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To the Committee on the Judiciary
U.S. House of Representatives

Hearing on the Espionage Act and the Legal and Constitutional
Implications of Wikileaks

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Mr. Chairman, Ranking Member Smith, and members of the Committee, thank you for your invitation to testify today on the implications of the Wikileaks controversy. I am reminded of the ancient Chinese curse, “May you live in interesting times.”

I have three main points to make today:

First, the government always overreacts to leaks, and history shows we end up with more damage from the overreaction than from the original leak.

Second, the government’s national security classification system is broken, overwhelmed with too much secrecy, which actually prevents the system from protecting the real secrets. The rest should all come out.

Third, we are well into a syndrome that one senior government official called “Wikimania,” where Wikimyths are common and there is far more heat than light – heat that will actually produce more leaks, more crackdowns, less accountable government, and diminished security.

By way of background, I should say right up front that my organization, the National Security Archive, has not gotten any 1.6 gigabyte thumb drives in the mail in response to our many Freedom of Information Act requests, nor have we found any Bradley Mannings among the many highly professional FOIA officers who handle our cases. It’s a lot more work to pry loose

national security documents the way we do it, but then it's a lot of work worth doing to make the rule of law a reality and give real force to the Freedom of Information Act.

It takes us years of research and interviews and combing the archives and the memoirs and the press accounts, even reading the agency phone books, to design and file focused requests that don't waste the government's time or our time but hone in on key documents and key decision points, then to follow up with the agencies, negotiate the search process, appeal the denials, even go to court when the stonewalling gets out of hand. Changing the iron laws of bureaucracy is a tall order, but we have allies and like-minded openness advocates in more than 50 countries now, passing access laws and opening Politburo and military dictators' files, poring through Communist Party records and secret police archives and death squad diaries, rewriting history, recovering memory, and bringing human rights abusers to trial.

Our more than 40,000 Freedom of Information requests have opened up millions of pages that were previously classified; we've published more than a million pages of documents on the Web and other formats; our staff and fellows have authored more than 60 books, one of which won the Pulitzer. Our Freedom of Information lawsuits have saved tens of millions of White House e-mail spanning from Reagan to Obama, whose Blackberry messages are now saved for posterity.

The George Foster Peabody Award in 1998 recognized our documentary contributions to CNN's *Cold War* series both from the Freedom of Information Act and from the Soviet archives; the Emmy Award in 2005 recognized our "outstanding achievement in news and documentary research"; and the George Polk Award citation (April 2000) called us "a FOIL'ers best friend" and used a wonderful phrase to describe what we do: "piercing the self-serving veils of government secrecy, guiding journalists in search for the truth, and informing us all."

Most pertinent to our discussion here today is our experience with the massive overclassification of the U.S. government's national security information. Later in this testimony I include some of the expert assessments by current and former officials who have grappled with the secrecy system and who estimate that between 50% to 90% of what is classified is either overclassified or should not be classified at all. That reality should restrain us from encouraging government prosecutors to go

after anybody who has unauthorized possession of classified information: such encouragement is an invitation for prosecutorial abuse and overreach – exactly as we have seen in the case of the lobbyists for the American Israel Public Affairs Committee.

The reality of massive overclassification also points us towards remedies for leaks that are the opposite of those on the front burners such as criminalizing leaks. The only remedies that will genuinely curb leaks are ones that force the government to disgorge most of the information it holds rather than hold more information more tightly.

But a rational response to excessive government secrecy will be even more difficult to achieve in the current atmosphere of Wikimania. The heated calls for targeted assassinations of leakers and publishers remind me of the Nixon White House discussions of firebombing the Brookings Institution on suspicion of housing a copy of the Pentagon Papers. It was the earlier leak of the secret bombing of Cambodia that started President Nixon down the path to the Watergate plumbers, who began with righteous indignation about leaks, then moved to black bag jobs and break-ins and dirty tricks, and brought down the presidency. All the while, as the Doonesbury cartoon pointed out, only the American people and Congress were in the dark. One famous strip showed a Cambodian couple standing amid bomb wreckage, and the interviewer asks, was this from the secret bombing? Oh, no, not a secret at all, “I said, look Martha, here come the bombs.”

Few have gone as far as Nixon, but overreaction to leaks has been a constant in recent American history. Almost every president has tied his White House in knots over embarrassing internal leaks; for example, the moment of greatest conflict between President Reagan and his Secretary of State George Shultz was not over the Iran-contra affair, but over the idea of subjecting Shultz and other high officials to the polygraph as part of a leak-prevention campaign. President Ford went from supporting to vetoing the Freedom of Information Act amendments of 1974 because of his reaction to leaks (only to be overridden by Congress). President George W. Bush was so concerned about leaks, and about aggrandizing presidential power, that his and Vice President Cheney’s top staff kept the Deputy Attorney General, number two at Justice, out of the loop on the warrantless wiretapping program, and didn’t even share legal opinions about the program with the top lawyers of the National Security Agency that was implementing the intercepts.

But even with this background, I have been astonished at the developments of the last week, with the Air Force and the Library of Congress blocking the Wikileaks web site, and warning their staff not to even peek. I should have known the Air Force would come up with something like this. The Archive's own Freedom of Information Act lawsuit over the last 5 years had already established that the Air Force created probably the worst FOIA processing system in the entire federal government – the federal judge in our case ruled the Air Force had “miserably failed” to meet the law's requirements. But now, apparently, the worst FOIA system has found a mate in the worst open-source information system? This policy is completely self-defeating and foolish. If Air Force personnel do not look at the leaked cables, then they are not doing their job as national security professionals.

Comes now the Library of Congress, built on Thomas Jefferson's books, also blocking access to the Wikileaks site. On the LC blog, a repeated question has been when exactly are you going to cut off the *New York Times* site too? One might also ask, when will you remove Bob Woodward's books from the shelves?

Official reactions like these show how we are suffering from “Wikimania.” Almost all of the proposed cures for Bradley Manning's leak of the diplomatic cables are worse than the disease. The real danger of Wikimania is that we could revert to Cold War notions of secrecy, to the kind of stovepipes and compartments that left us blind before 9/11, to mounting prosecutions under the Espionage Act that just waste taxpayers' money and ultimately get dropped, and to censorship pressure on Internet providers that emulates the Chinese model of state control rather than the First Amendment. So perhaps a first order of business should be to dissect some of what I call the “Wikimyths.”

1. A document dump.

So far there has been no dump of the diplomatic cables. As of yesterday, there were fewer than 2,000 cables posted on the Web in the Wikileaks and media sites combined, and another 100 or so uploaded each day, not the 251,000 that apparently exist in the overall database as downloaded by Bradley Manning. And even that set of a quarter-million cables represents only a fraction of the total flow of cable traffic to and from the State

Department, simply the ones that State staff considered “reporting and other informational messages deemed appropriate for release to the US government interagency community” (the Foreign Affairs Manual explanation of the SIPDIS tag). According to the editors of *Le Monde* and *The Guardian*, Wikileaks is following the lead of the media organizations on which documents to post, when to do so, and what to redact from the cables in terms of source identities that might put someone at risk. Such behavior is the opposite of a dump. At the same time, an “insurance” file presumably containing the entire database in encrypted form is in the hands of thousands, and Wikileaks founder Julian Assange has threatened to send out the decrypt key, if and when his back is against the wall. So a dump could yet happen of the cables, and the prior record is mixed. A dump did begin of the Iraq and Afghan war logs, but once reporters pointed out the danger to local cooperators from being named in the logs, Wikileaks halted the dump and withheld some 15,000 items out of 91,000 Afghan records.

2. An epidemic of leaks.

While the quantity of documents seems huge (hundreds of thousands including the Iraq and Afghan materials), from everything we know to date, all four tranches of Wikileaks publicity this year have come from a single leaker, the Army private Bradley Manning, who is now behind bars. First, in April, was the helicopter video of the 2007 shooting of the Reuters cameramen. Then came the Iraq and Afghan war logs (highly granular situation reports for the most part) in July and October. Now we see the diplomatic cables from the SIPRNet. Between 500,000 and 600,000 U.S. military and diplomatic personnel were cleared for SIPRNet access, so a security official looking for a glass half full would point out that a human-designed security system with half a million potential error points ended up only with one.

A better contrast would be to compare the proposals for dramatic expansion of the Espionage Act into arresting foreigners, to the simple operational security change that the Defense Department has already implemented. The latter would have prevented Manning from doing his solo downloads onto CD, and we should ask which approach would be more likely to deter future Mannings. State Department officials were gloating last week that no embassy personnel could pull a Manning because State’s version of the SIPRNet wouldn’t allow downloads onto walk-away media like thumb drives or CDs. Defense’s rejoinder was that its wide range of forward

operating bases, equipment crashes from dust storms and incoming fire, and often tenuous Internet connections – certainly compared to the usually cushy conditions inside embassies – meant some download capacity was essential. Now, just as nuclear missile launch requires two operators’ keys, and the handling of sensitive communications intelligence manuals requires “two person integrity,” and the Mormons send their missionaries out in pairs, a SIPRNet download would take two to tango.

3. A diplomatic meltdown.

Headline writers loved this phrase, aided and abetted by official statements like Secretary of State Hillary Clinton’s characterization of the cables’ release as an “attack on America” “sabotaging peaceful relations between nations.” In contrast, the Secretary of Defense Robert Gates played down the heat, in a much more realistic assessment that bears repeating. Gates told reporters two weeks ago, “I’ve heard the impact of these releases on our foreign policy described as a meltdown, as a game-changer and so on. I think these descriptions are fairly significantly overwrought.... Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest.” Most international affairs scholars are calling the cables fascinating and useful, but at least so far nothing in the diplomatic cables compares to the impact on public policy in 2004 from the leak of the Abu Ghraib photographs, or other recent leaks of the existence of the secret prisons, or the torture memos, or the fact of warrantless wiretapping, or even the Pentagon Papers’ contribution to the end of the Vietnam war.

4. Alternatively, no news here.

Wikileaks critics who were not bemoaning a global diplomatic meltdown often went to the opposite extreme, that is to say there was nothing really new in the Bradley Manning cables. The past two weeks’ worth of front-page headlines in the leading newspapers and broadcasts around the world should lay this myth to rest. Folks with more news judgment than we have in this room are continuing to assign stories from the cables, and foreign media in particular are getting an education perhaps more valuable for their understanding of their own countries than of the U.S. Likewise, the blogs are full of lists of stories showing all the things we didn’t know before the cables emerged. The real problem with the modern news media is evident from the fact that there are many more reporters clustered around the British

jail holding Assange, than there are reporters in newsrooms actually reading the substance of the documents. Celebrity over substance every time.

5. Wikiterrorists.

I wish all terrorist groups would write the local U.S. ambassador a few days before they are launching anything – the way Julian Assange wrote Ambassador Louis Susman in London on November 26 – to ask for suggestions on how to make sure nobody gets hurt. I can certainly understand the State Department’s hostile response and refusal to engage with Assange in the kind of dialogue U.S. government officials routinely have with mainstream media, and were already having with the *New York Times* over these particular cables. Given Wikileaks’s prior stance, who in State could possibly have taken at face value the phrase in the November 26 letter which says “Wikileaks will respect the confidentiality of the advice provided by the United States Government” about risk to individuals.

But I wish all terrorist groups would partner up with *Le Monde* and *El Pais* and *Der Spiegel* and *The Guardian*, and *The New York Times*, and take the guidance of those professional journalists on what bombs go off and when and with what regulators. Even to make the comparison tells the story – Wikileaks is not acting as an anarchist group, even remotely as terrorists, but as a part of the media, as publishers of information, and even more than that – the evidence so far shows them trying to rise to the standards of professional journalism.

I was quoted in Sunday’s *New York Times* as saying “I’m watching Wikileaks grow up” as they embrace the mainstream media which “they used to treat as a cuss word.” So far, with only a few mistakes to date, the treatment of the cables by the media and by Wikileaks has been very responsible, incorporating governmental feedback on potential damage, redacting names of sources, and even withholding whole documents at the government’s request. Of course, Assange and his colleagues could revert to more adolescent behavior, since there is the threat out there of the encrypted “insurance” file that would be dropped like a pinata if the organization reaches dire straits. But even then, even if all the cables went online, most of us would condemn the recklessness of such an action, but the fundamental media and publisher function Wikileaks is serving would not change.

6. When the government says it's classified, our job as citizens is to salute.

Actually our job as citizens is to ask questions. I have mentioned that experts believe 50% to 90% of our national security secrets could be public with little or no damage to real security. A few years back, when Rep. Christopher Shays (R-CT) asked Secretary of Defense Donald Rumsfeld's deputy for counterintelligence and security how much government information was overclassified, her answer was 50%. After the 9/11 Commission reviewed the government's most sensitive records about Osama bin Laden and Al-Qaeda, the co-chair of that commission, former Governor of New Jersey Tom Kean, commented that "three-quarters of what I read that was classified shouldn't have been" – a 75% judgment. President Reagan's National Security Council secretary Rodney McDaniel estimated in 1991 that only 10% of classification was for "legitimate protection of secrets" – so 90% unwarranted. Another data point comes from the Interagency Security Classification Appeals Panel, over the past 15 years, has overruled agency secrecy claims in whole or in part in some 65% of its cases.

When two of the CIA's top officers retired and went into business, the *Washington Post's* Dana Hedgpeth asked them what was most surprising about being in the private sector. Cofer Black and Robert Richer responded that "much of the information they once considered top secret is publicly available. The trick, Richer said, is knowing where to look. 'In a classified area, there's an assumption that if it is open, it can't be as good as if you stole it,' Richer said. 'I'm seeing that at least 80 percent of what we stole was open.'" ("Blackwater's Owner Has Spies for Hire," by Dana Hedgpeth, *Washington Post*, November 3, 2007). And this was before the Bradley Manning leaks.

In the National Security Archive's collections, we have dozens of examples of documents that are classified and unclassified at the same time, sometimes with different versions from different agencies or different reviewers, all because the secrecy is so subjective and overdone. My own favorite example is a piece of White House e-mail from the Reagan years when top officials were debating how best to help out Saddam Hussein against the Iranians. The first version that came back from our Freedom of Information lawsuit had large chunks of the middle section blacked out on national security grounds, classified at the secret level as doing serious

damage to our national security if released. But the second version, only a week or so later, had almost no black in the middle, but censored much of the top and the bottom sections as secret. Slide the two versions together and you could read practically the entire document. The punch line is: This was the same reviewer both times, just with almost completely contradictory notions of what needed to stay secret.

The *Associated Press* reported last week (December 9, 2010) that reporter Matt Apuzzo's review of the Bradley Manning cables "unmasked another closely guarded fact: Much of what the government says is classified isn't much of a secret at all. Sometimes, classified documents contained little more than summaries of press reports. Political banter was treated as confidential government intelligence. Information that's available to anyone with an Internet connection was ordered held under wraps for years." The first example AP cited was a cable from the U.S. Embassy in Ottawa briefing President Obama in early 2009 for an upcoming trip to Canada, a cable which "included this sensitive bit of information, marked confidential: 'No matter which political party forms the Canadian government during your Administration, Canada will remain one of our staunchest and most like-minded of allies, our largest trading and energy partner, and our most reliable neighbor and friend.' The document could not be made public until 2019, for national security reasons," the AP reported.

Among other issues raised by the AP reporting is the fact that more than half of the Bradley Manning cables are themselves unclassified to begin with. Why did these items need to be buried inside a system that went up to the secret level? Why couldn't those unclassified cables go up on the State Department's own public Web site? Are they really all press summaries and administrivia? Do they need any further review such as for privacy or law enforcement issues? What objection would the government have to preempting Wikileaks by posting these – that somehow it would be rewarding illicit behavior?

Bringing the reality of overclassification to the subject of leaks, Harvard law professor Jack Goldsmith, who served President George W. Bush as head of the controversial Office of Legal Counsel at the Justice Department, has written, "A root cause of the perception of illegitimacy inside the government that led to leaking (and then to occasional irresponsible reporting) is, ironically, excessive government secrecy." Goldsmith went on, in what was otherwise a highly critical review of the *New York Times'*

coverage of wiretapping during the George W. Bush years (“Secrecy and Safety,” by Jack Goldsmith, *The New Republic*, August 13, 2008), to point out, “The secrecy of the Bush administration was genuinely excessive, and so it was self-defeating. One lesson of the last seven years is that the way for the government to keep important secrets is not to draw the normal circle of secrecy tighter. Instead the government should be as open as possible....”

Goldsmith’s analysis draws on the famous dicta of Justice Potter Stewart in the Pentagon Papers case: “When everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.” In fact, Stewart observed, “the hallmark of a truly effective internal security system would be the maximum possible disclosure” since “secrecy can best be preserved only when credibility is truly maintained.”

Between Goldsmith and Stewart, then, Mr. Chairman, we have a pretty good guide with which to assess any of the proposals that may come before you in the guise of dealing with Wikileaks in these next months. We have to ask, will the proposal draw the circle of secrecy tighter, or move us towards maximum possible disclosure? We have to recognize that right now, we have low fences around vast prairies of government secrets, when what we need are high fences around small graveyards of the real secrets. We need to clear out our backlog of historic secrets that should long since have appeared on the public shelves, and slow the creation of new secrets. And those voices who argue for a crackdown on leakers and publishers need to face the reality that their approach is fundamentally self-defeating because it will increase government secrecy, reduce our security, and actually encourage more leaks from the continued legitimacy crisis of the classification system.

Thank you for your consideration of these views, and I look forward to your questions.

Biography of Thomas Blanton

Tom Blanton is the director (since 1992) of the National Security Archive at George Washington University (www.nsarchive.org), winner of the George Polk Award in April 2000 for “piercing self-serving veils of government secrecy, guiding journalists in search for the truth, and informing us all.” He is series editor of the Archive’s Web, CD-DVD, fiche and book publications of over a million pages of previously secret U.S. government documents obtained through the Archive’s more than 40,000 Freedom of Information Act requests. He co-founded the virtual network of international FOI advocates www.freedominfo.org, and is co-chair of the steering committee of the public interest coalition OpenTheGovernment.org. A graduate of Bogalusa (La.) High School and Harvard University, he filed his first FOIA request in 1976 as a weekly newspaper reporter in Minnesota. He won the 2005 Emmy Award for news and documentary research, for the ABC News/Discovery Times Channel documentary on Nixon in China. His books include *The Chronology* (1987) on the Iran-contra scandal, *White House E-Mail* (1995) on the 6-year lawsuit that saved over 30 million records, and *Masterpieces of History* (2010) on the collapse of Communism in 1989; his articles have appeared in *The New York Times*, *Washington Post*, *Wall Street Journal*, *USA Today*, *Boston Globe*, *Los Angeles Times*, *Slate*, *Foreign Policy*, *Diplomatic History* and in languages ranging from Romanian to Spanish to Japanese to Finnish (inventors of the world’s first FOI law). The Archive relies for its \$3.5 million annual budget on publication royalties and donations from foundations and individuals; the organization receives no government funding and carries out no government contracts.