

UNITED STATES

v.

JULIAN PAUL ASSANGE

REPORT OF CAREY SHENKMAN

RE: US ESPIONAGE ACT OF 1917

AND

COMPUTER FRAUD AND ABUSE ACT

I have been asked by the lawyers representing Julian Assange, Birnberg Peirce, to provide a report in respect of the request by the US government for his extradition on charges under the US Espionage Act of 1917 and under the Computer Fraud and Abuse Act. I have been asked to provide a report on the following issues:

- (i) A legislative history of the US Espionage Act from its first enactment in 1917.
- (ii) Its application to publication of secrets under successive US administrations.
- (iii) To comment on its particular application in light of the US extradition request for Mr Assange in 2019.
- (iv) To comment upon any extension of the Espionage Act in its application to Mr Assange.
- (v) I am asked to comment similarly upon the history and application of the Computer Fraud and Abuse Act.
- (vi) I am asked to comment upon critiques and analyses applied to the content and application of either or both Acts above.

The Legislative and Political History of the Espionage Act of 1917 and Its Application To Publication of Secrets

World War I

1. Following the U.S. declaration of war in World War I, the administration of President Woodrow Wilson introduced a multi-faceted bill that would become the Espionage Act of 1917.¹ The term ‘espionage’ was a misnomer. Although the law allowed for the prosecution of spies, the conduct it proscribed went well beyond spying. Indeed, the

¹ An earlier law, the Defense Secrets Act of 1911, was a spiritual precursor to the Espionage Act of 1917. The 1911 Act was broadly purposed and could criminalize any acquisition by newspapers of defense information. However, concerns for freedom of the press featured prominently in debate in 1917 while they were nearly nonexistent prior. Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Columbia Law Review 929, 939-941 (1973)

Espionage Act would become the principal tool for what President Wilson dubbed his administration's "firm hand of stern repression" against opposition to U.S. participation in the war.² Wilson declared a no-tolerance policy for those who "inject the poison of disloyalty into our most critical affairs."³ When the Espionage Act was proposed, Wilson believed that disloyal Americans "had sacrificed their right to civil liberties."⁴ Gilbert E. Roe, a leading First Amendment lawyer associated with the Free Speech League, the most important civil liberties organization during the period between the Civil War and the First World War, expressed alarm regarding the Espionage bill. He wrote in an April 7, 1917 letter: "There are worse calamities even than war. One of them would be the destruction of free speech and of free press—both of which have been much restricted even in times of peace."⁵ The law's indefinite language made it a "vehicle for oppression."⁶ "You do not need this statute," Roe concluded, "You do not need any statute like it in this country."⁷ One Senator characterized the law as "unconstitutional, un-American, unwise, and unnecessary," continuing that "no one can foresee all the evils to flow from it."⁸

2. The proposed legislation was debated extensively in Congress in April and May of 1917. Wilson contended that his "authority to exercise censorship over the press . . . is absolutely necessary to the public safety."⁹ A press censorship provision in the original bill prompted the strongest criticism. It gave the president broad authority to declare unlawful in wartime the publication of any information "of such character that it is or might be useful to the enemy."¹⁰ One Congressman referred to the provision as a "vicious precedent," another as "an instrument of tyranny."¹¹ The provision was also roundly criticized by the press and its leading trade organization, the American Newspaper Publishers' Association. The Association declared that the provision "strikes at the

² Woodrow Wilson, Address delivered at Joint Session of the Two Houses of Congress, *April 2, 1919*, 65th Cong., 1st Sess., Senate Doc. No. 5, Serial No. 7264, Washington, D.C., 1917, at 3-8.

³ Geoffrey R Stone, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* (NY: Norton, 2004) at 137.

⁴ Stone, 137.

⁵ David M. Rabban, *Free Speech in Its Forgotten Years* (NY: Cambridge University Press, 1998) at 305-306.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Stephen M. Kohn, *American Political Prisoners: Prosecutions under the Espionage and Sedition Acts* (Westport, CT: Praeger, 1994) at 8.

⁹ Stone at 149.

¹⁰ *Ibid.* at 147-148.

¹¹ *Ibid.*

fundamental rights of the people” and that “in war, especially, the press should be free, vigilant, and unfettered.”¹² Congress rejected the President’s press censorship provision, and narrowed two other sections of the administration’s bill limiting freedom of expression. In the first instance, open-ended language against instigating “disaffection” in U.S. military forces was replaced with a prohibition against causing “insubordination, disloyalty, mutiny, or refusal of duty.”¹³ In the second, language prohibiting “treasonable” and “anarchistic” publications was removed from a section defining the postmaster general’s authority to ban anti-war publications from the mails.¹⁴

3. The Espionage Act of 1917, passed by Congress on June 15, 1917, and further amended eleven months later, was expansive in scope. Despite the removal of the most egregious passages of the original bill, the Act threatened First Amendment rights more than any federal statute passed in the previous century. Its full title is noteworthy: “An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.”¹⁵ Whilst the Espionage Act established harsh penalties for spying for a foreign enemy in wartime and in light of U.S. entry into the war addressed such matters as U.S. control of arm shipments and its ports, the Act also reflected the government’s desire to control information and public opinion regarding the war effort.¹⁶ It embraced broad proscriptions against the possession and transmission of information related to national defense; established severe penalties for criticism of the war; contained conspiracy provisions; and established a censorship system for the press. The original legislation was not demarcated as wartime emergency legislation; key provisions would continue to apply in times of peace as well as war, and remain in force a century after their enactment.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.* at 150-151.

¹⁵ Espionage Act of 1917, Chap. 30, 65th Cong, Sess I, 1917, at 217.

¹⁶ The Espionage Act captures three categories of individuals: traditional spies (e.g. individuals working at the behest of a foreign power), government insiders who disclose secrets to the press, and members of the general public and media (e.g. individuals with no obligation to maintain secrets). While there is a body of law interpreting the Act as applied to the first category, this analysis focuses on applications of the law to the latter two categories of individuals.

4. The first section would come to have significant implications for secrecy in government, from the rudimentary communications technology of the early 20th century to the digital age. Title I of the Act came under the rubric of Espionage. It applied to persons who obtained information “respecting the national defense with intent or reason to believe that the information . . . is to be used to the injury of the United States, or to the advantage of any foreign nation.”¹⁷ A long list of prohibited types of information followed, ranging from maps and codes to the location of wireless stations and military bases. A critical passage of Title I, Section 1, targeted any person in possession of sensitive defense-related documents, whether legally or illegally, who “willfully communicates or transmits . . . the same to any person not entitled to receive it.”¹⁸ The characterization of illegal recipients of such information was open-ended, not limited to secret agents and foreign governments. This language would, years later, become the basis of what became § 793 of the Act and lead to prosecution of government employees who leaked classified information to the press. A conspirator who “induces or aids another” in transmitting secret defense information would be considered equally culpable. Violation of this section carried penalties of up to \$10,000 in fines and imprisonment for two years.
5. Title I, Section 3 criminalized seditious libel and provided a means to repress dissent. It barred communication of information or views by members of the general public deemed to be a hindrance to the war effort:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever...shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.¹⁹

6. This section prompted the overwhelming majority of Espionage Act indictments during the First World War. The Act also authorized a censorship system. Title XII gave the Postmaster General authority to ban from the mails publications that violated any provision of the Espionage Act. Section 2 stipulated that “Every letter, writing, circular, postal card, picture, print, engraving, photograph, Newspaper, pamphlet, book, or other

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 218.

¹⁹ *Ibid.* at 219.

publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.”²⁰ Persons failing to abide by rulings banning a given publication from the mails faced up to \$5,000 in fines and five years’ imprisonment. Emily S. Rosenberg observed that the government’s ability to block virtually all published material directed to a mass audience through the postal system “provided a major weapon of informational control.”²¹

7. For the first time since the discredited Sedition Act of 1798—a period encompassing the War of 1812, the Mexican War, the Civil War and the Spanish-American War—Congress passed a seditious libel law. The passage was followed shortly after by an amendment known as the Sedition Act of 1918 which took the provisions of the 1917 Act even further.²² John Lord O’Brian, Assistant Attorney General and head of the War Emergency Division, successfully lobbied against adding language protecting free expression that was truthful and made in good faith, claiming it would “greatly decrease the value of the espionage act as a deterrent of propaganda.”²³ The Sedition Act amended Title I, Section 3, of the Espionage Act to cover the expression of opinion by radical critics of American society as well as by opponents of U.S. participation in the war. The amendment punished with up to twenty years’ imprisonment those who uttered or wrote “disloyal” language “about the form of government of the United States” as well as “any language intended to bring the form of government of the United States” into “disrepute.”²⁴ The 1918 amendment, which explicitly coupled the Espionage Act in terms

²⁰ *Ibid.* at 230.

²¹ “The U.S. Government and the Communications Revolution during World War I,” in Kenneth Osgood and Andrew K. Frank (eds.), *Selling War in a Media Age: The Presidency and Public Opinion in the American Century* (Gainesville, FL: University Press of Florida, 2010) at 55.

²² The Sedition Act of 1918, Chap. 75, 65th Cong. Sess. II, Ch. 75 at 553, May 16, 1918.

²³ H.C. Peterson and Gilbert C. Fite, *Opponents of War, 1917-1918* (Seattle: University of Washington Press, 1957) at 219.

²⁴ The Sedition Act of 1918, Chap. 75, 65th Cong. Sess. II, Ch. 75 at 553, May 16, 1918. Punishment was extended to anyone who “...when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous, abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States...or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States...into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies...and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States...”

of seditious libel, has been called “the most repressive legislation in American history.”²⁵ Under the climate of the Espionage Act, vigilante groups took dissidents from their homes to force them to publicly profess their loyalty, sometimes beating and tar-and-feathering them.²⁶ These vigilante groups were sanctioned by the Department of Justice.²⁷ While the Sedition Act was ultimately repealed, the mechanisms of institutional enforcement it introduced and climate of political repression continued on with the Espionage Act.

8. From the outset, the Act was applied to targets both small and large. For instance it was applied to Robert Goldstein, producer of a film entitled *The Spirit of '76* (a silent epic film about the war of independence, a sub plot about efforts to install King George’s mistress as “Queen of America,” and graphic images of British atrocities. The film opened just weeks after U.S. entry into the war). Goldstein was charged under the newly minted Espionage Act with attempting to harm the war effort by portraying the U.S.’s chief ally in a critical light, and sentenced to 10 years imprisonment.²⁸
9. If the trial of Robert Goldstein seemed arbitrary, the prosecution of William “Big Bill” Haywood was not. For the business community and government officials, the radical labor leader was one of the most hated and feared figures in the nation. His organization, the International Workers of the World (the IWW, or Wobblies), was threatening to the Wilson administration. Haywood was tried, together with one hundred other IWW leaders *en masse*, for violation of the Espionage Act. All were found guilty, and Haywood received a 20-year sentence. Languishing in poor health, he passed away in 1928.
10. The August 1917 issue of *The Masses* was banned from the mails. At issue were four cartoons and four texts deemed to violate all three clauses of Title 1, Section 3, of the

²⁵ Stone at 185.

²⁶ Peterson and Fite at 196-203.

²⁷ The American Protective League (APL), a semi-private organization of citizens a quarter million strong, conducted surveillance of suspected German sympathizers, draft dodgers and political radicals. It emerged as a de facto political police force. Attorney General Thomas Gregory sanctioned the APL as "Organized with the Approval and Operating under the Direction of the United States Department of Justice, Bureau of Investigation." Michael Linfield, *Freedom Under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press, 1990) at 38.

²⁸ Robert J. Goldstein, *Political Repression in America: From 1870 to the Present* (Cambridge, MA: Schenkman, 1978) at 113.

Espionage Act. An example of one cartoon entitled “Liberty Bell” depicted the symbol of American liberty broken into fragments.²⁹

11. At the time the Socialist Party was the third largest political party in the United States, and its presidential candidate, Eugene Debs, was sentenced to ten years imprisonment over a speech in Canton, Ohio which was called “the most famous protest speech of its time.”³⁰ He had previously warned, “Free speech, free assemblage and a free press, three foundations of democracy and self-government, are but a mockery under the espionage law administered and construed by the official representatives of the ruling class.”³¹ By the time Debs’ appeal was rejected by the Supreme Court, the war was over. He continued to be nominated as a presidential candidate, and received 919,000 votes from federal prison. In December 1921, President Warren Harding commuted Debs’ prison sentence. Wilson exclaimed that “Debs should never have been released. Debs was one of the worst men in the country. He should have stayed in the penitentiary.”³²
12. The period comprising the passage of the Espionage Act of 1917 and the immediate aftermath is regarded today as one of the most politically repressive in the nation’s history. While the Great War ultimately ended and many principals convicted under the Act enjoyed pardons and commutations of their sentences, the law itself was to remain on the statute books for the century to come.
13. Prosecutions under the Espionage Act following its passage overwhelmingly targeted political opposition to World War I. Indeed, the first nearly 2,000 prosecutions under the Act of more than 2,500 defendants were made on account of their political speech.³³ Federal prosecutors considered the mere circulation of anti-war literature a violation of the Espionage Act.³⁴ “The suppression of the malignant few was the goal of the

²⁹ William L. O’Neill (ed.), *Echoes of Revolt: The Masses 1911-1917* (Chicago, Quadrangle Books, 1966) at 22-23.

³⁰ Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* Urbana and Chicago: University of Illinois Press, 1982) at 291.

³¹ David L. Sterling, “In Defense of Debs: The Lawyers and the Espionage Act Case, *Indiana Magazine of History*, Vol. 83, No. 1 (March 1987) at 18.

³² John Milton Cooper, Jr., *Woodrow Wilson: A Biography* (NY: Knopf, 2009) at 573.

³³ The prosecutions measured “utterances or publications alleged to obstruct the conduct of the war.” American Civil Liberties Union, War-Time Prosecutions for Speech and Publications, July 1945, available at Princeton University ACLU Records Collection MC001, Folder 13, Box Addendum 2-3.

³⁴ Ted Galen Carpenter, *The Captive Press: Foreign Policy Crises and the First Amendment* (Cato Institute, 1995), at 23.

Espionage Act of 1917,” writes historian Margaret Blanchard.³⁵ The most comprehensive study of the Espionage Act and its legislative history, published in 1973 by then-Columbia University Law professors Harold Edgar and Benno C. Schmidt, Jr., revealed intent to limit executive authority to stifle freedom of expression during the war. However, they argue that the resulting law suffered from drafting flaws making it “in many respects incomprehensible.”³⁶ They observe “incredible confusion surrounding the issue of criminal responsibility for collection, retention, and public disclosure of defense secrets.” This is compounded by the absence of provision for a “justification defense . . . permitting jury either to balance the information's defense significance against its importance for public understanding and debate, or to consider possible dereliction of duty by the employee's superiors.”³⁷ Sponsors of the Espionage Act were “*content to rely on prosecutorial discretion* to ensure that the provisions would not be invoked against innocent citizens merely curious about military policy.”³⁸

World War II

14. World War II did not see the same volume of prosecutions as did the First World War. While there were nearly 2,000 federal prosecutions of 2,500 persons in World War I, the American Civil Liberties Union (ACLU) reported 28 prosecutions involving 123 persons, on account of dissent or statements opposing the war, in the period ending July 1945.³⁹ Within this number there were many attempted prosecutions under the Espionage Act, particularly investigations of African American newspapers which advocated for greater civil rights at home.⁴⁰ Specifically, Black papers had criticized President Franklin D. Roosevelt’s policies of continued segregation in the armed forces. The Justice Department actively monitored publications and maintained monthly dossiers on papers such as the *Chicago Defender* and *Pittsburgh Courier*. Other targeted papers included the *Baltimore Afro-American* (which allegedly had “Communist connections”), the *Oklahoma City Black Dispatch* (whose editor, while not Communist, was described as

³⁵ Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992), at 76.

³⁶ Edgar and Schmidt, Jr., 934.

³⁷ *Ibid.* at 1085.

³⁸ *Ibid.* at 941 (emphasis added).

³⁹ American Civil Liberties Union, *War-Time Prosecutions for Speech and Publications*.

⁴⁰ See generally Patrick Washburn, *A Question of Sedition: The Federal Government's Investigation of the Black Press During World War II* (NY: Oxford, 1986).

“sympathetic” to the Communist cause), and the *People's Voice* (supposedly a “very helpful transmission belt for the Communist Party”).⁴¹ A special agent in Oklahoma City complained that a September 1942 issue of the *Black Dispatch* contained ‘Communitic phrases’ like “civil liberties,” “inalienable rights,” and “freedom of speech and of the press.”⁴² President Roosevelt had ordered officials to meet with representatives of the Black press to “see what can be done to prevent their subversive language.”⁴³ Espionage Act indictments were heavily weighed.

15. The Attorney General at the time, Francis Biddle, was critical of the Espionage Act and staved off prosecutions of the Black press. He would write in his memoirs, “History showed that sedition statutes—laws addressed to what men said—invariably had been used to prevent and punish criticism of government, particularly in time of war.”⁴⁴ Despite those sentiments, Biddle was inclined to sanction sedition prosecutions of political radicals, particularly those on the right. The primary targets were pro-fascist leaders and publications who were arrested under the Espionage Act for their statements.⁴⁵ The Act was amended in 1940 to expand penalties and make some provisions applicable during peacetime. Fringe publications such as cult leader William Dudley Pelley’s bizarre *Galilean* were aggressively prosecuted for hindering the war effort and causing insubordination.⁴⁶

16. An allegation that the *Chicago Tribune* revealed a major military secret—namely, that the U.S. had broken Japan’s naval code—provided Roosevelt with an opportunity to go after his leading press nemesis, Robert R. McCormick, editor of the *Chicago Tribune*.⁴⁷ The isolationist McCormick strongly opposed U.S. entry into the war, and was a fierce critic of New Deal programs, which he considered socialistic. Roosevelt called for the surveillance of newspapers that opposed him, including anti-administration publishers

⁴¹ *Ibid.* at 181-184.

⁴² *Ibid.* at 170.

⁴³ *Ibid.* at 81.

⁴⁴ Francis Biddle, *In Brief Authority* (Westport, CN: Greenwood Press, 1976), 151.

⁴⁵ Michael S. Sweeney and Patrick S. Washburn, “‘Ain’t Justice Wonderful’ The *Chicago Tribune*’s Battle of Midway Story and the Government’s Attempt at an Espionage Act Indictment in 1942,” *Journalism & Communication Monographs*, 2014, 74-79.

⁴⁶ See generally Scott Beekman, *William Dudley Pelley: A Life in Right-Wing Extremism and the Occult* (Syracuse University Press 2005).

⁴⁷ Sweeney and Washburn, 76. Sweeney and Washburn’s piece provides a detailed account of the *Tribune* case more generally.

such as the *Washington Times-Herald*, the *New York Daily News*, and the *Chicago Tribune*. The *Tribune* pursuit was abandoned in large part due to prosecutorial concerns over press freedom and further disclosures of secret information during a prosecution.

Post-World War II / Early Cold War

17. In the period following World War II, the Espionage Act was utilized as a method to restrict disclosure of secret information, transformed from a tool predominantly used to curb seditious libel. The law was still selectively applied. The breadth and malleability of the law offered enormous discretion for prosecutors to decide against which disclosures of information law should be enforced. The first post-World War II Espionage Act prosecution for leaks to the press, *Amerasia*, was undertaken in the heat of highly contentious policy debates surrounding East Asia policy. The case made national headlines. *Amerasia* was considered by a leading scholar to “have been a case in which pragmatic political and diplomatic concerns determined the government’s handling of the case.”⁴⁸

18. The fierce anti-Communist climate of the years leading to 1950 prompted widespread redefinition of the federal criminal code. It was against this backdrop that the Espionage Act faced the broad amendments that established the law’s current reading. The Attorney General proposed additions to address “treacherous operations of those who would weaken our country internally.”⁴⁹ The amendments were expansive in their scope. Professors Edgar and Schmidt, Jr. in their authoritative analysis for instance call the introduction of subsections 793(d) and 793(e) legislative drafting “at its scattergun worst where greatest caution should have been exercised” and an exercise in “hopeless imprecision.”⁵⁰ They warn that the statutes “pose the greatest threat to the acquisition and

⁴⁸ Girard, 129.

⁴⁹ 95 Cong. Rec. 441-42 (1949).

⁵⁰ Edgar and Schmidt, Jr., 998-999. The amendments, foremost, renumbered the provisions of the Espionage Act. Former provision 1(d) was rebranded as 793(d), which punished the dissemination or retention of documents or information “relating to the national defense” by those “lawfully having possession” of it. However *new* provisions were added—including subsections 793(e) and 793(g). Subsection 793(e) punished those with “unauthorized possession” who disseminated or retained NDI. The addition of 793(e) expanded the Act well beyond government employees and those privy to NDI. Individuals with “unauthorized possession” broadly included any member of the public or the press. It was a sweeping addition. It did not have any restricting ‘bad-faith’ or scienter requirement. 793(g) made conspiracy to violate the Act a crime. Both 793(d) and (e) also added intangible “information” to the

publication of defense information by reporters and newspapers.”⁵¹ Of earlier sections 793(a) and 793(b) they warn that the culpability provisions “do not apply to the activities of reporters, newspapers, and others who intend to engage in public speech about defense matters.”⁵² They ultimately conclude that “*Selective enforcement is a real danger,*” especially without a justification or proportionately defense.⁵³ Senator Harley Kilgore warned that the additions “might make practically every newspaper in the United States and all the publishers, editors, and reporters into criminals without their doing any wrongful act.”⁵⁴ Even an Interdepartmental Group on Unauthorized Disclosure of Classified Information, convened by the administration, acknowledged that the application of subsections 793(d) and 793(e) to and by the press “is not entirely clear.”⁵⁵ They stood in contrast to the concurrently-enacted communications intelligence provision in § 798, which specifically penalized one who “*publishes . . . any classified information . . . concerning the communications intelligence activities of the United States or any foreign government.*”⁵⁶ Unlike § 798, § 793 makes no mention of publication.

19. Attorney General Tom Clark suggested that prosecutorial discretion would safeguard against prosecutions of the press. He reassured that “the integrity of the three branches of the Government” would ensure that “nobody other than a spy, saboteur, or other person who would weaken the internal security of the Nation need have any fear of prosecution under either existing law or the provisions of this bill.”⁵⁷ The American Newspaper Publishers Association succeeded in including a general provision in the McCarran Act—the legislation which included the Espionage Act amendments—that “Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech.” Unfortunately such promises did not carry the force of law to override the broad provisions of the Act.

categories of NDI covered by the Act where the “possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of a foreign nation.” 793(e) finally punished retention even without a demand made by a U.S. official. This created an obligation for ordinary citizens to return classified information to the government. Finally, the amendment extended the statutes of limitations under the Act. The new additions were an extraordinary escalation of the breadth of the Espionage Act.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* at 1087 (emphasis added).

⁵⁴ 95 Cong. Rec. 9747 (1949).

⁵⁵ Report of the Interdepartmental Group on Unauthorized Disclosure of Classified Information (March 31, 1982), at C-4.

⁵⁶ 18 U.S.C. § 798 (emphasis added).

⁵⁷ 95 Cong. Rec. 9749 (1949).

20. In 1951, President Truman issued Executive Order 10290 establishing the modern classification system. Importantly, it allowed the executive, rather than Congress, to decide the scope of phrase “national defense information” by determining what information was classified. This allowed the president unprecedented power to effectively decide the scope of criminal law.⁵⁸

Subsequent Application of the Espionage Act to Publication of Secrets

21. In the decades that followed there would be well-publicized attempts to use the Espionage Act against sources for media within government. Most notable of these are the Pentagon Papers case, the accompanying prosecution of Daniel Ellsberg and Anthony Russo, and attempts to enjoin the *New York Times* as well as investigate journalists working on the Pentagon Papers. In sequence, however, the next controversial interpretation of the Act followed the successful prosecution of Samuel Morison for disclosing classified photos to the British military journals *Jane’s Defense Weekly* and *Jane’s Fighting Ships*. The Fourth Circuit Court of Appeals upheld his conviction; one judge provided commentary on the serious press freedom concerns implicated in the case.⁵⁹ A concurring opinion by Judge Harvie Wilkinson reassured that the conviction of Morison was limited to his role as a *source* and that “press organizations . . . are not being, and probably could not be, prosecuted under the espionage statute.”⁶⁰ He warned of the “staggering breadth” of the Act, but also relied on the conjecture that the “political firestorm that would follow prosecution of one who exposed an administration’s own ineptitude would make such prosecutions a rare and unrealistic prospect.”⁶¹ The sum of Judge Wilkinson’s words are that the Act’s targeting of the press is prevented by political safeguards, rather than any limitations or defenses in the law.

22. An intervention was made in the *Morison* appeal by a coalition of nearly thirty media organizations including major newspapers such as the *Wall Street Journal* and *New York Times* as well as journalistic rights organizations such as the Reporters Committee for

⁵⁸ Executive Order 10290, 6 Fed. Reg. 9795 (1951).

⁵⁹ See generally *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1984).

⁶⁰ *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988).

⁶¹ *Ibid.* at 1084.

Freedom of the Press and Society of Professional Journalists. Their brief warned that subsections 793(d) and 793(e) of the Espionage Act are so broad that “Investigative reporting on foreign and defense issues would, in many cases, be a crime. Corruption, scandal and incompetence in the defense establishment would be protected from scrutiny.”⁶² They observe that “Congress has been sensitive to the valuable informative role of press leaks, and has repeatedly rejected proposals to criminalize the mere public disclosure of classified or defense-related information.”⁶³

The Espionage Act and Media Sources under the Obama Administration

23. More Espionage Act prosecutions of media sources under the administration of President Barack Obama were initiated than under all previous administrations combined.⁶⁴ These prosecutions included cases against Thomas Drake, Shamai Leibowitz, Stephen Kim, Chelsea Manning, Donald Sachtleben, Jeffrey Sterling, John Kiriakou, and Edward Snowden. These defendants are prevented from arguing that their disclosures were made in the public interest or to expose corruption, fraud, or war crimes. Hence it is irrelevant that John Kiriakou “had a moral and ethical problem with torture” in revealing CIA torture practices or Thomas Drake sought to expose “massive fraud, waste and abuse.”⁶⁵ In the prosecution of Drake, the government’s position was that “a defendant’s intent or belief about information relating to the national defense, or intent or belief about the proposed use of that information, is irrelevant under the statute.”⁶⁶ National security law professor Heidi Kitrosser notes in consequence that under the Espionage Act, a “wide and obvious potential for politically motivated targeting threatens a substantial chilling effect.”⁶⁷ She further observes how the “existing statutory scheme *grants near-total discretion* to the executive branch to prosecute leaks of classified information.”⁶⁸ Former

⁶² Brief of *The Washington Post et al.*, *United States v. Morison*, No. 86-5008 (March 27, 1987), at 34.

⁶³ *Ibid.* at 49.

⁶⁴ Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 *Will. & Mary L. Rev.* 1221, 1225 (2015).

⁶⁵ John Kiriakou, *I went to prison for disclosing the CIA’s torture. Gina Haspel helped cover it up*, *Washington Post* (March 16, 2018); Jane Mayer, *Thomas Drake vs. the N.S.A.*, *The New Yorker* (May 23, 2011).

⁶⁶ Government’s Reply to Defendant’s Response to Motion *In Limine* To Preclude Evidence of Necessity, Justification, or Alleged “Whistle-blowing,” *United States v. Drake*, No. 10-CR-00181 (D. Md. March 21, 2011), at 4.

⁶⁷ *Ibid.* at 1258.

⁶⁸ *Ibid.* at 1229 (emphasis added).

CIA director Stansfield Turner discussed the widespread use of leaks of classified materials by government officials, leaks that are not prosecuted:

[T]he White House staff tends to leak when doing so may help the President politically. The Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when it's being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly. The Congress is most likely to leak when the issue has political manifestations domestically.⁶⁹

24. Prominent criminal defense attorney Abbe Lowell observed that as a result that “what makes these prosecutions particularly worthy of close scrutiny is the fact that the Executive Branch leaks classified information often to forward several of its goals and then prosecutes others in the same branch for doing the same thing.”⁷⁰

25. The Obama administration aggressively pursued journalist records in its Espionage Act leak investigations. In May 2013 federal investigators secretly seized two months of phone records of *Associated Press* reporters.⁷¹ During the 2013 prosecution of former State Department employee Stephen Kim under the Espionage Act, *FOX News* reporter James Rosen was treated as an accomplice in Kim's case—potentially criminally liable for his newsgathering activities.⁷² “Based on the foregoing, there is probable cause to believe that the reporter has committed a violation of 18 U.S.C. § 793 (Unauthorized Disclosure of National Defense Information), at the very least, either as an aider, abettor and/or co-conspirator of Mr. Kim.”⁷³

26. Apprehension about the Rosen and *AP* cases created a firestorm of criticism by news organizations and civil libertarians. On May 14, the Reporters Committee on Freedom of the Press sent a letter of protest to Attorney General Eric Holder co-signed by fifty major news outlets.⁷⁴ The following week, President Obama referred to the controversy in his speech at the National Defense University. He said he was “troubled by the possibility

⁶⁹ Stansfield Turner, *Secrecy and Democracy: The CIA in Transition* (London: Sidgwick & Jackson, 1986) at 149.

⁷⁰ Defendant Stephen Kim's Motion to Dismiss Count One of the Indictment on Due Process and First Amendment Grounds, *United States v. Kim*, No. 1:10-CR-225 (D.D.C. January 31, 2011), at 3-4.

⁷¹ Charlie Savage and Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, *New York Times*, May 13, 2013.

⁷² Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, *Washington Post*, May 20, 2013.

⁷³ Affidavit in Support of Application for Search Warrant, *Application for Search Warrant for E-mail Account [REDACTED]@Gmail.com*, No. 10-291-M-01 (D.D.C. November 7, 2011), at 27.

⁷⁴ Reporters Committee for Freedom of the Press, Letter to Eric Holder, Attorney General, May 14, 2013.

that leak investigations may chill the investigative journalism that holds government accountable,” adding that “Journalists should not be at legal risk for doing their jobs.”⁷⁵ In October 2014, after Holder announced his intention to resign as Attorney General, he told C-SPAN that the greatest regret of his tenure was his department’s affidavit characterizing James Rosen as a suspected co-conspirator in violation of the Espionage Act.⁷⁶

27. The widespread press outcry over leak investigations and efforts against the media arguably led the Obama administration to back down on pursuing journalists. Indeed, in November 2013 the *Washington Post* cited U.S. officials to report that Julian Assange was unlikely to face charges over publishing classified documents despite earlier aggressive pursuit of his case. “If the Justice Department indicted Assange, it would also have to prosecute the *New York Times* and other news organizations and writers who published classified material, including *The Washington Post* and Britain’s *Guardian* newspaper, according to the officials.”⁷⁷ This was dubbed the “*New York Times* problem” and officials “all but concluded” that no case would be brought as a result.⁷⁸

28. The 2010 publications of WikiLeaks prompted debates in the House Judiciary Committee of the U.S. House of Representatives on the scope of the Espionage Act. Numerous legal scholars and practitioners collectively recommended that Congress revise the Espionage Act.⁷⁹ A common critique of the Act was the lack of proportionality or public interest defense available under the Act. Defendants have no opportunity to argue that disclosures of information subject to the Espionage Act can be mitigated at all by intent to serve the public interest. This is true even where the underlying information exposes corruption, abuses, or even violations of international law or war crimes.

⁷⁵ The White House, Office of the Press Secretary, Remarks by the President at the National Defense University, Washington, D.C., May 23, 2013.

⁷⁶ Washington Ideas Forum, Day 1 Morning Session, Presented by C-SPAN, October 29, 2014.

⁷⁷ Sari Horwitz, *Julian Assange Unlikely to Face U.S. Charges Over Publishing Classified Documents*, Washington Post, November 25, 2013.

⁷⁸ *Ibid.*

⁷⁹ Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks, Hearing Before the Committee on the Judiciary, House of Representatives, 111th Cong., 2d Session (2010).

29. Steve Vladeck, a prominent commentator on U.S. national security law and author of textbooks in the field, noted that “the uncertainty surrounding this statute benefits no one and leaves many questions unanswered about who may be held liable and under what circumstances, for what types of conduct.”⁸⁰ The plain text of the law, he points out, “draws no distinction between the leakers, the recipient of the leak, or the 100th person to redistribute, retransmit, or even retain the national defense information.”⁸¹ The law conflates three categories of individuals—classic spies, government insiders leaking materials, and private persons and the press who disclose information. “I very much doubt that the Congress that drafted the Espionage Act in the midst of the First World War meant for it to cover each of these categories, let alone cover them equally.”⁸² Yet, all three categories of individuals are placed in the same category as a result of the law’s failure to require specific intent to harm the United States. Vladeck critiqued the “real elephant in the room” of the lack of defense based on improper classification and “disclosure of things that perhaps should never have been kept secret in the first place.”⁸³

The Espionage Act under the Trump Administration

30. The administration of Donald Trump has prosecuted disclosures of national security information more aggressively than any presidency in U.S. history. Indeed, Trump’s Justice Department is on track, in less than one four-year presidential term, to exceed the number of Espionage Act prosecutions under two terms of Obama’s presidency. In October of 2019, Trump’s Justice Department indicted its eighth alleged journalistic source, Henry Kyle Frese.⁸⁴ This escalation in prosecutions is consistent with a dramatic policy shift in approach to applying the Espionage Act. “You should consider jailing journalists who publish classified information,” Trump reportedly told his FBI director, James Comey.⁸⁵ Those remarks were doubled down upon by then-Attorney General Jeff Sessions. He stated that he cannot “make a blanket commitment” not to put reporters in

⁸⁰ *Ibid.* (testimony of Stephen I. Vladeck, Professor of Law, American University [now at University of Texas School of Law]).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Alex Emmons, *The Espionage Act Is Again Deployed Against a Government Official Leaking to the Media*, *The Intercept*, October 9, 2019.

⁸⁵ Michael M. Grynbaum, Sydney Ember and Charlie Savage, *Trump’s Urging That Comey Jail Reporters Denounced as an ‘Act of Intimidation,’* *New York Times*, May 17, 2017.

jail “for doing their jobs.”⁸⁶ Sessions testified in 2017 that the Justice Department had increased its investigations into media leaks to 27, an increase representing a tripling of investigations from his predecessor.⁸⁷

Summary of criticisms of the use of the Espionage Act until 2019

31. The current escalation of use of the Espionage Act of 1917 in the United States against activities that have nothing to do with ‘espionage’—as the term is commonly understood—is entirely consistent with the political origins and applications of the Act since World War I. The expansive scope of the law allows for extraordinary selectivity in the initiation of prosecutions. It has led to severe double standards. The breadth of the law is fiercely critiqued by leading scholars and commentators across the political spectrum as well as both within and outside government. One of the most candid official criticisms of the Espionage Act 1917 was delivered in 1979 when the CIA’s general counsel (appointed to his position by the then-CIA Chief George H.W. Bush) testified before a committee of the U.S. House of Representatives that the Act is “so vague and opaque as to be virtually worthless,” and hence “likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate.”⁸⁸ Lapham could not say definitively whether leaks to the press were a crime. Of the key features surrounding interpretation of the Act, the first is the lack of availability of proportionality defenses, and the second the ambiguity surrounding interpretation of § 793, its breadth.

The indictment of a publisher under the Espionage Act

32. The indictment of a publisher for the publication of secrets under the Espionage Act has no precedent in U.S. history. Neither does the indictment of a publisher under the Act for conspiracy to disseminate secrets. Furthermore the closest attempts at prosecution have always been of U.S. publishers subject to U.S. jurisdiction. There has been no known prior attempt to bring an Espionage Act prosecution against a non-U.S. publisher.

⁸⁶ Callum Borchers, *Sessions Says He Can’t ‘Make a Blanket Commitment’ Not to Jail Journalists*, Washington Post, October 18, 2017.

⁸⁷ Charlie Savage and Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, New York Times, August 4, 2017.

⁸⁸ Espionage Laws and Leaks: Hearing Before the Subcomm on Legislation of the House Permanent Select Comm on Intelligence, 96th Cong., 1st Sess. 22 (1979).

33. Although successive administrations considered the prosecution of publishers, in each instance that consideration has been abandoned either as a result of political considerations and / or the ramifications for the question of press freedom generally.

34. An examination of the recorded historic attempts to prosecute publishers helps to illuminate the capricious factors that impact whether or not prosecutions under the act are pursued. The results are nevertheless accommodated by and consistent with the wide latitude for interpretation under § 793 of the Espionage Act. Each of the examples below demonstrates the underlying political calculations at play in their inception and conclusion:

1. ***The Chicago Tribune, 1942***: Franklin D. Roosevelt and his Justice Department convened a grand jury against the *Chicago Tribune*, a conservative paper which was fiercely critical of Roosevelt and his policies. The paper published secrets following the U.S. victory at the Battle of Midway. The two leading scholars of the affair concluded that “Roosevelt pushed for an indictment in part because he relished embarrassing and punishing a political enemy.”⁸⁹ Indeed, the *Tribune* was one of his greatest political enemies. The case became a cause *célébré* for freedom of speech. The *Tribune* issued a statement reminding the public of its conflict with the Roosevelt administration: “For years they have tried to harass us, to alienate our readers, to weaken our influence, always without success.”⁹⁰ Ultimately the case lost momentum and was dropped, owing partly to the concerns raised for freedom of the press and reluctance to disclose more secret information at trial. The prosecutor of the case, William Mitchell, was skeptical that the Espionage Act applied to publication by a newspaper.⁹¹
2. ***Amerasia, 1945***: Harry Truman convened a grand jury to investigate *Amerasia*, a small foreign affairs journal based in New York City that published analysis of Asia critical of post-war policies.⁹² Their stories were based on classified information provided by government sources who were deeply concerned over official policies, particularly in China. One of the sources’ superiors said “I’ll get that S.O.B. [John S. Service] if it’s the last thing I do.”⁹³ However, those same sources were often tasked by their superiors to leak information to the press.⁹⁴ Of *Amerasia*’s editor, Philip Jaffe, the Ambassador to Japan said “We’ll get this guy Jaffe, no matter how long it

⁸⁹ Sweeney and Washburn, 76.

⁹⁰ David Camelon, *McCormick Lays Charges Against Tribune to Politics*, Chicago Herald-American, August 7, 1942.

⁹¹ Sweeney and Washburn, “Ain’t Justice Wonderful,” 39.

⁹² For a broader discussion of the case and its geopolitical context, see Ely Jacques Kahn, *The China hands: America’s foreign service officers and what befell them* (NY: Penguin, 1976).

⁹³ John S. Service, *The Amerasia papers: some problems in the history of US-China relations* (Berkeley: Center for Chinese Studies China Research Monographs, 1971), 355-58.

⁹⁴ Timothy J. Girard, *Premature witch hunt? The Amerasia case in context*, PhD diss., University of Ottawa, 2005, 45-46.

takes.”⁹⁵ Truman’s administration arrested three journalists and three government sources for conspiracy to violate the Espionage Act. However, no indictments were ultimately issued under the Espionage Act. Evidence emerged that the Justice Department was heavily influenced by political pressures from multiple factions within the Truman administration.⁹⁶ Acting U.S. Secretary of State Joseph Grew came under heavy criticism when he indicated that the arrests were “one result of a comprehensive security program which is to be continued unrelentingly in order to stop completely the illegal and disloyal conveyance of confidential information to unauthorized persons.”⁹⁷ Following a press outcry,⁹⁸ the Espionage Act charges were scuttled and the most severe sentence were small fines. However, left-wing employees were stunned into “mouselike silence.”⁹⁹ One of the most in-depth scholarly treatments concludes that “*Amerasia* thus appears to have been a case in which pragmatic political and diplomatic concerns determined the government’s handling of the case.”¹⁰⁰

- 3. Pentagon Papers and Boston Grand Jury, 1971-1973:** Following the publication of the Pentagon Papers, a 7,000-page classified and top secret geopolitical study of the Vietnam War which contradicted Richard Nixon’s public justification for the war, his Justice Department attempted to enjoin the *New York Times* and prosecute their source Daniel Ellsberg as well as his colleague Anthony Russo. Nixon *also* convened a much lesser-known grand jury in Boston to investigate a broader Espionage Act conspiracy to acquire and publish the Pentagon Papers.¹⁰¹ The *New York Times* anticipated possible charges under the Espionage Act and Nixon wanted to “do everything we can to destroy the *Times*.”¹⁰² A Justice Department press release indicated that “all avenues of criminal prosecution have remained open.”¹⁰³ At the 1972 convention of the American Society of Newspaper Editors, a Justice Department official made threats under the Act that if reporters acted as if “entirely free to determine for themselves what was proper to publish” they would encounter “interminable mischief.”¹⁰⁴ The Boston grand jury led to the imprisonment of Harvard Professor Samuel Popkin for a week for refusing to disclose his academic

⁹⁵ Philip J. Jaffe, *The Amerasia Case from 1945 to present* (Jaffe, New York, 1979), 19.

⁹⁶ Harvey Klehr and Ronald Radosh, *The Amerasia Spy Case: Prelude to McCarthyism* (Chapel Hill: University of North Carolina Press, 1996), 81-82.

⁹⁷ Lansing Warren, Inquiry on ‘Leaks’ Is Pushed; Grew Indicates More Arrests, *New York Times*, June 8, 1945, 1.

⁹⁸ For instance, the *New York Post* ran an editorial distinguishing providing information to foreign powers and journalists publishing leaked information. “The first is espionage. The latter is an old Washington custom practiced . . . by just about every Washington correspondent worth his salt to his newspaper . . . If Mr. Grew is able to throttle the editors of left wing *Amerasia* because they expose his policy, any decent American newspaper which similarly opposes his policies may be next on the list of Grew’s State Dept. Gestapo.”

⁹⁹ *Red Baiting*, *New York Herald Tribune*, June 9, 1945.

¹⁰⁰ Girard at 129.

¹⁰¹ *United States v. Doe*, 455 F.2d 753 (1st Cir. 1972). The crimes investigated by the grand jury included “the gathering and transmitting of national defense information (18 U.S.C. § 793).”

¹⁰² Attorney General Mitchell telegraphed Arthur Sulzberger warning that “publication of this information is directly prohibited by the provisions of the Espionage Law, Title 18, United States Code, Section 793.” See also Mark Feldstein, *Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington’s Scandal Culture* (New York: Farrar, Straus and Giroux, 2010), at 151.

¹⁰³ *Mitchell Will Prosecute Law Violations in Leaks*, *New York Times*, July 2, 1971, 1.

¹⁰⁴ The audience reportedly widely understood the official to be threatening prosecution under the Espionage Act. William L. Claiborne, *Government Secrets and the Press*, *Washington Post*, April 20, 1972, B1.

- sources.¹⁰⁵ The grand jury also sought testimony from other prominent academics such as Noam Chomsky.
4. **Beacon Press, 1972-1974:** the publishing arm of the religious Unitarian Universalist Association (UUA), was also investigated under the Espionage Act for publication of the Pentagon Papers. Beacon published a full version of the Papers after Senator Mike Gravel read the Papers into public domain by entering them into the congressional record. The publisher was visited repeatedly by the FBI and had its bank and congregation records seized.¹⁰⁶ Beacon Press' status as a religious organization made this illegal under the First Amendment. The harassment was attributed to the UUA's activism and war resistance.¹⁰⁷ The *New York Times* editorialized that the "government's harassment of Beacon Press and its concurrent fishing expedition into the wider affairs of the parent religious association imperil not only press freedom but constitutional rights involving religion and association as well."¹⁰⁸ The case against Beacon was ultimately dropped following Nixon's resignation.¹⁰⁹
 5. **Jack Anderson, 1971-1972:** Jack Anderson was a prominent investigative journalist and #64 on the 'Enemies List' maintained by Richard Nixon. Anderson published a top-secret report regarding a secret U.S. military intervention in the war between India and Pakistan, that many feared would catalyze World War III. The report later won him the Pulitzer Prize in journalism. Military investigators insisted that Anderson and his source had conspired to violate the Espionage Act on grounds that Anderson "made the enemy aware" of U.S. secrets.¹¹⁰ Nixon wanted Anderson prosecuted. "I'd love to take that bastard Anderson" to prosecute him, Nixon said.¹¹¹ The Attorney General said "I would like to get ahold of this Anderson and hang him." "Goddamnit, yes," replied Nixon.¹¹² Nixon pushed "you've gotta find something [on Anderson] . . . you just gotta invent something."¹¹³ However, it emerged that the source of the story was secretly spying on Nixon for the Joint Chiefs of Staff in a prominent scandal known as the 'Radford-Moorer Affair.' A public prosecution would have proven politically embarrassing, and Nixon considered the impact of prosecuting a journalist on his re-election campaign in 1972.¹¹⁴ "We can't be in the business of prosecuting the press . . . prior to an election."¹¹⁵ These political considerations led the Espionage Act case to be dropped. Notably, the affair led to a CIA plot to murder Anderson; Nixon's "Plumbers" considered placing LSD on the steering wheel of Anderson's car to make a crash seem like an accident, or, alternatively, to "knife" Anderson.¹¹⁶

¹⁰⁵ Robert Reinhold, *Queries to Professor Indicate U.S. Groping on Pentagon Papers*, *New York Times*, March 28, 1971.

¹⁰⁶ For a leading scholarly account of Beacon Press' involvement in the Pentagon Papers, see Allison Trzop, *Beacon Press and the Pentagon Papers*, Boston, Beacon Press, 2006.

¹⁰⁷ Homer Bigart, *Unitarians See US Harassment on Gravel Papers*, *New York Times*, July 31, 1972, 8.

¹⁰⁸ Editorial, *Freedom Alert*, *New York Times*, July 17, 1972.

¹⁰⁹ Robert Nelson West, *Crisis and Change: My Years as President of the Unitarian Universalist Association, 1969-1977* (Boston, Skinner House Books, 2007), 74.

¹¹⁰ Feldstein at 179.

¹¹¹ Feldstein at 192.

¹¹² White House Tape No. 643-13, January 3, 1972, *printed in* Douglas Brinkley, Luke Nichter, *The Nixon Tapes: 1971-1972* (Boston, Houghton Mifflin Harcourt, 2014).

¹¹³ Feldstein at 192.

¹¹⁴ Feldstein at 195; John Ehrlichman, *The Whole Truth* (New York: Simon & Schuster), 309.

¹¹⁵ Feldstein at 192.

¹¹⁶ Feldstein at 286-87.

6. **Seymour Hersh, 1975:** President Gerald Ford’s administration considered prosecuting Pulitzer Prize-winning journalist Seymour Hersh and *the New York Times* under the Espionage Act for a scoop describing highly classified Naval taps into Soviet communications which repeatedly violated the territorial waters of the Soviet Union and other nations. Notably, officials considered a provision, 18 U.S.C. § 798, which unlike § 793 specifically proscribes publication. § 793 of the Espionage Act makes no mention of publication. However, a memo written by a young Dick Cheney, then a White House aide, warned that a prosecution would be political damaging and lead to a public relations disaster.¹¹⁷ Various considerations included “What will the public reaction be? What will the Hill reaction be? . . . How do we counter expected criticism.”¹¹⁸ No prosecution ultimately materialized due in large part to concerns about public perception of infringements on press freedom.
7. **James Bamford, 1981:** Investigative journalist James Bamford was authoring *The Puzzle Palace*, the first book on the workings of the National Security Agency (NSA). Via the U.S. Freedom of Information Act Bamford received thousands of NSA documents and a top-secret criminal file investigating the Agency, prepared by the Justice Department. He obtained the file legally. Nevertheless government officials made a formal demand for return of the documents under the Espionage Act, including subsection 793(e), threatening prosecution. He published the book based on the materials and was not charged. Subsequent statements by the NSA made clear that the prosecution was not legitimately connected to security but intended to save the Agency from embarrassment. In 1982 an NSA public relations officer admitted to Congress that Bamford’s book did not contain “specific, identifiable” examples of classified information, but that it was nonetheless “damaging” because it was “not calculated to reassure citizens with respect to the NSA” and “does not contribute to the health of the U.S. intelligence community.”¹¹⁹ Such an assertion suggested a belief that journalists were under an obligation not to criticize these agencies.
8. ***The Washington Post*, 1986:** CIA chief William Casey “launched a campaign to keep details about secret intelligence communications out of the media through use of the Espionage Act.”¹²⁰ He browbeated the *Washington Post* on several occasions with prosecution under the Act. For instance when the *Post* disclosed secret U.S. monitoring of Libyan communications, on grounds that it was the basis for a potential U.S. invasion of Libya, Casey said there were “cold violations” of the Espionage Act.¹²¹
9. The *Post* once more entered his crosshairs the following year in what the *Columbia Journalism Review* viewed as potentially the “sharpest confrontation” between press and government since the Pentagon Papers case.¹²² In May of 1986, Ronald W. Pelton, a former NSA employee, was tried for espionage after selling classified information to the Soviets. Journalist Bob Woodward learned that the information concerned a top-secret NSA project—Ivy Bells—where American submarines were eavesdropping in Soviet harbors. Meeting with *Post* editors, Casey said “I’m not threatening you, but you’ve got to know that, if you publish this, I would recommend

¹¹⁷ Lowell Bergman and Marlena Telvick, *Dick Cheney’s Memos From 30 Years Ago*, PBS Frontline, February 13, 2007.

¹¹⁸ *Ibid.*

¹¹⁹ Briefing to the Senate Select Committee on Intelligence Concerning “The Puzzle Palace,” 23 September 1982.

¹²⁰ Blanchard at 450.

¹²¹ Jay Peterzell, *Can the CIA Spook the Press?*, *Columbia Journalism Review*, Sept./Oct. 1986, at 29-34.

¹²² *Ibid.*

that you be prosecuted under the intelligence statute [referring to § 798 of the Espionage Act].”¹²³ The *Post* held off on the story, but *NBC News* ran it. Casey issued a public threat that “We believe that the assertions, if true, made by James Polk on the *NBC Today* show, violate the prohibitions in 18 U.S.C. 798 against publishing any classified information concerning the communications intelligence activities of the United States. My statutory obligation to protect intelligence sources and methods require me to refer this matter to the Department of Justice.”¹²⁴ The attempt was widely derided by legal scholars, and the Justice Department was not keen to prosecute the case due to the controversy. Casey later downplayed his earlier threats and accused the press of being paranoid and “hysterical.”¹²⁵ In earlier internal memos, Casey emphasized that applying the Espionage Act against leaks to the media had a deterrent effect and was like “driving tacks with a sledge hammer.”¹²⁶ The invocation of § 798, rather than § 793, expresses hesitation on part of Casey that § 793 applies to publication. The former section specifically punishes one who ‘publishes’ while the latter does not.

10. Book Publications, 1980’s: Bill Casey also reportedly threatened Bob Woodward with prosecution under the Espionage Act for writing a forthcoming book on the CIA. Casey also threatened Sy Hersh over a forthcoming book concerning the 1983 downing of a Korean Air Lines passenger plane by the Soviet Union. Casey told Random House, publisher of the Hersh book, that the Act applied to unclassified information.¹²⁷

11. MIT Professor Theodore Postol, 1992: Postol, an MIT nuclear physics professor and critic of U.S. missile defense systems, was investigated in response to his pointing out life-threatening dangers in false claims made regarding Cold War defense systems. Postol was accused of publishing secrets about the Army’s Patriot Missile in the journal *International Security*. While Postol held a security clearance, his paper was based purely on public sources and his knowledge of physics.¹²⁸ After Postol was contacted by a Defense Department investigator, Postol brought the matter to U.S. Representative John Conyers Jr., who organized public hearings on the matter. The Defense Department dropped its investigation following embarrassment at the First Amendment implications of its efforts against an academic.

The Computer Fraud and Abuse Act of 1986 (CFAA)

35. The Computer Fraud and Abuse Act has come to be criticized as one of the most politicized of laws in the United States in its use. The CFAA’s passage and the prosecutions that followed are an extension of the Espionage Act—with its serious

¹²³ *Ibid.*

¹²⁴ Stephen Engelberg, *CIA Director Requests Inquiry on NBC Report*, *New York Times*, May 20, 1986, at A17.

¹²⁵ Michael J. Sniffen, *CIA and NSA Chiefs Appeal for Media Cooperation in Keeping Spy Secrets*, *Associated Press*, May 29, 1986.

¹²⁶ Emma Best, *Former CIA Director compared prosecuting leakers under the Espionage Act to “driving tacks with a sledge hammer”*, *MuckRock*, September 11, 2017.

¹²⁷ Peterzell at 30-31.

¹²⁸ John Lancaster, *Pentagon Drops Security Probe of Professor on Patriot Article*, *Washington Post*, March 23, 1992.

flaws—to the digital age. Indeed, the CFAA suffers from similar breadth that enables the Espionage Act’s enormous malleability. Columbia Law professor Tim Wu, a leading academic in the area of telecommunications and technology law, calls the CFAA “the most outrageous criminal law you’ve never heard of” and the “worst law in technology.”¹²⁹ USC Law Professor Orin Kerr, formerly at the Justice Department, a leading scholar on the CFAA and the most-cited criminal law faculty in the United States,¹³⁰ suggests that the law is so “extraordinarily broad” that without limitation it is unconstitutionally vague.¹³¹ Other academic analysis observe the “extreme prosecutorial discretion” allowed under the law.¹³² Indeed, in at least one case federal prosecutors have argued that violation of a Web site’s terms of service is a criminal offense.¹³³

36. The law is most notorious for spurring the aggressive prosecution of Aaron Swartz, a young programming prodigy who contributed to many prominent technology projects including co-founding Reddit. He was also an activist for freedom of information and making the Internet accessible for the public. He attempted to download and make free for the public articles from academic repositories; both JSTOR and MIT declined to press civil charges, and even made more articles freely available in response to his actions. However the Justice Department aggressively charged Swartz under the CFAA. His political beliefs which included advocacy for open information “played a role in the prosecution” according to the Justice Department.¹³⁴ Swartz tragically committed suicide following the weight of charges pursued and what was widely perceived to be the Justice Department’s desire to make an example of him.¹³⁵ The handling of the case led to congressional investigation. U.S. Representative Jared Polis said “The charges were ridiculous and trumped-up. It is absurd that he was made a scapegoat.”¹³⁶ Sir Tim Berners-Lee, founder of the Internet, deeply mourned Swartz’s death and called the

¹²⁹ Tim Wu, *Fixing the Worst Law in Technology*, *The New Yorker*, March 18, 2013.

¹³⁰ USC Gould, *Prof. Orin Kerr is the Most-Cited Criminal Law and Procedure Faculty Member in the U.S.*, July 22, 2018, available at <https://gould.usc.edu/about/news/?id=4470>.

¹³¹ Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 *Minn. L. Rev.* 1561 (2010).

¹³² Sarah A. Constant, *The Computer Fraud and Abuse Act: A Prosecutor’s Dream and a Hacker’s Worst Nightmare—The Case Against Aaron Swartz and the Need to Reform the CFAA*, 16 *Tul. J. Tech. & Intell. Prop.* 231, 232 (2013).

¹³³ *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

¹³⁴ Ryan J. Reilly, *Aaron Swartz Prosecutors Weighed ‘Guerilla’ Manifesto, Justice Official Tells Congressional Committee*, *Huffington Post*, February 22, 2013.

¹³⁵ Constant at 240-244.

¹³⁶ *Ibid.* at 244.

CFAA “seriously broken” as a result.¹³⁷ Swartz’s suicide has led to serious efforts to reform the CFAA with proposals such as “Aaron’s Law” sponsored by numerous U.S. legislators—civil society organizations such as the Electronic Frontier Foundation (EFF) have pointed out severe “prosecutorial discretion” and “misuses” in existing legislation.¹³⁸

37. The history of the CFAA is instructive in understanding the connections of some of its provisions, particularly subsection 1030(a)(1), to the Espionage Act. In the climate of the 1980s, computer threats were a growing apprehension in Washington. President Ronald Reagan, a former actor who recognized the big screen’s influence, watched the then-blockbuster *War Games* at Camp David. In the film a teenager played by Matthew Broderick instigates nuclear war by hacking into defense networks from his home computer. Reagan met with his cabinet and asked them if they had seen the movie.¹³⁹ These fears prompted aggressive legislation within a primitive cyberspace where the modern Internet did not yet exist.
38. This climate prompted the passage of the CFAA. The CFAA had provisions originally enacted in 1984 and codified in 1986 in provisions of 18 U.S.C. § 1030. The original 1984 Act criminalized three offenses: computer misuse to obtain financial records, hacking into government computers, and computer misuse to obtain national defense information. The latter provision covering national defense information was a carbon copy of portions of the Espionage Act. Subsection 1030(a)(1) prohibited unauthorized access to a computer system with intent to obtain or disseminate national defense information to persons not authorized to receive it. Except for the added requirement of “unauthorized access to a computer system,” subsection 1030(a)(1) was identical to the language featured in provisions of § 793 of the Espionage Act. This duplication was deliberate. The House Judiciary Committee Report commented that the CFAA “includes ‘intent’ language consistent with the existing espionage laws.”¹⁴⁰ The same report made reference to the film *War Games* as a “realistic representation” of computer abilities.¹⁴¹

¹³⁷ Mark Hachman, Tim Berners-Lee: We Need a Free Web, Except When We Don’t, PC World, March 12, 2014.

¹³⁸ Cindy Cohn, Executive Director, EFF, *Aaron’s Law Reintroduced: CFAA Didn’t Fix Itself*, April 29, 2015.

¹³⁹ See generally Fred Kaplan, *Dark Territory: The Secret History of Cyber War* (Simon & Schuster, 2017).

¹⁴⁰ H.R. Rep. No. 98-894 (1984), reprinted in 1984 U.S.C.C.A.N. 3689, 3706.

¹⁴¹ *Ibid.*

The measure importantly never defined the difference between “authorized” and “unauthorized” access to a computer system. Professor Wu observes “no one really knows what those words mean.”¹⁴² The issue of the scope of ‘unauthorized’ access constitutes a serious ambiguity running through the preponderance of the CFAA.

39. The potential for a prosecution under the CFAA with a backdrop of political motivation was seen as early as 1989 when a federal grand jury in San Jose, CA, indicted a black hat hacker (now journalist writing for *Wired*) Kevin Poulsen on espionage and CFAA charges. Poulsen had government contracts granting him security clearances. But he had gained notoriety for penetrating the Pac Bell phone company, uncovering evidence of unlawful FBI domestic surveillance and spying on embassies.¹⁴³ The CFAA charge stemmed from his possession of an e-mail containing an image of the access screen for the army’s Masnet network. The screen warned that unauthorized access violated the CFAA, but was merely the equivalent to a digital ‘no trespassing’ sign. There was no evidence that Poulsen did anything to attempt to circumvent the screen, but he was nevertheless charged under the CFAA.¹⁴⁴ That charge was dropped in 1992.¹⁴⁵ The Espionage Act case was ultimately dropped as well as prosecutors pursued less contentious charges against him.

40. A key problem with the CFAA, which has split U.S. courts, is providing clarity as to the scope of ‘unauthorized access.’ The varying interpretations range from traditional understanding of ‘hacking’ to conduct that is well beyond. Courts are divided: some federal Courts of Appeals have held that improper ‘use’ of computer information is not a crime if the underlying access is permitted.¹⁴⁶ Other Courts of Appeals have agreed with the Justice Department’s position that using accessed information for unapproved purposes violates the CFAA, a considerably broader definition.¹⁴⁷

¹⁴² Wu, Fixing the Worst Law in Technology.

¹⁴³ See generally Jonathan Littman, *The Watchman: The Twisted Life and Crimes of Serial Hacker Kevin Poulsen*, (Little, Brown and Company 1997).

¹⁴⁴ Donald Clark, *Government Cracks Down on Hacker*, *San Francisco Chronicle*, Nov. 2, 1982 at C1.

¹⁴⁵ *United States v. Poulsen*, 41 F.3d 1330, 1333 (9th Cir. 1994).

¹⁴⁶ *United States v. Valle*, 807 F.3d 508 (2d Cir. 2015); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012); *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (*en banc*).

¹⁴⁷ *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001); *United States v. John*, 597 F.3d 263, 269 (5th Cir. 2010); *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); see also Prosecuting Computer Crimes, Computer Crime and Intellectual Property

Conclusion

41. The legislative history of the Espionage Act of 1917, coupled with its circuitous scope, established a legal regime toward government secrets in the United States that is highly selective in its enforcement and potentially limitless in its reach. There is no precedent for the law’s extraterritorial application to a publisher for the dissemination of secrets. In their seminal academic analysis of the Espionage Act, then-Columbia University Law professors Harold Edgar and Benno C. Schmidt, Jr., critiqued the Espionage Act as “in many respects incomprehensible.”¹⁴⁸ They also took issue—as do nearly all national security scholars weighing the Espionage Act—with the absence of any proportionality analysis or defense built into the law. The Espionage Act treats the same three categories of individuals: traditional spies, government employees who leak information, and members of the public and press. The dramatic differences between these categories of individuals would seem to invite a nuanced legal analysis. No such nuance is provided by the Act. This has led to a history of capricious enforcement highly susceptible to the political considerations of various administrations. The law’s political nature is apparent through not only its wartime origins, but also from studying abandoned attempts to utilize the Act against the publication of secrets. The flaws present within the Espionage Act of 1917 also manifest within the Computer Fraud and Abuse Act, a contentious law which is widely critiqued for its lack of definition of key terms and susceptibility to political misuse. Portions of § 793 of the Act are repeated verbatim in the CFAA, particularly in subsection 1030(a)(1) which was passed as a carbon copy of the Act. One of the nation’s leading legal academics calls the CFAA the “worst law in technology.”¹⁴⁹

42. There has never, in the century-long history of the Espionage Act, been an indictment of a U.S. publisher under the law for the publication of secrets. Accordingly, there has never been an extraterritorial indictment of a non-U.S. publisher under the Act. During World War I, federal prosecutors considered the mere circulation of anti-war materials a violation of the law. Nearly 2,500 individuals were prosecuted under the Act on account

Section, Criminal Division, Office of Legal Education (arguing there was legislative intention to “address the unauthorized access *and* use of computers and computer networks”) (emphasis added).

¹⁴⁸ Edgar and Schmidt, Jr. at 934.

¹⁴⁹ Tim Wu, *Fixing the Worst Law in Technology*, *The New Yorker*, March 18, 2013.

of their dissenting views and opposition to U.S. entry in the War. Targets were as small as independent filmmaker Robert Goldstein or as prominent as presidential candidate Eugene Debs and national labor leader William “Big Bill” Haywood. Over a century later, exposure of wartime abuses would still fall within the crosshairs of the Act subject to the policy objectives of the administration in power. The difference from the expansive use under the Act in World War I of individuals for their dissenting views and opposition to the U.S. is that the law is being used not only against publishers but extraterritorially. The current U.S. administration has signaled its desire to escalate prosecutions as well as “jailing journalists who publish classified information.”¹⁵⁰ The Espionage Act’s breadth provides such a means. While prior legislators and Attorneys General have attempted to provide reassurance that § 793 of the Act would not ever be used against the press, such reassurances are regarded as having no weight against the plain text of the law and the reality of the present day. What is now concluded, by journalists and publishers generally, is that any journalist in any country on earth—in fact any person—who conveys secrets that do not conform to the policy positions of the U.S. administration can be shown now to be liable to being charged under the Espionage Act of 1917.

Exhibits:

1. Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Columbia Law Review 929 (1973).
2. Brief of *The Washington Post et al.*, *United States v. Morison*, No. 86-5008 (March 27, 1987).
3. Sari Horwitz, *Julian Assange Unlikely to Face U.S. Charges Over Publishing Classified Documents*, Washington Post, November 25, 2013.
4. Michael S. Sweeney and Patrick S. Washburn, “‘Ain’t Justice Wonderful’ *The Chicago Tribune’s Battle of Midway Story and the Government’s Attempt at an Espionage Act Indictment in 1942*,” Journalism & Communication Monographs, 2014.
5. Allison Trzop, *Beacon Press and the Pentagon Papers*, Boston, Beacon Press, 2006.
6. Jay Peterzell, *Can the CIA Spook the Press?*, *Columbia Journalism Review*, Sept./Oct. 1986.
7. Homer Bigart, *Unitarians See US Harassment on Gravel Papers*, New York Times, July 31, 1972.
8. Timothy J. Girard, *Premature witch hunt? The Amerasia case in context*, PhD diss., University of Ottawa, 2005.

¹⁵⁰ Michael M. Grynbaum, Sydney Ember and Charlie Savage, *Trump’s Urging That Comey Jail Reporters Denounced as an ‘Act of Intimidation,’* New York Times, May 17, 2017.

9. Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 *Will. & Mary L. Rev.* 1221, 1225 (2015)
10. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks*, Hearing Before the Committee on the Judiciary, House of Representatives, 111th Cong., 2d Session (2010).

Qualifications of Carey Shenkman:

Carey Shenkman, Esq. is a First Amendment attorney, constitutional historian, and litigator. For the past five years he has researched and co-authored a forthcoming volume dedicated to the history of the Espionage Act and its implications for freedom of the press. Mr Shenkman serves as an advisor on Columbia University's Global Freedom of Expression program, Of Counsel to the Council on American-Islamic Relations, New York (CAIR-NY), Fellow for the Washington D.C.-based think tank Institute for Social Policy and Understanding (ISPU), and maintains institutional affiliations with several other non-profits. Mr Shenkman has lectured at numerous law schools and journalism schools regarding the Espionage Act of 1917, and has been frequently interviewed and invited as a guest speaker and panelist at numerous symposia.

From 2013 to 2016 he worked for the Law Office of Michael Ratner, President Emeritus of the Center for Constitutional Rights, whose firm provided advice on the case of Julian Assange. Mr Shenkman does not presently represent Mr Assange and writes this in his individual capacity as an independent commentator on the Espionage Act of 1917.

Statement of Truth:

1. I understand that my duty as a subject matter expert is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence as necessary. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.
2. My submission is based on my independent study and historical research.
3. I confirm that I have not entered into any arrangement where the amount or payment of my fees is dependent on the outcome of the case.
4. I acknowledge that a) I have no conflict of interest, other than any which I have disclosed in my report, and b) I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to these assertions.
5. I have attributed sources for information I have used.
6. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

7. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
8. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.
9. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.
10. I further understand the following:
 - a. my report will form the evidence to be given under oath or affirmation;
 - b. the court may at any stage direct a discussion to take place between experts;
 - c. the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;
 - d. I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert.
 - e. I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.
11. I confirm that the contents of this report are true to the best of my knowledge and research.

Dated the 18 day of December, 2019

Signed



Signature witnessed by _____

Respectfully Submitted,

CAREY SHENKMAN

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