

FLOYD ABRAMS' ABUSE OF POWER

I promise I'm going to catch up on the WikiLeaks stuff in more detail soon, but I wanted to do a quick post pointing out the idiocy of Floyd Abrams' attack on WikiLeaks. The logic of Abrams' op-ed—which argues that WikiLeaks is different from the Pentagon Papers and therefore bad and also ohbytheway bad for journalists—is as follows:

Daniel Ellsberg chose not to release the last four volumes of the Pentagon Papers because he didn't want to get in the way of diplomacy.

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."

But Assange—because of what Abrams characterizes as WikiLeaks' "general disdain for any secrecy at all"—did release diplomacy-damaging materials.

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.

Abrams tries to draw a distinction between Ellsberg and Assange with what are apparently meant to be rhetorical questions.

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?

From there, Abrams predicts that what he characterizes as WikiLeaks' irresponsible actions will lead to legislation and legal cases restricting the First Amendment.

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.

In Abrams' mind, Assange is responsible for the response the government is taking toward him, not the government actors themselves. Nor are those who misrepresent Assange's and WikiLeaks' actions—thereby making it easier for the government to curtail legal rights—responsible.

You know, people like Floyd Abrams.

Abrams' purported rhetorical questions—can anyone doubt that WikiLeaks would have published the diplomatic volumes of the Pentagon Papers? can anyone doubt he wouldn't have paid the slightest heed to efforts to end the war?—are one of two things that dismantle his entire argument laying the responsibility for the government's overreaction to Assange with

Assange. Because—as Digby has explained at length—we have every reason to doubt whether WikiLeaks would have published the diplomatic volumes of the Pentagon Papers. And we have solid evidence that WikiLeaks would shield really dangerous information.

Because they already have. And because they have now outsourced responsibility for choosing what is dangerous and newsworthy or not to a bunch of newspapers.

Indeed, back before WikiLeaks ceded that role to a bunch of newspapers, WikiLeaks was actually being more cautious with the publication of sensitive information than the NYT was.

So rather than blaming the government and the press for mischaracterizing what WikiLeaks has done here and then using that mischaracterization to justify an overreaction to that mischaracterization, Floyd Abrams just participates in it. WikiLeaks is responsible, Floyd Abrams says, and I’m going to misrepresent what they have done to prove that case.

Effectively, Abrams contributes to the myth that he says will result in new government action restricting the First Amendment.

Thanks Floyd.

But, as I said, there are two fundamental problems with Abrams’ argument.

Here’s the other one:

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.**

[snip]

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. [my emphasis]

Floyd Abrams' entire argument about WikiLeaks is premised on his claim that these diplomatic cables demonstrate no abuse of power at all. No misconduct by the US. (Note, too, how he moves the bar with the Pentagon Papers, apparently revealing some uncertainty whether the Pentagon Papers revealed "lack of candor"—something abundantly exposed in the WikiLeaks cables—or outright "official wrongdoing.")

There's a lot that has been revealed in this dump that I would consider misconduct and even more that I would consider abuse of power.

But consider just the examples of the cables showing the US pressure on Germany and Spain to drop prosecutions of US rendition and torture (and if you haven't already read Carol Rosenberg's examination of our pressure on Spain, I recommend it).

I don't see how any person—much less a constitutional lawyer—can claim that US efforts to get other democracies to set aside rule of law in their countries to help the US avoid responsibility for its crimes is not an abuse of power. Unless you believe that torture is cool, that wrongful kidnapping is cool, that the US should not be bound by its own laws or international law, or that the US should be

immune from law generally, I don't see how you conclude that our efforts to bigfoot the legal systems of our allies does not constitute an abuse of our considerable international power.

And yet somehow Floyd Abrams suggests just that—that revealing the US' double standards about rule of law, all in the service of avoiding any accountability for torture, does not constitute a valuable revelation.

But I guess for a guy that blames an anticipated government assault on the First Amendment not on the government itself, but on a myth that he himself propagates, cables that expose US hypocrisy about rule of law and acknowledgment of vulnerability for prosecution for torture wouldn't equate to abuse of power, either.