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NATIONAL SECURITY LEAKS AND THE LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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NATIONAL SECURITY LEAKS AND THE LAW

WEDNESDAY, JULY 11, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Smith, Gohmert, Lungren, Forbes, Gowdy, Adams, Scott, Conyers, Johnson, Chu, Deutch, and Quigley.

Staff Present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Arthur Radford Baker, Counsel; Sam Ramer, Counsel; Lindsay Hamilton, Clerk; (Minority) Joe Graupensperger, Counsel; Aaron Hiller, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order.

Within the last few months, the American people and the rest of the world have become privy to an astonishing number of revelations concerning the secret operations of our Armed Forces and the national intelligence agencies. We have learned a Pakistani doctor cooperated with U.S. forces in conducting DNA tests to help locate Osama bin Laden. We have learned that the President of the United States personally decides the human targets of drone strikes in other countries by looking at mugshots and brief biographies of targets that we have been told resemble a high school yearbook layout. We have learned that the United States, in cooperation with its ally Israel, sabotaged the Iranian nuclear campaign with the Stuxnet virus. We have learned that Obama expanded the assault even after the virus accidentally made its way into the Internet in 2010. We have learned that the United States sabotaged Iranian computers with the Flame virus. We have learned that the CIA takedown of an al Qaeda plot to blow up the U.S.-bound airliner involved an international sting operation with a double agent tricking terrorists into handing over a prized possession, a new bomb reportedly designed to slip through airport security. We have also learned that the double agent belonged to another ally, Saudi Arabia.

We didn't learn of these secret programs and details through spies or other countries' diplomats or even from the WikiLeaks scandal. We learned of these secrets from the pages of The New

York Times and other newspapers. The editors of The New York Times and other newspapers have publicly claimed many times that they see themselves as having a duty to inform.

During the Bush administration, The New York Times and other newspapers savaged President Bush and the intelligence community for its tactics in the war on terror. How times have changed. Here is a sample of the headlines that accompanied these latest national security leaks: "Obama Order Sped Up Wave of Cyberattacks Against Iran"—The New York Times; "Secret 'Kill List' Proves a Test of Obama's Principles and Will"—New York Times; "Stuxnet Was the Work of U.S. And Israeli Experts, Officials Say"—Washington Post. These are not the type of critical headlines that pursued Bush administration officials.

Not only has the Administration not complained about these articles, but officials made a planner, operator, and commander of SEAL Team 6 who killed Osama bin Laden available to a Hollywood director and screenwriter working on a movie about this successful raid, according to Pentagon and CIA records obtained by Judicial Watch, who got the information through FOIA requests.

The four leaders of the Intelligence Committees have condemned these leaks. Senator Feinstein said that she was deeply disturbed by these leaks and wants an investigation, and she is right. The Attorney General has deployed two U.S. attorneys who report to him to investigate the leaks and to determine whether anyone from the Administration should be prosecuted. Today we will have a look at the law and discuss the options available for investigating these disclosures to the press.

These leaks threaten our national security, our relations with foreign governments, and continued candor from embassy officials and foreign sources. They already have had profound consequences. The doctor who cooperated with us was sentenced to 30 years in prison by Pakistani authorities. Intelligence sources have told us that the Saudi Arabian double agent was exposed because of news reports.

As long as there have been governments, there has been information protected by those governments. This country needs its secrets kept, regardless if the news media wants to expose them to condemn a President or to praise him. This isn't simply about keeping the government's secrets secret. This is about the safety of American personnel overseas at all levels, from the foot soldier to the Commander in Chief.

It is now my pleasure to recognize for his opening statement the Ranking Member of this Subcommittee, the distinguished gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

And today we will examine issues related to leaks of sensitive government information, sometimes classified, sometimes not classified. This hearing is motivated in no small part by a recent spate of stories in the news that appear to have—as their basis—leaked information from within the Federal Government. These stories include details of cyber warfare in Iran, a covert mission to thwart a suicide bomber bound for the United States, and the Administration's process of nominating individuals as targets for drone strikes in Yemen and in Pakistan.

Although these stories may have given some Members a renewed sense of urgency, it is important to put them in context. There are two points to be made here: First, the Obama administration's work to investigate and prosecute suspected leaks is without peer. This Administration has prosecuted more leaks than all previous Presidential administrations combined. Attorney General Eric Holder has appointed two U.S. attorneys to lead the Federal investigations into recent leaks. The Director of National Intelligence, James Clapper, has issued new rules to deter future incidents; among them, rules authorizing the inspector general of the defense community to conduct an independent administrative investigation even if the Justice Department declines to bring criminal charges in a specific case.

Second, the problem of leaks in the Federal Government is not new. There were spies at the founding of the Republic. We have grappled with this problem in Federal law since the First World War. In the modern sense of leaking information to the press, we have had to work to balance our security interests with the interests of a free and robust press for the better part of 50 years.

These problems are not amenable to easy solutions, particularly in light of the fact that we do not always agree on the scope of the problem. We all want to protect national security so that we can keep our citizens safe. But we cannot disregard the right of American citizens in a system of self-governance, a system that requires the public to be well-informed.

When a government official leaks sensitive information to the press that reveals the government is engaged in unlawful activity, do we simply leave it up to the same government's discretion as to whether to prosecute the person for possibly serving the public's interest? What about leaks of information that do not implicate any national security interest at all? Overclassification is an enormous problem in the Federal Government, and current law does not distinguish between leaking classified information with the intent to harm the United States and blowing the whistle on unlawful activity that never should have been classified in the first place. Congress may soon consider legislation that attempts to address these shortcomings in existing law.

As we move forward, we must be careful. Any decision to limit what the public officials and private citizens may say about sensitive government information must be balanced against the important issues of free speech, due process, and the fact that some of this information may reveal improper or even criminal government actions.

Just as the authors of the Espionage Act of 1917 did not anticipate our problems with leaks in the digital information age, there may be unforeseen consequences of any changes we make today. It is easy to overreact to news stories, particularly in an election year, but we must be careful before we limit what people say, particularly with respect to the operation of our government.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. SENSENBRENNER. Thank you.

The Chair of the full Committee, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. And, Mr. Chairman, I associate myself with your opening statement.

Mr. Chairman, recent leaks of highly classified information pose a serious threat to our national security and put the lives of Americans and our allies at risk. National security experts from both Republican and Democratic administrations have expressed outrage over the leaks and the effect they have on ongoing and future intelligence operations.

What sets these leaks apart from other leaks we have seen is that the media reports that many of these have come from highly placed Administration officials. If true, this means that Administration officials are weakening our national security and endangering American lives.

National security operational details exist to meet the covert needs of the intelligence community that protects the American people. As FBI Director Mueller recently testified, quote, "Leaks such as this threaten ongoing operations, puts at risk the lives of sources, makes it much more difficult to recruit sources, and damages our relationships with our foreign partners. And, consequently, a leak like this is taken exceptionally seriously, and we will investigate thoroughly." Director Mueller went on to say, quote, "I don't want to use the word 'devastating,' but this will have a huge impact on our ability to do our business. Your ability to recruit sources is severely hampered, so it also has some long-term effects, which is why it is so important to make certain that the persons who are responsible for the leak are brought to justice," end quote.

News publications that publicize classified information claim to promote increased government transparency, but I wonder if their real motivation is self-promotion and increased circulation. They claim to be in pursuit of uncovering government wrongdoing but dismiss any criticism that their actions may be wrong or damaging to our country.

These leaks have also resurrected debate on First Amendment protections afforded to media publications. What are the boundaries of free speech? How do we balance this freedom with the government's need to protect certain information?

I hope the Justice Department will bring the full force of the law against those who leak protected information. We can judge whether the Administration is willing to conduct a serious and objective investigation by considering two factors: one, whether they will hold Administration officials responsible; and, two, whether the investigation is completed before the general election. Otherwise, the American people rightly can conclude that the Administration is hiding the truth and has endangered American security and American lives.

Mr. Chairman, finally, I want to say that the Administration's track record is not encouraging. It was pointed out by the Ranking Member of the Subcommittee a minute ago that the Administration has, in fact, initiated a number of investigations of leaks, but very little, if anything, has coming out of those investigations. I hope this time it will be different.

Thank you, Mr. Chairman. I yield back.

Mr. SENSENBRENNER. The Ranking Member of the full Committee, the distinguished gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

And good morning to our witnesses.

This is a difficult matter, national security leaks and the law. My good friend from Texas, the Chair of this full Committee, wonders if self-promotion played a role and if there were prominent members of the Administration involved in the leaks. Well, that is what we are here to try to determine. He hasn't mentioned any names, so I presume he is not sure who is doing it. We have our own investigative capacity, and so why don't we inquire ourselves?

We also have the regular power of subpoena. If there is somebody he thinks we ought to talk to, we should talk to them. If there is somebody that isn't cooperating with us in this investigation, which is a legitimate subject for discussion, we should subpoena them.

Mr. SMITH. If the gentleman will yield, I will take the gentleman up on his offer immediately. And I suspect the Chairman of the Subcommittee will, as well. If you are going to support our efforts to subpoena individuals from the Administration, I couldn't ask for more.

Mr. CONYERS. Well, that is why I am suggesting it.

Mr. SENSENBRENNER. If the gentleman will yield, if he will submit to the Subcommittee Chair a list of people that he wishes subpoenaed and the full Committee Chair does the same, I think we can have a good, bipartisan subpoena-issuing session.

Mr. CONYERS. Yeah, but the only problem is that, at this point, neither of you have anybody that you want to subpoena, I presume, and neither do I.

Mr. SMITH. Oh, I will be happy to come up with some names.

Mr. CONYERS. Well, okay. Well, that is great. You know, we could have had this discussion before 10 a.m. on the 11th day of July. But right now this hearing is going on without anybody knowing who they would like to talk with. And now we have all agreed to pull together three bipartisan lists. I am very sure the former attorney general from California, who is a Member of the Committee, he could easily come up with a list.

Mr. LUNGREN. I will give you some right now, if you would like to. How about all the people that were in the Situation Room——

Mr. CONYERS. Wait a minute. I didn't yield.

Mr. LUNGREN [continuing]. Identified by The New York Times?

Mr. CONYERS. Just a moment, sir.

Mr. SENSENBRENNER. The time belongs to the gentleman from Michigan.

Mr. CONYERS. Yeah.

We can get you time.

I am not here requesting names. I am here pointing out that we don't, apparently, have any names. Now, all of a sudden, we have a bipartisan panel, everybody is willing to produce names. And, by the way, I didn't say that I had any names myself. You are the ones running the Committee and saying that this is an important subject. And I agree with you. But I just want to describe the nature of the setting as this starts out with.

Now, let me point out just a couple things. We must react to concerns about leaks in ways that do not undermine the openness and transparency of government. I think we can start off there as a beginning point. I think I would like to hear some discussion about the issue of overclassification of documents in the Federal Government. I think that is worth our attention.

And then, a law passed in 1917 needs to be looked at again. What went on as espionage in the early part of the 20th century I don't think has much relevance now. And I think there is a lot of work for the Committee on the Judiciary and this Subcommittee in particular to work on.

Mr. SENSENBRENNER. The gentleman's time has expired, and, without objection, he is given 2 additional minutes.

Mr. CONYERS. Well, I thank you, Chairman Sensenbrenner. And I won't use the 2 minutes.

But I will just conclude by saying, when we look at the issue of leaks, let's look at them across a period of time that includes all the former as well as the current Administration.

And I thank you for your generosity, and I return the balance of the time. Thank you very much.

Mr. SENSENBRENNER. Thank you.

Without objection, all Members' opening statements will appear in the record at this point.

[The prepared statement of Mr. Sensenbrenner follows:]

Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security

Within the last few months, the American people, and the rest of the world, have become privy to an astonishing number of revelations concerning the secret operations of our armed forces and national intelligence agencies. We have learned that a Pakistani doctor cooperated with U.S. forces in conducting DNA tests to help locate Osama Bin Laden. We have learned that the President of the United States personally decides the human targets of drone strikes in other countries, by looking at mug shots and brief biographies of targets that, we have been told, "resembled a high school yearbook layout."

We have learned that the United States, in cooperation with its ally, Israel, sabotaged the Iranian nuclear campaign with the Stuxnet virus. We have learned that Obama expanded the assault even after the virus accidentally made its way onto the Internet in 2010. We have learned that the United States sabotaged Iranian computers with the "Flame" virus.

We have learned that the CIA takedown of an Al Qaeda plot to blow up a U.S.-bound airliner involved an international sting operation with a double agent tricking terrorists into handing over a prized possession: a new bomb purportedly designed to slip through airport security. We have also learned that the double-agent belonged to another ally, Saudi Arabia.

We didn't learn of these secret programs and details through spies, or other countries' diplomats, or even from the Wikileaks scandal. The world learned of these secrets from the pages of the New York Times and other U.S. newspapers.

The editors of the New York Times, and other newspapers, have publicly claimed many times that they see themselves as having a duty to inform. During the Bush Administration, the New York Times and other newspapers savaged President Bush and the intelligence community for its tactics in the War on Terror.

How times have changed. Here is a sample of the headlines that accompanied these latest national security leaks:

- "Obama Order Sped Up Wave of Cyberattacks Against Iran"—NY Times
- "Secret 'Kill List' Proves a Test of Obama's Principles and Will"—NY Times
- "Stuxnet was work of U.S. and Israeli experts, officials say"—Washington Post

These are not the type of critical headlines that pursued Bush Administration officials. Not only has the Administration not complained about these articles, but officials made "a planner, operator and commander of SEAL Team Six" who killed Osama bin Laden available to a Hollywood director and screenwriter working on a movie about the successful raid, according to Pentagon and CIA records obtained by Judicial Watch, who got the information through FOIA requests.

The four leaders of the Intelligence Committees have condemned these leaks. Senator Dianne Feinstein said that she was deeply disturbed by these leaks, and wants an investigation. I agree.

The Attorney General has deployed two U.S. Attorneys, who report to him, to investigate the leaks and to determine whether anyone from the Administration should be prosecuted. Today, we will take a look at the law and discuss the options available for investigating these disclosures to the press.

These leaks threaten our national security, our relations with foreign governments, and continued candor from embassy officials and foreign sources. They have already had profound consequences. The doctor who cooperated with us was sentenced to 30 years in prison by Pakistani authorities. Intelligence sources have told us that the Saudi-Arabian double-agent was exposed because of news reports.

As long as there have been governments, there has been information protected by those governments. This country needs its secrets kept, regardless if the news media wants to expose them to condemn a president, or to praise him.

This isn't simply about keeping government's secrets secret. This is about the safety of American personnel overseas at all levels, from the foot soldier to the Commander-in-Chief.

[The prepared statement of Mr. Scott follows:]

Prepared Statement of the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security

Today, we will examine issues related to the leaks of classified information. This hearing is motivated, in no small part, by a recent spate of stories in the news that appear to have their basis in information leaked from within the federal government. These stories include details of cyberwarfare in Iran, a covert mission to thwart a suicide bomber bound for the United States, and the Administration's process of nominating individuals as targets for drone strikes in Yemen and Pakistan.

Although these stories may have given some members a renewed sense of urgency, it is important to put the problem into context. There are two points to make here.

First, the Obama Administration's work to investigate and prosecute suspected leaks is without peer. This Administration has prosecuted more leaks than all previous presidential administrations combined. Attorney General Eric Holder has appointed two U.S. attorneys to lead the federal investigations into the recent leaks. Director of National Intelligence James Clapper has issued new rules to deter future incidents—among them, rules authorizing the Inspector General of the Intelligence Community to conduct an independent administrative investigation even if the Justice Department declines to bring criminal charges in a specific case.

Second, the problem of leaks in the federal government is not new. There were spies at the founding of the Republic. We have grappled with this problem in federal law since the First World War and, in the modern sense of "leaking" information to the press, we have worked to balance our security with the interests of a free and robust press for the better part of 50 years.

These problems are not amenable to an easy solution, particularly because we do not always agree on the scope of the problem. We all want to protect national security so that we can keep our citizens safe. But we cannot disregard the right of American citizens to a system of self-governance—a system that requires the public to be well-informed.

When a government official leaks classified information to the press that reveals the government is engaged in unlawful activity, are we to simply leave it up to that same government's discretion whether to prosecute that person for possibly serving the public's interest?

What about leaks of information that do not implicate any national security interests at all? Over-classification is an enormous problem in the federal government, and current law does not distinguish between leaking classified information with an intent to harm the United States, and blowing the whistle on unlawful activity that never should have been classified in the first place.

Congress may soon consider legislation that attempts to address these shortcomings in existing law. As we move forward, we must be careful. Any decision to limit what public officials and private citizens may say about the government must be balanced against important issues of free speech and due process. Just as the authors of the Espionage Act of 1917 did not anticipate our problems with leaks of digital information to a national press, there may be unforeseen consequences to any changes we make today.

It is easy to overreact to a news story, particularly in an election year—but we must be careful before we limit what people say, particularly with respect to the operation of our government.

[The prepared statement of Mr. Smith follows:]

Prepared Statement of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary

Recent leaks of highly classified information pose a serious threat to our national security and put the lives of Americans and our allies at risk. National security experts from both Republican and Democratic administrations have expressed outrage over the leaks and the effect they have on ongoing and future intelligence operations.

What sets these leaks apart from other leaks we have seen is that the media reports that many of these have come from highly-placed Administration sources. If true, this means that Administration officials are weakening our national security and endangering American lives.

National security operational details exist to meet the covert needs of the intelligence community that protects the American people.

As FBI Director Mueller recently testified: ". . . leaks such as this threaten ongoing operations, puts at risk the lives of sources. Makes it much more difficult to recruit sources and damages our relationships with our foreign partners. And consequently a leak like this is taken exceptionally seriously and we will investigate thoroughly."

Director Mueller went on to say "I don't want to use the word devastating, but [this will] have a huge impact on our ability to do our business . . . your ability to recruit sources is severely hampered . . . So it also has some long-term effects, which is why it is so important to make certain that the persons who are responsible for the leak are brought to justice."

News publications that publicize classified information claim to promote increased government transparency. But I wonder if their real motivation is self-promotion and increased circulation.

They claim to be in pursuit of uncovering government wrongdoing but dismiss any criticism that their actions may be wrong or damaging to the country.

These leaks have also resurrected debate on First Amendment protections afforded to media publications. What are the boundaries of free speech? How do we balance this freedom with the government's need to protect certain information?

I hope the Justice Department will bring the full force of the law against those who leaked protected information.

We can judge whether the Administration is willing to conduct a serious and objective investigation by considering two factors: (1) whether they will hold Administration officials responsible, and (2) whether the investigation is completed before the general election.

Otherwise, the American people rightly can conclude that the Administration is hiding the truth and has endangered American security and American lives.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on the Constitution

As we examine the question of national security leaks and the law in today's hearing, we should keep in mind several considerations about historical context, high-profile leaks, and the ways in which we respond to them as a policy matter.

Leaks of sensitive information by officials in the federal government have taken place since the founding of the Republic. Within any system of government, there

are officials who are motivated by varying considerations to disclose inside information. Concerns about leaks are not new.

In our system of government, the people have a right to know what their government is doing and why. Public oversight gives the government powerful incentive to act effectively, responsively and lawfully.

On the other hand, the people also have an expectation that the government will protect our national security. In order to keep the country safe, the government must have the ability to deliberate with an appropriate degree of confidentiality.

In reacting to national security leaks, we must be careful not to tip the balance between these two competing interests. If we overreact, we risk reaching a point where so much of our government is shrouded with secrecy that our citizens cannot effectively know what is being done in their name.

Similarly, when we consider whether to change our laws to better protect the government from national security leaks, we must take care with respect the disclosure of information that never should have been classified in the first place.

I think most of us would readily acknowledge that our government has a problem with overclassification. Some government officials have themselves suggested that about half of all classified information is unnecessarily classified. If we are to seriously consider taking a stronger stand against leaks, we must carefully distinguish between information that is classified in order to protect national security and information that is classified for other reasons, such as to protect someone from embarrassment or legal scrutiny, or simply because it is easier to make information secret than to share it with the public.

Finally, I want to note for the record that the Obama Administration has already prosecuted more leak-related cases than were brought under all previous presidents combined. There can be no doubt that President Obama and Attorney General Eric Holder take national security and national security leaks as seriously as possible.

In addition, the Director of National Intelligence has announced that the intelligence community will implement new rules to deter future leaks—requiring additional polygraph tests for staff, and giving the Inspector General of the Intelligence Community new powers to launch an independent investigation.

These steps seem to me a measured, appropriate response to recent events. Congress must exercise similar discretion as it moves to handle national security leaks in the future.

Mr. SENSENBRENNER. And, without objection, the Chair is authorized to declare recesses during votes on the House floor.

It is now my pleasure to introduce today's witnesses.

Ken Wainstein is a partner in the law firm of Cadwalader, Wickersham & Taft, where his practice focuses on corporate internal investigations. He is also an adjunct professor at Georgetown Law School. Mr. Wainstein served as an assistant U.S. attorney in both the Southern District of New York and in the District of Columbia. Later, he served as the U.S. attorney in D.C. and then was Assistant Attorney General for National Security. He served as FBI Director Robert S. Mueller's chief of staff and then as President George W. Bush's homeland security advisor. He received his undergraduate degree from the University of Virginia and his law degree from the University of California at Berkeley.

Mr. Nathan Sales is an assistant professor of law at the George Mason University School of Law. Before coming to George Mason, Sales was Deputy Assistant Secretary for Policy Development in the U.S. Department of Homeland Security. He previously served as counsel and senior counsel in the Office of Legal Policy at the U.S. Department of Justice. He was the John M. Olin Fellow at Georgetown University Law Center in 2005 and 2006. From 2003 through 2005, he practiced at the Washington, D.C., law firm of Wiley, Rein, and Fielding. Professor Sales clerked for the Honorable David B. Sentelle of the U.S. Court of Appeals for the D.C.

Circuit. He received his undergraduate degree from Miami University and his J.D. from Duke.

Colonel Ken Allard is a commentator on foreign policy and security issues. For more than a decade, he was a featured military analyst on NBC News, MSNBC, and CNBC. In 2006, he joined the faculty at the University of Texas, San Antonio, as an executive in residence and senior lecturer in management. His military career included overseas service as an intelligence officer as well as tours of duty as an assistant professor at West Point, special assistant to the Army chief of staff, and dean of students at the National War College. He received his undergraduate degree from Lycoming College, his MPA from Harvard, and his Ph.D. In international security from the Fletcher School of Law and Diplomacy at Tufts.

Professor Stephen Vladeck is a professor of law and the associate dean for scholarship at American University Washington College of Law. He is also a Supreme Court fellow at The Constitution Project. He is the senior editor of the peer-reviewed Journal of National Security Law and Policy, a senior contributor to the Lawfare blog, and a member of the Executive Committee of the Section on Federal Courts of the Association of American Law Schools. Previously, he was an associate professor of law at the University of Miami School of Law. Professor Vladeck clerked for the Honorable Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit and the Honorable Rosemary Barkett on the U.S. Court of Appeals for the 11th Circuit. He received his bachelor of arts from Amherst and his J.D. from Yale Law School.

The witnesses' full statements will be entered into the record in their entirety, so I ask that each of you summarize in 5 minutes or less. And to help you stay within the time limit, there is a timing light on your table. And you all know what that means.

So I now recognize Mr. Wainstein.

TESTIMONY OF KENNETH L. WAINSTEIN, PARTNER, CADWALADER, WICKERSHAM & TAFT LLP

Mr. WAINSTEIN. Chairman Sensenbrenner, Ranking Member Scott, Chairman Smith, Ranking Member Conyers, and distinguished Members of the Subcommittee, it is an honor to appear before you today and to testify alongside my distinguished copanelists.

I spent much of my government career in the national security world, where I saw the vital role that sensitive information plays in our national security operations and how those operations can be put in jeopardy whenever that information is compromised.

The problem of national security leaking has come to the fore recently because of several particularly damaging leaks over the last few months. While these recent leaks are alarming, the reality is that government leaking has been happening for as long as government has existed, and every American administration since the founding of the Republic has suffered its share of leaks.

Leaks of national security information can compromise all aspects of our national security program. They can compromise specific national security operations, as happened in 2006 with the disclosure of the Treasury Department's secret program for tracking terrorist finances. They can compromise human sources, as appar-

ently happened when it was recently reported that a Saudi source had helped to foil al Qaeda's recent airplane bombing plot. And keep in mind that whenever a source's identity or existence is leaked, it not only negates the effectiveness of that particular source, it also undermines our ability to develop and cultivate sources in the future.

Leaks can also compromise our methods, as apparently happened with the recent disclosure of our alleged use of malware to attack the Iranian nuclear weapons program. They can certainly endanger our government personnel, like the CIA chief of station who was publicly outed and then killed by terrorists in Athens in the 1970's. And, importantly, they can weaken our alliances, those operational relationships between us and foreign services that are so vital to our national security operations around the world.

In short, leaks can be severely damaging to our efforts to protect our country.

Now, there is a wide range of different types of leaks, but the most common scenario these days is the leak of sensitive information to the press by a government official, an official whose motivation may range from base self-interest to a laudable desire to blow the whistle on wrongdoing and change government operations for the better.

I share Congress' concern about the need to enhance our defenses against such illicit disclosures. An important part of that effort is ensuring that in the appropriate cases we investigate and we prosecute those who disclose our operational secrets. As you know, however, the Justice Department does not have a lengthy record of successful leak prosecutions. That thin track record is not for a lack of trying, however. Rather, it is the result of myriad obstacles that stand in the way of building a prosecutable media leak case.

Those obstacles are many, and they include the following: First, it is very difficult often to identify the leaker in the first place, given the large universe of people who are often privy to the sensitive information that gets disclosed. Second, our leak investigations operate under strict limitations in the Justice Department's internal regulations—limitations that are in place for all the right First Amendment reasons. And, finally, even when investigators can get by those challenges and the leaks are identified, the agency whose information was compromised is often reluctant to proceed with a prosecution out of fear that trying the case in public will both highlight the compromised information and disclose further sensitive information that it wants to keep confidential.

For all these reasons, leak investigations and leak cases are exceptionally challenging, and the question is whether any of these obstacles can or should be addressed by changes to the governing legislation. I agree with those who say that our current espionage statues are cumbersome and antiquated, and I would support Congress' effort to reform them. Keep in mind, however, that this reform effort will be very complicated. Because it directly implicates the tension between national security and our cherished First Amendment values, legislating in this area is challenging and inevitably raises a host of complex issues.

For example, consideration of a law that would flatly prohibit and punish any disclosure of classified information will require ex-

amination of the problem of overclassification of government information. Also, any effort to revise the Espionage Act will lead to a debate whether the person who receives and publishes leaked information, i.e., the press, should be subject to the same criminal exposure as the government official who leaked it in the first place.

These are certainly complex issues. Given the damage caused by the continued leaks and the inadequacy of our current leak legislation, however, it is important that Congress take these issues on and consider an appropriate legislative response.

No matter where one stands on the political spectrum, we should all recognize that the unchecked leaking of classified and sensitive information can cause grave harm to our national security. Congress plays an important role in addressing that problem, and I applaud the Committee for the initiative it is showing with today's hearing.

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

Mr. SENSENBRENNER. Thank you.

[The prepared statement of Mr. Wainstein follows:]

Prepared Statement of Kenneth L. Wainstein, Partner, Cadwalader, Wickersham & Taft LLP

Chairman Sensenbrenner, Ranking Member Scott and distinguished Members of the Subcommittee, thank you for inviting me to testify before you today about the issue of national security leaks.

My name is Ken Wainstein, and I am a partner at the law firm of Cadwalader, Wickersham & Taft. Prior to my leaving the government in January of 2009, I was honored to work for many years with the men and women of the Intelligence Community and others who defend our national security against our adversaries. I am also honored to appear today alongside my co-panelists, who bring a wealth of experience to a discussion of this critically important issue.

Since the attacks of September 11, 2001, I have spent much of my professional career in the national security world, where sensitive sources and methods are the lifeblood of our national security operations. Whether it was source information that factored into decision making at the White House or intelligence from a wiretap we secured at the Justice Department, I have seen the vital role that sensitive information plays in our national security operations and how those operations can be put in jeopardy whenever that information is compromised. And unfortunately, that information is compromised all too frequently.

The problem of national security leaking has come to the fore recently because of several particularly damaging leaks over the past few months. While these leaks are alarming, they are sadly only the most recent manifestations of an age-old problem. The reality is that government leaking has been happening for as long as there has been government, and every American administration since the founding of the Republic has suffered its share of leaks.

While some leaks may be innocuous or simply embarrassing, others can be severely damaging to our national security. Leaks of national security information can compromise all aspects of our national security program, including:

- National security operations: From the 1942 newspaper report that the U.S. had broken the Japanese military code to the 2006 disclosure of the Treasury Department's secret program for tracking terrorist finances, we have repeatedly seen vital operations put in jeopardy by careless or malicious leaks.
- Human sources: A key element of any intelligence program is the source—the human being who is positioned to provide intelligence on an adversary and its plans and intentions. Whenever a source's identity is leaked from the government—as apparently happened when it was reported that a Saudi source had played a central role in the foiling of Al Qaeda's recent airplane-bombing plot—it not only negates the effectiveness of that source; it also undermines our ability to develop other sources.

- Methods: Leaks about our methods tip our hand to our adversaries and give them the opportunity to adapt their defenses against those methods. A classic example is the recent disclosure of our alleged use of malware to attack the Iranian nuclear weapons program.
- Government personnel: Obviously, leaks can also prove dangerous or fatal to our personnel in sensitive positions, as was tragically demonstrated by the murder of the CIA's Chief of Station in Athens by terrorists in the 1970's after his outing by a former CIA employee.
- Alliances: Leaks from within our government can undermine those relationships with foreign services that are so vital to our national security, especially in relation to our effort against international terrorists.
- The integrity of government service: Finally, it's worth noting that government employees with clearances give a personal promise that they will protect the government's classified information. The integrity of public service is diminished whenever that promise is broken.

In assessing why leaks happen and what should be done to prevent them, we have to examine the reasons why people leak in the first place. While there are a range of motives behind different leaks and leakers, I will put those motives into two general categories for discussion. The first category includes those instances where a government official passes sensitive information to a foreign government or other foreign power—the classic espionage scenario with spies like Aldrich Ames or Robert Hanssen who betray their country for money, out of resentment against their government or agency, or out of misplaced loyalty or affinity for another country. We all condemn the traitorous actions of these classic spies, and the Justice Department has mounted strong prosecution efforts whenever such spies have been identified over the years.

The second, and more common, scenario is the leak of sensitive information to the press by a government official whose motive may range from base self-interest to a laudable whistleblower's desire to change government operations for the better. While I appreciate that some of those responsible for media leaks—i.e. the "whistleblowers"—may genuinely feel they are acting in the country's best interests, I share the concern expressed by many in Congress about the need to enhance our defenses against such disclosures. An important part of that effort is ensuring that, in the appropriate cases, we investigate and prosecute those who disclose our operational secrets.

As you know, however, the Justice Department does not have a lengthy record of successful leak prosecutions. While it has brought many strong espionage cases over the years, there have been very few prosecutions for leaks to the media.

That thin track record is not for lack of effort on the part of the investigators and prosecutors. Rather, it is a result of the myriad obstacles that stand in the way of building a prosecutable media leak case. Those obstacles are many, and they include the following:

First, it is often very difficult to identify the leaker, given the large universe of people who often are privy to the sensitive information that was disclosed. It is not uncommon for many people to be read into the most highly-classified program or to be recipients of intelligence derived therefrom—a problem which has only gotten worse with the increased integration and information-sharing we have seen in the intelligence and law enforcement communities since the 9/11 attacks.

Second, our leak investigations operate under the limitations in the Justice Department's internal regulations, which make it difficult to obtain information from the one party who is in the best position to identify the leaker—the member of the media who received the leaked information. These regulations have been in place for years, and serve as a procedural bulwark protecting the vital role of the free press in our democracy. These regulations ensure that "the prosecutorial power of the Government [is] not . . . used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." United States Attorneys' Manual, Section 9–13.400. The upshot is, however, that an investigator who wants to use a subpoena to compel information from a reporter can do so only after the Attorney General personally grants his or her permission—a process that has resulted in only about two or three dozen subpoenas to the press for source information over the past couple decades.

Third, even when the leaker is identified, the agency whose information was compromised is often reluctant to proceed with the prosecution. The concern is that charging and trying the case will both highlight the compromised information and likely result in the disclosure of further sensitive information that may come within the ambit of criminal discovery or admissible evidence. While the Classified Infor-

mation Procedures Act helps to address this problem, there is always a concern about disclosure when a national security crime is prosecuted and brought to a public trial.

Finally, even if the Justice Department succeeds in identifying and indicting the suspected leaker, it can expect to face a vigorous defense. These cases typically feature legal challenges from defense counsel invoking everything from First Amendment principles to allegations of improper classification to arguments that their client's alleged leak was actually an authorized disclosure within the scope of his or her official duties. The Rosen and Weissman case that was dismissed after years of litigation is an example of the difficult issues that these cases present.

For all these reasons, leak cases are exceptionally challenging, and successful prosecutions are few and far between. The question for Congress is whether any of these obstacles can or should be addressed by changes to the governing legislation. I agree with those who find the current espionage statutes cumbersome and antiquated in their approach and terminology, and I would support Congress' effort to reform them.

This reform effort will be complicated, and will entail some very carefully calibrated lawmaking. Because it directly implicates the tension between national security and our First Amendment values, legislating in this area is challenging and raises a host of complex issues. For example, consideration of a law that flatly prohibits and punishes any disclosure of classified information will require examination of the problem of over-classification of government information. Similarly, the strengthening of legislation targeting government leakers may require an examination of the whistleblower protection acts to ensure that true whistleblowers can get their concerns raised and addressed without going to the press. Finally, any effort to revise the Espionage Act will lead to a debate whether the person who receives and publishes leaked information (i.e. the press) should be subject to the same criminal exposure as the government employee who committed the leak.

These are certainly complex issues, and they will require careful consideration. Given the damage caused by the continued leaks and the inadequacy of our current leak legislation, however, it is important that Congress take these issues on and consider an appropriate legislative response.

* * * * *

No matter where one stands on the political spectrum or in the current national security policy debates, we should all recognize that the unchecked leaking of sensitive information can cause grave harm to our national security. Congress plays an important role in addressing that problem, and I applaud this Committee for the initiative it is showing with today's hearing.

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

Mr. SENSENBRENNER. Professor Sales?

TESTIMONY OF NATHAN A. SALES, ASSISTANT PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. SALES. Thank you. Chairman Sensenbrenner, Ranking Member Scott, Chairman Smith, Ranking Member Conyers, and other Members of the Subcommittee, thank you all for inviting me here to testify. It is a pleasure to appear before you again.

I would like to use my testimony to outline some of the legal tools the government has available to combat leaks. First, Federal courts have held that it is a crime under the Espionage Act for officials to leak classified information to the press. Second, officials frequently sign secrecy agreements when they go to work for the government, and the Supreme Court has held that these secrecy contracts are enforceable.

Now, these tools are useful, but they are not perfect. As we have already heard, the Espionage Act in particular is notoriously vague, and Congress might want to consider amending it.

So let me go into more detail, starting with criminal prosecutions. The basic thrust of the Espionage Act is fairly straight-

forward. It is a crime for officials to, quote, "reveal information relating to the national defense to any person not entitled to receive it." Now, this law, as the name implies, quite plainly applies to spies who give secrets to foreign governments. The courts have held that it also applies when officials give secrets to the press.

The leading case is *United States v. Morrison*. Morrison was a naval intelligence officer, and he was convicted of violating the Espionage Act after he gave classified military photographs to a British magazine in 1984. The Fourth Circuit affirmed his conviction, squarely holding that the law applies to leakers, not just to spies. The reason leakers can be prosecuted, said the court, is because of the plain language of the statute. The Espionage Act doesn't refer narrowly to spies; it speaks in broad and comprehensive terms. Nor does it contain any exception for leaks to the press. The court also emphasized the statute's purposes. Congress' goal in 1917 was to prevent secrets from falling into the wrong hands. That harm materializes regardless of whether our enemies get their secrets directly from spies or indirectly by reading about it in the newspaper. What about the Constitution? The Fourth Circuit rejected the notion that Morrison had a First Amendment right to leak. To hold otherwise, quote, "would be to prostitute the salutary purposes of the First Amendment."

Morrison is such an important precedent because it stands relatively alone. There simply aren't that many cases applying the Espionage Act to leakers. To this day, Morrison remains the only person ever convicted of leaking classified information to the press, though several others have pled guilty to similar charges. In fact, over the 100-year lifespan of the Espionage Act, the government has only brought charges against leakers nine times. Six of those prosecutions have come since President Obama took office in 2009.

Next, I would like to discuss a lesser-known but still important tool for combating leaks: contract law. Sometimes the government will get advance notice that an employee or former employee intends to leak classified information. That isn't just a potential crime; it is also a potential breach of contract. This is so because intelligence officials typically sign secrecy agreements as a condition of access to classified information. The government can go to court to have these contractual obligations enforced.

Indeed, the Supreme Court and the Fourth Circuit have both upheld these sorts of secrecy agreements. The two cases, known as Snepp and Marchetti, each involved a former CIA official who wanted to publish a book about his time working at the agency. Again, the First Amendment is not an obstacle. According to the Supreme Court, the government's interest in preventing leaks is so strong, it can restrict officials from revealing classified information even without an express contractual requirement to that effect.

Finally, let me spend a couple seconds talking about how these laws might be improved. It is no secret that some of the key terms in the Espionage Act are ambiguous. Just what does "information relating to the national defense" mean anyway? And who specifically is a "person not entitled to receive it"? Judges and academics have been hoping that Congress would resolve these and other interpretive mysteries for more than a decade.

There is another problem with the act. The Espionage Act makes it a crime to leak information relating to the national defense, as opposed to classified information or properly classified information. As a result, the statute has the potential to produce both false positives and false negatives. In other words, the law might criminalize some leaks that aren't really harmful, and it might fail to criminalize other leaks that are harmful.

Here is an example of the false negatives problem, which is probably more severe. Imagine what would happen if somebody leaked the U.S. negotiating strategy for ongoing talks over a free trade agreement. That information almost certainly doesn't relate to the national defense but might nevertheless be properly classified. Because it doesn't fall within the four corners of the Espionage Act, it might not be unlawful even though such a leak would cause exceptionally grave harm.

Congress ought to consider, and indeed Congress has in the past considered, either tweaking the Espionage Act to resolve these ambiguities or perhaps to enact an entirely new statute.

Mr. Chairman, thank you again for your time. I would be happy to answer any questions.

Mr. SENSENBRENNER. Thank you very much.

[The prepared statement of Mr. Sales follows:]

National Security Leaks and the Law

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

July 11, 2012

Statement of Nathan A. Sales
Assistant Professor of Law
George Mason University School of Law

Chairman Sensenbrenner, Ranking Member Scott, and Members of the Subcommittee: Thank you for inviting me to testify today; it is a pleasure to appear before you again. My name is Nathan Sales, and I am a law professor at George Mason University School of Law, where I teach national security law, administrative law, and criminal law. Previously, I was Deputy Assistant Secretary in the Office of Policy at the U.S. Department of Homeland Security. I also served in the Office of Legal Policy at the U.S. Department of Justice, where my work focused on national security policy, among other matters. The views I will express in this hearing are mine alone, and should not be ascribed to any past or present employer or client.

Briefly stated, my testimony is as follows. The government has a number of legal tools available to combat unauthorized leaks of highly classified information. Federal courts have held that the rarely used Espionage Act of 1917 – the leading law on unauthorized access to classified information – applies to government employees who leak to the press, not just those who spy for foreign governments. In addition, intelligence officials routinely sign employment contracts pledging that they will not reveal any classified information, and that they will submit any writings to the government for pre-publication review. Federal courts, including the Supreme Court, agree that these arrangements are enforceable. At the same time, key terms in the Espionage Act are notoriously vague, and Congress should act to provide greater clarity, either by tweaking the existing statutory language or by enacting an entirely new law that is specifically crafted to deal with the problem of leaks. Finally, no statute requires the Justice Department to appoint a special prosecutor to investigate leaks by senior administration officials, but DOJ regulations provide for such a step and it has been done in the past.

I. Background and Overview

Leaks seem to be ubiquitous these days. Just within the past several months, government employees have revealed highly classified operational details about a number of sensitive military and intelligence matters, including the following: A Pakistani doctor who is said to have helped the CIA track down Osama bin Laden in Abbottabad, Pakistan;[1] a plot by al Qaeda's Yemeni affiliate to bomb commercial airliners that reportedly was uncovered by an asset of the

[1] Mark Mazzetti, *Vaccination Ruse Used in Pursuit of Bin Laden*, N.Y. TIMES, July 11, 2011; *see also* Richard Leiby & Peter Finn, *Pakistani Doctor Who Helped CIA Hunt for bin Laden Sentenced to Prison for Treason*, WASH. POST, May 23, 2012.

Saudi intelligence service;[2] the government's purported process for selecting targets for drone strikes, including President Obama's personal participation in the decisions;[3] and the alleged role of the United States and Israel in developing two pieces of malware, Stuxnet and Flame, that were designed to disable the Iranian regime's nuclear weapons program.[4] Previous years likewise saw officials leak classified information about the identity of Valerie Plame Wilson, a CIA employee;[5] the CIA's network of secret prisons for detaining and questioning senior al Qaeda figures, such as 9/11 mastermind Khalid Sheikh Mohammed;[6] the NSA's warrantless Terrorist Surveillance Program, which intercepted certain communications between al Qaeda suspects abroad and their contacts in the United States;[7] and the Treasury Department's efforts to track al Qaeda's finances by collecting and analyzing data about international money transfers.[8]

What are the government's options for preventing or sanctioning these sorts of leaks? There are two broad categories of possible responses. First, on the supply side, the government might seek to restrict officials from revealing secrets with which they have been entrusted. Specific techniques for doing so include prosecuting leaking employees for violating various criminal laws, as well as entering contractual arrangements in which officials promise, in exchange for employment with the government, not to disclose classified information. Second, on the demand side, the government might seek to restrict the press from publishing leaked classified information. Specific techniques for doing so include filing various criminal charges, this time against the media, or asking a court to issue an injunction that bars the press from publishing the material – i.e., a prior restraint. This approach, of course, raises profound constitutional questions,[9] and the bulk of my testimony today will focus on the supply side option – curtailing leaks through restrictions on government employees.

II. Restrictions on Government Employees

The Espionage Act,[10] which was originally enacted in 1917 and has been amended several times since, is the principal source of legal restrictions on government employees who improperly reveal classified information. Section 793(d) of the statute makes it a crime for an official to "willfully communicate[], deliver[], [or] transmit[]" any "information relating to the

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[2] Scott Shane & Eric Schmitt, *Double Agent Disrupted Bombing Plot, U.S. Says*, N.Y. TIMES, May 8, 2012.

[3] Jo Becker & Scott Shane, *Secret "Kill List" Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012.

[4] David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012; Ellen Nakashima et al., *U.S., Israel Developed Flame Computer Virus to Slow Iranian Nuclear Efforts, Officials Say*, WASH. POST, June 19, 2012.

[5] Robert D. Novak, *Mission To Niger*, WASH. POST, July 14, 2003; *see also* R. Jeffrey Smith, *Armitage Says He Was Source of CIA Leak*, WASH. POST, Sept. 8, 2006.

[6] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005.

[7] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005.

[8] Eric Lichtblau & James Risen, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006.

[9] *See, e.g.*, Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

[10] 18 U.S.C. § 792 et seq.

national defense" to "any person not entitled to receive it," if the official "has reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation."[11] Violations are punishable by jail terms of up to ten years.[12] The Espionage Act quite plainly applies to spies who share secrets with hostile foreign governments. Courts have held that it also applies to employees who leak secrets to the press (though it is seldom used in this way).

The leading case on this issue is *United States v. Morison*.[13] Samuel Loring Morison was a Navy intelligence officer who provided *Jane's Defence Weekly*, a British magazine, with classified satellite imagery of a new Soviet aircraft carrier in 1984.[14] (Morison later claimed that the reason he leaked the photographs was to alert the public about alarming Soviet military capabilities, and thereby inspire Congress to increase the Navy's budget, but it's more likely he was angling for a full time job at *Jane's*.[15]) He soon found himself charged with violating section 793(d) as well as several other laws.[16] Morison's primary defense was that the Espionage Act "was intended to punish only 'espionage' in the classic sense of divulging information to agents of a hostile foreign government and not to punish the 'leaking' of classified information to the press."[17] The district court emphatically rejected this argument, and the Fourth Circuit affirmed its ruling – and Morison's conviction – on appeal.

According to the appellate court, the notion that leakers can be held liable follows from the plain language of the Espionage Act. "[T]he statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for [Morison's] contention." To the contrary, they "plainly apply" to leaks. The statutory language "includes no limitation to spies or to an agent of a foreign government," and it "declare[s] no exemption in favor of one who leaks to the press. It covers 'anyone.'" "It is difficult," the court concluded, "to conceive of any language more definite and clear."[18]

The Fourth Circuit also emphasized that the structure of the Espionage Act supports liability for leakers. Unlike section 794 – a related provision that narrowly and specifically prohibits disclosures "to any foreign government"[19] – section 793(d) more broadly prohibits disclosing information "to *any person* not entitled to receive it."[20] The statutes differ in another

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[11] *Id.* § 793(d).

[12] *Id.* § 793.

[13] 604 F. Supp. 655 (D. Md. 1985), *aff'd*, 844 F.2d 1057 (4th Cir. 1988).

[14] *Morison*, 844 F.2d at 1061.

[15] *Id.* at 1062.

[16] Morison also was charged with violating 18 U.S.C. § 793(e), a section of the Espionage Act that makes it a crime to possess classified information without authorization, as well as 18 U.S.C. § 641, which makes it a crime to embezzle or steal any "thing of value" belonging to the government.

[17] *Morison*, 604 F. Supp. at 657.

[18] *Morison*, 844 F.2d at 1063 (some internal quotation marks omitted).

[19] 18 U.S.C. § 794(a).

[20] *Id.* § 793(d) (emphasis added).

important way: The maximum penalty for violating section 793(d) is ten years incarceration, while violations of section 794, a more serious offense, are punishable by life imprisonment or by death. The implication is that Congress meant for sections 793(d) and 794 to cover two "separate and distinct" crimes. "[S]ection 793(d) was not intended to apply narrowly to 'spying' but was intended to apply to disclosure of the secret defense material to *anyone* 'not entitled to receive' it, whereas section 794 was to apply narrowly to classic spying."[21]

Finally, leakers can be held liable under the Espionage Act because of Congress's purpose in enacting the statute. According to the district court, Congress's goal was to prevent the nation's most sensitive secrets from falling into the hands of hostile foreign powers.[22] That is precisely what happens when classified information is leaked to the media and then published.[23] In other words, the harm about which Congress was concerned will materialize regardless of the means by which a foreign power learns of a secret – whether directly from a spy or indirectly by reading about it in the newspaper. "[T]he danger to the United States is just as great when this information is released to the press as when it is released to an agent of a foreign government."[24]

What about the Constitution? The Fourth Circuit made short work of Morison's claim that it would violate the First Amendment to apply the Espionage Act to leakers. It is "beyond controversy" that a government employee who reveals classified information "is not entitled to invoke the First Amendment as a shield to immunize his act of thievery." To hold otherwise "would be to prostitute the salutary purposes of the First Amendment."[25] The court also denied that the Espionage Act was unconstitutionally vague or overbroad. Some of the terms in the statute were less than crystal clear, the panel acknowledged, but jury instructions could cure those deficiencies. In particular, the district judge properly instructed the jury that the phrase "relating to the national defense" must be limited to information that "would be potentially damaging to the United States or might be useful to an enemy of the United States" and that is "not available to the general public."[26] Likewise, the jury was told to interpret "not entitled to receive" in light of the government's classification system – one is "not entitled to receive" classified information if one lacks the requisite security clearances.[27]

Morison is such an important precedent because there are relatively few judicial interpretations of how the Espionage Act applies to leakers. To this day, Samuel Morison remains the only person the government has successfully tried under the statute for leaking classified information to the press, though several other government employees have pled guilty

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[21] *Morison*, 844 F.2d at 1065.

[22] *Morison*, 604 F. Supp. at 660.

[23] *Id.* at 659.

[24] *Id.* at 660.

[25] *Morison*, 844 F.2d at 1069-70. Two of the panel's judges wrote separately to express the view that, while prosecuting leakers can sometimes implicate serious First Amendment interests, those interests were overcome here by the government's need to protect sensitive national security secrets. *Id.* at 1081, 1083 (Wilkinson, J., concurring); *id.* at 1085 (Phillips, J., concurring).

[26] *Id.* at 1071-72.

[27] *Id.* at 1074.

to comparable charges.[28] (President Clinton later pardoned Morison on his last day in office.[29]) Indeed, over the century long lifespan of the Espionage Act, the government has only brought charges against leakers nine times, with six of those prosecutions coming since President Obama took office in 2009.[30] Nevertheless, in the wake of *Morison*, it seems fairly well established that some leaks of highly classified information are crimes – in other words, the press counts as persons "not entitled to receive" the information under the Espionage Act – and that the First Amendment generally is no obstacle to holding leakers accountable.

The Espionage Act is perhaps the government's best known legal tool for combating leaks, but it is not the only one. In addition to the sanctions of the criminal law, the government can use civil law to prevent disclosure of classified information – in particular, the law of contract. The standard practice is for intelligence community officials to sign secrecy agreements when they begin employment with the government; when they leave, they also sign oaths reiterating their commitment to confidentiality. These agreements typically forbid officials from disclosing any classified information to people who lack the requisite clearances. They also require officials to submit their writings for prepublication review, allowing the government to verify that they do not contain any classified information. The government can ask a court to enforce these obligations if it learns that a current or former employee may reveal secrets. In particular, a court might issue an injunction forbidding an official from disclosing any classified information, or it might impose a constructive trust on the proceeds from the sale of any books or other writings.

The Supreme Court (in *Snepp v. United States*[31]) and the Fourth Circuit (in *United States v. Marchetti*[32]) both squarely held that these sorts of secrecy agreements are enforceable. Each case involved a former CIA official who sought to publish a book about his time at the agency. The Supreme Court stressed that Snepp "voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review," and there was no reason to think he "executed this agreement under duress."[33] The Fourth Circuit likewise explained that Marchetti acquired "secret information touching upon the national defense and the conduct of foreign affairs" "while in a position of trust and confidence," and that he was "contractually bound to respect it."[34] The courts further held that, even though secrecy agreements operate as prior restraints on speech, the First Amendment generally does not forbid them. "[S]uch

[28] Charlie Savage, *For U.S. Inquiries on Leaks, a Difficult Road to Prosecution*, N.Y. TIMES, June 9, 2012; Charlie Savage, *Nine Leak-Related Cases*, N.Y. TIMES, June 20, 2012.

[29] Vernon Loeb, *Clinton Ignored CIA in Pardoning Intelligence Analyst*, WASH. POST, Feb. 17, 2001.

[30] Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES, June 19, 2012. Those prosecuted by the Obama administration include a former FBI linguist who pled guilty after leaking classified information to a blogger, a former CIA official who allegedly revealed the identities of officers involved in the agency's interrogation and rendition programs, and an Army intelligence analyst who allegedly disclosed military and diplomatic documents to WikiLeaks. Savage, *Nine Leak-Related Cases*, *supra* note 28.

[31] 444 U.S. 507 (1980).

[32] 466 F.2d 1309 (4th Cir. 1972).

[33] *Snepp*, 444 U.S. at 509 n.3.

[34] *Marchetti*, 466 F.2d at 1313.

agreements are entirely appropriate," the Fourth Circuit explained. "Marchetti, of course, could have refused to sign" the contract, in which case "he would not have been employed" and thus "would not have been given access to the classified information he may now want to broadcast."[35] In fact, both courts suggested that the government's interest in protecting classified information is so great that the First Amendment permits it to restrict its employees' speech even in the absence of an express contractual requirement.[36] (The Fourth Circuit emphasized that the government may only bind its employees to secrecy with respect to classified information. A contract would violate the First Amendment, and would be unenforceable, "to the extent that it purports to prevent disclosure of unclassified information."[37])

This is not to say that the current legal architecture for restricting leaks is perfect. As one of the judges in *Morison* opined, "the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries."[38] Several of the statute's critically important terms suffer from varying degrees of ambiguity – "information relating to the national defense," "any person not entitled to receive it," and so on. These phrases may not be so opaque that they are void for vagueness under the Constitution, as the Fourth Circuit explained in *Morison*, but they still would benefit from greater clarity. Right now, the principal mechanism for obtaining this needed clarity is for trial judges to provide limiting instructions to juries on a case by case basis. (Once again, *Morison* is the preeminent example.) Jury instructions are better than nothing, but Congress should consider a more durable and sustainable solution – enacting more precise statutory language.

Congressional action is preferable for at least two reasons. First, jury instructions do not provide government employees or members of the general public with advance notice of what conduct will result in criminal sanction.[39] Ex post jury instructions can assist defendants who could not have reasonably known that their disclosures were unlawful at the time they made

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[35] *Id.* at 1316. This transaction can be understood in economic terms. *See generally* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309. In exchange for a job that entails access to classified information, an official effectively "sells" the government his right to reveal that information (which, of course, he would not acquire at all but for his government employment). Snepp and Marchetti – and any other officials who took government jobs subject to secrecy agreements – calculated that they were better off with this arrangement than without it. They regarded the benefit of government employment as greater than the cost of the foregone speech. If courts declined to enforce these secrecy agreements, that would create a windfall for the officials. Snepp and Marchetti were already compensated for their agreement to refrain from revealing secrets, and they now would be exercising a right that they previously assigned to the government.

[36] *Snepp*, 444 U.S. at 509 n.3 ("[T]his Court's cases make clear that – even in the absence of an express agreement – the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."); *Marchetti*, 466 F.2d at 1316 (reasoning that "the law would probably imply a secrecy agreement had there been no formally expressed agreement").

[37] *Marchetti*, 466 F.2d at 1317.

[38] United States v. Morison, 844 F.2d 1057, 1085 (4th Cir. 1988) (Phillips, J., concurring).

[39] *Cf. id.* at 1086 ("[J]ury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes.").

them. But, unlike clear statutory standards announced ex ante, they do not provide fair warning of what one must not do if one wishes to avoid being charged in the first place. Second, relying on ad hoc jury instructions to tailor the scope of the Espionage Act effectively delegates a vital national security function to the courts. Ultimately it is the responsibility of Congress and the President – the two politically accountable branches, and the ones charged by the Constitution with preserving the nation's security – to determine the circumstances in which government employees who reveal sensitive secrets should be eligible for criminal liability.

Another difficulty with the Espionage Act as it currently stands is that, because the statute makes it a crime to leak "information relating to the national defense," as opposed to classified information per se, it threatens to produce both false positives and false negatives. First, consider the problem of false positives, or overinclusion. Certain types of unclassified but private "information relating to the national defense" could be released to the public without harming the national security in any meaningful way. Suppose an official reveals that the Secretary of Defense received a failing grade in an undergraduate military history class. Read literally, the Espionage Act might prohibit such a trivial disclosure, if the resulting embarrassment is deemed to somehow harm the United States or help a foreign country. The problem of false negatives, or underinclusion, is probably even more acute. Certain types of highly classified information may not "relat[e] to the national defense," yet leaking it could cause exceptionally grave harm. Imagine the diplomatic fallout that would result from the disclosure of a memo detailing the United States Trade Representative's negotiating strategy for a round of talks over a free trade agreement. In its present form, the Espionage Act does not address either problem effectively.

Commentators, including two of the judges in *Morison*,[40] have been calling on Congress to remedy the perceived shortcomings of the Espionage Act for decades. Congress has a number of options if it wishes to do so. The most modest solution would be to enact legislation that provides greater clarity on the meaning of key statutory terms. For instance, what particular types of information count as "information relating to the national defense," the disclosure of which is a crime? Who, specifically, is a "person not entitled to receive it"? How certain must an official be that the revealed information "could be used to the injury of the United States or to the advantage of any foreign nation," and what sorts of injuries and advantages are sufficient to trigger liability? A somewhat more ambitious legislative fix would be to eliminate the phrase "information relating to the national defense," and replace it with a prohibition on disclosing "classified information" per se (or perhaps "properly classified information," to make clear that the judiciary has a role in deciding whether the information is justifiably kept secret). The most ambitious reform of all would be to enact an entirely new statute that is specifically crafted to deal with the problem of leakers. Such a law might straightforwardly make it a crime for a government employee to reveal any classified information (not just "information relating to the national defense") to a person who is not authorized to access it (as opposed to one not "entitled" to "receive" it). (Legislation along these lines passed both houses of Congress in 2000, but President Clinton vetoed it.[41]) To be clear, the purpose of this testimony is not to endorse any particular legislative reform; before doing so it would be necessary to consider the constitutional

[40] *Id.* at 1085 (Wilkinson, J., concurring); *id.* at 1086 (Phillips, J., concurring).

[41] Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303 (2000).

issues raised by these and other proposals far more thoroughly than is possible here. My more modest ambition is simply to lay out a menu of policy options from which Congress may wish to choose.

III. Independent Prosecutors

Finally, let me briefly address the rules and procedures that govern the Justice Department's appointment of independent prosecutors in leak investigations.

After the 1999 expiration of the independent counsel statute, there is no longer any legal requirement that the Attorney General appoint a special prosecutor to investigate alleged misconduct by senior executive branch officials. Congress originally enacted the independent counsel law as part of the Ethics in Government Act of 1978.[42] The goal of this post-Watergate reform was to prevent the actual or apparent conflicts of interest that can arise when Justice Department officials in the presidential chain of command are responsible for investigating and prosecuting high ranking figures elsewhere in the executive branch.

Toward that end, the statute established an elaborate process for appointing independent counsels. The Attorney General was required to conduct a preliminary investigation upon receiving information "sufficient to constitute grounds to investigate whether any [covered senior official] may have violated any Federal criminal law."[43] If he concluded that there were "reasonable grounds to believe that further investigation is warranted," the law required him to ask a special federal court known as the Special Division to appoint an independent counsel.[44] Once appointed by the court, an independent counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[45] In addition, he enjoyed a great deal of autonomy. Because an independent counsel was appointed by the Special Division, his authority and legitimacy derived from the court rather than the Attorney General. An independent counsel was supposed to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws," but there was an exception where doing so "would be inconsistent with the purposes of" the statute.[46] Perhaps the most significant safeguard of independence had to do with removal. Other than by the court, an independent counsel could be removed from office "only by the personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."[47]

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[42] 28 U.S.C. §§ 49, 591 et seq. (1994). *See generally* Morrison v. Olson, 487 U.S. 654 (1988).

[43] 28 U.S.C. § 591(a).

[44] *Id.* § 592(c)(1).

[45] *Id.* § 594(a).

[46] *Id.* § 594(f).

[47] *Id.* § 596(a)(1).

While the independent counsel statute is a now dead letter, the Justice Department adopted regulations in 1999 that allow for a "special counsel" to be appointed in certain circumstances.[48] Under these rules, the Attorney General "will appoint" a special counsel if he determines that "criminal investigation of a person or matter is warranted," that investigation by normal DOJ personnel "would present a conflict of interest," and that a special counsel "would be in the public interest."[49] Once appointed, a special counsel has "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."[50] He also is fairly autonomous. A special counsel must be appointed from outside the U.S. government.[51] As a general matter, he is required to comply with DOJ's rules and policies,[52] but he "shall not be subject to the day-to-day supervision of any official of the Department."[53] He may be "removed from office only by the personal action of the Attorney General,"[54] and then only for reasons of "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[55] Even if the Attorney General does not appoint a special counsel in a particular case, he might nevertheless decide to recuse himself from the matter. Recusal helps eliminate any appearance of impropriety that could result if the Attorney General had direct supervisory authority over investigators who are looking into allegations of wrongdoing by other high ranking officials.

These rules and practices apply to all investigations, not just investigations of allegedly unlawful leaks. But prosecutorial independence may be especially appropriate in leak cases. Leak cases almost always involve the news media, and Justice Department rules normally require prosecutors to obtain the Attorney General's approval before asking a grand jury to subpoena a reporter to learn the source of a given leak.[56] As a result, the Attorney General would be required to personally participate in an investigation into whether any of his fellow senior officials in the executive branch unlawfully disclosed classified information to the press. Needless to say, this situation that has the potential to raise the very conflict of interest problems that inspired Congress to enact the independent counsel statute and, more recently, the Justice Department to enact its special counsel regulations.

The previous decade offers an example of what steps the Justice Department might take to minimize conflict issues in a leak investigation. In 2003, the Department appointed a special counsel to investigate whether senior administration officials had unlawfully revealed the identity of a CIA employee. The special counsel's independence went even further, in an important respect, than what was required under DOJ's regulations: He was expressly delegated

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[48] 28 C.F.R. pt. 600.

[49] *Id.* § 600.1.

[50] *Id.* § 600.6.

[51] *Id.* § 600.3(a).

[52] *Id.* § 600.7(a).

[53] *Id.* § 600.7(b).

[54] *Id.* § 600.7(d).

[55] *Id.*

[56] United States Attorneys' Manual § 9-13.400.

all investigative powers of the Attorney General (as under the old independent counsel statute) rather than the lesser powers of a U.S. Attorney (as under the regulations).[57] As a result, it wasn't necessary for the special counsel to receive approval from DOJ leadership before asking a grand jury to subpoena the press, granting immunity to a witness, taking an appeal, and so on.[58] Moreover, to avoid even the appearance of impropriety, the Attorney General recused himself from the investigation, handing all supervisory authority over the case to the Deputy Attorney General.[59]

* * *

Mr. Chairman, thank you again for the opportunity to testify this morning. I would be happy to answer any questions you or other Members of the Subcommittee might have.

[57] Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Dec. 30, 2003, *available at* http://www.justice.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf; *see also* Department of Justice Press Conference, Appointment of Special Prosecutor to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General John Ashcroft from the Investigation, Dec. 30, 2003, *available at* http://www.fas.org/irp/news/2003/12/doj123003.html.

[58] Department of Justice Press Conference, *supra* note 57.

[59] *Id.*

Mr. SENSENBRENNER. Let me say that the yellow and red lights don't seem to be working, so I will help the witnesses wrap up.

And thank you, Professor. You wrapped up without any help.

Colonel Allard?

TESTIMONY OF COLONEL KENNETH ALLARD, U.S. ARMY (RET.)

Colonel ALLARD. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Could you please pull the mike a little bit closer to you and make sure it is turned on?

Colonel ALLARD. Thank you, Mr. Chairman. I appreciate your invitation, and also the Members of the Committee.

Mr. Chairman, on my way here, I had the occasion to stop at Midway Airport. And there at Midway Airport they have dedicated a certain portion of the terminal to a memorial to Midway. Very appropriate. But while there, there is a great quote from Admiral Nimitz, who we in Texas are very, very proud of because he was the hero of the Battle of Midway. And what he said on that memorial I think is very, very important for us today. He looked back at the naval intelligence apparatus at Midway, and he said, the fate of the Nation quite literally depended on a few dozen men who have devoted their lives and their whole careers in peace and war to radio intelligence. That intelligence gave us the edge at Midway. It literally meant the difference between life and death and victory and defeat.

The topic which concerns us today is equally vital. The reason being, what has just happened is in my lifetime unprecedented. I mean, we all have seen leaks. I have been around government for the better part of 30 years. If you see government, you see leaks. Everyone understands this. And, by the way, it is equally bipartisan and occurs at every level, every Administration. No one is exempt.

And so if you try to amend the Espionage Act, you have to be very, very careful. But I very much associate myself with the idea of being extremely reluctant to mess with the law. I think what you must do first is look back at the original consensus, going back all the way to Philadelphia, between freedom and responsibility, particularly, the obligation of those who are being defended to make sure those secrets are intact.

What really concerns me today is that we have seen, as I said, something I had never thought I would ever see in my lifetime. When the Sanger articles began to appear, when his book appeared, I never thought I would see those revelations ever being discussed in the open press. The reason: When you commit industrial espionage against a sovereign power, ladies and gentlemen, that is, by definition, an act of war, pure and simple. The key thing about intelligence, as Admiral Nimitz said, is that it removes ambiguity. When ambiguity in intelligence removed, armies march and navies sail. That is what has just happened.

With Iran, the Islamic Republic of Iran, they have links to terror that other people here are much more expert in than I am. But on this very Hill 2 days ago, you heard testimony from General Keith Alexander. General Alexander happens to have been my student at the National War College. What he said was, "We are extremely vulnerable to any form of terrorism by virtue of cyber means." So when you do the same cyber means yourself, you can understand how it is sort of—people in a glass houses should not throw stones. That is what just happened here. And when you look at that, it should bring the Committee up very short, because you know

what? You have the responsibility of looking at the Espionage Act and thinking, can we do anything better with this?

I have great respect for what this Congress can do in terms of investigation. I have been here as a congressional fellow myself. Mr. Smith, I do not normally admit that back in Texas. But it is true, I was in these halls for two occasions. One was Goldwater-Nichols; the second was the Federal Acquisition Streamlining Act of 1994. Both those acts were landmark legislation. They were both accompanied by a great degree of rigor, intellectual, every other way, analytical, to make sure the laws were being looked at, were being analyzed correctly.

With Goldwater-Nichols, defense organization was the oldest game in this town. It was looked at time and again, and finally people said, we need to address this law, here is why. With the Acquisition Streamlining Act, we looked at 800 laws and said, here is how defense procurement can be improved, here is how and why, statute by statute. That was done. By the way, that statute that was passed in 1994 is still the leading statute for defense procurement today.

So there is every means and every, I think, incentive for this Committee to look very carefully at the Espionage Act. Mr. Conyers, you are absolutely correct, sir. It was passed during the industrial age. We are now in an information age. What do you do when you have open source intelligence?

I defended the Constitution with my life for over 25 years. For the last 15, I have been making a living from it, first on NBC News and now doing some writing on my own. And I will tell you, I have never seen anything remotely like this, where suddenly you have the access to information that you have. And so you have to sit here and make sense of all this and say, you know what? I have only been—one of the statutes we looked at in the 1994 legislation was whistleblowing. And guess what? That is extremely important to do now, as well.

The last thing I would say to you is, you all said, be very careful about the institutions doing this, because in the case of The New York Times, I will tell you right now from personal experience, they abuse their position. We see it time and again. What Mr. Sanger did was—I used to work against the KGB, okay? What Mr. Sanger did was the equivalent of having a KGB operation being run against the White House.

So when you investigate—which you should. I know how those things are done. I know about putting people in somewhat—let me put it this fairly: Make sure they are well aware of what their rights are, and make very sure of the fact that there is accountability there, first and foremost. That is the way this thing should be done, very carefully.

But more than that, the thing I will just say to you——

Mr. SENSENBRENNER. The gentleman's time has expired.

Colonel ALLARD. And I will tell you one key thing: Make very sure that when you look at them, you are looking at this thing from the standpoint of the national interest, not the press' interest.

Thank you, sir.

[The prepared statement of Colonel Allard follows:]

Prepared Statement of Colonel Kenneth Allard, U.S. Army (Ret.)

Mr. Chairman, Members of the Committee, Ladies & Gentlemen: Thank you for the privilege of testifying before this committee. It is an honor for me, a former APSA Congressional Fellow, to return from whence I came—something seldom to admitted back home in Texas.

Today's topic, "National Security Leaks And The Law" is one I can address at several levels. Most of my military career was spent as an intelligence officer, including overseas assignments in the Army's equivalent of the FBI. As an Army Special Agent, I investigated the national security crimes enumerated by Title 18, US Code, including sabotage, subversion and espionage—all against the deadly serious backdrop of the Cold War. My military career ranged from entry as a draftee to retirement from active duty as a Colonel and Dean of the National War College. Out of uniform, I spent nearly a decade as an on-air military analyst for NBC News, MSBC and CNBC. My media involvement today is principally as a columnist for blogsites ranging from the Daily Caller to the Daily Beast but most recently for the Huffington Post. The author of five books, I am also a featured reviewer for the New York Journal of Books (NYJB).

Based on those experiences, this morning I can suggest to this committee that your misgivings about media bias are well-founded and fully shared by your constituents; that 'media ethics' is a term often indistinguishable from 'media self-interest,' usually in direct support of a pervasive left-wing narrative; and that such self-interests inevitably trump the interests of national security. In short: Media objectivity has been replaced by media advocacy, even at the expense of national security. Let me briefly cite three specific examples to support that assessment.

First, I was recently assigned by NYJB to review a new book by New York Times reporter David Sanger. Ironically entitled *Confront & Conceal* (NY: Crown Publishers, 2012), my evaluation as a reviewer is that Mr. Sanger's book conceals nothing and represents a new low in the profligate revelation and sale-for-profit of the most sensitive American military and diplomatic secrets. Sadly this vice is also habit-forming, since we have now become accustomed to the anarchy of Julian Assange and Wikileaks; and to the repetitive, in-your-face defiance of every defense classification by Bob Woodward—both in his Washington Post columns and his books. But Mr. Sanger's book, among other things, reveals that the Obama White House orchestrated a deliberate, integrated campaign of industrial espionage against Iranian nuclear facilities, including the use of the Stuxnet and Flame viruses.

The danger of those shocking revelations can hardly be over-stated. Not only is industrial sabotage against Iran clearly an act of war, just like a blockade or an aerial bombardment; but such headlines also expose the United States to retaliation from a country whose links to terror are well-established. As the President's own cyber-czars have repeatedly warned us, the American economy and infrastructure are computer-dependent and therefore uniquely vulnerable to retaliatory cyber-strikes. One of the defining features of cyber-war is the absence of a return address on a worm, a virus or a well-orchestrated computer hack. Yet Mr. Sanger—systematically penetrating the Obama White House as effectively as any foreign agent—removed any conceivable doubt about Stuxnet, Flame or American intentions regarding Iran. I believe that Mr. Sanger's actions cry out for a painstaking investigation. Did he violate the Espionage Act? If he did, those actions potentially place him, his superiors at the New York Times and his publishers at Crown Books in jeopardy of forfeiting their liberty and property. Far from advancing our rights as citizens—as a free press should—Mr. Sanger deliberately placed his country at significant risk for his own profit. He might just as well have knocked over a local bank and then claimed a journalistic interest in money supply—his own most of all.

Ever since the articles profiling Mr. Sanger's book first appeared in the New York Times, the blogosphere has been alive with speculation dominated by one question. Was this expose timed deliberately by the NYT to enhance President Obama's re-election chances? The Times has revealed only that multiple sources helped to produce its story. President Obama has publically stated that he finds it "offensive" that anyone would dare to suggest "that my White House would purposely release classified national security information." So let me stress for the record that I do not know if those leaks were deliberate and, until it investigates for itself, neither does this committee. But the rather casual treatment of Top Secret-codeword information has been a constantly recurring theme among people with National Security Council experience. I am not naïve enough to think this problem has been limited to the Obama White House—or that Republican officials in previous administrations have been blameless. But Mr. Chairman, as an experienced field investigator, I

would recommend unraveling the current failure chain in the most exacting fashion—while always asking Cicero's classic question: Cui bono?

Second, I can also speak from personal experience as a book reviewer about the dubious ethics routinely employed by the NYT to advance its own agenda. Basically, the Times exploits its dominant position in the news industry to promote the views of its own authors and its own agendas. Mr. Sanger's front-page articles, for example, were closely coordinated with his book's publication date—the better to insure it "flew off the shelves" and increased sales. But so too were those all-important first reviews from the few writers allowed prior access to the book. We at the NYJB were not among them, even though we offered to sign a pre-release non-disclosure agreement, a common publishing practice. But the NYT does not trust anything it cannot control, a position it strengthens still further by publishing its own book reviews. Naturally, that position also allows it the luxury of chastising its political enemies, particularly when the issues involve national security. Last year, for example, I signed a non-disclosure agreement with his publisher to review the book by former Secretary of Defense Donald Rumsfeld, *Known And Unknown.* Exactly as agreed, my review appeared at midnight on the book's publication date—but it was not the first. Days earlier, the NYT also reviewed the Rumsfeld book and, not surprisingly, trashed it. But their dirty little secret: the NYT had somehow obtained a "bootleg copy" of the book from an unscrupulous source—probably paying for the privilege. As most insiders in the publishing community know all too well, the NYT will go to any lengths to insure that their worldview is trumpeted exclusively from the housetops. But those publishers also fear being excluded from the Blue Ribbon of publishing—**New York Times Best-Seller**—so they won't tell you. I just did of course but let me also add the observation that purloining information—either classified or protected by copyright is precisely what the NYT does, as well or even better than my KGB colleagues during the Cold War.

Third, I have personally experienced what it feels like when the NYT deliberately distorts national security information, even to the point of plagiarism. On April 20, 2008, the NYT published an inflammatory expose: "Behind Analysts, Pentagon's Hidden Hand" by David Barstow. The Times' article charged that over 70 retired officers, including me, had misused our positions while serving as military analysts with the broadcast and cable TV networks. The article went on at considerable length (7500 words) to suggest that: we had been seduced by privileged access to closed-door Pentagon briefings; that some of the military analysts had allowed their ties to defense contractors to influence what they later said on TV (there were even hints of possible kickbacks); but above all, that the military analysts had conveyed to their TV audiences a view of the wars in Afghanistan and Iraq secretly shaped by Pentagon propaganda.

Mr. Chairman, I shall not long detain the committee by repeating information already in your possession, but let me briefly summarize what happened next:

- The NYT article prompted angry denunciations from 40 House Democrats as well as Senators Carl Levin, Hillary Clinton and Barack Obama;
- In response, investigations were promptly launched by the General Accounting Office, the Federal Communications Commission as well as the Pentagon IG; and finally
- After more than three years, four separate Federal investigations, and the expenditure of at least $2.3M, we were fully exonerated by the DOD IG. That agency found no evidence that any Federal law, regulation or instruction had been violated, despite the charges leveled by the NYT.

Equally revealing: The NYT finally published a grudging "clarification"—but on Christmas Day, deeply buried in an interior section. As the Wall Street Journal commented acidly several days later, the original NYT story, "all fit tidily into the narrative that the war was a conspiracy run by a Dick Cheney-Don Rumsfeld shadow government. Michigan Senator Carl Levin and then-Presidential candidates Barack Obama and Hillary Clinton called for federal investigations. Well, those investigations have now shown that the liars weren't at the Pentagon."

(http://online.wsj.com/article__email/SB10001424052970204791104577110642828278 05lMyQjAxMTAxMDIwNzEyNDcyWj.html?mod=wsj__share__email#articleTabs%3D article)

Mr. Chairman, that same WSJ article referred to the book I wrote—*Warheads: Cable News and the Fog of War,* published in 2006 by the US Naval Institute Press—18 months prior to the NYT article. From that article's publication until this morning, I have never mentioned the name of its author, David Barstow, recipient

of the 2009 Pulitzer Prize. However, I have complained, publicly that Mr. Barstow neglected to mention even the existence of *Warheads* in the course of his lengthy article. He thereby concealed how my book provided him with a framework that he repeatedly acknowledged to me during at least 3–4 hours of telephone interviews in early 2008. (I have separately provided the committee's general counsel with Mr. Barstow's private telephone and cell phone numbers as verification.) Our conversations even began with references to specific pages and chapters in *Warheads*.

Yet Mr. Barstow ultimately failed to mention *Warheads*—or even its existence—because to have done so would have fatally undercut what the WSJ later described as "myth-making." I have made these same points in articles that have appeared from newspapers (*San Antonio Express News*) to well-respected blogsites like Real Clear Politics. When Mr. Barstow was awarded the Pulitzer, I also complained directly to the Dean of the Columbia School of Journalism, which administers the Pulitzer awards committee. Finally, I also contacted the New York Times public editor and publisher: All to no avail.

Based on these experiences, I can recommend three specific actions to this committee, especially if you are serious about pursuing today's topic, which extends far beyond simple media bias.

First, it is essential that the Congress take the lead in investigating Mr. Sanger and his White House sources. Who leaked the information, who else was involved and who conspired to publish that information to a global audience? (which certainly included that hostile foreign power known as the Islamic Republic of Iran) Were the motivations of those in this failure chain political, economic or ideological? Finally, has Title 18 actually been violated and are criminal charges warranted? I suggest that this determination is one that Congress cannot delegate elsewhere—certainly not to the independent counsels appointed by an Attorney General already found in contempt of Congress.

Second it is vital that such an investigation also be undertaken to test the Espionage Act. Is this act, passed during World War I, still adequate to protect American secrets in the 21st century—amidst the information revolution? Even before this revolution began, leaking has been a bipartisan sport, practiced so widely as to erase the law's previously bright lines. Its provisions clearly apply to anyone employed by our government or holding a government-issued security clearance. But in the brave new world of open-source information, what are the obligations of journalists or even those without security clearances? While espionage is a criminal offense in most countries, some argue that we should not criminalize investigative reporting, that some degree of latitude is essential to protect whistleblowers and the usually undefined privilege of the public's right to know. Bottom line: The Congress and this committee must find a new trial balance between freedom and responsibility because the old one has obviously collapsed.

Third, the Congress clearly owes the Warheads an apology for the actions taken in its name and at the direct instigation of some Members still holding office. Not only are some of my brothers authentic heroes but all are distinguished veterans who did nothing to deserve the ignominy heaped upon them by the New York Times—much less potential indictments. Most Americans live in mortal fear of an IRS audit. What would they say to four Federal investigations being inflicted on the Warheads—each financed by significant outlays from the public treasury?

My conclusion does not take the form of a specific recommendation to this committee, since there can now be little doubt about media bias. Our citizens simply take that bias for granted, considering the New York Times to be one of its more extreme examples. So what do we do about it? Last year, I reviewed a fascinating book, *The Deal From Hell,* by James O'Shea, former editor of the Chicago Tribune and the Los Angeles Times. (NY: Perseus Books, 2011) Mr. O'Shea makes the sensible point that our media outlets—great and small—depend on popular support, just like any other business. As voters, we freely make choices at the polls. Why then as information consumers should we not feel free to boycott newspapers when we find their actions egregious? Or even to apply those same judgments to companies who use them to send their commercial messages? Such power to reward or penalize rests solely in the hands of our citizens: but they need leadership and encouragement.

In conclusion, Mr. Chairman, I leave you with a quote from one of my favorite newspaper characters, that all-wise, practical philosopher named Pogo, who famously said, "We have met the enemy and he is us." Never more so than here and now!

Mr. SENSENBRENNER. Professor Vladeck?

TESTIMONY OF STEPHEN I. VLADECK, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. VLADECK. Thank you, Chairman Sensenbrenner, Ranking Member Scott, distinguished Members of the Subcommittee. Thank you for the invitation to testify today and in such distinguished company.

I have had the honor of testifying previously alongside Professor Sales and Mr. Wainstein, but 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, in my view, fairly strong evidence of both the recurring nature of such unauthorized disclosures of classified information and the difficulties that generations of lawmakers, lawyers, and I daresay law professors have confronted in trying to address them.

Thus, although I am sure 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 only a symptom of the much larger disease that has already been alluded to this morning of overclassification, a problem that Congress unquestionably has the power, if not always the inclination, to ameliorate.

Second, even if this Subcommittee believes that national security leaks by themselves are a problem worth a solution and that this Administration's fairly aggressive track record has not been sufficiently aggressive, the primary statute that the Federal Government has thus far used to prosecute alleged leakers, the Espionage Act, which we have already been discussing, is terribly ill-suited to the task.

Instead, if Congress wants to pursue reform in this field, it must fundamentally revisit the Federal classifications game 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 is 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 won't belabor the Members with a long discourse on the pervasiveness of overclassification. Mr. Chairman, my written testimony has a little more on this, and certainly we can bring this up in the Q&A if it is relevant. I just want to add a couple of brief points about what has already been said with respect to the Espionage Act.

So Mr. Wainstein and Professor Sales talked about the age of the Espionage Act, the ambiguity of the Espionage Act. I think it is also important to elaborate on a point that Mr. Wainstein made: The Espionage Act does not focus on the initial party who wrong-

fully discloses national defense information. Instead, it applies in its terms to anyone who knowingly disseminates, distributes, or even retains—I think that is a very important point—retains national defense information to which they are not entitled without immediately returning that material to the relevant 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. This is a big part of why the act raises such profound First Amendment questions, not because, as Professor Sales suggested, of the First Amendment rights of the putative leaker, but because of the First Amendment rights of they who retransmit the leak and those of us who read about the leak on the pages of The New York Times, The Washington Post, and so on.

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 protects the 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. Similar language appears in most other Federal whistleblower statutes.

Finally, the Espionage Act does not deal with the real elephant in the room: situations where individuals disclose classified information that should never have been classified in the first place, including information about unlawful government programs and activities. Most significantly, every court to consider the question has rejected the availability of a so-called improper classification defense, a claim by the defendant that he could not have violated the Espionage Act because the information he is disclosing should not have been classified.

Testifying before the House Permanent Select Committee on Intelligence in 1979, Anthony Lapham, then the general counsel of the CIA, described the uncertainty surrounding the Espionage Act as the worst of both worlds. As he explained, quote, "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 serve 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 the national security leaks, Mr. Chairman, Lapham's central critique drives home why, regardless of who is in the White House, prosecuting national security leakers will always be a legally and politically fraught proposition.

Thank you, and I look forward to your questions.

Mr. SENSENBRENNER. Okay. Thank you very much.

[The prepared statement of Mr. Vladeck follows:]

Prepared Statement of Stephen I. Vladeck, Professor of Law and Associate Dean for Scholarship, American University Washington College of Law

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.

* * *

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.

Mr. SENSENBRENNER. We will now have questions under the 5-minute rule. And, first, I will recognize the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I appreciate that.

Does anybody believe that the laws that we are talking about, particularly the Espionage Act, would not properly come into play with the alleged revelation of or participation, if true, in the Stuxnet virus or the Flame virus?

Mr. VLADECK. I will give the law professor answer. I think it depends on how that information was actually disclosed. So——

Mr. LUNGREN. Well—well—okay. You are going to the question—are you suggesting that it is a question of overclassification?

Mr. VLADECK. No, sir. I am suggesting that there could be situations where information is disclosed because an official who has the authority to authorize such a disclosure provides that authority. And I don't know that we know whether or not that is true in this case.

Mr. LUNGREN. Would it bother you to know that the detail that was described in The New York Times, if true, is a level of detail not presented to Members of Congress, such as the Chairman of the Cybersecurity Subcommittee on Homeland Security? That happens to be me.

Mr. VLADECK. I wouldn't have guessed.

Mr. LUNGREN. Wouldn't that bother you, that an Administration that is supposed to be working with the proper role of the legislative branch to do oversight utilizes classification in such a way that Members are not aware of the particulars unless they read The New York Times? That is, if what is in The New York Times is true.

Mr. VLADECK. It would bother me. All I would point out is that it would hardly be the first time that Members of Congress found out about those kinds of programs from the press as opposed to from the Administration. I mean, it would bother me no matter who was in Congress and who was in the White House.

Mr. LUNGREN. Because that also goes to the constitutional question of the powers of the legislative branch to do proper oversight to ensure that we are not having malefactors in the executive branch in the areas of serious concern.

Colonel, you said this is unprecedented——

Colonel ALLARD. Yes.

Mr. LUNGREN [continuing]. In your experience.

Colonel ALLARD. It absolutely is.

Mr. LUNGREN. And I know why I think it is unprecedented, but could you tell me why you believe it is unprecedented? In addition to the fact that, as you mentioned, the experience of Midway, I do recall there was an expression utilized during World War II that went, "Loose lips sink ships." They could certainly sink cybersecurity.

Colonel ALLARD. Absolutely can. For reasons that General Alexander pointed out on this very Hill 2 days ago. We are vulnerable to any form of cyber means. We are more dependent on these forms of computers, computer systems, everything, than any other country on Earth. So guess what? If a cyber virus comes into us—the same way that we did it to Iran, apparently—we are more vulnerable to this than the other guy. Why would you then do it? That is what bothers me the most, other than the fact that I read this in The New York Times.

As I read his book, what really bothered me was the consistent access he had. Because, having written five books myself, you can't write a book unless you have been there and can actually talk about these things. He was actually there or had people in there who told him what actually occurred. When that degree of penetration is going on, as I said, that is like the KGB is acting in the operation.

Mr. LUNGREN. My observation is, either The New York Times is lying or they had access to information of a particular detail that could only have come from someone who participated in the Situation Room. And as someone who has been involved in prosecutions in the past, you do look to motivation to try and figure out where your investigation would take you.

Colonel ALLARD. That is right.

Mr. LUNGREN. Would it be unreasonable for us to subpoena individuals who would apparently be involved in the discussions that were revealed in these articles?

Colonel ALLARD. As I read not only in Mr. Sanger's book but also Bob Woodward's book 2 years ago, "Obama's Wars," at least the first two chapters are classified Top Secret Codeword. As I looked at that, I thought, okay, if I were doing the investigation, I would say, cui bono, Cicero's great question, who benefits? Whose position is enhanced by these leaks? That is where you begin the investigation.

Mr. LUNGREN. I know who has not benefited by it; that is, the Navy SEALs who were involved in the operations and their families. I know that those professionals who were working with us in the area of cybersecurity are not benefited by this. I know that the national security interests of the United States are not benefited by this. And so we ought to be looking at what is benefited by this.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Sales, in 5 minutes you can't detail things that you had in your statement. You went through the definition of the offense, "willfully communicating, delivering, transmitting any information related to the national defense to any person not entitled to receive it if the official has reason to believe this information could be used to injure the United States or advantage any other country."

And there are a lot of words in there that are subject to interpretation. One is "national defense." You have talked about that a little bit. Is that limited to military?

Mr. SALES. It certainly includes military matters, but not——

Mr. SCOTT. Includes military. What about—you mentioned trade deals. Are trade deals not covered by, quote, "national defense"?

Mr. SALES. I don't think it clearly is covered in the way that intelligence information would be covered or military information would be covered.

Mr. SCOTT. Foreign intelligence in some of the legislation we have considered included trade deals.

Mr. SALES. I think a trade deal arguably could be in some circumstances, but it is not as clearly relevant as military information or intelligence information would be.

Mr. SCOTT. Are we talking about only classified information being covered, or can sensitive information that has not been classified be covered?

Mr. SALES. Under the current statute, it is possible that unclassified information that relates to the national defense could trigger criminal liability.

Mr. SCOTT. All classified information covered?

Mr. SALES. Not necessarily. There might be some forms of classified information that are not properly classified. There might be some forms of classified information that do not relate to national defense. And——

Mr. SCOTT. Is "improperly classified" a defense to a criminal action?

Mr. SALES. As my friend and colleague, Professor Vladeck, has pointed out, most courts, in fact I think all courts, have rejected the notion that improper classification exonerates one under the Espionage Act.

Mr. SCOTT. Okay.

Professor Vladeck, we had leaks to the press. I think one of the first cases was the Pentagon Papers. Is a reporter liable under this if he reports what he heard?

Mr. VLADECK. You know, Congressman, we talked about this before. I think that the text of the statute, I think, could be used to go after a reporter, not necessarily for the act of publishing this information, but even for the act of holding onto it when he is not entitled to.

I think the government has always been very, very reluctant to pursue those cases because of the very serious First Amendment concerns they raise. But in the Pentagon Papers case you mentioned, Justice White specifically suggested in his concurrence that although the courts could not stop The New York Times from publishing the Pentagon Papers, the Nixon administration could potentially prosecute them after the fact.

Mr. SCOTT. So the state of the law now is what?

Mr. VLADECK. You know, I think the best I can say is the law is unclear. I think there has only been one case in the history of the Espionage Act where the government has prosecuted a third party—that is, a recipient of the information as opposed to the leaker. That case fell apart. That was the APAC case in Virginia in 2005.

I think there would be serious First Amendment concerns in such a case, but those concerns have not yet, you know, produced an opinion saying that you cannot bring such a prosecution. So that is why I referenced that quote about the uncertainty about the scope of the statute.

Mr. SCOTT. Well, if you are talking about the press generally, we have some new problems. Who is a journalist and who isn't? Is a blogger a journalist?

Mr. VLADECK. Well, you know, the Supreme Court, I think for that exact reason, has historically resisted giving special content to the press clause of the First Amendment because they don't want to draw the distinction between The New York Times and a blog. So I think that is only part of the murkiness here.

Mr. SCOTT. And then the WikiLeaks, is he a blogger or a journalist?

Mr. VLADECK. Well, I mean, I think if the government were to ever go after Julian Assange under the Espionage Act, I am sure that he would try to raise a First Amendment claim along the lines that he is merely the press, retransmitting this information.

Mr. SCOTT. Well, let me just—can I ask generally, what is the difference between somebody that leaks and a whistleblower?

Mr. VLADECK. Perspective? I mean, I think——

Mr. SCOTT. Is that the "intent to harm" part of the statute?

Mr. VLADECK. I mean, I guess the problem is, you know, Congressman, there are examples of individuals who have been prosecuted for leaking who saw themselves as whistleblowers. I think Thomas Drake is a very good example of that.

You know, and that is why I think it is a question of perspective. I think whistleblowing—if we understand whistleblowing to mean calling attention to waste or misconduct on the part of the government, I think sometimes that will include leaking information that is not properly in the public domain.

Mr. SCOTT. Colonel, do you want to comment on that?

Colonel ALLARD. There are two things. The test being, first of all, the subject matter. Is it relevant, is it germane to the national defense? That test of legitimacy is key. The second, what was your motivation? Any legal test also involves motivation. Was the motivation here a promiscuous relationship to dump government secrets, or was it intended to do something else? It is a very tough line to draw.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Wainstein, you said leaks have been around for time immemorial. It strikes me, one way to have fewer leaks is to actually prosecute and put in prison the people who do the leaking. So I want to talk to you for a second.

I couldn't find a Federal statutory reporter privilege. Am I missing it?

Mr. WAINSTEIN. You couldn't find a reporter privilege? No. You are right.

Mr. GOWDY. It doesn't exist——

Mr. WAINSTEIN. It doesn't exist.

Mr. GOWDY [continuing]. In statute, so then we would have to turn to the common law. And I am not aware of any privileges that are unqualified, and certainly the reporter's privilege would be limited and would be qualified. So then we move to this area where—because it is the First Amendment, heaven knows we can't have any limitations on that.

So I thought maybe you and I together, with the help from our friends who are law professors, could come up with some examples on where there are limitations of people's First Amendment rights. I will go first. Obscenity. What is another one, Professor?

Mr. SALES. Well, in *Near v. Minnesota*, the Supreme Court——

Mr. GOWDY. You don't have to cite the cases.

Mr. SALES. Information about ships' sailing dates and——

Mr. GOWDY. How about deceptive advertising? How about students on high school campuses? They don't have the full panoply of First Amendment rights. How about libel? How about government employees?

So the notion that the First Amendment has no limitations whatsoever is balderdash, legally and otherwise.

So that then leaves me with this conclusion: We are asking the U.S. attorney, I think in the District of Columbia, to investigate leaks. And if he follows DOJ policy, he has to ask the Attorney General, 4 months shy of an election, for permission to subpoena a reporter in a case that may wind up being embarrassing for this Administration.

So why do we not have a special prosecutor in this case?

Mr. WAINSTEIN. I think, Congressman, you are referring to the internal DOJ guidelines——

Mr. GOWDY. Yes.

Mr. WAINSTEIN [continuing]. That require that the Attorney General personally sign off on a request to subpoena a reporter.

Mr. GOWDY. That is exactly right. DOJ policy.

Mr. WAINSTEIN. It is DOJ policy. It is in place to protect the free press, to make sure that prosecutions don't chill the exercise of free press.

Mr. GOWDY. Well, it is certainly not the law. That is just DOJ policy.

Mr. WAINSTEIN. It is not the law. If you look at the Espionage Act, there is nothing in the Espionage Act. As you pointed out, there is no privilege.

Keep in mind, however, you can make leak investigations and leak prosecutions without actually subpoenaing the reporter——

Mr. GOWDY. You may can. But you can also win murder cases without calling the eyewitnesses. You can win a murder case without calling the DNA expert.

Why not send a subpoena to the reporter? Put him in front of a grand jury. You either answer the question or you are going to be held in contempt and go to jail, which is what I thought all reporters aspired to anyway.

Mr. WAINSTEIN. Well——

Mr. GOWDY. I mean, all of us aspire to be Committee Chairmen. I thought that that was the crown jewel in a reporter's resume, is to actually go to jail protecting a source. Give them what they want.

Mr. WAINSTEIN. Yeah, there was a reporter who got the crown jewel and spent, whatever it was, 70 days in jail or something——

Mr. GOWDY. Seventy days.

Mr. WAINSTEIN [continuing]. In the Plame case.

Mr. GOWDY. You can sleep for 70 days.

Mr. WAINSTEIN. But you make a good point, which is that the easiest way to make these cases is to just go to the reporter. Either get the reporter's phone records, email records——

Mr. GOWDY. I mean, if you were the prosecutor——

Mr. WAINSTEIN [continuing]. Or actually subpoena him and put him in the grand jury. That would be the——

Mr. GOWDY [continuing]. What would you do other than that?

If you were the prosecutor and your job was to get to the bottom of it as quickly as you could, you would send a subpoena to the reporter, right?

Mr. WAINSTEIN. Right.

Mr. GOWDY. And put him in front of a grand jury.

Mr. WAINSTEIN. Right. And keep in mind, I am going to defend the existence of that regulation, not necessarily defending the application of it and how stringently it should be applied——

Mr. GOWDY. I am not saying that every line AUSA in every district in the country should be able to subpoena a reporter. I am not saying that. I am just saying that something as important and compelling, if you want to use a constitutional analysis—if you want to talk about the tiers of scrutiny, something as compelling as national security. And Ron Machen has to ask the Attorney General for permission to subpoena a reporter in what may be a very embarrassing fact pattern 4 months before a general election.

You know, we have to have confidence in the outcome, and you have to have confidence in the process. So why not do what lots of Members of the House and Senate have asked and have a special prosecutor? Why not do it?

I have never heard law professors this silent before.

Mr. VLADECK. I mean, you know, I think it assumes facts not in evidence. Right? It assumes that the Attorney General, faced with a request from two U.S. attorneys, two highly regarded U.S. attorneys, specifically chosen for this task——

Mr. GOWDY. Well, has the reporter appeared before a grand jury yet?

Mr. VLADECK. If they have, we wouldn't know, because grand jury proceedings are sealed.

Mr. GOWDY. Oh, well, then we didn't——

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman Sensenbrenner. I, first of all, want to compliment you on pulling together a stellar panel of witnesses who, from very varied experiences, have made this a very important and interesting hearing.

I wanted to begin with just two observations. One, I would like any of you that would like to tell us about anything new to your perspective of this subject of national security leaks and the law that have come to your attention as a result of the discussions that you have heard of your fellow panelists and the Members of the Committee.

Does anyone have something they would like to add to the record?

Colonel?

Colonel ALLARD. Mr. Conyers, when I talk about the fact that you have to be very careful in revising the Espionage Act, I say that not only because I was a special agent myself; I have also been the subject of four congressional investigations, four Federal investigations, myself, based on this article, which came out in 2008. It took this Committee—I am sorry, it took the four Federal agencies 3 years, $2.3 million to exonerate these people that included myself.

So guess what? When I talk about the protections of the law, I know what I am talking about. I have not only been a special agent, I have also been a subject.

Mr. CONYERS. Yes.

Colonel ALLARD. So guess what? That is a chilling effect. You never forget that. Fortunately, I am here to tell you that this should probably come in first because I managed to succeed. And believe me when I tell you, when you defy Federal agencies, if you are not right, they are coming after you.

So I would simply say, when you try and enact legislation, be very careful——

Mr. CONYERS. Uh-huh.

Colonel ALLARD [continuing]. Because you are going right back to Philadelphia.

Mr. CONYERS. Thank you.

Colonel ALLARD. That is consensus that I think I talked about in my statement.

Mr. CONYERS. Thank you.

Mr. Wainstein, what would you offer to this discussion, sir?

Mr. WAINSTEIN. I guess you are asking if there is anything new today. The thing that struck me—and Steve Vladeck and I were talking about this at the beginning—this is our third hearing on this issue in the last year and a half. We testified in the Senate in 2010 about the Espionage Act, we testified here before you all in the aftermath of the WikiLeaks disclosures, and then today, all about what should we do about the Espionage Act. And I think, if anything, that reinforces in my mind that there is a real imperative to take a look at the legislation and bring it into the modern age, because it needs reform.

Mr. CONYERS. Uh-huh.

Professor Sales?

Mr. SALES. Thank you, Congressman.

One quick follow-up to what Mr. Wainstein just said. Congress actually did this in 2000. Congress, both houses, passed legislation that would have created an entirely new statute along the lines we discussed earlier. Do away with the Espionage Act for dealing with leakers. The press is a totally separate issue and much more complicated issue. But to answer the question, what do we do with government employees who leak, Congress actually solved that problem a decade ago. Unfortunately, the legislation was vetoed, so we are still waiting for more precise instructions on exactly what the scope of liability is for officials who leak.

Mr. CONYERS. Professor Vladeck, should we just rewrite the whole subject of security leaks, or should we just improve on the 1917 version?

Mr. VLADECK. You know, Congressman, I think I would actually go even further. I would say, not only should there be a careful, calibrated amendment of the Espionage Act, but that I think that Congress should see as part of that effort reforming the classification scheme. Because I think Congress has historically not exercised the power in that area that I think it clearly has to not leave this all up to the executive branch's fiat.

You know, the Atomic Energy Act of 1954 actually provides detailed classification rules for certain forms of information regarding

our nuclear energy program, but it is alone. Right? All of the other classification is done by executive order.

And so I think, you know, if the Committee is serious about a workable system going forward, I think that system can't just include the back-end sanctions. It has to include the front-end rationalization of how we classify national security secrets.

Mr. CONYERS. I would ask any of you that would like to submit this for the record, because time won't permit it today, but I would like an evaluation from any of you about the following subjects: Watergate and the Plumbers; the Pentagon Papers and Dan Ellsberg; and the whole concept of prior restraint. I would appreciate anything that you could get on that.

Mr. SENSENBRENNER. Without objection, the material will be put in the record. We would like to publish the record sometime within the next 2 years, however, since this is somewhat of a broad request, but do your best.

The gentlewoman from Florida, Ms. Adams.

Mr. CONYERS. Thank you.

Mrs. ADAMS. Thank you, Mr. Chairman.

Mr. Wainstein, does leaking military field reports or diplomatic cables endanger innocent people and harm our national security?

Mr. WAINSTEIN. Certainly can. And I think in the WikiLeaks case we saw that there was danger presented to people, in particular those folks who were over in the war zones who helped us out and who then get outed by those documents that were made public. Who knows what has happened to some of them, but I am in fear for their lives.

Mrs. ADAMS. And, Colonel, if you could, how would you address to our allies—you know, I am sure they are concerned with the problems of our intelligence services, loss of confidence in our keeping the ability to keep secrets and such. How would you repair that damage and how would you address it if you could?

Colonel ALLARD. I am not sure.

Ma'am, I was a young intelligence officer in Germany during the Church Committee hearings back in the 1970's. I had sources look at me and say, you know what, I am not going to do that for you because I don't want to see my name on the front page of The New York Times or Washington Post. I now know how they felt.

And let me tell you something. When you have that reluctance of sources to believe in the confidence of the United States, that is a huge blow. It takes years to overcome this. And I don't think it will be overcome unless and until this Congress passes legislation which makes a sensible accommodation.

But I absolutely agree with the Professor Vladeck 100 percent. You have to address both the input as well as the output. We are overclassified. And so, if you try and protect everything, you protect nothing.

And, by the way, the American people are tired of paying the bill for these things. It costs money to classify; it takes money to protect it. We are not doing either thing very well.

Mrs. ADAMS. Well, I have to tell you that hearing your statements, "act of war," "KGB," unprecedented, consistent access to documents, information that should be classified—you would agree that you think this, if it was true, should have been classified?

Colonel ALLARD. Ma'am, there is no question about the fact that what is in Sanger's book, as well as on the front page of The New York Times, is a valid exercise in classification. If that is not classified, then nothing is.

Mrs. ADAMS. So——

Colonel ALLARD. And, as I said, this affects American security of every single one of us here, every single one. If all of a sudden the utilities stop operating, you have Mr. Sanger to thank for it.

Mrs. ADAMS. So then you would agree that what you have read, if in fact it is true, should have been classified; therefore, there should be a thorough and complete investigation.

Colonel ALLARD. There absolutely should be! As I said in my statement, I was here when the Congress investigated. What really bothers me, I think, about this is, it has become an agency for American secrets to wind up becoming reporters' profits. That is what has happened here.

Mrs. ADAMS. And I agree that that should not be happening at the—I guess at the benefit of the reporters or whomever they are benefiting, but at the detriment of the American people. And, as you said, we are vulnerable, too, and this puts our American people at risk.

And with that, I am going to yield to my colleague, the astute—let's see—attorney, prosecutor, Trey Gowdy.

Mr. GOWDY. Well, I was hoping to keep that a secret, but I thank the gentlelady from Florida for outing me as a lawyer.

Mr. Wainstein, I want you to assume that you and another highly decorated former prosecutor, the former attorney general from the great State of California, Mr. Lungren, were appointed special counsel. You would subpoena the reporter and you would subpoena everyone in the Situation Room, right, before a grand jury?

Mr. WAINSTEIN. Well, Congressman, I have to go back to what Steve Vladeck said. It sort of depends on the circumstances, in terms of, you know, who would be in the zone of interest. It depends on where the source came from, where the leak came from.

In terms of the reporter, I think that special counsel, at least I believe—don't quote me on this—but I believe they may not be encumbered by the same regulations.

Mr. GOWDY. Right.

Mr. WAINSTEIN. So they might be able to go ahead and subpoena the reporter.

However, they are going to be sensitive to the First Amendment concerns, as well. And I wouldn't be surprised if that special counsel does try to exhaust other avenues of investigation before immediately subpoenaing——

Mr. GOWDY. Well, and that leads to my final question, which is this: Why would the reporter be entitled to any more protection than those in the Situation Room or someone who worked on the White House staff who may have overheard it? Why are we affording—because it is not statutory, and the common law is weak as water. Why are you giving more protection to a reporter than you are anyone in the Situation Room if they were subpoenaed?

Mr. WAINSTEIN. It is purely—and this has been on the part of both Administrations over time—it is a concern with not chilling the free press. It is a recognition that reporters serve a very impor-

tant function in our society, and if we start subpoenaing them in with regularity, they are going to be less energetic in trying to root out information from the government.

And reporters, as you know, reporters serve a very important function of disclosing wrongdoing within the government, not necessarily secrets, but wrongdoing. So it is a balancing act, and that is the reason why those regulations are there. That is the reason for the reluctance to just willy-nilly subpoena reporters in on a regular basis.

That being said, I firmly support, when the time is right and the circumstances justify it, to bring the reporter in, especially in a case where there is serious damage to the national security.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Chu.

Ms. CHU. Thank you, Mr. Chair.

I would like to ask a question to Professor Sales and see what Professor Vladeck might think about this afterwards. And it is a follow-up on the issue of the press.

It has been suggested by some critics that one way to ebb the flow of classified information is to discourage the press from publishing such information by filing criminal charges or seeking injunctions from courts. However, both of these approaches raise constitutional concerns as it pertains to restricting free speech.

How do we balance the need to keep certain information confidential with the importance of upholding free speech and freedom of the press?

Mr. SALES. Thank you, Congresswoman.

If I had an answer to that question, I would probably be a dean instead of a professor. That is the million-dollar question.

There are compelling values on both sides of the ledger. On the one hand, the First Amendment is a guarantee not only of individual rights to speak and receive information but also a profound civic value in favor of open government, debate, and democracy. And you can't have that without transparency and openness. On the other hand, highly classified and properly classified national security information needs to be kept secret. If it leaks, we can't wiretap Osama bin Laden. If it leaks, sources get caught in the Kremlin and killed. How to balance those two different sets of considerations, equally vital values pulling in different directions, it is impossible, I think, to say in the abstract. I think that question can only be resolved in the context of a specific case.

So in the New York Times case, the famous Pentagon Papers case, what kind of information is at stake there? Well, as it turns out, the information, though classified, wasn't really all that embarrassing anyway. Well, it was embarrassing, but it wasn't operational details, "Here is the name of our source in Hanoi." Right? It was a history of the U.S. involvement in Southeast Asia.

When balanced against the compelling interest in free speech, it is easy to see why information of that minimal sensitivity—not no sensitivity, but minimal sensitivity—why the balance tilts in favor of the press. But on the other hand, information about, you know, the name of the Pakistani doctor who assisted us in tracking down Osama bin Laden and who now is in jail for 3 decades, that has

a much more profound harm to the national security, and so the First Amendment equities in that case might look very different.

Ms. CHU. Professor Vladeck?

Mr. VLADECK. I would just add, I absolutely think this ties in nicely with Congressman Gowdy's colloquy with Mr. Wainstein. Because I think Mr. Wainstein suggested that the Attorney General guideline is there to protect the press. I actually think it is also there to protect the government. Because I think the more the government goes after the press, the more the government is seen as not exercising care and diligence in pursuing the press in cases like this, the more the courts, I think, will be inclined to step in and protect the press. Right? So I think the government builds its credibility for cases, along the lines that Professor Sales describes, where it might actually really have a strong case by not running to the courthouse for a subpoena every single time there looks like there is a national security leak.

I think that the reality is, this balance is impossible to strike in the abstract. The closest the Supreme Court has come is the accommodation it made in the Pentagon Papers case, which is prior restraints are the highest bar and are the most disfavored, and after-the-fact prosecutions are a separate issue that we will worry about when we get there.

And I think it says a lot about the national security leaks we have weathered over time that there has never been a prosecution of a member of the press for violating the Espionage Act. You know, that we have never had one I think is actually as strong a testament to striking that balance carefully as anything I could say.

Ms. CHU. Uh-huh.

Professor Vladeck, I also wanted to ask about the question of whether we should distinguish between motivations for leaks. There are lots of different reasons why a leak could occur. Some are motivated by government whistleblowing and seeking to raise awareness about an issue or policy. Other leaks indeed might be motivated by maliciousness. Still others might be just doing a pick of the flattery by a recording reporter.

How much consideration should be given to understanding the motivation behind a leak?

Mr. VLADECK. It is a great question. I think it really depends on what we see as the harm. If the harm is the disclosure of the protected information at large, then I think motivation is irrelevant. And I think that is part of the problem with the Espionage Act the way it is currently crafted. That is the premise from which it proceeds, right, that once the information is out there in a way that could harm national security, it doesn't matter why it is out there.

I think a more carefully tailored statute could very well take into account the kinds of things you suggest. If the goal was to reveal waste and fraud or if the goal was to call the attention of Americans to an illegal government program, you know, perhaps that would be a way to narrow the focus of the statute. The problem is, the way the law is right now, there is no room for that. And so we can have that conversation here and we can have it on the editorial pages but not in the courts.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And we appreciate the witnesses' being here. We certainly do.

But this Department of Justice policy to get approval from the AG himself, I think is where it is coming back to, Professor, you had said the AG policy protects not only the reporter but also the government. And I keep coming back to, so who is protecting the people? I mean, the people are the ones that are supposed to be protected.

How about, who is protecting the soldiers? Okay, we have a DOJ policy that protects the AG. It also protects the reporter. Who is protecting Navy SEALs? Who is protecting the one that gave us the information that got bin Laden? I mean, who is protecting those who are helping us? And I am not getting the impression that we have anybody doing that right now.

I know that at this very table we had the Attorney General of the United States testify before the full Committee. In his words, there are political dimensions to justice. That goes against everything every law professor I have ever heard told me and taught me. It goes against everything every Democratic Party member teacher I had taught me. They knew this country, they knew what founded this country, and they, I think, instilled it in me.

And somebody needs to be watching out for the people and for the man that is going to do 3 decades in prison unless we get firm about stepping up and helping him.

Now, I would just like to know, if we don't have a special prosecutor, who is going to stand up and protect those who are out there protecting us?

And as you are thinking about that, let me just tell you, a father of one of the SEAL Team 6 members told me that after—and we don't have to wonder too far how SEAL Team 6 got disclosed, when we saw the Vice President on TV saying something like, "Well, how about that SEAL Team 6? Aren't they great? Yeah, let's hear it for them." And a father of one of the SEAL team members told me that his daughter-in-law, their family, got pretty instant military protection because they knew that the Vice President had just outed these guys.

And then when the President picks that up and starts talking about SEAL Team 6, and then when you have the Taliban target a helicopter with nearly two dozen of SEAL Team 6 members, who was out there protecting them when the Vice President and the President outed SEAL Team 6?

We know the President can declassify, so there can be no prosecution there, but how about in these other cases? Is there anybody else that you could propose that would actually be looking, not out for the government, not out for the reporter, but for the people, for those who are trying to protect us, other than a special prosecutor? I would really like to hear who it is.

Mr. SALES. Well, Congressman, I think those are excellent points, and that explains why DOJ created this regulation in the first place.

Let's go back to first principles. DOJ recognized that sometimes there could be an appearance of impropriety or a conflict of interest

where the Attorney General and others in the Presidential line of command are responsible for investigating——

Mr. GOHMERT. Well, let me—because you left this—that is why we have "this regulation." Are you talking about the one that requires the Attorney General, who believes there are political dimensions to justice, that is why we have to get his permission? Is that what you are saying? Is that the policy you are talking about?

Mr. SALES. Well, Congressman, what I am saying is that, because of the potential for conflict of interest, there is a mechanism now for appointing special counsels outside of the normal Presidential chain of command to give them a measure of independence so that they don't have to get approval from superiors in the Justice Department or elsewhere before taking certain investigative steps, such as issuing a subpoena to a reporter.

I think the example from 2003 is a very good example of how this regulation can work in practice. After it was alleged that senior Administration officials——

Mr. GOHMERT. All right, you are going beyond my question. My time——

Mr. SALES. Okay.

Mr. GOHMERT [continuing]. Is running out.

Let me just also make this point, that this same Attorney General has appointed, or asked for an investigation by an inspector general at DOJ who got a tape of a conversation with a Federal agent, and rather than acting like a true inspector general for a potential prosecution down the road, she turns it over to the Federal agent, "You better listen to this before I ask you questions." We got a real problem in the Department of Justice if that is the kind of special investigations we get.

And my time is up. I yield back.

Mr. SENSENBRENNER. Okay. The Chair will say that after he recognizes the gentleman from Georgia, Mr. Johnson, he will recognize himself for the last series of questions.

The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

And I am just wondering, where was the moral indignation and outrage and the like that has been displayed before us this morning, where was that when Valerie Plame, a CIA agent, a covert CIA agent, was outed by the previous Administration? Where was the indignant outrage?

Mr. GOHMERT. Will the gentleman yield?

Mr. JOHNSON. Yes.

Mr. GOHMERT. I was outraged Richard Armitage was not prosecuted. He should have been, and I still hope he will be, for outing her.

Mr. JOHNSON. Reclaiming my time, I am glad to know that there was at least one of my colleagues on the other side of the aisle that voiced indignation, but I think you may have been by yourself on that. And it seems like there was a protective covering that was hoisted upon the actors in that drama by my colleagues on the other side, but now, you know, we want to be more indignant than I think is required.

Sometimes we have good leaks and sometimes bad leaks. Is that correct? I mean, Abu Ghraib was a good leak, and there are some leaks that are bad. Would you gentlemen generally agree?

I see heads shaking, going up and down, so that I think that means "yes" in America. Is that correct?

Colonel ALLARD. No.

Mr. JOHNSON. Huh?

Colonel ALLARD. No, sir.

Mr. JOHNSON. That is not correct? All right.

Colonel ALLARD. Sir, as a counterintelligence officer, do not tell me there is such a thing as a good leak.

Mr. JOHNSON. Well, I guess it depends on where you are sitting, though.

Colonel ALLARD. I am as opposed to—in a war, I am as opposed to the free flow of information as to the free flow of sewage, because it can cost lives.

Mr. JOHNSON. Well——

Colonel ALLARD. They have done so, I think, in this instance——

Mr. JOHNSON.—I understand, but, I mean, you have some good leaks and bad leaks. I don't think you can disagree with that. We really needed to learn with Abu Ghraib so that we could correct what was going on over there.

And, you know, the problem is that, you know, sometimes our laws can go too far so as to shield free speech. And I think that is a conflict that we probably need to address here.

Those memos, those torture memos written by Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee advised the U.S. Government that acts widely regarded as torture might be legally permissible under an expansive interpretation of Presidential authority. At least one of these memos was leaked to the public, while others were obtained through litigation.

The memos were widely criticized as legally flawed and morally indefensible. President Obama repudiated the opinions in early 2009. The source of the leak for those memos was never found.

And we have leaks that have occurred throughout every Administration that has served in America. Is there any particular reason why we should be so dramatically concerned about the recent spate of leaks that have occurred?

Mr. WAINSTEIN. If I could, Congressman, you have put your finger on an interesting point, you know, whether there are good leaks or bad leaks. And some people will say, look, we have to allow some leaks because that is the only way information about wrongdoing within the government is going to get surfaced.

But that is not the case. I mean, now Congress, in its wisdom, has passed a series of whistleblower-protection laws, which say that if you are a whistleblower, in other words you are a person within the government, you see something that looks like waste, fraud, abuse, or criminal conduct, you can take that information up, and in the intelligence community you can take it up to the Intelligence Committees in Congress.

The point being that there is an avenue for surfacing that information other than going to the press now. So the argument that you need to have press leaks——

Mr. JOHNSON. I got you.

Mr. WAINSTEIN [continuing]. In order to allow that is really not the case.

Mr. JOHNSON. I got you. Do the whistleblower laws take precedence over the espionage statutes?

Mr. WAINSTEIN. Well, they do. And, in fact, Professor Vladeck has spoken to this in today's testimony. There is some tension there. But the notion is that if you follow, as a government employee, follow the whistleblower-protection procedure and disclose things to the right people within the——

Mr. JOHNSON. Then you will not be prosecuted for——

Mr. WAINSTEIN. That is the idea. Now, there is a concern. Those things have to be sufficiently user-friendly to——

Mr. JOHNSON. Is that in the law?

Mr. SENSENBRENNER. The gentleman's time has expired.

The Chair recognizes himself for 5 minutes for the final questions.

First of all, let me point out that, in the case of the Valerie Plame leak, the leak was by an Administration supporter. And there was a special counsel appointed, Patrick Fitzgerald, who was the U.S. attorney for the Northern District of Illinois. And there were some very controversial prosecutions involved, which resulted in some convictions. I think we all know who was convicted.

Now, the other thing is that I, you know, agree with Colonel Allard, you know, that there is no such thing as a good leak. A good leak is one that, you know, you agree with who gets damaged in the national security realm, and a bad leak is that you disagree with it. Nobody should get damaged in the national security realm by a leak.

And the thing is, if somebody is engaged in misconduct, the whistleblower-protection acts do provide for protection of a whistleblower who sends the information up the chain of command to people who have been cleared, including Members of the Senate and House Permanent Select Committee on Intelligence.

Now, having said all of that, you know, this is a very difficult area to legislate in. And I don't think that we have the time left in this Congress to be able to deal with the various issues.

First, I agree with Professor Vladeck that the Espionage Act of 1917 is outdated. You know, the type of espionage that this country faces now is not the type of espionage that German spies did in the march to World War I. Though I would point out that there were a whole package of laws that Woodrow Wilson got passed, including the Sedition Act, which resulted in one of my predecessors as the representative of the Fifth District of Wisconsin getting excluded from Congress twice, getting reelected by a constituency that Mr. Wilson decided—or the constituency that decided that Mr. Wilson chose the wrong side to fight for in the First World War, and he spent some time as a sitting Member of Congress sitting in jail for sedition. So, you know, it seems to me that, you know, the history of those kinds of acts mean that we have to update them.

I am not for having an Official Secrets Act like occurs in the United Kingdom, but I am for revising standards for classification. And there ought to be some type of almost strict liability on someone who deliberately leaks something that he or she knows to be classified to somebody who does not have a security classification.

And, finally—and this is the question that I would like to ask, and we will start with you, Mr. Wainstein. Are there any circumstances where putting a reporter in jail for publishing a leak are permissible under the First Amendment?

Mr. WAINSTEIN. I believe so.

Mr. SENSENBRENNER. And what are——

Mr. WAINSTEIN. I believe, actually, you can look at the iconic case, speaking of Midway, where the Chicago Tribune actually published the fact that we had broken the Japanese code in 1942, which could have been devastating to our war effort and could have resulted in the loss of thousands, if not tens of thousands, more American lives. Under certain circumstances, you could see that if someone had done that with impunity and knowledge of the consequences and gone ahead and published it, that is something that I think would be worthy of prosecution and punishment.

Mr. SENSENBRENNER. You know, how about prosecution and punishment for those that disclosed it was SEAL Team 6 that actually went in and took out bin Laden? Is that the same thing?

Mr. WAINSTEIN. Sir, it depends on the facts and the consequences. I really couldn't, sort of, opine on it because I—in retrospect, I can see what it would have done to World War II. It is hard for me to know whether the fact that SEAL Team 6 that operates in secret, whether it is going to suffer the same damage or not, and also the intent behind the leak. That is a—you know, that is a serious leak, though, something that should be——

Mr. SENSENBRENNER. Okay.

Mr. WAINSTEIN [continuing]. Seriously looked at by a prosecutor.

Mr. SENSENBRENNER. Well, you know, here we are talking 70 years after the fact of the leak on the Japanese codes on Midway. Perhaps 70 years from now, we will be talking in this Committee about the leaks on SEAL Team 6, which I think emphasizes the fact that we do need to update the laws.

Professor Sales——

Mr. WAINSTEIN. If I could, Mr. Chairman, just——

Mr. SENSENBRENNER. Okay.

Mr. WAINSTEIN [continuing]. Keep in mind, the distinction between punishing and prosecuting the newspaper reporter, that is a very different issue from prosecuting and punishing the leaker. And, you know, to your question as to whether you should put the reporter in jail, that is a bigger step.

Mr. SENSENBRENNER. Okay.

Professor Sales, and then—my time is already up, but—well, answer the question.

Mr. SALES. Gladly.

I think the answer to the question is "yes, comma, it depends." There are circumstances in which it certainly would be constitutionally permissible to hold reporters to the same criminal law standards that every other citizen in the United States is expected to follow.

In fact, the Supreme Court in the Pentagon Papers case recognized that there may be circumstances in which it would be consistent with the First Amendment to apply the terms of the Espionage Act to reporters that publish classified information.

Mr. SENSENBRENNER. Thank you very much.

And I would like to thank all of the witnesses for appearing, you know, in I think what is a very interesting hearing that has a lot of interrelated and difficult policy questions involved.

I, frankly, think that in the next Congress this Committee should take a whack at trying to put something together that updates the law and attempting to balance competing interests and how they interrelate with each other, recognizing the fact that at least at the beginning of this process everybody will come in and testify against something that is in the law. But I think it is unacceptable to keep relying on the 1917 act to deal with the issue of leaks, as well as the issue of espionage, because espionage now is a lot different than it was in the First World War.

That having been said, thank you all for coming.

And, without objection, the hearing is adjourned.

[Whereupon, at 11:36 a.m., the Subcommittee was adjourned.]

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