

The Espionage Act and the Cult of Secrecy

The most important compromise that allowed for the passage of the U.S. Constitution was that there be included a series of amendments called the Bill of Rights, which guaranteed certain freedoms to the individual, a counterpoint to the Articles of the Constitution itself which merely delineated the powers of the branches of government. The most important and revolutionary of the amendments was the first, which simultaneously protected from government censure the individual free exercise of religion, freedom of speech and of the press, and freedom to peaceably assemble and petition. These freedoms are the bedrock of civil liberties and have become universally accepted as the preeminent hallmarks of a free society. In practice, however, there have always been difficulties interpreting the limits of these so-called individual freedoms in relation to the authority of the State. This is especially true in times of war, in which it has often been supposed that nothing, not even freedom of speech or of the press, can stand in the way of State security, secrecy, and success in the war effort. Though these individual freedoms have been enshrined into the U.S. Constitution as the foremost rights of the citizenry, there have been many setbacks and the long battle to protect these very freedoms continues even into the present day.

For example, only seven years after the ratification of the First Amendment, John Adams signed into law the Sedition Act of 1798 in which it was made illegal to write or say anything "false, scandalous, or malicious" against the government. The legal basis for this was that, while freedom of speech was allowed, it did not mean freedom from prosecution for seditious or "dangerous" speech after the fact. This would seem to seriously undermine the notion of free speech itself.

Moving forward in history we come to another similar piece of legislation that is still enforced and impacts us directly today, and which will be the focus of the rest of this essay: the Espionage Act of 1917.

Woodrow Wilson, after campaigning in 1916 on the fact that he had “kept us out of war”, was elected to a second term as president and immediately brought America into World War One in 1917. Three months later, Wilson signed into law the Espionage Act, in which it was punishable by death or 30 years in prison to convey information that would interfere with the success of the military or promote the success of its enemies. This included the intent to cause insubordination, disloyalty, mutiny, refusal of duty, or even to obstruct the recruitment of conscripts into the military. It was also intended to silence all dissent against the war, to monitor and punish any pro-German or anti-British sympathies, and to block the distribution of printed materials through the Post Office (this was a time in which the Post Offices were one of the most extensive arms of the federal government throughout the states and the Postmaster General was actually an influential and powerful position—made more powerful by being able to block or intercept anything sent through the mail). The Espionage Act has been amended many times since 1917, and is arguably stronger than ever in our own time. In 1933 a provision was added to prohibit the disclosure of anything sent in code; in 1961 a provision was removed that had restricted the law’s jurisdiction to U.S. territory or to American citizens; at least two times it was amended to increase the penalties it imposed; in 1950, during the McCarthy era and the growing militarization of the Cold War, the McCarran Internal Security Act changed the scope of possible crimes from the “intent” to harm or aid to “mere retention” of information. Not only open and free speech, but even secret information are now under the control of the Espionage Act.

Government authorities wasted no time after the law's passage to begin enforcement. A disproportionate number of its victims were Socialists and members of unions such as the Industrial Workers of the World, which were strongly against American intervention in the war. Eugene V. Debs, the four-time Socialist candidate for President, was convicted and sentenced to 10 years in prison for making a speech that "obstructed recruiting". Even a film called *The Spirit of '76* was seized and its producer imprisoned and fined; apparently the film portrayed too much British cruelty during the American Revolution which could undermine support for the current close American ally in the war effort. After the war, the law was invoked in order to arrest and deport several hundred foreign socialists and anarchists, allegedly due the bombing of Attorney General's house by an anarchist agent. If you are wondering how this broad limitation of free speech held up at the Supreme Court, I will direct you to the 1919 case of *Schenck v. United States* in which the Court decided that the law was justified if such speech constituted a "clear and present danger" to the government, the same as if a man shouted "Fire" in a crowded theatre according to the famous Justice Oliver Holmes. Schenck had denounced the war conscription law as "involuntary servitude" and his arrest as an abridgment of freedom of speech and of the press. Rather than Justice Holmes' "fire", could we consider Schenck's act more like warning people of a fire in the theatre before entering? Is not war itself a "clear and present danger", much more dangerous than a mere argument against it? What is the fine line in which citizens are allowed to object to war without creating a danger to the government?

During the Cold War, the McCarren Act and the red-baiting of Senator McCarthy breathed new life into the Espionage Act. While the Act was originally intended to apply only during wartime, it has been continuously in force since 1950 – the long years of the Cold War, the permanent militarization of American policy and economy, and even the recent "War on

Terror” show how far such justifications can be stretched to protect the government from its own citizens (not vice versa, which is the ideal). Public speech and print have been superseded by the possession of secret information as the main focus of the law. In 1971, Daniel Ellsberg and Anthony Russo were charged under the Espionage Act of publishing classified documents that came to be known as the Pentagon Papers. They consisted 7000 pages of top secret records of the Department of Defense’s involvement in the Vietnam from the 1940s-70s, leaked by Ellsberg and Russo to the New York Times because of their indignation about the crimes of the United States against the people of Vietnam. The Nixon administration attempted to block the publication but it was ruled freedom of speech by the Supreme Court; the administration then indicted the leakers under the Espionage Act. They would have almost certainly been convicted and served long sentences but were instead released because of a legal technicality – the Watergate scandal that caused Nixon’s downfall came about when Nixon’s henchmen tried to steal compromising information about Ellsberg from his psychiatrist’s office. The Pentagon Papers case obviously had major historical ramifications, but also made it clear that the government considered the distribution of secret information to the press for the purpose of exposing secrets of the same government to be espionage. We must ask ourselves which is the worse crime: sanctioning injustice, oppression, and murder around the world, or the disclosure of these secret indiscretions to the public?

The final section of this essay concerns the recent cases of Chelsea Manning and Edward Snowden, both of which are related to the Pentagon Papers case. Manning has been sentenced to 35 years in prison for violating the Espionage Act by stealing government intelligence and diplomatic cables that revealed governmental corruption and giving them to WikiLeaks to be published. Edward Snowden has been charged with violating the Espionage Act for stealing and publishing secret government information that revealed the extent of the widespread secret

surveillance powers of the National Security Agency. Just as the Pentagon Papers, the crimes of Manning and Snowden only involved the transmission of information to the public that had been classified by the government as secret.

There are a few issues at play that we can discuss after this brief historical synopsis of the Espionage Act. You will have noticed the prevalence of the word "secret" in the examples I mentioned. It seems that the pervasive cloud of government secrecy is an excuse for any number of illegal or immoral acts to be committed. The reason the Pentagon Papers, the Manning leaks, and the Snowden leaks are such captivating events is not only that they reveal secrets protected by the state, but that the revealed contents of these state secrets are so shocking to the public. The government naturally wants the focus to be on the importance of maintaining secrecy and the punishment for violation of the Espionage Act, but polls show that the public is much more concerned with the harmful content of the secrets than the comparatively harmless crime of revealing them (harmless except to the reputation of the government). This is because the government is intended to be "of the people, by the people, and for the people", and many people still hold this democratic ideal close to heart. When it is revealed how much the government hides from its citizens, we have the right to be shocked, outraged, and demand accountability; the people to be held accountable are not the ones whose conscience and sense of moral outrage drove them to provide us with the secrets, however, and they should probably be rewarded rather than punished.

Another aspect is the fine line between Freedom of Speech and state security. The Espionage Act and the cases above show exactly where the line stands between what is considered the right to free speech and what is considered the government's prerogative to limit any expression that supposedly endangers state security. In my opinion, there is a clear solution to this problem, which is the absolute protection of Freedom of

Speech and the other freedoms of the First Amendment. Whenever state security is invoked in order to limit fundamental rights, it is a slippery slope that takes us further away from the idea of the open democratic society towards something on the opposite end of the spectrum that could be called either tyranny, fascism, or totalitarianism. If we imagine George Orwell's *1984* today, there would surely be a Ministry of Freedom which would limit Freedom of Speech to active daily repetition of the mantra: "War is Peace. Freedom is Slavery. Ignorance is Strength."

Additionally, we should remember that a feature of the Espionage Act, however we feel about it, was that it was only meant to be enforceable and enforced during "wartime". This is a crucial point if we consider that the traditional idea of wartime changed after World War II to be replaced with the idea of the continuous "Cold War", or the state of being permanently on war footing against global enemies. The militarization of the American economy was central to its growth and success in the post-World War II years, and was important for protecting American corporate profits around the world. This did not change after the end of the Cold War; the Clinton Administration determined that the U.S. military must be able to fight two regional conflicts simultaneously, the Bush and Obama years have seen the invention and proliferation of the ill-conceived concept of the War on Terror. There are also at least 800 American bases and military installations in at least 156 countries around the world ([link](#)). If this still does not qualify as a permanent state of war, it is surely a state of hyper-militarization against enemies more imagined than real. It must be mentioned that the type of state and military secrets revealed by the aforementioned cases are not tactical, operational, or strategic in nature – I am not advocating something akin to reporting on troop movements to the Germans during World War II; rather, these are systemic and institutional secrets that hide crimes and corruption of government agencies and their corporate partners. In

comparison, Julius and Ethel Rosenberg were convicted and executed under the Espionage Act for purportedly providing the Soviet Union with plans for nuclear weapons. However dubious the evidence against them, the nature of the crime is different from the argument I am attempting to make; giving detailed military information or weapons to hostile nations or groups is something else entirely from revealing moral injustices and atrocities of a government to its own people in the name of transparency and justice.

Let us now consider the Patriot Act and the system of state surveillance. In the weeks after 9/11, the Bush Administration and Congress created and easily passed a new law with the Orwellian name of the Patriot Act, which allows for a very broad interpretation of government access to any information that it claims could be used to maintain security (The Obama administration and a new Congress easily renewed the law in 2011). The last decade and a half has seen a huge expansion of the state security apparatus in general, headlined by agencies such as the new Department of Homeland Security, the infamous CIA, and the venerable National Security Agency (there are at least 16 separate government intelligence agencies and an untold number of private intelligence contractors, such as Stratfor, whose ignoble mission of trading secret information to governments and corporations was revealed in another recent leak by the hacker Jeremy Hammond). It was Ben Franklin who said that "they who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety." Never has this aphorism been so apt. The most recent revelations of the Snowden case show us just how pervasive and perverse the NSA has become (or maybe it was always this way, but with less amenable technology and/or publicity). What we are dealing with is the interception, collection, and monitoring of personal email, internet searches, phone conversations, and more, all over the world and on American citizens in their own houses. The NSA, we have learned, has virtually unchecked power and resources with no limitations or

oversight. It is unclear who is being made more secure from whom.

In conclusion, we must remember that the things in this article are just the tip of the proverbial iceberg in the larger issue of Free Speech versus state secrecy and security. Indeed, the First Amendment has needed protection from government infringement since before the ink was even dry on the Bill of Rights. It will continue to be so in the future. A democracy (or what passes for one) will always depend on the active involvement of citizens to defend their own rights against the class of the Power Elite who would happily curtail those rights for their personal and financial gain. A government "of the people, by the people, and for the people" will be so in fact, as well as in name, only as long as its citizens force their elected leaders to work for them. A corollary to this is that citizens can only be involved in decision-making and accountability if they are in possession of relevant information on what exactly their government has been doing in their name (and with their tax money). This is why we should honor transparency rather than secrecy, and give courageous whistleblowers medals rather than prison sentences. We should not acquiesce in the expansion of the surveillance state and the cult of secrecy, giving up freedoms in the name of security. Such a systemic evil can lead only to an Orwellian future which must be avoided at any cost.