Secrecy in Our Open Society

Hearing of the House Committee on the Judiciary
On the Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks
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A basic principle of our political order, enshrined in the First Amendment guarantee of freedom of speech and of the press, is that openness is an essential prerequisite of self-governance. Indeed, at the very core of our democratic experiment lies the question of transparency. Secrecy was one of the cornerstones of monarchy, a building block of an unaccountable political system constructed in no small part on what King James the First had called the "mysteries of state." Secrecy was not merely functional, a requirement of an effective monarchy, but intrinsic to the mental scaffolding of autocratic rule.

Standing in diametrical opposition to that mental scaffolding was an elementary proposition of democratic theory: Legitimate power could rest only on the *informed* consent of the governed. Along with individuals at liberty to give or to withhold approval to their government, informed consent requires, above all else, information, freely available and freely exchanged. Official secrecy is anathema to this conception. No one has put this proposition more forcefully than James Madison, who tells us that "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives."

Our country has long operated under a broad consensus that secrecy is antithetical to democratic rule and can encourage a variety of political deformations. Secrecy can facilitate renegade governmental activity, as we saw in the Watergate and the Iran-Contra affairs. It can also be a breeding ground for corruption. Egregious recent cases are easy to tick off.

The potential for excessive concealment has grown more acute as the American national security apparatus expanded massively in the decades since World War II, bringing with it a commensurately large extension of secrecy. In 2008 alone, there were a staggering 23 million so-called "derivative classification" decisions, the government's term for any step "incorporating, paraphrasing, restating, or generating in a new form information that is already classified."

With a huge volume of information pertaining to national defense walled off from the public, secrecy almost inevitably has become haphazard. Arresting glimpses of mis- and overclassification are not hard to uncover. The CIA has disclosed, for example, the total government-wide intelligence budget for 1997, 1998, 2007, and 2008, while similar numbers for both intermediate and earlier years remain a state secret. This seems entirely capricious.

Given the massive secrecy, and given our political traditions, it can hardly come as a surprise that leaking is part and parcel of our system of rule. Not a day goes by in Washington without government officials sharing inside information with journalists and lobbyists in off-the-record briefings and in private discussions over lunch. Much of the material changing hands in this fashion winds up getting published. A study by the Senate Intelligence Committee counted 147 separate disclosures of classified information that made their way into the nation's eight leading newspapers in a six-month period alone.

As these high numbers indicate, leaks to the press are a well-established informal practice. They enable policy makers to carry out any one of a number of objectives: to get out a message to domestic and foreign audiences, to gauge public reaction in advance of some contemplated policy initiative, to curry favor with journalists, and to wage inter- or intra-bureaucratic warfare. For better or worse, leaking has become part of the normal functioning of the U.S. government. And for better or worse, leaking is one of the prime ways that we as citizens are informed about the workings of our government.

But if openness is the default position we would all prefer in a self-governing society, it cannot be unlimited. Secrecy, like openness, is also an essential prerequisite of governance. To be effective, even many of the most mundane aspects of democratic rule, from the development of policy alternatives to the selection of personnel, must often take place behind closed doors. To proceed always under the glare of public scrutiny would cripple deliberation and render government impotent.

And when one turns to the most fundamental business of democratic governance, namely, self-preservation, the imperative of secrecy becomes critical, often a matter of survival. Even in times of peace, the formulation of foreign and defense policies is necessarily conducted in secret. But this is not a time of peace. Ever since September 11, the country has been at war. And we are not only at war, we are engaged in a particular kind of war—an intelligence war against a shadowy and determined adversary. The effectiveness of the tools of intelligence—from the recruitment of agents to the capabilities of satellite reconnaissance systems to the interception of terrorist communications—remains overwhelmingly dependent on their clandestine nature. It is not an overstatement to say that secrecy today is one of the most critical tools of national defense.

The leaking of secrets thus can fundamentally impair our ability to protect ourselves. The various WikiLeaks data dumps of the last few months are a vivid case in point. There is a widespread recognition that the massive releases of classified information have injured the security of the United States. Indeed, thanks in part to the march of technology, we have on our hands what might be called WMDs, weapons of mass disclosure, leaks so massive in volume and so indiscriminate in what they convey, that it becomes difficult to assess the overall harm, precisely because there are so many different ways for the harm to occur. Secretary of State Hillary Clinton has condemned WikiLeaks for "endangering innocent people" and "sabotaging the peaceful relations between nations on which our common security depends." Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, has stated that WikiLeaks might already have blood on its hands. Secretary of Defense Robert Gates, responding to the release of classified military field reports this past summer, called the

consequences "potentially severe and dangerous" for our troops and Afghan partners.

But the WikiLeaks phenomenon is hardly the only significant and damaging leak of the recent era. To take just one of several examples readily at hand, the 9/11 Commission had singled out the tracking of terrorist finances as one of the weak points in U.S. intelligence that had allowed the Sept 11 plot to succeed. After 9/11, a top secret joint CIA- Treasury Department program was set in motion to monitor the movement of al Qaeda funds via access to the computerized records of a Belgian financial clearing house known as SWIFT. But In June 2006, the *New York Times* published a front-page story revealing the existence of the intelligence gathering effort.

The *Times* story itself noted that the monitoring had achieved significant successes, including providing information leading to the arrest of Hambali, the top operative in that al Qaeda affiliate in Southeast Asia behind the 2002 bombing of Bali in Indonesia. By revealing details of the secret program, the *Times* telegraphed to al Qaeda one of our most important means of tracking its plans. Both leading Republicans and Democrats in Congress, and ranking career intelligence officials said that the leak prompted al Qaeda operatives to move funds in ways far less easy for the U.S. government to track. In this connection, it is quite notable that the al Qaeda and the Taliban are now making extensive use of such means of moving money as untraceable money-grams, hawala, and couriers. Our adversaries do pay attention to what we reveal to them.

The *Times* published the SWIFT story against the strenuous objections of government officials, Republican and Democratic alike. It has never offered a convincing justification for doing so. Its own ombudsman and its chief counsel both subsequently disavowed the decision. Eric Lichtblau, one of the two reporters who wrote the SWIFT story, offered his own rationale for its publication, explaining that it was, “above all else, an interesting yarn.” It is difficult to imagine a more trivial justification for a step of such gravity.

Sometimes it takes many years for the damage from such interesting yarns to make itself felt. In my recent book, *Necessary Secrets: National Security, the Media, and the Rule of Law*, I explored an older leak—the so called Black Chamber Affair—that contributed significantly to the success of the Japanese surprise attack on Pearl Harbor. In 1931 a retired American cryptographer by the name of Herbert O. Yardley, out of a job in the Great Depression and having fallen on hard times, published a book called *The American Black Chamber* that laid bare the entire history of American codebreaking efforts, including our prior successes in cracking Japanese codes.

Here in the United States, Mr. Yardley's book was praised highly in some quarters of the press. As one leading publication wrote in a typical vein, "Simply as entertainment, this exposé is well worth the price." In Japan, on the other hand, the book caused an uproar about the laxity with which codes had been constructed. One of the consequences of the uproar was that the Japanese military infused new funds into research on cryptographic security. Within three years they had developed a machine-generated cipher, a precursor to the famously complex Purple code machine. Some sensitive Japanese communications were no longer transmitted over the airwaves even in encrypted form. Instead worldwide courier system was introduced to ensure their secure delivery.

We did not suffer the consequences of any of all this activity for a decade, but in the months before Pearl Harbor, one of the ramifications of Mr. Yardley's book was that the United States was not able to read crucial Japanese military communications, and we missed key warning signs that Pearl Harbor was going to be attacked.

Informing our adversaries of our capabilities is the most direct form of damage caused by leaking. But this hardly exhausts the universe of the kinds of harm that leaks of secret information can cause. Let me mention several others, especially as they impinge today on conduct on the war on terrorism.

For one thing, leaks significantly impact our ability to engage in exchanges of information with allies and adversaries alike. Even routine diplomatic

discourse becomes impossible if both foreign and American officials labor in fear that their confidential remarks are to going to end up on the front page of the *New York Times* via an outfit like WikiLeaks. Even more dangerous is the impact on intelligence sharing. In any particular instance in which information gathered by an ally is particularly sensitive, foreign intelligence officials can be quite reluctant to share it with our government if it will result in a headline that might compromise their own sources and methods, and possibly lead to the deaths of informants and agents.

For another thing, leaks tend to cripple our deliberative and decision-making processes. We have vast national-security bureaucracies filled with leading experts on all manner of questions. And yet whenever important decisions are taken, ranking officials almost always conclude that it essential to push their underlings away as far as possible, lest someone in the bowels of the bureaucracy, for whatever motive, places a telephone call to a reporter and torpedoes the policy. American decisionmakers are thus compelled to take crucial decisions while in effect groping in the dark, with results that often times speak for themselves.

And for yet another thing, leaks constrict the arteries by which information is circulated across and within the national- security machinery of the U.S. government. The 9/11 Commission pointed to a dearth of information sharing among government agencies as one of the factors that led to al Qaeda's terrible achievement in penetrating our defenses. Remedial measures taken after September 11 have allowed information to flow more freely to where it needs to go, although bottlenecks still exist. The Pentagon, for its part, has succeeded in pushing raw intelligence down to the war-fighters on the battlefield so that it can actually be used. But with greater access came greater risks. One of those risks turned up in the person of Pfc. Bradley Manning, who seems to be the culprit who turned over vast quantities of information to WikiLeaks. That breach has increased the pressure to tighten the information spigot, undoing some of the important gains in our counterterrorism efforts garnered by post 9/11 reforms.

Finally, leaking is an assault on democratic self-governance itself. We live in a polity that has an elected president and elected representatives. Leaking is a way in which individuals elected by no one and representing no one can use their privileged access to information to foist their own views on a government chosen by the people.

There are two different kinds of perpetrators engaged in this assault and they operate under very different ethical and legal strictures. On one side are so-called whistleblowers, who pass along secrets from within the national-security apparatus to journalists. Somewhere upward of 2.4 million Americans hold security clearances. A population that size will always contain a significant quotient of individuals disaffected for one or another reason. The power to leak on a confidential basis offers any one of the 2.4 million a megaphone into which he or she can speak while wearing a mask. Often acting from partisan motives or to obtain personal advancement, and almost always under the cover of anonymity, such whistle-blowers are willing to imperil the nation but not their careers.

The other face of the assault on democratic self-government comes from journalists, who operate in tandem with the whistleblowers, and claim protection to publish whatever they would like under the banner of the First Amendment. In publishing leaked materials, journalists indefatigably demand openness in government and claim to defend the people's "right to know." But along with the public's "right to know," constantly invoked by the press, there is also something rarely spoken about let alone defended: namely the public's right *not* to know. Yet when it comes to certain sensitive subjects in the realm of security, the American people have voluntarily chosen to keep themselves *un*informed about what their elected government is doing in their name. The reason why we choose to keep ourselves uninformed is not an enigma. It is obvious. We entrust our government to generate and to protect secrets, secrets that are kept from us, because what we know about such matters our adversaries will know as well. If we lay our secrets bare and fight the war on terrorism without the tools of intelligence, we will succumb to another attack.

Norman Pearlstine, the chief executive of Time Inc, says that "when gathering and reporting news, journalists act as surrogates for the public." Pearlstine's observation can be true. But when journalists reveal secrets necessary to secure the American people from external enemies, a converse observation can be true. In that event, journalists are not surrogates for the public but usurpers of the public's powers and rights.

Reporters and editors regard themselves as public servants, but they suffer from a tendency to forget that they are private individuals, elected by no one and representing no one. They operate inside private corporations which are themselves not at all transparent. Indeed, the putative watchdogs of the press, ever on the lookout for the covert operations of government, can themselves be covert operators, with agendas hidden from the public. The press plays an indispensable role in our system as a checking force, but its practitioners can and sometimes do wield their power—including the power to disclose government secrets—for political ends of their own choosing.

That is not the only point of conflict between the press and the public, for newspapers are also profit-seeking institutions. Every day of the year, journalists delve into the potential and real financial misdeeds and conflicts of interest besetting corporate America. But newspapers, curiously, seldom if ever delve into the potential and real conflicts of interest besetting journalism, particularly in the area of publishing sensitive government secrets. Or perhaps it is not so curious. For journalists operate inside a market economy in which financial rewards accrue not just to news corporations and their shareholders but also to they themselves. A Pulitzer Prize brings immense prestige in the profession, and a $10,000 check, a sum almost always matched by news organizations with generous raises and/or bonuses. And then of course there is a book market in which discussion of secret programs can generate hundreds of thousands of dollars in royalties. Lecture fees can add tens of thousands of dollars more. The incentives to cast aside scruples about injury to national security, injury that is seldom immediately apparent, and lay bare vital secrets can be powerful, indeed, irresistible.

At the end of the day, we are presented with two conflicting positions: on the one hand, leaking is a necessary and widespread practice inside our democracy. On the other hand, it is fundamentally anti-democratic and it can cause great harm. Both views are right and we are faced with a contradiction. How can the tension between these two very different faces of the phenomenon be reconciled?

One pathway through the contradiction is by looking at the legal framework in which the leaking occurs. For law is not just a mechanical set of rules and sanctions, but also a moral code by which conduct can be considered and judged.

There are two classes that have to be considered here: leakers and those who disseminate information provided by the leakers to a mass audience.

Leakers are almost in every instance, except when they possess the actual legal authority to declassify information, breaking the law. Everyone who works with classified information is in effect being entrusted by the public to safeguard the secrets they encounter. As a condition of employment, they are asked to sign an agreement pledging to observe the laws protecting those secrets. The agreement reads in part:

> I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may

> disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information. … I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws.

Nothing about this promise is unclear. No one who affixes his name to this nondisclosure agreement is compelled to do so; government officials sign it of their own free will.

What is more, officials who uncover illegal conduct in the government are by no means bound by their signature to keep silent and permit violations of law to continue. Congress has enacted "whistleblower protection acts" that offer clear and workable procedures for civil servants to report misdeeds and ensure that their complaints will be duly and properly considered. When classified matters are at issue, these procedures include direct appeals to the Justice Department and to members of the intelligence committees in Congress. They emphatically do not include blowing vital secrets by disclosing them to al Qaeda and the rest of the world via WikiLeaks or the news media.

The rules and laws governing leakers are quite clear. The same, alas, cannot be said regarding those who disseminate leaked information in the media. Here there are two radically opposing views.

On one side there is the position put forward by journalists, who maintain that the First Amendment gives the press an absolute right to publish whatever government secrets it wants to publish. Bill Keller, executive editor of the *Times*, says that the Founding Fathers, in opening the Bill of Rights with the First Amendment, "rejected the idea that it is wise, or patriotic to surrender to the government important decisions about what to publish." This absolutist view of the First Amendment is widespread among journalists. They say that the words of the First Amendment are unequivocal: "Congress shall make no law . . . abridging the freedom of speech, or of the press." "No law" means "no law," are what journalists and their defenders repeat over and over again.

But the framers were hardly the apostles of libertarianism that they are today made out to be by Mr. Keller and many others. More than anything else, the First Amendment was conceived of by the framers as a continuation of the Blackstonian understanding embedded in British common law, as a prohibition on prior restraint on the press. Censorship was what the framers aimed to forbid. But laws punishing the publication of certain kinds of material after the fact were something else again. Joseph Story, the preeminent 19th century interpreter of the Constitution put this understanding most forcefully when he wrote that the idea that the First Amendment was "intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please is a supposition too wild to be indulged by any rational man."

And indeed our courts have long held, and the press itself has long readily accepted, that the sweeping words of the First Amendment are fully compatible with legal restrictions on what journalists can and cannot say in print. Statutes forbidding certain kinds of commercial speech and punishing libel, to which virtually no one inside the media ever objects, have long been held to be fully constitutional abridgements of freedom of the press.

But in the vital area of national security, journalists nevertheless insist that they and they alone are the final arbiters of what can and cannot be published. And they act upon this insistence, publishing national-security secrets on some occasions with little or no regard for the consequences. As Dean Baquet, the Washington bureau chief of the *New York Times*, has put it, the press is free to publish whatever it wishes "no matter the cost."

But Mr. Baquet's understanding is not in line with either our Constitution or our laws. Congress—that is, the American people, acting through their elected representatives—has enacted a number of different statutes that prohibit the publication of certain kinds of national-security secrets. Thanks to the Valery Plame-Judith Miller affair, we are most familiar these days with a 1982 law, the Intelligence Identities Protection Act, that makes it a felony to disclose the identity of undercover operatives working for the CIA or other U.S. intelligence agencies. Congress has also carved out special protection for secrets concerning

atomic weapons and communications intelligence. The 1917 Espionage Act offers a more general blanket protection to all closely held information pertaining to national defense.

These laws are on the books, and they have been upheld by the Supreme Court. But the stark fact is that they are not being enforced. Remarkably enough, despite how ubiquitous leaking is in our system—there have been only three successful prosecutions of leakers in our entire history. The prosecution of leakers is rare because they are exceptionally difficult to catch. Almost every president beginning with Richard Nixon has launched investigations designed to ferret out leakers, but law enforcement almost always comes up empty. The simple fact is that typically with respect to any given leaked secret, too many people, sometimes hundreds, have had access to it, and the tools of investigation, including polygraph interviews, simply do not yield results. The problem of controlling the illicit flow of information out of the bureaucracies remains unresolved.

As for prosecutions of the press, they have been rarer still than the prosecution of leakers. Indeed, there have been no successful convictions in our entire history and only one attempted prosecution. That attempted prosecution occurred during World War II, and is highly relevant today. It was directed against the *Chicago Tribune*, then published by Colonel Robert McCormick, an ardent isolationist, who seemed to hate Roosevelt far more than he hated either Hitler or Hirohito.

In 1942, in the immediate aftermath of the Battle of Midway, the *Chicago Tribune* published a story strongly suggesting that the decisive American naval victory at Midway owed to the fact that the United States had been successfully reading Japanese codes. Shocked officials in the War Department in Washington sought to throw the book at Col. McCormick and a grand jury was empanelled to hear evidence and bring charges. When it turned out that the Japanese had not changed their codes in reaction to the news story, the War Department asked the Justice Department to drop the proceedings lest further attention be called to a story the Japanese had seemingly ignored.

But there can be no blinking the gravity of that breach. If the United States, thanks to the *Chicago Tribune*, had lost its window into Japanese military communications, the war in the Pacific would still have ended in certain Japanese defeat. That outcome was all but assured by the atomic bomb. But three years were to elapse before the atomic bomb was ready for use. In the interim, without the priceless advantage of knowing Tokyo's every next move in advance, thousands—tens of thousands—of American soldiers and sailors would have needlessly died.

Since 1942, we have never had a subsequent prosecution. Perhaps the major reason is that the press has for the most part, until quite recently, been fairly restrained and responsible. Consider, for example, the *New York Times*'s decision in 1971 to publish excerpts of the top-secret collection of documents provided to it by Rand Corporation researcher Daniel Ellsberg. By any measure, that was the most sensational leak in all of American history up to its time. But the Pentagon Papers case was sensational not so much because of the sensitive nature of the secrets disclosed but primarily because Richard Nixon tried, unsuccessfully, to get a prior restraint from the courts to stop the presses.

In the Pentagon Papers case, the secrets at issue were nothing at all like the ultra-sensitive material published by the *Chicago Tribune*. The Pentagon Papers became public during the Nixon administration, but they had been compiled during the Johnson administration. By 1971, when Mr. Ellsberg turned the Pentagon Papers over to Neil Sheehan of the *New York Times*, not one of the documents in the Pentagon Papers case was less than three years old. Though the documents bore a top-secret stamp, the passage of time had rendered them nearly innocuous. No ongoing intelligence operations or war plans were disclosed.

This brings us back to our current dilemmas. For the fact is that the material being published today by WikiLeaks and by our leading newspaper is closer to what the *Chicago Tribune* published during World War II than to what was contained in the Pentagon Papers. The secrets that are being revealed today are not historical in nature; they involve ongoing diplomatic, military and intelligence programs.

Such conduct brings urgently to the fore a fundamental question raised by the phenomenon of leaking: namely, who in the final analysis gets to decide what can be kept secret and what cannot?

It is not question susceptible to a glib answer or an easily formulated rule, for the crux of the matter is that the public interest in transparency, and a vigorous press that ensures transparency, is diametrically opposed to the public interest in secrecy.

On the one hand, we live now in a world in which small groups of remorseless men are plotting to strike our buildings, bridges, tunnels, and subways, and seeking to acquire weapons of mass destruction that they would not hesitate to use against our cities, taking the lives of hundreds of thousands or more. To contend with that grim reality, our national-security apparatus inexorably generates more secrets, and more sensitive secrets, and seemingly exercises weaker control over those same vital secrets than ever before.

Yet on the other hand, we cannot lose sight of facts that I noted at the outset, namely, that our national security system is saddled with pervasive mis- and overclassification that remains entrenched despite universal recognition of its existence and numerous attempts at reform.

With the two desiderata of set in extreme tension, it would hardly make sense for the Justice Department to prosecute the press on each and every occasion when it drops classified information into the public domain. Such an approach would be absurd, a cure that would drain the lifeblood from democratic discourse and kill the patient.

A much more reasonable approach would be to continue to live with the ambiguities of our current practices and laws. Vigorously prosecuting and punishing leakers is an obvious place to begin. It is an irony that it is Barack Obama, the President who came into office pledging maximum transparency in government, who is now carrying out such a policy. His administration has thus

far launched four leak prosecutions, more than all preceding American presidents combined.

As for the press, a first step is to try to alter the political climate in which irresponsible tell-all-and-damn-the consequences journalism flourishes. The WikiLeaks case, in which documents have been released wholesale with consequences that cannot yet even be imagined, has already caused a change in attitudes , making it clear to the public that not all so-called whistle-blowing is commendable, and that in extreme cases, the dissemination of secrets can merit prosecution.

The press does and should have an essential checking role on the government in the realm of foreign affairs, national defense, and intelligence. And that checking role, if it is to be more than a charade, must extend, as it now does, into the inner workings of the U.S. national security apparatus where secrecy is the coin of the realm. But in ferreting out and choosing to report secrets, the press has to exercise discretion.

Newspaper editors are fully capable of exercising discretion about sensitive matters when they so choose. A dramatic example came to light in 2009 when the *New York Times* revealed that it had succeeded for a period of six months in suppressing news that one of its reporters, David Rohde, had been kidnapped in Afghanistan by the Taliban. Indeed, the editors seemed to exercise the art of concealment with greater success than the U.S. government's own secrecy apparatus is often capable of achieving. Neither the *Times* nor its industry competitors, who readily agreed to gag themselves at the *Times*'s request, published a word about the missing journalist until Mr. Rohde escaped his captors and made his way to safety. Bill Keller's explanation was: "We hate sitting on a story, but sometimes we do. I mean, sometimes we do it because a military or another government agency convinces us that, if we publish information, it will put lives at risk."

Mr. Keller deserves some measure of praise for that. But such discretion cannot be—and under our current laws is not—a strictly voluntary affair. Despite Mr. Keller's claims, the *Times* and other leading newspapers have been

far from responsible in their handling of secrets. But even if they were models of rectitude, the public would still be left without recourse in the face of other lesser publications that are not such models, or outfits like WikiLeaks.

Thus, even as the press strives to carry the invaluable function of delving into government secrets, this does not mean it should be exempt from the strictures of law. What it does mean is that in enforcing the law, the executive must also exercise judgment and seek to punish only the publication of those secrets that truly endanger national security while giving a pass to all lesser infringements.

Just as there must be editorial discretion, so too must there be prosecutorial discretion. It is right and proper that jaywalkers are not ticketed for crossing little-trafficked roads. It is also right and proper that they are arrested for wandering onto interstate highways. When newspaper editors publish secrets whose disclosure is arguably harmless—say, for example, the still-classified CIA budget for fiscal year 1964—or secrets that conceal abuses or violations of the law, they should trust that, if indicted by a wayward government, a jury of twelve citizens would evaluate the government's ill-conceived prosecution and vote to acquit. On the other hand, if newspapers editors or an organization like WikiLeaks disclose a secret vital to our national security—and have no justification for doing so beyond a desire to expose for exposure's sake—they should also be prepared to face the judgment of a jury of twelve citizens and the full wrath of the law. Journalists and their defenders, and WikiLeaks and its defenders, find that view anathema. They want unlimited freedom and accountability to no one but themselves. Their behavior raises the fundamental question of whether the free society built by the Founding Founders can defend itself from those who would subvert democracy by placing themselves above or outside the law.

I thank the members of the Committee for addressing the difficult and important issues involved in maintaining secrets in an our open society.