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## WikiLeaks: We Don't Need Another 'Hero'

By Joel Cohen and Katherine A. Helm

Julian Assange. Just saying the name conjures up emotions in most people who pay attention to the world around them. Good or bad, he and his WikiLeaks Empire are a force to be reckoned with – especially when he extorts the government by proposing a doomsday scenario that, if arrested on espionage charges, he'll publish more, *and presumably worse*.

Since the end of November, WikiLeaks has published hundreds of thousands of diplomatic cables, representing the largest unauthorized release of contemporary classified information in world history. Many of the U.S. government documents were classified, either at the confidential or the secret level, meaning that their release is considered to pose a serious threat to national security.

How should Assange be treated under the law for what he spearheaded? What sort of a call would a judge make, in his role as judicial umpire, if a prosecution against Assange were pitched to him? As

has been evidenced by the often-hyperbolic discussions of how to deal with Assange legally, prosecuting him under the Espionage Act (rather than, say, assassinating him, as some have suggested) may be the likeliest path – though a thorny path it would be. No easy balls or strikes here.

Those who call for the WikiLeaks team to be classified as a terrorist group and its leader, Assange, to be prosecuted for treason, are probably not thinking entirely judiciously. Indeed, speaking about charges of treason seems somewhat futile, or maybe wishful, given the burden of proving wrongful intent, and the sheer breadth of relatively innocuous material that has been overtly released. Yet, it remains a label that is being bandied about by a number of people – who will probably have a better perspective on what matters and what doesn't only when the dust settles.

That said, it is undoubtedly equally off-kilter to agree with those who say the release of the diplomatic cables was a no-harm, no-foul situation. What could

have been devastating to national security instead showed just how professional U.S. government employees really are – or are not, according to some talking heads. Well, that’s an opinion. But trying to use it to justify what Assange did is ludicrous. That is like claiming safe sex isn’t really all that important only after you didn’t suffer any repercussions from not practicing it.

And although Daniel Ellsberg has become a cult figure for releasing the Pentagon Papers, largely because the Vietnam War was by then so unpopular, Ellsberg should hardly be seen as the apotheosis of what a First Amendment commentator should be. Besides, unlike Ellsberg or Deep Throat, Assange is not leaking classified government secrets to expose government wrongdoing, which is what whistleblower statutes seek to protect. Even Ellsberg was prosecuted for his civil disobedience (though the Nixon administration’s continued interference got the case tossed). Assange fashions WikiLeaks as a whistleblower site, but he’s doing it for his own political ideologies, for which he deserves no protection.

*Time* magazine has proclaimed that, whether you like Assange or not, it is indisputable that he now has the power to impose his judgment of what should or shouldn’t be secret. But just because he has that power – due to the confederacy of the “insider” purloiners of the documents, who deserve the full weight of the law on them – doesn’t mean that we should let him exert it without consequence or legal repercussion. Imagine that the president of the United States, the Secretary of State, and the Chairman of the Joint Chiefs of Staff were rigorously debating whether to keep something confidential and/or how to present it, and we “let” Assange decide for them. If we continue to debate this and do

nothing, the Rolling Stones’ answer to the question “Who killed the Kennedys?” may apply here with equal force. It was you and me. We all will have let this happen, by letting down our guard and failing to see the illegal action that has occurred, and the hypocrisy with which Assange has wanted to maintain the strict confidentiality of his sources, while telling the world things that could surely destabilize American foreign policy.

Assange’s position is to classify himself as simply the postman. He’s just carrying out the truth, on the wings of doves, and letting openness and our illustrious transparency expose the real evildoers.

We should not fall for that. Yes, there may be too much unnecessary secrecy in governments around the world. Indeed, it may ultimately be to everyone’s benefit to let folks have a broader view of what’s behind the curtain, and specifically to see just how much bad advice actually gets circulated – but it is indisputable that there are circumstances where private conversations are absolutely necessary. It is hardly blasphemous, civically speaking, to question our government, but it is also not blasphemous to question whether we need to know all the details about confidential communications between foreign and U.S. diplomats that need to exist to let people ably do their jobs. This is precisely why the House Judiciary Committee held a hearing this week on the legal issues surrounding WikiLeaks and a potential prosecution under the Espionage Act.

There is a reason under the U.S. Constitution why certain sources merit broader First Amendment protection than others. Assange’s legal advisers are incorrect in maintaining that WikiLeaks’ actions deserve the same protection under the First Amendment that reputable media outlets typically

enjoy; that claim ignores the zeitgeist. It ignores the fact the context in which the documents have been, and are continuing to be, released. Remember: You can't falsely shout "fire!" in a crowded theater without responsibility for the consequences. WikiLeaks has no journalistic integrity because the confidential sources and anonymous "editors" have no accountability. They do not deserve a journalistic shield for their own covert actions – and they call themselves an anti-secrecy movement! Neither freedom of the press nor freedom of expression provides a license to cripple diplomatic foreign policy efforts or endanger national security ad libitum (at one's pleasure).

Think back to a few months ago, when a Florida pastor, for reasons not clear – except his obvious trolling for his own "15 minutes" – decided he wanted to burn Qurans. He clearly wanted to make a spectacle of himself and cause an uproar that might have potentially put our military overseas in jeopardy as payback, notably in Islamic countries. Whether or not some members of the right wing might have secretly agreed with the message, they felt the need to publicly condemn his actions, if only to position themselves as trying to protect our troops. At the same time, those on the other end of the political spectrum, while condemning the act if only *in part* because of its potential impact on our soldiers abroad, applauded the First Amendment's protections, even for such an idiot.

While the Quran-burning condemnations were widespread, what if someone had floated the idea of legislation criminalizing the conduct? Might they not have been able to muster popular support for the proposition that such actions might present a "clear and present danger," to invoke Justice Oliver Wendell Holmes' exquisite formulation that created

an exception to the First Amendment's protection of free speech? Notably here, the case that created that exception was the same case that upheld the constitutionality of the Federal Espionage Act. In *Schenck v. U.S.*, 249 U.S. 37 (1919), the Supreme Court affirmed the indictment of Charles Schenck, the general secretary of the American Socialist Party, for distributing draft resistance literature during World War I.

Assange's actions present a far different, and potentially far worse, problem for our democracy than threats of Quran burning. The speedy and near-universal denouncement within the United States of the pastor helped alleviate the clear "danger" that al-Qaeda or similar entities might have persuaded those on the fence in the Muslim world that mainstream America actually supported the pastor's nutty ideology. The United States prevailed because it had the ability, through the rapid-fire spoken remarks of its representatives and its citizenry, to characterize the would-be Quran burner's thinking as idiosyncratic. Assange, though, potentially provides our enemies, and those who straddle between different worlds, with black-and-white proof of what our government often keeps secret to protect us – and sometimes those secrets aren't pretty.

From what Assange has been saying, he apparently has a treasure trove of government (and private industry) misdeeds just waiting to be released to the media. But before anyone gets ready to fill up on Schadenfreude pie, remember that not all the secrets will be as innocuous as some of the embarrassing diplomatic gaffes we've read about so far. Some could be far worse; the only real truth right here and right now is that we just don't know. Once those secrets are out, there is no turning back from the precipice. Assange, anarchist that he is, relies precisely on that reality.

So before we wash our hands and seal our fate, let's think long and hard about what can be done to Assange, under the law, to both uphold justice and protect our national security.

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