NATIONAL SECURITY LEAKS AND THE LAW
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Subcommittee on Crime, Terrorism, and Homeland Security
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Chairman Sensenbrenner, Ranking Member Scott, and distinguished members of the Subcommittee:

Thank you for the invitation to testify today—and in such distinguished company. Although I've had the honor of testifying previously alongside Professor Sales and Mr. Wainstein, the fact that we and Colonel Allard continue to be called before you and other committees of the Congress to speak on the topic of national security leaks provides strong evidence of both the recurring nature of such unauthorized disclosures of national security information and the difficulties that generations of lawmakers, lawyers, and legal commentators have confronted in attempting to address them.

Thus, although I'm sure that reasonable people will disagree about the *politics* of aggressively seeking to prosecute those allegedly responsible for the unauthorized disclosure of national security information, I hope to convince you of two related points that should transcend the politics of the moment: ***First***, national security leaks are in many ways symptomatic of the much larger disease of pervasive overclassification—a problem that Congress unquestionably has the power, if not the inclination, to ameliorate. ***Second***, even if this subcommittee believes that national security leaks by themselves are a problem worth a solution, the primary statute that the federal government has thus far used to prosecute alleged leakers—the Espionage Act of 1917—is terribly ill-suited to the task.

Instead, if Congress wants to pursue reform in this field, it must fundamentally revisit the federal classification scheme, and as part of that scheme provide a far more narrowly tailored and carefully crafted sanction specifically targeted at government employees who intentionally disclose *properly* classified information to the public without any intent to harm our national security. Until and unless reforms like these are undertaken, national security leaks will recur regardless of whether a Democrat or a Republican sits in the White House. What's more, given how many governmental abuses over the past decade have been publicly exposed only through these kinds of leaks, so long as the classification regime remains in its current form, this may not be an entirely undesirable result.

I. OVERCLASSIFICATION

I won't belabor this hearing with a long discourse on the pervasiveness of overclassification. Let me just briefly make three observations about the relationship between overclassification and national security leaks.

First, the incentive structure with regard to governmental classification decisions is entirely one-sided. The only sanction that results from a government officer wrongly classifying particular national security information is that such information is declassified—*i.e.*, that which should have happened in the first place. And even then, that remedy only results when the wrongful classification is discovered and/or otherwise exposed. This reality produces two distinct—but related—results: far too much information is wrongly classified, and it is exceedingly difficult to declassify through normal channels even the national security information that should never have been classified in the first place.

Second, despite yeoman efforts on this front, the current Administration has not accomplished nearly as much with regard to declassification—and reducing overclassification—as it had initially intended. Indeed, as the Information Security Oversight Office's report for Fiscal Year 2011 shows, discretionary declassification has *decreased* as compared to prior years, and there is little reason to think the Administration has had any more success in reducing overclassification. If we can all agree that there is a substantial volume of classified national security information that should never have been classified in the first place, then that puts the problem of national security leaks into a somewhat different light.

Third, and despite some suggestions to the contrary, I think it is beyond question that Congress has at least *some* power to regulate Executive Branch classification of national security information. Although *most* governmental classification has been conducted pursuant to Executive Order since the Second World War, statutes like the Atomic Energy Act of 1954 stand as powerful countervailing evidence to the oft-raised claim that Congress lacks the constitutional authority to interfere with governmental classification decisions. Instead, the principal constraint on Congress's power to regulate classification has historically been political, not constitutional. But if Congress were to carefully and comprehensively address both the authority for and limits on governmental classification authority, I suspect there would at once be far less need for, and far more support for punishment of, unauthorized disclosures of national security information.

II. THE ESPIONAGE ACT

With regard to prosecutions for the unauthorized disclosure of classified information, it also bears emphasizing that the Espionage Act of 1917—the statute pursuant to which most leak prosecutions have thus far been brought—is a

singularly poor vehicle for punishing even those national security leaks that we can all agree merit criminal sanction.

As its title suggests, the Espionage Act of 1917 was designed and intended to deal with classic acts of espionage. Because the statute was targeted at conventional spying, the plain text of the Act fails to require a specific intent either to harm the national security of the United States or to benefit a foreign power. Instead, the Act requires only that the defendant know or have "reason to believe" that the wrongfully obtained or disclosed "national defense information" is to be used to the injury of the United States, or to the advantage of any foreign nation. No separate statute deals with the specific—and, in my view, distinct—offense of disclosing national defense information for more benign purposes. Thus, the government has traditionally been forced to shoehorn into the Espionage Act three distinct classes of cases that raise three distinct sets of issues: classic espionage; leaking; and the retention or redistribution of national defense information by third parties. I very much doubt that the Congress that drafted the statute in the midst of the First World War meant for it to cover each of those categories, let alone to cover them equally.

In addition, the Espionage Act does not focus solely on the initial party who wrongfully discloses national defense information, but applies, in its terms, to *anyone* who knowingly disseminates, distributes, or even *retains* national defense information without immediately returning the material to the government officer authorized to possess it. In other words, the text of the Act draws no distinction between the leaker, the recipient of the leak, or the 100th person to redistribute, retransmit, or even *retain* the national defense information that, by that point, is already in the public domain. So long as the putative defendant knows or has reason to believe that their conduct is unlawful, they are violating the Act's plain language, regardless of their specific intent and notwithstanding the very real fact that, by that point, the proverbial cat is long-since out of the bag. Whether one is a journalist, a blogger, a professor, or any other interested person is irrelevant for purposes of the statute.

This defect is part of why so much attention has been paid as of late to the potential liability of the press—so far as the plain text of the Act is concerned, one is hard-pressed to see a significant distinction between disclosures by entities such as WikiLeaks and the re-publication thereof by major media outlets. To be sure, the First Amendment may have a role to play there, as the Supreme Court's 2001 decision in the *Bartnicki* case and the recent *AIPAC* litigation suggest, but I'll come

back to that in a moment. At the very least, one is forced to conclude that the Espionage Act leaves very much unclear whether there is *any* limit as to how far downstream its proscriptions apply—which goes a long way toward explaining why the government has historically been reluctant to push the Act to its textual limits even in cases against alleged leakers.

Moreover, the potentially sweeping nature of the Espionage Act as currently written may inadvertently interfere with federal whistleblower laws. For example, the Federal Whistleblower Protection Act ("WPA") protects the public disclosure of "a violation of any law, rule, or regulation" only "if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." And similar language appears in most other federal whistleblower protection statutes.

To be sure, the WPA, the Intelligence Community Whistleblower Protection Act, and the Military Whistleblower Protection Act all authorize the putative whistleblower to report to cleared government personnel in national security cases. And yet, there is no specific reference in any of these statutes to the Espionage Act, or to the very real possibility that those who receive the disclosed information, even if they are "entitled to receive it" for purposes of the Espionage Act, might still fall within the ambit of 18 U.S.C. § 793(d), which prohibits the willful *retention* of national defense information. Superficially, one could fix this problem by amending the whistleblower statutes to clarify that the individuals to whom disclosures are made under those statutes are "entitled to receive" such information under the Espionage Act. But so long as the whistleblower statutes don't so provide, that may only put further pressure on internal whistleblowers to resort to more public forms of disclosures, rather than the procedures Congress has already devised for national security cases.

Finally, the Espionage Act does not deal in any way with the elephant in the room—situations where individuals disclose classified information that should never have been classified in the first place, including information about unlawful governmental programs and activities. Most significantly, every court to consider the issue has rejected the availability of an "improper classification" defense—a claim by the defendant that he cannot be prosecuted because the information he unlawfully disclosed was in fact unlawfully classified. If true, of course, such a defense would presumably render the underlying disclosure legal.

In one sense, it's entirely understandable that the Espionage Act nowhere refers to "classification," since our modern classification regime postdates the Act by over 30 years. Nevertheless, given the overclassification concerns I raised above, the absence of such a defense—or, more generally, of any specific reference to classification—is yet another reason why the Espionage Act's potential sweep is so unclear. Even where it is objectively clear that the disclosed information was erroneously classified in the first place, the individual who discloses the information (and perhaps the individual who receives the disclosure) might (and I emphasize *might*) still be liable.

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Testifying before the House Permanent Select Committee on Intelligence in 1979, Anthony Lapham—then the General Counsel of the CIA—described these uncertainties surrounding the scope of the Espionage Act of 1917 as "the worst of both worlds." As he explained,

> On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.

Whatever one's views of national security leaks, Lapham's central critique—that the uncertainty surrounding this 93-year-old statute leaves too many questions unanswered about who may be held liable, and under what circumstances, for what types of conduct—drives home why, regardless of who occupies the White House, prosecuting national security leakers will always be a legally and politically fraught proposition. That will necessarily be true until and unless Congress revisits the entire statutory scheme—and with the care and thoughtfulness that the concerns I've identified above will hopefully necessitate.

Mr. Chairman, I thank you again for the opportunity to testify before the subommittee today. I look forward to your questions.