

STATEMENT OF

**KENNETH L. WAINSTEIN
PARTNER, O'MELVENY & MYERS LLP**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

CONCERNING

**THE ESPIONAGE ACT
AND THE LEGAL AND CONSTITUTIONAL
ISSUES RAISED BY WIKILEAKS**

PRESENTED ON

DECEMBER 16, 2010

Chairman Conyers, Ranking Member Smith and Members of the Judiciary Committee, thank you for inviting me to this important hearing. My name is Ken Wainstein, and I am a partner at the law firm of O'Melveny & Myers. Prior to my leaving the government in January of last year, I served in a variety of capacities, including Homeland Security Advisor to the President, Assistant Attorney General for National Security, United States Attorney, General Counsel and Chief of Staff of the FBI and career federal prosecutor. It is an honor to appear before you today, along with this panel of very distinguished experts, and to testify about the recent WikiLeaks releases.

This situation reflects the tension in our democracy between protecting government secrets and upholding First Amendment protections for the press. On one hand, it highlights the importance of the free press in our country and the need to avoid interference with its appropriate functioning. An aggressive media is one of the pillars of our democracy, and we need to think long and hard before taking any steps that will chill press efforts to examine and report on the inner workings of government. This concern is particularly strong in regard to news dissemination over the Internet, which has done so much to spread information and knowledge throughout the world and particularly in those countries with repressive governments.

The WikiLeaks releases also remind us of the importance of maintaining the confidentiality of national security deliberations and operations. During my government service, I saw all too often how the failure to do so has debilitating consequences for our policies and national interests. Our military operations and personnel are compromised whenever our adversaries are alerted to our plans; our diplomatic efforts are undermined if foreign counterparts learn how we balance interests and develop negotiating positions; and our Intelligence Community's ability to identify and defeat threats to our Nation is diminished whenever sensitive sources and methods of collection are disclosed.

Congress has long recognized this concern. In fact, Stephen Vladeck and I testified before the Senate Judiciary Committee just this May about the problem of government leaks. At that time, our concern revolved primarily around the leak to a traditional news organization -- the type of leak that has been a fixture of life since the founding of the Republic. Since May, however, we have all learned that there is a much greater threat -- the threat posed by an organization that is committed, not to the traditional media function of reporting newsworthy information, but to the mass and indiscriminate disclosure of sensitive information about the inner workings of our government.

The Challenge of WikiLeaks

This is a threat that far surpasses the age-old problem posed by the news reporter who is tempted to publish a sensitive piece of information that comes his or her way. It arose over the past few years with the development of Internet technology that allows loose, virtual organizations to ferret out government secrets and disclose them in the unconstrained environment of cyberspace with little or no regard to our national security. And, it is a threat that will only get more dangerous with the advance of enabling technology and with the realization after these recent leaks that it takes so little to strike such a grandiose blow against government

secrecy -- nothing more than a computer, access to a disaffected government employee with a clearance, and a willingness to compromise our nation's interests and security.

Given this threat, we now find ourselves at a juncture where the stakes seem much higher than they did when we testified back in May. To the extent the government previously had time for extended deliberation before deciding how to address press leaks, it no longer has that luxury. With their mass disclosures of sensitive information, Julian Assange and WikiLeaks have forced the government's hand.

In responding to that challenge, there are two decisions the U.S. Government needs to make. The first is whether to prosecute Assange and WikiLeaks under our current laws for their mass release of sensitive military and diplomatic documents. The second is whether to revise our current espionage laws to enhance our ability to prosecute, deter and hopefully prevent such damaging leaks in the future. I will address each of these decision points in order.

The Prosecution of Assange and WikiLeaks

There has been much speculation lately about the prospects of successfully prosecuting Assange and WikiLeaks under the Espionage Act -- which is the only type of prosecution I will address today; I won't get into whether these leaks can be charged as a theft of government property or a copyright violation or under some other theory of prosecution.

Assange has professed the belief that he cannot be prosecuted because his conduct is protected by our laws and Constitution. That belief gives him and the other Julian Assanges of the world the sense of security that emboldens them to pursue and disclose government secrets. If Assange and WikiLeaks pay no penalty for their recent audacious releases, that sense of security will become one of invulnerability, they will redouble their efforts to match or exceed their recent exploits, and copycat operations will start to appear throughout the Internet. Just this Tuesday, in fact, a new copycat came on line when a former WikiLeaks employee announced plans to stand up a rival website for leaked materials.

(1) The Legal Issues Arising from a Prosecution

I was heartened to hear the Attorney General's recent statements about holding WikiLeaks accountable for their actions, and I commend the Justice Department for apparently undertaking a careful but determined effort to mount a prosecution. If this effort ripens into a criminal case against Assange and WikiLeaks, it will certainly raise a host of hotly-litigated legal issues.

As an initial matter, the parties will argue over the degrees of malicious intent and damage to the national security that the government will have to show to support an espionage charge. Given that no media organization has ever been brought to trial on leak charges, this is uncharted territory and it is difficult to predict exactly what evidence of intent and national-security damage a court will require before allowing a prosecution to proceed.

Depending on those two threshold legal rulings, there will be a number of challenging factual issues, including the following:

- Whether the released documents could cause actual damage to our national security or are simply embarrassing or awkward for our foreign relations, the latter of which would probably not satisfy any damage element that the court requires.
- Whether Assange's contention that he actually acted out of a salutary desire to provide greater openness and improve our polity would trump the government's ability to demonstrate he intended damage to our national security.
- Whether Assange's pre-release offer to entertain the government's suggested redactions to prevent the release of damaging information undercuts any showing of intent to cause national-security damage.

While these will be difficult issues, it appears from the publicly available information that the government stands a fighting chance of prevailing against the legal challenges and getting its case to the jury. In terms of national-security damage, the best evidence is in those parts of the released documents that discuss and identify persons who have provided information or assistance to our government -- especially those living in the theaters of war whose anonymity is often the key to survival.

In terms of intent, Assange's argument that he meant no harm falters when examined against the record of his actions. While he may well genuinely believe that public access to these materials is good for governance and the governed, he clearly knew that significant injury could result from their release. The documents dealt with some of the most critical matters of state; they contained sensitive information such as the specifics of troop movements and deployments; and lest there was any doubt, the State and Defense Departments put him on notice with letters detailing the damaging consequences that would ensue if he leaked the materials in his possession.

Nor does Assange's claim of complete altruism sound credible in light of some of his recent statements. First, his candid remark that he "enjoy[s] crushing bastards" with his document releases points to a more personal rather than simply a public-minded agenda. Also telling was his recent announcement that further material has been distributed to 100,000 people in encrypted form and that WikiLeaks will decrypt and release key parts of those documents if official action is taken against him. This threat reflects a willingness to use his leaked documents for extortion and personal protection rather than simply to advance the values of transparency and public awareness.

Equally unavailing is his retort that the U.S. Government is to blame for any damage because it rebuffed his offer to entertain proposed redactions. That is a specious argument, and is no different than a burglar claiming innocence because he had previously warned the victimized homeowner to buy an alarm system.

(2) The Primary Constitutional Challenge to the Prosecution

Even if the government prevails in these factual arguments, it will face a strong constitutional challenge based on WikiLeaks' purported media status and the protections afforded the press under the First Amendment. The main issue here is whether prosecuting Assange or WikiLeaks for receiving and disseminating the leaked material -- as opposed to simply prosecuting the responsible government employee for leaking it in the first place -- unduly jeopardizes the constitutionally-protected role of the press in our country. If WikiLeaks can be prosecuted for espionage for these leaks, there is no legal or logical reason why a similar prosecution could not lie against all of the mainstream news organizations that routinely receive and publish protected "national defense information."

I agree that this is a serious concern. It is the reason why we should all pause and think through the implications before charging into a prosecution in this case; it is the reason why the Justice Department has internal procedures for all media-related cases that impose strict limitations on the investigation and prosecution of press activities -- limitations that go well beyond what the law requires; and it is the reason why -- despite the media's publication of leaked classified information on an almost daily basis -- the government has never chosen to prosecute a media organization for espionage.

The key to overcoming this concern is to distinguish WikiLeaks from other news outlets - to show the difference between WikiLeaks' mission and conduct and the mission and typical conduct of a standard media organization. The main points of distinction are fairly apparent, and include the following:

- The media is generally dedicated to the dissemination of newsworthy information to educate the public; WikiLeaks focuses first and foremost on obtaining and disclosing official secrets.
- The media gathers news about sensitive areas of government operations with probing investigative reporting; WikiLeaks uses its elaborate system of high-security, encrypted drop boxes on the Internet that are designed specifically to facilitate disclosures of sensitive government information and to circumvent the laws prohibiting such disclosures.
- The media typically publishes only those pieces of sensitive information that relate to a particular story of perceived public importance; WikiLeaks is in the business of releasing huge troves of leaked materials with little to no regard for current relevance or resulting damage.

Drawing these distinctions should hopefully lower any First Amendment obstacles to prosecution. It should also reassure the public and media that this case presages no more aggressive prosecution effort against the press and that the Justice Department's longstanding policy of forbearance remains in place for all entities that operate in alignment with the media's traditional purpose and functions.

The Revision of the Espionage Act

The government's second decision is whether and how to undertake a revision of the Espionage Act. As many have recently noted, the statute is badly outdated and in important ways it says both too much and too little. On one hand, the law's broad language suggests that every newspaper reporter who receives a sensitive piece of information relating to the military is subject to espionage prosecution. On the other hand, the law completely overlooks some of our most critical espionage vulnerabilities. While it carefully prohibits the transmission of blueprints and signal books and the use of aircraft to photograph defense facilities, the Espionage Act says nothing about the dissemination of materials over the Internet. Similarly, while there is a whole code section devoted to the disclosure of communications intelligence, the law makes no mention of the disclosure of human intelligence assets.

There are limits to how much the statute can be refined to address every situation. For example, there is probably no practical way -- in this era of diffused and varied means of Internet reporting -- to come up with a definitive list of criteria that can clearly distinguish those entities that qualify as media deserving full First Amendment protection from those that do not. Nonetheless, there are a number of areas where the law could be revised to more clearly delineate the proscribed conduct and better define the relevant standards for prosecution.

A comprehensive review of the Espionage Act should include consideration of the following:

- Clarifying the intent required for prosecuting a government employee who leaks information versus that required for prosecuting the third parties that receive that information.
- Determining when the government needs to demonstrate that the leak caused damage to our national security -- for instance, only when prosecuting the media or also when prosecuting the government leaker -- and defining the potential for damage that is required before a person can be convicted for illegally disclosing information.
- Possibly limiting the reach of the statute to the initial publisher of the leaked materials and not to the person who reads and discusses that publication with others -- as millions have done in the aftermath of the recent WikiLeaks release -- which is arguably considered a separate dissemination and criminalized by the statutes in their current form.
- Dropping the term "national defense information" and providing a clearer definition of the category of information that is protected under the Espionage Act.
- Deciding whether to adopt a law -- as has been proposed -- that would make it unlawful for a government employee to disclose classified information regardless of whether there is potential damage to national security.

While there are numerous other aspects of the Espionage Act that warrant careful review, these are some of the central issues that go to the balance between protecting our official secrets and ensuring freedom of the press. A clarification of these issues will go a long way toward making the statute more directly relevant to the espionage threats of the 21st Century.

* * * * *

WikiLeaks presents a challenge for the Executive Branch, which now has to decide how to respond to these disclosures with the laws that are currently on the books. But, it also presents a challenge for Congress, which has to decide whether we need new statutory tools to sanction and deter egregious releases of government secrets while at the same time maintaining the First Amendment's protections for our free press. I commend the Committee for stepping up to this challenge and for undertaking the complex task of considering revision of the Espionage Act. Given the fundamental importance of this issue to our civil liberties and to our national security, I am confident that it will be time very well spent.

I appreciate you including me in this important effort, and I stand ready to answer any questions you may have.