information bearing on foreign policy only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials from government to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called The Fourth Branch of Government."

It is worth noting here that Frankel was defending freedom of the press from an essentially bourgeois standpoint. That it appears somewhat radical today testifies to the extreme degeneration of bourgeois democratic values within the ruling class and its institutions.

Judge Gurfein refused the government's demand for a restraining order. The Nixon administration challenged this ruling in the Court of Appeals, which granted the injunction restraining the *Times*. But the case moved almost immediately to the US Supreme Court, which heard arguments on June 26.

The US solicitor general, Erwin Griswold, stated that the publication of the Pentagon Papers "will, as I have tried to argue here, materially affect the security of the United States. It will affect lives. It will affect the process of the termination of the war. It will affect the process of recovering prisoners of war. I cannot say that the termination of the war or recovery of prisoners of war is something which has an immediate effect on the security of the United States. I say that it has such an effect on the security of the United States that it ought to be the basis of an injunction in this case." Griswold added, for good measure, that "it is perfectly obvious that the conduct of delicate negotiations now in process or contemplated for the future has an impact on the security of the United States."

In his efforts to persuade the Supreme Court, Griswold was raising the possibility that the Pentagon Papers might somehow sabotage the Nixon administration's purported efforts to bring the Vietnam War to a conclusion. The clear implication of this argument was that the *Times'* publication of the papers would cause unnecessary deaths. Without accepting this argument, it was far more substantial than any allegation hurled against the WikiLeaks' revelations.

Justice Harry Blackmun, at that time on the right wing of the Supreme Court, expressed concern that the *Times* did not accept the legitimacy of prior restraint in publishing material that might lead to "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate, as honest brokers, between would-be belligerents."

Bickel replied, bluntly, that he disagreed "that impairment of diplomatic relations can be a case for prior restraint…"

As to the possibility of the death of soldiers, Bickel would accept the legitimacy of prior restraint, provided that a clear and unequivocal link can be established between publication of papers and death. But no such connection had been shown by the government. At no point had it been shown that there is a "link between the act of publication as the cause of that event [the death of soldiers] and the event that is feared. That link is always, I suggest, speculative, full of surmises, and a chain of causation that after its first one or two links gets involved with other causes operating in the same area, so that what finally caused the ultimate event becomes impossible to say which the effective cause was. The standard I would propose under the First Amendment would not be satisfied by such things."

As is often the case with extemporaneous argument, it is not always easy to follow. But in response to a pointed question from Justice Potter Stewart, who asked whether the *Times* would accept prior restraint to avoid the death of 100 young soldiers, Bickel replied with a precise formulation, insisting that "the chain of causation between the act of publication and the feared event, the death of these 100 young men, is obvious, direct, immediate."

Stewart pressed his point: "Suppose the information was sufficient that judges could be satisfied that the disclosure of … the identity of a person engaged in delicate negotiations having to do with the possible release of prisoners of war, that the disclosure of this would delay the release of those prisoners for a substantial period of time. I am posing that so it is not immediate. Is that or is that not a matter that should stop the publication and therefore avoid the delay in the release of the prisoners?"

Bickel, in response, stuck to his guns. It had to be demonstrated that the single act of publishing specific information clearly and decisively determined—and not in combination with "17 causes feeding into them"—the threatened event. "Mr. Justice," Bickel stated, "that is a risk that the First Amendment signifies a society is willing to make. That is part of the risk of freedom that I would certainly take."

The Supreme Court, by a vote of 6 to 3, overturned the injunction that had been temporarily imposed on the *Times* by the Court of Appeals.

The decision was hailed by the *New York Times,* which declared, "The nation's highest tribunal strongly reaffirmed the guarantee of the people's right to know, implicit in the First Amendment of the Constitution of the United States."

The position of the *Times* reflected the position of broad sections of the press. The *Wall Street Journal* joined the *Times* in endorsing the Supreme Court's decision: "In our view," it wrote, "the nation's security lies in a continuing willingness of its people to face unpleasant facts, to engage in full and earnest debate and to protect the free, democratic institutions that make these things possible."

Hardly a trace of such sentiments is to be found in the media as it exists today. The owner of the *Wall Street Journal* is Rupert Murdoch, whose vast media outlets seek to whip up the atmosphere of a lynch mob around Assange. The executive editor of the *New York Times*, Bill Keller, has proclaimed that he considers the right "not to publish" as important as the right to publish. Were an authoritarian military-police dictatorship to come to power in the United States, it would not have to move Mr. Keller out of his office.

As for Floyd Abrams, the erstwhile defender of the First Amendment devotes a substantial portion of his column to a discussion of the possibilities of a successful prosecution of Julian Assange. He offers suggestions as to how the Espionage Act of 1917 could be successfully employed against Assange. Abrams suggests that "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."

Not satisfied with offering advice to potential federal prosecutors, Abrams concludes his column with an extraordinary accusation against the publisher of WikiLeaks. "Mr. Assange," he writes, "is no boon to

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American journalists." Why? "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."

What contemptible cowardice! By exposing government lies, Assange is making life harder for those who willingly grovel before the power of the state. By exercising his democratic rights, Assange is provoking the wrath of the enemies of the First Amendment.

The last 40 years has witnessed a dreadful putrefaction of bourgeois democracy. The economic decay of American capitalism has found its legal expression in an accelerating repudiation of core Constitutional principles. The Watergate crisis, in which the Nixon administration was implicated in criminal activity, unfolded in the immediate aftermath of the Pentagon Papers controversy. In fact, the anti-democratic conspiracies plotted inside the Nixon White House—which included the planning of illegal acts against Daniel Ellsberg—developed, in part, as a response to the Supreme Court ruling on the Pentagon Papers. In the 1980s, the Reagan administration engaged in clearly criminal activity related to its prosecution of a dirty war against the people of El Salvador and Nicaragua. In the 1990s, a cabal of right-wing Republicans in Congress—in league with elements within the federal judiciary—nearly succeeded in removing a president from office through a political conspiracy. In 2000, the outcome of the presidential election was falsified with the decisive intervention of the Supreme Court. In the aftermath of that political crime, the actions of the United States have assumed an ever-more openly criminal character. Wars have been launched on the basis of lies. People have been killed, imprisoned and tortured in flagrant violation of long-established constitutional principles.

Within the ruling elite and its intellectual representatives, there has been a virtual collapse of any substantial politically-committed constituency for democratic rights. In this sense, the lining up of institutions such as the *Times* and past defenders of the First Amendment like Abrams behind the persecution of Julian Assange and WikiLeaks is a significant measure of the diseased state of American democracy at the end of the first decade of the 21st century.

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