The Espionage Act and the Rise of America's Secrecy Regime

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Also by Sam Lebovic

For Em, again and always

INTRODUCTION

After remaining silent for so long, I started speaking.
—Terry Albury (2021)

BEFORE HE WENT TO PRISON, TERRY ALBURY HAD BEEN AN FBI agent for sixteen successful, if not always entirely happy, years. He had joined the Bureau as an idealistic college graduate in August 2001, hoping to put away sex offenders and child pornographers. After 9/11, Albury embraced the FBI's new focus on counterterrorism, taking seriously his mission to keep Americans safe. As an agent in San Francisco in 2007, he helped arrest a pair of radical Islamists plotting a bombing and received a commendation from FBI director Robert Mueller. He even served a short stint as a counterterrorism investigator in Iraq.[1]

But by the time he moved to Minneapolis, in 2012, Albury was beginning to nurse doubts about his work. He had been involved in too many counterterrorism investigations that went nowhere. They had been opened on the basis of what he called "BS" information—such as a tip from a single, unreliable source—or because of religious or racial prejudice.[2]

When Albury arrived in Minneapolis, the FBI's main target was the Somali community. A number of young Somali men had recently left the city to join the militant group Al-Shabab. But when Albury began looking at files opened on the relatives of some of those men, or on local imams, as he participated in community-outreach programs with local mosques—programs that were also a way of recruiting more informants, of starting more surveillance—he frequently found little evidence of terrorism. Yet the surveillance continued, and the files stayed open, sucking up resources and accumulating more irrelevant information. Even if the Bureau turned up

nothing, those files would follow the surveilled individuals throughout their lives. Whenever they applied for a passport or a job that required a background check, it would be revealed that they had once been looked at by the FBI. The real impact of his life's work, Albury had come to believe, wasn't protecting Americans from terrorism. Rather, he concluded, "I helped to destroy people."[3]

Albury, himself the son of a political refugee from Ethiopia, was the only Black field agent in Minneapolis. That made it hard to stomach the anti-Somali prejudice that wove its way through the FBI's work in the city, especially after the murder of Michael Brown in 2014 and the eruption of Black Lives Matter protests. "Minneapolis broke me," Albury said later. "It became too hard to ignore the human cost of what we were actually doing."[4]

In 2016 Albury reached out to the *Intercept*, an investigative-journalism website that had made its name publishing disclosures about the security state. He took photos of secret policy documents that outlined the procedures by which the FBI ran its surveillance operations and sent them to the site, which published a series of articles on the "FBI's Secret Rules" in January 2017. Albury didn't see himself as bringing "huge programs to light the public wasn't aware of." What he disclosed were new details about practices that were already the subject of controversy and debate, as well as suspicion among surveilled communities. For instance, one of his most important disclosures was a full and unredacted copy of the Domestic Investigations and Operations Guide, the FBI's internal rulebook.[5]

The *Intercept* articles confirmed that racial and religious profiling was taking place despite FBI rules that banned it. And they raised new questions about the effectiveness and justice of counterterrorism operations. Albury had come to think that these investigations were driven as much by institutional pressures—by the desire of the FBI to be seen to be active—as by any objective threat of domestic terrorism. He seems to have hoped that his disclosures would trigger a public debate about the Bureau, perhaps on the level of the famous Church hearings into FBI abuses in the 1970s, in which it had been revealed that J. Edgar Hoover's FBI had been illegally harassing and intimidating radical activists, including Albury's uncle, who had been a member of the Black Panthers.[6]

That debate never happened. Amid the chaotic opening months of the Trump presidency, there was little public appetite for a close look at the FBI's counterterrorism work.

The FBI, however, was paying very careful attention. It wanted to know who had spilled its secrets. In 2016 it had received a tip-off that the stories were coming when two journalists had filed Freedom of Information Act (FOIA) requests for documents that Albury had disclosed. One of those documents had been seen by only sixteen people in the previous five years. Another had a small highlight mark that identified it. They led the Bureau directly to Albury.

Albury was fired and charged with violating the Espionage Act. There was never any suspicion that he was engaged in espionage as most of us understand the term—there was no suggestion that he was spying for a foreign government or selling secrets for financial gain. His motives were straightforward: "As a public servant, my oath is to serve the interest of society, not the FBI… [, and] the public I served had a right to know what the FBI was doing in their name." But his desire to inform the public was completely irrelevant; it wasn't even a possible defense against the charge of espionage. Nor was it necessary for the government to prove that the disclosures had done any actual harm to the nation's security or to the effectiveness of the FBI's work.[7]

The Espionage Act makes it a crime to disclose secret information to those unauthorized to receive it: no excuses, no exceptions. Albury pled guilty to leaking classified information to the press and was sentenced to four years in prison.[8]

Albury is not the only recent victim of the Espionage Act. In the eight years that the Obama administration was in power, it brought espionage charges against eight people for disclosing information to the media. Trump brought six such charges in four years. One case per year may not seem like much. But between 1917, when the Espionage Act was passed, and 2008, a grand total of five such cases had been brought, and only one, in the 1980s, had led to a successful conviction.[9] Yet during the war on terror, Edward Snowden, Chelsea Manning, Thomas Drake, John Kiriakou, Reality Winner, Jeffrey Sterling, and Daniel Hale have all felt the sting of the law.

Moreover, simply counting up the convictions radically understates the power of the law. The Espionage Act serves as the final backstop securing the nation's bloated secrecy regime. No one knows exactly how much information is kept secret by the government. That's part of the problem with secrecy. But by any reckoning, it is a staggering amount. One 2001 estimate suggests that there are 7.5 billion pages of classified information cloistered in the US government—as many pages of secrets as there are pages in all the books on all the shelves in the Library of Congress. By the 2010s, between fifty million and ninety million documents were newly stamped as "secret" every year. Managing them is an expensive business. In 2017, the last year in which this figure was made public, maintaining its secrets cost the United States more than $18 billion.[10]

The power of the Espionage Act lies not just in the cases in which it is used but also in the work it does to protect the secrets of a giant bureaucracy. The law hangs over government employees, threatening to send them to jail for disclosing any information that has been stamped as "secret."

How did the United States end up in this situation? How had a law passed during World War I to prevent foreign spies from stealing secrets become a tool powerful enough to prevent the public from learning what its government is doing?

You won't find an answer by reading the language of the statute. At the heart of the Espionage Act are two sections of the US criminal code, Sections 793 and 794. Section 794 criminalizes what we might think of as traditional espionage—it makes it illegal to collect information for a foreign government. Section 793, the section used to prosecute leakers today, is murkier. It contains six complicated clauses intended to protect secrets by making it illegal to gather or transfer information without authorization. But exactly what they mean, and how they are supposed to work, is very unclear.

For more than a century, lawyers have complained that the Espionage Act is a poorly drafted, deeply confusing law. In the Pentagon Papers case of 1971, which was the first and last time the Supreme Court grappled with the meaning of the sections used to send Albury to jail, Justice John Marshall Harlan called it a "singularly opaque statute."[11] Two years later, a pair of law professors tried to get to the bottom of the mess. After 160 pages of dense

legal analysis, they threw up their hands: “The longer we looked, the less we saw… the statutes implacably resist the effort to understand.”[12]

To understand the law, it is necessary to trace its history. The laws and practices of secrecy emerged in a piecemeal, improvised fashion over many decades. The result is a jerry-rigged and unwieldy regime that keeps too much information secret and that thwarts democratic oversight of national-security and foreign-policy institutions. The pathologies of the present are a product of the past.

This book is the first to tell the whole story of this controversial, confusing law.

The problems with the Espionage Act began with its rushed passage through Congress in 1917. Technically, the Espionage Act was an omnibus law that combined more than a dozen laws relating to foreign relations and defense policy and neutrality. Little attention was paid to what would become Sections 793 and 794, which had been largely copied from an earlier Defense Secrets Act, itself rushed through Congress six years before. As a result, no one really noticed that although Section 793 made it illegal to disclose “information relating to the national defense” to people who weren’t authorized to receive it, at no point did the law stop to define what “information relating to the national defense” meant or to delineate any process by which someone might be authorized to access it. At the center of the law was a gaping hole.

What followed were decades of improvisation as courts, politicians, and lawyers tried to make sense of how the laws of secrecy were supposed to work. Sometimes, Congress passed new laws seeking to keep information secret that lawmakers weren’t sure was covered by the 1917 law, such as diplomatic code (in 1933) or atomic energy (in 1946) or cryptography (in 1950). In 1950, in the middle of the Cold War spy scare, Congress amended Section 793 itself, although the revisions ended up making the law even more confusing.

More often, the executive branch tried to protect secrets by developing new bureaucratic practices that rounded out the law: by requiring employees in particular agencies to sign confidentiality agreements, for instance, or by asking the press to keep from publishing secret information. The most

important of these patches came in 1951, when Harry Truman established the modern classification system—a standardized bureaucratic process to classify information as “Confidential” or “Secret” or “Top Secret.” Three-and-a-half decades late, this classification system plugged the biggest hole in the 1917 law. The executive branch now had a process to determine what sorts of information were supposed to be kept away from unauthorized eyes. By the Cold War, a robust secrecy regime had arisen.

Amid the fallout from the controversial war in Vietnam, many of those secrets began to spill. By the 1970s, it turned out that no one was really happy with the secrecy regime, which underwent another round of renovations. Those who were outraged by the secrecy of the state sought the passage of new transparency laws, such as the Freedom of Information Act and new forms of congressional oversight. Those who were more upset that important security information had spilled concluded that the Espionage Act was clearly not up to snuff, and they sought instead to install a suite of new secrecy protections, such as the Classified Information Procedure Act (1980), the Intelligence Identities Protection Act (1982), and internal boards to review the public statements of former intelligence officials. All this was layered on top of the Espionage Act and the classification system, which survived the second half of the twentieth century unchanged.

By 9/11, the nation’s secrecy regime was an elaborate patchwork of statutes and executive orders and bureaucratic practices. As the White House waged its war on terror, it would find that the ambiguities of this patched-together legal structure gave it considerable power to develop and deploy an array of secretive policies and programs. Nine decades after it was passed, the Espionage Act at last became a remarkably effective tool for protecting secrets.

Part of the reason that the US secrecy laws are so complicated is that they straddle an unresolved dilemma of democratic life. On the one hand, a democratic government needs the capacity to keep some information secret. You don’t want rogue actors getting their hands on the nuclear codes, just as you don’t want individual bureaucrats cynically trading secrets for cash. And on a slightly more abstract level, if a democratically elected government has a mandate to administer a program and needs to keep some operational details

secret to make that program effective—the names of undercover officers, say, or the schedule for spot audits—then you also want to make sure that no disgruntled employee can undermine the program by spilling the secret: that would amount to a one-person veto. But on the other hand, what makes a democracy democratic is the fact that it rules with the consent of the governed. Such consent is meaningful only if citizens can be fully informed about what their government is doing. The central reason that we so highly value the right to free speech is that it allows the public to educate itself. None of this works if the government can operate in secret. So if someone learns of a secret abuse of power, if they discover that the public is being lied to, then democratic norms require that they share what they learn with their fellow citizens.

In a formal sense, this dilemma is perhaps unresolvable. But a functioning secrecy regime would seek to balance these conflicting priorities—it would find a way to allow for the keeping of a limited number of appropriately held secrets while minimizing the potential for abuse. In theory, that's what the various moving parts of America's secrecy regime are supposed to do.

In reality, the system is a chaotic mess. Overclassification is endemic; transparency measures such as the FOIA are a weak counterweight. When so much information is classified, leaks are inevitable—the temptation to conduct politics by sharing a tip, floating a program, or undermining a rival is too great. Despite the fact that all of those leaks should be criminal according to the letter of the Espionage Act, no one thinks it would be realistic—or desirable—to apply that law literally. Instead, the sweeping provisions of the Espionage Act give the government incredible discretion to prosecute leaks when it so chooses. Such a legal system cannot produce just outcomes; it inevitably bends to the interests of the powerful.

It should be no great surprise that the secrecy regime is as dysfunctional as it is. No master plan guided its growth, and at no point has it been calmly and rationally evaluated. It has been shaped instead by decades of political conflict. Time and again, those who sought to protect the nation from foreign threats claimed the need to police the sorts of information that could circulate in the public sphere. In part, they wanted to prevent foreign spies from accessing valuable information, and the history of the Espionage Act is in no small part the history of spy scares, both real and imagined. But during World War I the Espionage Act was famous not for its secrecy provisions but for

another section of the omnibus bill, which was used to send more than a thousand Socialists and radicals to jail on the grounds that their criticism interfered with the war effort just as much as a foreign spy or saboteur would. This heavy-handed censorship regime produced a civil-libertarian backlash that led directly to the rise of our modern understanding of the First Amendment. Supreme Court justice Oliver Wendell Holmes's famous free-speech metaphors—"shouting fire in a crowded theater," "the free trade in ideas"—were both issued in Espionage Act cases in 1919.

The Espionage Act thus helped to produce the first exchanges between two interest groups that would become regular combatants in the twentieth century. The guardians of national security would repeatedly seek new powers to protect their secrets, which often meant threatening the freedoms of the news media: if you wanted to prevent an enemy from learning a valuable secret, you also needed to keep the secret out of the papers. Then civil-liberties groups would rally against the new threat, successfully claiming a First Amendment right not only to criticize the government but also to publish government secrets.

Over time, these clashes between the forces of national security and the forces of free speech produced an uneasy stalemate. Efforts to extend security regulations into the public sphere were repeatedly defeated. Today, Americans are remarkably free to debate government policy, and, by and large, the media are free to publish state secrets if they can get their hands on them. In one sense, the American public sphere is freer than ever before.

Yet because the champions of civil liberties were largely concerned with protecting their autonomy from government overreach, they acquiesced to the power of the state to police its own domain. They did not protest the rise of new secrecy laws and practices anywhere nearly as much as they protested the proposal of new censorship practices. So the security state's desire to control public debate has flowed instead down this path, the path of secrecy.

On one level, the story of the Espionage Act is thus a story of an important, underappreciated evolution in the way the national-security state has sought to police debate in America. Where once the Espionage Act was used as a tool of censorship, today it is used as a tool of secrecy. Where once the state sought to regulate speech, now it is happy to let the public criticize and debate all it wants. What it controls instead is the very information that citizens need to form their opinions.

Although this is, in some sense, a story of evolution, a story of the ways that an old law has come to be used for new purposes, it is also a story of continuity. The state is still using the Espionage Act to silence its critics; it's just that the location of those critics has changed. When the Espionage Act was only a year old, it was used to silence the radical political advocate Eugene Debs, who went to jail for speaking out against what he considered to be an unjust and unnecessary war. A century later, the Espionage Act is used to silence internal critics such as Albury, who went to jail for seeking to inform the public about what he considers to be an unjust and unnecessary security policy.

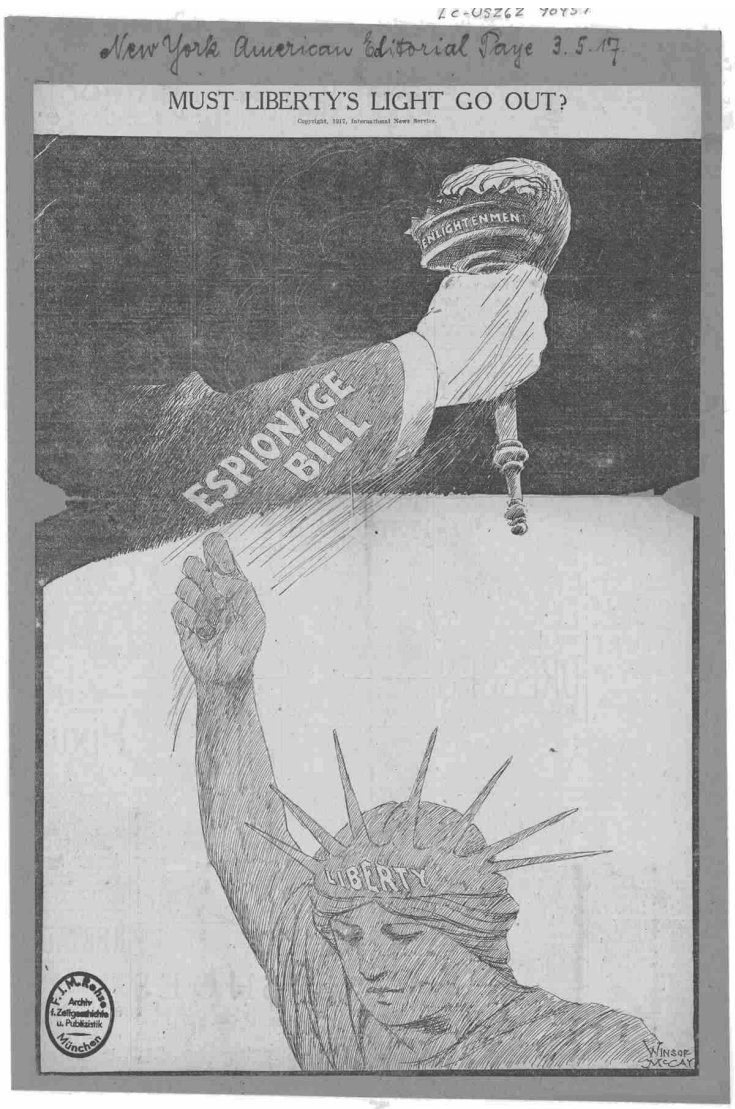
The result is that a new form of censorship has become more important, one aimed not at the outsider critic of the government but at the insider who can inform the public in the first place. Call someone like Albury or Snowden or Manning what you will—a leaker, a source, a whistleblower, a traitor—they are now the central front in the long-running struggle to bring democratic oversight and control to the security state.

For the historical record makes it quite plain that the Espionage Act has produced a secrecy regime that has grown well beyond any legitimate need to keep information confidential. Public knowledge of matters of national and international significance has been blocked and distorted by the state. Wars have been started in secret. Coups have been engineered. People have been tortured. Millions of people have been subject to surveillance; many of the most committed champions of civil liberties and civil rights have been harassed and intimidated. A corrupt military-industrial complex has channeled billions of taxpayer dollars into private pockets. Foreign policies have been adopted that have led to blowback, costing American lives even as they create pressures for yet more secrecy, yet more security. And when some of these secrets have spilled out, producing momentary controversies that have shaped the history of the Espionage Act, they have also damaged Americans' faith in their government, fueling the cynicism and rage that roil US politics today.

For more than a century, the Espionage Act has undermined American democracy. It continues to do so today. To understand how this happened, we need to start at the beginning, in the years before World War I, when a rising empire began to worry that foreigners might steal its secrets.

Chapter 1

THE FEAR OF SPIES



In 1917 newspapers criticized the proposed Espionage Act as a threat to their liberties, as this editorial cartoon suggests. Winsor McCay, "Must Liberty's Light Go Out?," *New York American*, May 3, 1917. (Library of Congress)

It was June 14, 1917, and Woodrow Wilson's Flag Day wasn't going exactly as planned. The United States had been at war for a little more than two months, and the new holiday was supposed to be a pageant of patriotism. Only the previous year, in the first federally recognized Flag Day, Wilson had marched at the head of a parade of sixty thousand flag-waving Americans, wearing a straw hat and a boutonniere of red, white, and blue carnations. After a twenty-one-gun salute and the unfurling of a giant flag from the Washington Monument, he had delivered a pugnacious address on the need for national unity: "There is disloyalty active in the U.S., and it must be absolutely crushed." That night he had been renominated for the presidency, his party including in its platform an attack on foreigners and foreign-born Americans who were seeking to divide the nation. Wilson's first Flag Day had gone swimmingly.[1]

But on the day of the sequel, it rained torrentially. Huddled under an umbrella held by a Secret Service officer, Wilson delivered his speech to barely one thousand "drenched and bedraggled" patriots. Even Edith Wilson chose to stay in the car. It was an appropriate deflation of this ersatz national holiday, already on its way to becoming the neglected stepchild of the federal calendar. Only the themes of Wilson's speech—loyalty, unity, fear of the foreign—recaptured the mood of the previous year. America had gone to war, he explained, because the Germans had "filled our unsuspecting communities with vicious spies and conspirators and sought to corrupt the opinion of our people." Now the Germans were deploying an army of "agents and dupes" to "undermine the government" and intrigue against the war effort. But they would not win, warned the sodden president, for the United States was dedicated to the cause: "Woe be to the man or group of men that seeks to stand in our way."[2]

The next day, Wilson signed the Espionage Act into law.

To understand the origins of the secrecy laws that the United States still lives with, it is necessary to understand the anxieties of Wilson's era of imperial conflict and racial paranoia. From the American Revolution through the first decade of the twentieth century, the nation had made do without a law designed to protect its secrets. But then in 1911, Congress hastily enacted a