Written Statement of the
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before the
House Judiciary Committee

December 16, 2010

"The Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks"

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Chairman Conyers, Ranking Member Smith, and Members of the Committee:

The American Civil Liberties Union (ACLU) commends the Committee and its staff for bringing attention to the Espionage Act and the legality of its proposed use against third-party publishers of classified information. If the Espionage Act were to be applied to publishers, it would have the unconstitutional effect of infringing on the constitutionally protected speech rights of all Americans, and it would have a particularly negative effect on investigative journalism – a necessary and fundamental part of our democracy. Application of the Espionage Act to publishers would compel individuals and journalists to refrain from publishing information that would be a valuable addition to today's marketplace of ideas. On behalf of the ACLU, a non-profit, non-partisan organization having over half a million members, countless additional activists and supporters, and 53 affiliates nationwide, we urge Congress to resist the urge to broaden the Espionage Act's already overbroad proscriptions and, instead, to narrow the Act's focus to those responsible for leaking properly classified information to the detriment of our national security.

The Espionage Act affords government a basis for prosecuting and penalizing, to the maximum possible extent, the improper leaking of classified information.[1] In fact, the conduct proscribed by the Espionage Act is so broad that courts have been compelled to narrow the construction of certain terms in order to avoid finding the law unconstitutional.[2] And still, media outlets – those responsible for informing the public and encouraging public discussion of important civic issues – remain at risk of prosecution under the Act.[3] In the current environment, it would be all too easy for inflamed public passions to serve as the basis for arguments to justify broadening even further the proscriptions of the law. Instead, Congress should stand clear-eyed and firm against arguments based on passion, not reason – and narrow the Espionage Act to those who leak properly classified information. Publishers who are not involved in the leaking of classified information should be praised by our society for their contributions to public discourse, not vilified as the co-conspirators of leakers with whom they have no criminal connection.

[1] 18 U.S.C. §§ 791 et seq. (Chapter 37 – Espionage and Censorship). The Media Law Resource Center published an excellent summary of the speech and publication restrictions in the Espionage Act and other similar statutes. *See generally*, S. Buckley, *Reporting on the War on Terror: The Espionage Act and Other Scary Statutes*, Media Law Resource Center, Inc. (2006) (hereinafter MLRC).

[2] Gorin v. U. S., 312 U.S. 19, 27 (1941) (scienter and bad faith required for conviction under certain sections of Act), *Id.* (publicly released information cannot serve as basis for conviction); U. S. v. Heine, 151 F.2d 813 (2d Cir. 1945) (overturning conviction for transmittal of publicly released documents compiled and turned over to Germany during World War II).

[3] *See* New York Times v. U. S., 403 U.S. 713, 733-34 (1971) (White, J., concurring) (joining decision not to enjoin publication of Pentagon Papers, but noting the possibility of criminal prosecution of publishers under different circumstances).

Today's hearing is titled "Hearing on the Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks". Speculating about the facts underlying the recent WikiLeaks publications is less important than understanding the laws implicated by recent public discourse. The issues associated with the Espionage Act, even in its current form and without amendment as has been proposed, are extremely important to our democracy and go well beyond this one recent incident.

The Espionage Act has a long history and many flaws. Some of the law's provisions are breathtakingly broad. Read literally, some provisions would punish the transmission – by anyone, including organizations such as the New York Times or Wall Street Journal - of information that is unclassified and legitimately in the public sphere. Others would punish publication – again, by anyone - of information the release of which would have no negative impact on our national defense. Still others would punish publishers who are engaged in nothing more than well-understood norms of news gathering and dissemination.[4] Some of these problems would be exacerbated by a recently introduced bill that purports to broaden the restrictions on information release.[5]

Instead of expanding the Espionage Act, Congress should limit its application and make the law more understandable. While we urge restraint in applying the existing law in its current very broad form, if Congress is determined to act, we would urge Congress to take the following actions:

1. Improve the classification system to ensure that classified documents are properly classified.
2. Remove all references to 'publication' from the Espionage Act and limit prosecutions under the Act to those directly responsible for the improper acquisition or transfer of properly classified information.

Classification

Excessive government secrecy is not a new phenomenon. Nearly every entity commissioned to study classification policy over the last sixty years, from the Coolidge Committee in 1956 through the Moynihan Commission in 1997, has reached the same conclusion: the federal government classifies far too much information, which damages national security and destroys government accountability and informed public debate.[6] Despite the results of these

[4] *See generally* MLRC at 3 – 24, 27 – 30.

[5] S. 4004, Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act (111th Cong., introduced Dec. 2 2010). The bill would broaden, not narrow, the application of the Espionage Act under section 298 dealing with disclosures of classified information. It would expand the types of classified information it would be unlawful to publish and the types of recipients of information that would trigger criminal liability.

[6] *See, e.g.*, Charles A. Coolidge et al., Report to the Secretary of Defense by the Committee on Classified Information (1956) (Coolidge Committee Report), *available at* http://thememoryhole.org/foi/coolidge_committee.pdf; Office of the Director of Defense Science Research and Engineering, Report of the Defense Science Board Task Force on Secrecy (1970) [hereinafter Defense Science Board Report], *available at* http://www.fas.org/sgp/othergov/dsbrep.pdf; Keeping the Nation's Secrets: A Report to the Secretary of Defense by the Commission to Review DOD Security Policies and Practices (1985) (Stilwell

studies, reform has proven elusive and we are now living in an age of government secrecy run amok:

- According to the *Washington Post*, there are 1,271 government organizations and 1,931 private companies working on programs related to counterterrorism, homeland security and intelligence, and an estimated 854,000 people hold top-secret security clearances.[7]
- According to the Information Security Oversight Office (ISOO), the government made 54,834,989 separate classification decisions in 2009 alone. ISOO changed the way it counted electronic records in 2009 so exact year-to-year comparisons are not possible, but this figure is more than double the record 23,241,098 classification decisions reported in 2008 and six times the 8,650,735 classification decisions made in 2001.[8]
- Experts in security policy have estimated that at least fifty percent of the material the government classifies is made secret unnecessarily.[9]
- "Derivative classification" in particular has exploded. Fully 99.66% of classification decisions are not made by the government's trained "original classification authorities" (OCAs), but by other government officials or contractors who may have received little or no training and wield a classification stamp only because they work with information *derived* from documents classified by OCAs.[10]
- Document reviews conducted by ISOO discovered classification errors in 65% of the documents examined, with several agencies posting error rates of more than 90%.[11] Errors which put the appropriateness of the classification in doubt were seen in 35% of the documents ISOO reviewed in 2009, up from 25% in 2008.[12]
- Government agencies have been using a multitude of unregulated control designations to restrict the flow of *unclassified* information. Twenty federal government departments and agencies have used at least 107 different control markings with more

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Commission Report), *available at* http://www.fas.org/sgp/library/stilwell.html; The Joint Security Commission, Redefining Security: A Report to the Secretary of Defense and the Director of Central Intelligence (1994), *available at* http://www.fas.org/sgp/library/jsc; Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2 (1997) [hereinafter Moynihan Commission Report], *available at* http://www.fas.org/sgp/library/moynihan/index.html; Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report (2004) [hereinafter 9/11 Commission Report], *available at* http://www.gpoaccess.gov/911/index.html.

[7] Dana Priest and William M. Arkin, "A Hidden World, Growing Beyond Control," Washington Post, July 19, 2010, at: http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/

[8] Information Security Oversight Office, Report to the President 2009, (Mar. 31, 2010), p. 10, at: http://www.archives.gov/isoo/reports/2009-annual-report.pdf

[9] "Too Many Secrets: Overclassification as a Barrier to Information Sharing," hearing before the House Committee on Government Reform August 24, 2004, (testimony of Undersecretary of Defense for Intelligence Carol A. Haave and Information Security Oversight Office director J. William Leonard) p. 82-83, available at: http://www.fas.org/sgp/congress/2004/082404transcript.html

[10] Information Security Oversight Office, Report to the President 2009, (Mar. 31, 2010), p. 7, at: http://www.archives.gov/isoo/reports/2008-annual-report.pdf

[11] ISOO Report 2009, at 18.

[12] Id. See also, ISOO Report 2008, at 22.

than 131 different procedures for handling what those agencies considered "sensitive" information, with no legal justification.[13]

The classification system in the United States is a mess. It is far too easy to classify documents and, as a result, thousands of documents are classified that, if released, pose no real risk to the national security. Documents that are unnecessarily classified under such a system have the effect of grossly expanding the penalties of the Espionage Act to the release and publication of documents having purely innocuous content – but which happen to be designated as secret. Such a system must be brought under control before the Espionage Act's provisions will have any semblance of fairness.

Freedom of the Press

Freedom of the press is fundamental to our nation's identity and should be fiercely protected. From Watergate to the warrantless wiretapping program, revelations of historic consequences are the product of a free and unrestricted press. At a time when those in power hide behind the phrase 'state secret' instead of 'no comment,' journalists should be commended for continuing to push beyond the hyperbole. In this regard, we must always distinguish between the actions of the source of properly classified information and the publisher of that information.

The state of our democracy is in peril when publishers are threatened with prosecution for treason and imprisonment and subpoenas are used as intimidation tactics. Americans found out about our government's use of warrantless domestic wiretapping only through intrepid reporting. Journalists cannot maintain their independence without access to information from confidential sources. More to the point, as Congressman Ron Paul recently said, "In a society where truth becomes treason, we are in big trouble."[14]

While some leaked information can be seen by some as damaging to the national defense, many leaks have ultimately been viewed as shining a beneficial light on the workings of our government, outweighing any potential harm. The release of the Pentagon Papers during the time of the Vietnam War demonstrated the weakness in our decision making during that era and raised significant questions about the Gulf of Tonkin incident that served as the basis for putting the country on a more formal war footing.[15] More recently, CIA secret prisons, the use of torture by US forces, and the practice of targeted killings by the United States all were disclosed through leaks to media outlets. The beneficial impact of such disclosures makes abundantly clear that a statute that could be read to permit prosecution for the release of all closely-held government information, regardless of whether it is properly classified, and regardless of its national defense impact, goes too far. In order to maintain our democratic

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[13] *The Over-Classification and Pseudo-Classification of Governmental Information: The Response of the Program Manager of the Information Sharing Environment: Hearing Before the Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment H. Committee on Homeland Security*, 110th Cong. (Apr. 26, 2007) (Statement of Ambassador Ted McNamara, Program Manager, Information Sharing Environment, , Office of National Intelligence), *available at* http://homeland.house.gov/SiteDocuments/20070427081925-82568.pdf.

[14] A. Barr, *Ron Paul Stands Up*, Politico (Dec. 3, 2010) *available at* http://www.politico.com/news/stories/1210/45930.html.

[15] Speech of Rep. Ron Paul, M.D., *Lying Is Not Patriotic*, House Floor, Dec. 9, 2010.

values, commitment to free speech, and government accountability, not only should the classification system be repaired, but Congress should ensure the limitation of the Espionage Act so that it cannot be used to prosecute publishers with no involvement in the original leak of classified information.

It is also worth noting in this discussion that the protections afforded publishers from prosecution ought not to be conditioned on the particular medium in which they happen to do their work. All publishers who engage in news gathering, research, writing, editing, audio or video recording, or other processes intended to obtain or produce information for public dissemination should be given equal status and are entitled to the protections of the First Amendment. The constitutional protections afforded publishers exist not in connection with any particular form of communication, but rather they are intended to stimulate the free flow of information in order to serve society's interests, including the need to hold government accountable and to acquire and share knowledge.[16]

A law that criminalizes the reporting function of 'publication' – particularly when the publisher bears no responsibility for the underlying unlawful acquisition or transfer of secret information – does nothing but act in contravention of such principles. The medium is of no relevance in considering the merits of the constitutional right. Would the New York Times print edition carrying the Pentagon Papers have been treated differently by prosecutors than a mythical online version of the Times in the Vietnam era? Certainly, the answer is no and, at least as it relates to the current controversy, we should bear in mind that online publishers of news possess the very same protections as those in the traditional world of newspaper publishers and news broadcasters.

And because the rights of online publishers and offline publishers are identical, any restrictions must be judged by the same standard. If we know anything about the rights of a free press and the right to free speech, it is that a restriction must be narrowly drawn to serve a compelling public interest.[17] In the Pentagon Papers case, the government sought to bar publication of the released government documents and ultimately failed in that attempt.[18] Can you imagine the outcry if the government sought not merely to stop publication of the Pentagon Papers, but also to shut down publication of the New York Times and Washington Post in full? Similarly, online publishers publish many things. If one published item is somehow deemed to be appropriately restricted, that determination in no way justifies taking an entire website down from the internet. To do so would limit the exchange of information in the marketplace of ideas, would fail the 'narrow tailoring' test, and would fail to serve a compelling public interest.

As this Committee examines the Espionage Act, we urge the Committee to refrain from an emotional response in the wake of the most recent release of closely-held government information. Certain previous Congressional actions based upon inflamed passions have been

[16] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 869-70 (1997) (upholding speech rights on the internet equivalent to speech rights in other media).
[17] R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992); U.S. v. Playboy Entertainment Group, 529 U.S. 803, 812 (2000).
[18] New York Times v. U. S., 403 U.S. at 714.

detrimental to our democracy, and history has judged those actions harshly. The Alien and Sedition Acts were used to prosecute prominent Republican newspaper editors in the late 1700's. In the next century, similar laws were used to suppress the speech of abolitionists, religious minorities, suffragists, and pacifists. In the 1900's, laws were adopted against lecturing on birth control, labor organizing, and author Upton Sinclair was arrested for trying to read the text of the First Amendment. It was in response to these excesses that the American Civil Liberties Union was founded 90 years ago.[19]

The First Amendment requires constant vigilance to protect against its erosion. It is designed to defend controversial speech and is rarely invoked to protect speech to which no one objects. The challenge for this Committee today and in the coming session is whether it will be able to engage in a sober assessment of the speech and press restrictions in the Espionage Act; and whether this Committee will be able to ensure that any new law it approves will be narrowly drawn so as to truly minimize its impact on the fundamental rights of free speech and a free press. To meet those challenges, this Committee and this Congress will surely need to narrow, not expand, the Espionage Act to take into account the wealth of improperly classified information, the wealth of classified information that does no harm to the national defense upon release, and the fundamental right of all publishers, whether online or off, to engage unrestrainedly in the traditional news gathering and dissemination process without fear of criminal prosecution.

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[19] ACLU, *Freedom of Expression* (No. 10, Mar. 1, 2002) *available at* http://www.aclu.org/national-security/freedom-expression.