BOOK REVIEW

Espionage and whistleblowing

Brian Martin

In 1917, the United States entered World War I, several years after it started. US President Woodrow Wilson led the push to join the war, which included conscription and clamping down on dissent. Congress passed the Espionage Act, targeted at those who hindered the war effort.

Woodrow Wilson

In its usual meaning, espionage refers to spying, for example giving or selling military secrets to the enemy. That would compromise military operations and hence had to be countered with the severest penalties. The idea is that lengthy imprisonment would deter spying on behalf of the enemy. (Spying for "our side" is another matter.)

Who would have guessed that a law passed against spying during World War I would be used against US whistleblowers more than a hundred years later? If you want to know the full story, read Ralph Engelman and Carey Shenkman's book *A Century of Repression: The Espionage Act and Freedom of the Press.* This is a long, scholarly and highly referenced treatment, filled with so much fascinating detail that I can only mention a few highlights.

Engelman and Shenkman provide a detailed examination of the uses of the Espionage Act, giving informed accounts and commentary on a range of cases. Some of these have been high-profile stories, including those involving Daniel Ellsberg, who leaked the Pentagon Papers to the media, Chelsea Manning who leaked documents to WikiLeaks, Edward Snowden who leaked documents about spying by the National Security Agency, and Julian Assange, WikiLeaks founder.

The United States is known as the home of free speech, with the First Amendment to the Constitution as the signifier of a commitment to protecting the speech of citizens and the press. Alas, much of this reputation is a mirage. Espionage Act prosecutions provide a telling illustration. US federal governments over the past century have wanted to silence criticism of their policies, and the Espionage Act has been one of their most useful tools.

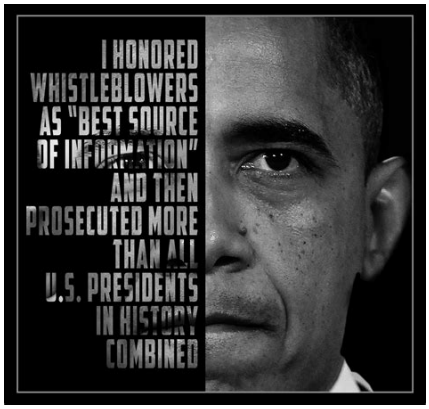
During and after World War I, the act was used to smash the socialist left. By the end of the war, nearly the entire dissident press had been banned from the postal system. So much for freedom of the press. I was astounded to read about how the Espionage Act was used, in a seemingly random process, against critics of the war.

> "For example, in Iowa a man received a one-year jail sentence for applauding and contributing twenty-five cents at an antiwar rally. A Vermont pastor was sentenced to fifteen years for distributing a pacifist pamphlet based on the teachings of Christ. A Russian-born woman, a socialist editor, earned a ten-year sentence for making an antiwar statement to a women's dining club in Kansas City." (p. 32)

During the Cold War, the Espionage Act was linked to the rise of McCarthyism, the campaign against left-wing figures from all walks of life. After 9/11, it was used against critics of the War on Terror.

The Espionage Act was often used as a weapon against the left, but this was not just a tool for Republican administrations. The Act had its genesis in the Democrat administration of Woodrow Wilson, and during World War II, the Democrat President Roosevelt contemplated using the act against a prominent newspaper, the *Chicago Tribune,* owned by a wealthy conservative. (We need to remember that US conservatives have often opposed involvement in foreign wars.)

In the 2000s, national security whistleblowers have been prime targets. The Obama government launched more prosecutions of whistleblowers under the act than all previous administrations combined.



Engelman and Shenkman tell how the scope of the act was widened over the years via legislation and court rulings, some of them involving well-known figures and others, just as important, concerning cases mostly forgotten. Even some of the failed prosecutions, for example against Daniel Ellsberg, did little to protect future targets because court rulings were too narrow.

In Australia, prosecutions in the domain of what is called national security are often really about protecting governments and officials from embarrassment and enabling corruption to continue with impunity. There are obvious parallels with the US experience. The overall pattern is one of finding ways of silencing critics.

In several places, Engelman and Shenkman note that prosecutions were intended to send a message to others who might think of speaking out. For example, Shamai Leibowitz, accused of giving FBI documents to a blogger who criticised Israeli government policies,

was convicted and imprisoned, as "the government insisted on a punitive approach that would set an example for other would-be insider sources." (p. 182)

Thomas Drake, who leaked information from the National Security Agency to the *New York Times,* initially cooperated with investigation of the leak, but was still prosecuted. "The goal of the prosecution had shifted from investigating the *Times* story to making an example of Drake to discourage other insider sources from going to the press." (p. 178)

However, this draconian approach had another effect: some insiders, like Edward Snowden, learned to avoid internal reporting processes and go straight to the media.

Those who have followed the Australian cases of Witness K, Bernard Collaery, David McBride and Richard Boyle will see parallels with the use of the Espionage Act in the US. For example, John Kiriakou, who revealed torture by the CIA, was the only person to be imprisoned: none of the torturers or administrators were.

John Kiriakou

> "Disclosures in Espionage Act cases have often exposed questionable or illegal conduct, whose perpetrators nonetheless often elude accountability. It is noteworthy that whistleblowers have been imprisoned for extended sentences for revealing serious violations of the US Constitution or international law for which offending officials are rarely punished or even reprimanded." (p. 265)

Related to this is a double standard: some high-level figures, like General David Petraeus, who revealed highly secret information to his biographer-lover, got off with a misdemeanour conviction with no jail time, whereas Jeffrey Sterling, who leaked information in the public interest, went to jail.

In Engelman and Shenkman's telling, the ambit of the Espionage Act has gradually expanded so that it covers insider sources. The culmination, so far, is its use against Julian Assange.

> "The indictment of Assange marked the first full-fledged frontal legal attack on a publisher, based on the Espionage Act, for disclosing government secrets. It represented an unprecedented extension — unlikely the last — of the Espionage Act to threaten freedom of a press now deemed 'the enemy of the American people' by the federal government." (p. 247)

Engelman and Shenkman describe how the *New York Times* has distanced itself from Assange, reporting on unsavoury aspects of his appearance and behaviour. Decades earlier, the *Times* had done the same thing to Ellsberg.

Engelman and Shenkman note that the US, unlike Britain, has never had an official secrets act. However, the Espionage Act, as it has been developed, serves as a surrogate. It is plausible that if the Espionage Act hadn't been available, some other means would have been found to achieve the same goals.

Alongside the story of the Espionage Act, Engelman and Shenkman tell about the American Civil Liberties Union, the ACLU, well known for its defence of free speech. The ACLU was founded just after World War I in response to the excesses of free-speech suppression. But the ACLU wasn't always a great defender. It went silent during much of the Cold War, and new organisations sprang up to take its place. The trajectory of the ACLU and other US free-speech defenders is paralleled in Australia by the variety of organisations that have taken up the torch for whistleblowers and the media.

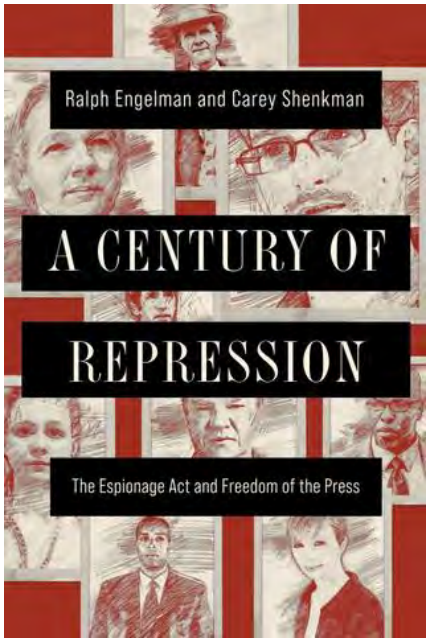
Strangely, at one point the CIA proposed an alternative to the Espionage Act to criminalise unauthorised disclosures. The CIA director William Casey wanted to discredit confidential sources, saying "Unless the leaker can be painted in hues distinctly different from the whistleblower, the battle, indeed the war, on leaks will most certainly be lost." (p. 152)


William Casey

Leaker, whistleblower: what's in a name? Engelman and Shenkman say using the term "confidential source" offers more status.

Engelman and Shenkman sum up:

> "For over a century, the Espionage Act has served as a means of information control, an obstacle to the ability of the press to report critically about US foreign policies and military engagements. Its fundamental flaw consists of associating, in a single law, the act of espionage on behalf of a foreign power with all other disclosures of information deemed secret by the federal government. The act permits the government to conflate actions necessary in a democratic society — dissent, whistleblowing, and investigative reporting — with disloyalty." (p. 249)



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