

DON'T LET TRUMP—OR BIDEN—DISTRACT FROM THE REAL VICTIMS OF THE ESPIONAGE ACT

CAREY SHENKMAN AND RALPH ENGELMAN[∞]

In light of investigations of both main presidential candidates in the current election cycle under the Espionage Act of 1917, including an unprecedented ongoing criminal trial against Donald Trump, the antiquated hundred-year-old law deserves renewed scrutiny. Trump now cries he is a victim. It's an ironic complaint given the real victims of the Act who have had their lives ruined over the last century: activists in radical political movements, labor organizers, anti-war dissidents, and whistleblowers. Trump's own administration aggressively weaponized the law to prevent the free flow of information against those who expose government abuses. His Justice Department initiated an unprecedented and ongoing prosecution against publisher Julian Assange, neither a government employee nor even a U.S. citizen, which threatens catastrophic consequences for the freedom of the press both in the U.S. and globally. So as the news is dominated by Trump's case, we must also remain mindful of the pressing danger posed by the law to those in less powerful positions.

It's not every election year that both candidates in a presidential contest fall under the crosshairs of the Espionage Act of 1917. But here we are. Donald Trump is currently facing over thirty felony counts under the antiquated law for retaining classified documents at Mar-a-Lago. President Biden was himself subject to a special counsel investigation after Obama-era confidential documents were discovered at his office, but ultimately did not face prosecution. The investigation into Biden concluded, in what appeared to be a political hit job by the special counsel, that Biden was a “well-meaning, elderly man with a poor memory.”¹

Meanwhile, Trump's defense team has gone on the offensive, recently making news with a 68-page discovery request seeking evidence of “collusion” in the Biden administration as well as “analytic bias” from the Intelligence Community.² In other words, Trump claims he's a victim—a victim of the Espionage Act being used unfairly.

[∞] Ralph Engelman and Carey Shenkman are co-authors of the book “A Century of Repression: The Espionage Act and Freedom of the Press” (University of Illinois Press, 2022). Engelman is senior professor emeritus of journalism and communication studies at Long Island University, Brooklyn, and faculty coordinator of the George Polk Awards. He is the author of *Public Radio and Television in America: A Political History* and *Friendlyvision: Fred Friendly and the Rise and Fall of Television Journalism*. Shenkman is a human rights lawyer and NYU Law School Alum ('13) focusing on freedom of expression and technology. He works with numerous civil society organizations, testified in Assange's extradition proceedings in London, and has in the past done legal work surrounding that case and the protection of media sources and journalists generally.

¹ *United States v. Trump*, Superseding Indictment, No. 23-CR-80101-CR (D. Fla., July 27, 2023); Michael D. Shear, *Special Counsel's Report Puts Biden's Age and Memory in the Spotlight*, New York Times (Feb. 8, 2024).

² *United States v. Trump*, Defendants' Motions to Compel Discovery, No. 23-80101-CR (D. Fla., Jan. 16, 2023).

When news of the Trump indictment and subsequent Biden investigation came down, we had just recently published a book on the Espionage Act (hereafter “the Act”), *A Century of Repression*. It was the law’s first panoramic political history: we focused on themes like the Act’s role in the rise of the FBI; how early resistance to the Act prompted the modern civil liberties movement; and its use against activists and, more recently, whistleblowers. So when a former president was crying foul play about the Act, we were understandably following quite closely.

Trump’s claims of victimhood are ironic. His own administration had weaponized the same law, but against whistleblowers—government officials who, unlike him, revealed misconduct, abuse, and violations of the constitution.³ Trump already enjoys privileges such as getting bail, which wasn’t the case for his administration’s targets.⁴ And the Justice Department has recently taken the position that non-spying violations of the Espionage Act can effectively qualify as terrorism, another label that—due to a technicality—is unlikely to apply to Trump despite the gravity of the allegations against him.⁵

Trump’s administration also initiated the unprecedented prosecution and ongoing extradition of WikiLeaks publisher Julian Assange under the Act—Assange may face extradition imminently from the United Kingdom⁶—for publications in 2010 that changed the shape of modern journalism. The Obama administration declined to prosecute the same case on First Amendment concerns;⁷ now Biden’s administration is continuing the prosecution Trump initiated. In contrast to Biden’s let-off as “well-meaning,” Espionage Act targets like Assange, who never signed a U.S. oath and is not even a U.S. citizen, are unlikely to be treated with similar slack. And considering Trump weaponized the Act in this way when in office, Trump and his defense team would do best to stay in their lane with the cries of victimhood.

The last time a presidential candidate came under the crosshairs of the Espionage Act was a century ago. Things looked very different then. In 1919, the Supreme Court upheld the conviction of the legendary socialist and labor leader

³ See, e.g., *Defending Rights & Dissent*, Statement on the Espionage Act Indictment of Donald Trump (June 14, 2023), available at <https://www.rightsanddissent.org/news/statement-on-the-espionage-act-indictment-of-donald-trump/>.

⁴ Katie Mettler, *Judge denies bail for accused NSA leaker Reality Winner after not guilty plea*, Washington Post (June 9, 2017), available at <https://www.washingtonpost.com/news/morning-mix/wp/2017/06/09/judges-denies-bail-for-accused-nsa-leaker-reality-winner-after-not-guilty-plea/>.

⁵ Sentencing Letter from U.S. Attorney Damian Williams to Judge Jesse Furman, *United States v. Schulte*, No. 17-CR-00548 (S.D.N.Y., Jan. 25, 2024), at 11 (arguing for, and ultimately achieving, a terrorism enhancement under §3A1.4 of the federal sentencing guidelines, where allegations involve a computer and thus trigger a computer crimes provision incorporating the Act); see also David Aaron, *How Much Prison Time Does Former President Trump Face? Applying the U.S. Sentencing Guidelines*, Just Security (June 12, 2023), available at <https://www.justsecurity.org/86901/how-much-prison-time-does-former-president-trump-face-applying-the-u-s-sentencing-guidelines/> (analyzing potential sentencing in Trump’s case, and not listing a §3A1.4 terrorism enhancement despite allegations of high-level disclosures, potentially as the documents at issue were primarily in physical rather than digital format).

⁶ Julian Assange’s “final” appeal against U.S. extradition to be held in February, Reuters (Dec. 19, 2023), available at <https://www.reuters.com/world/julian-assanges-final-appeal-against-us-extradition-be-held-february-2023-12-19/>.

⁷ Sara Horwitz, *Julian Assange unlikely to face U.S. charges over publishing classified documents*, Washington Post (Nov. 25, 2013).

Eugene Debs for making his famous anti-war speech on June 16, 1918 in Canton, Ohio. He was sentenced to ten years in prison but, characteristically defiant, said: “I enter the prison doors a flaming revolutionist . . . my head erect, my spirit untamed and my soul unconquerable.”⁸ While confined fourteen hours a day, he ran for president in 1920 on the Socialist Party ticket from the Atlanta Federal Penitentiary. He wore convict denim in campaign posters and received nearly a million votes. Debs was subsequently pardoned by Warren Harding.⁹ The story of the anti-war Debs bears little else in common with Trump.

The prospect of Trump’s conviction under the Espionage Act represents yet another twist in the circuitous, often bizarre history of the Act. The conversations surrounding Trump (and briefly Biden), including sterile analysis of how their conduct fits into the text of the law, completely obscures the practical history of how the Act has been deployed. The understandable desire to hold Trump accountable for violations of legal norms should not blind us to the problematic legacy of the Espionage Act and the continuing and imminent threat it poses to the freedom of the press.

A widely held misconception about the Espionage Act is that it is a law intended to target foreign spies, misapplied for other purposes. At the time of its passage, the Act—despite having ‘espionage’ in the title—instead contained a wealth of provisions punishing insubordination and fostering disloyalty; the Act was also introduced in conjunction with the first Sedition Act the country had seen since the Alien and Sedition Acts of 1798.¹⁰ During the First World War—the first modern information war—the Act was overwhelmingly used for the prosecution of dissidents, the Black press, radical labor, and socialists. The Wilson administration deployed the Espionage Act against criticism of U.S. participation in the conflict, led by the Socialist Party and the radical labor union the Industrial Workers of the World. Nearly the entire leadership of both organizations ended up in prison, including Eugene Debs. Thomas W. Gregory, Wilson’s attorney general, made clear in his annual report in 1917 that domestic unrest was a primary concern in the enactment and application of the Act.¹¹ During WWI, over 2,000 people, primarily left-wing activists, were convicted for seditious libel, not for espionage.¹²

Passage of the Espionage Act also set in motion two incongruent careers that would define civil liberties in the century to follow. John Lord O’Brian, the head of Wilson’s War Emergency Division of the Justice Department, the government department that was responsible for enforcing the Espionage Act, hired 22-year-old J. Edgar Hoover, whose worldview would be shaped by the Justice Department’s

⁸ Erick Trickey, *When America’s Most Prominent Socialist Was Jailed for Speaking Out Against World War I*, Smithsonian Magazine (June 15, 2018), available at <https://www.smithsonianmag.com/history/fiery-socialist-challenged-nations-role-wwi-180969386/>.

⁹ For an account of Debs’s imprisonment, see Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (Urbana: University of Illinois Press, 1982), 300-329.

¹⁰ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: Norton, 2004), 145.

¹¹ Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1917* (Washington, D.C.: Government Printing Office, 1917), 73.

¹² Robert Justin Goldstein, *Political Repression in Modern America: From 1870 to 1976* (Urbana: University of Illinois Press, 2001), 113.

wartime association of dissent with treason. Hoover aggressively pursued not only dissidents but also the prosecution of the Black press, writing to Congress that the “Negro is seeing red”; this worldview would survive with him through the FBI’s shameful and notorious COINTELPRO operations against Black liberation activists in the decades that ensued.¹³ Conversely, prosecutions under the Act during WWI prompted Roger Baldwin to shift his activism from pacificism to civil liberties and to establish the ACLU at the end of the war. Today, the ACLU is an important voice opposing the Espionage Act’s use against the free flow of information.

While the sedition provisions of the Act were subsequently repealed, the spirit of the law remained—a blunt instrument meant to limit the free flow of information that the government would prefer be kept secret.

The Act was amended in 1950 at the height of McCarthy’s Red Scare under the McCarran Act, which was designed to protect against “un-American” and “subversive” activities.¹⁴ Hence, during the Cold War and the War on Terror, the Espionage Act was increasingly deployed to punish dissident government employees who provided information about U.S. foreign and military policies to the press. The Act, amended and expanded, contained much of its original language, including the prohibition against sharing national defense information with “any person not entitled to receive it” and, indeed, against any “unauthorized possession” of such information.¹⁵ The staggering breadth of these provisions has been the subject of seminal law review articles. In 1973, in the aftermath of the failed Espionage Act prosecution of Daniel Ellsberg and Anthony Russo, Professors Benno Schmidt, Jr. and Harold Edgar wrote in the *Columbia Journalism Review* a scathing critique of the law’s muddled origins and poorly crafted, ambiguous language, which they maintained was a “loaded gun” pointed at journalists.¹⁶ In recent years Espionage Act investigations have resulted, for example, in *New York Times* reporter James Risen’s seven-year battle to resist a subpoena to testify before a grand jury, secret monitoring of numerous *Associated Press* reporters and editors, and the designation of *Fox News* reporter James Rosen as a possible aider and abettor in a State Department contractor’s violation of the Act.¹⁷ Even former Attorney General Eric Holder, Jr., who oversaw many of these modern cases, has since called for the Act’s reform.¹⁸

Indeed, a broad range of political figures and constitutional scholars, conservatives and liberals alike, have advocated replacing the Act with separate laws

¹³ Patrick S. Washburn, *A Question of Sedition: The Federal Government’s Investigation of the Black Press during World War II* (New York: Oxford University Press, 1986), 27.

¹⁴ House Committee on Un-American Activities, Internal Security Act of 1950, H.R. Rep. No. 9490, 81st Cong., 2d Sess., reprinted in 1950 US Code Cong. Serv. 3886, 3886-87.

¹⁵ 18 U.S.C. § 793.

¹⁶ Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, Colum. L. Rev. 73, no. 5 (May 1973).

¹⁷ Sarah Ellison, *What Was New York Times Reporter James Risen’s Seven-Year Legal Battle Really For?*, Vanity Fair (Mar. 17, 2015); *Gov’t obtains wide AP phone records in probe*, Associated Press (May 13, 2013); Ryan Lizza, *The D.O.J. Versus James Rosen*, New Yorker (May 20, 2013).

¹⁸ “Report of the Commission,” in Lee C. Bollinger and Geoffrey R. Stone, eds., *National Security, Leaks, and Freedom of the Press: The Pentagon Papers Fifty Years On* (New York: Oxford University Press, 2021), 272, 281.

for espionage and unauthorized disclosures by whistleblowers in order to strike a better balance between national security and First Amendment requirements. Congress has seen recent efforts to reform the Act spearheaded by Rep. Rashida Tlaib and many others on the hill.¹⁹ Proposed changes include a narrowing of the broad scope of possible targets of the Act and a public interest defense for whistleblowers which would allow for consideration of the impact of disclosures. These amendments are urgently needed. In the case of Daniel Hale, who exposed illegal drone killings of civilians in Yemen, prosecutors persuaded a federal judge to hold that revelations are irrelevant (and inadmissible) to the question of culpability under the Act.²⁰ Rather, the actual *motivations* behind any disclosures that fall under the Act is a question solely for receiving mercy at sentencing, a mercy rarely granted in jurisdictions sympathetic to national security concerns.²¹

During his presidency, Trump's posture regarding the Espionage Act was characteristically transactional and inconsistent. This was most clearly reflected in his administration's treatment of Julian Assange, the publisher of WikiLeaks and target of unprecedented Espionage Act charges. Trump was once quoted as saying "I love WikiLeaks," an homage to its release of documents from the Democratic National Committee prior to the 2016 election, which is not at issue in the indictment of Assange.²² The indictment and extradition of Assange, should it proceed, would put any journalist in the world at risk of prosecution under the Act.²³ Indeed, Assange is neither a U.S. government employee (and hence has made no secrecy agreements) or even a U.S. citizen. Imagine the headlines if China or Russia were to seek an extradition of a U.S. journalist, filing an indictment with the exact same words used against Assange.

The prospects are slim of Trump running a campaign from federal prison with campaign posters in convict denim, as Eugene Debs did in 1920. But that unlikelihood itself is revealing. Debs led a movement of dissent. Trump may bluster that he is being treated unfairly. But he is currently on a coasting path to the Republican presidential nomination, a position of power and influence light-years apart from the ostracization the Act's targets have faced for over a century. The potential broader legal impacts of his case are unclear, given the early stages of arguments and the factual focus of his case on the retention of documents as a former president. But if he becomes president again, we can be sure of one thing—that the same law Trump claims victimhood under today will be flipped around once again

¹⁹ Rep. Tlaib has sought to amend the National Defense Authorization Act to include protections for journalists and their sources. Prior, Senator Ron Wyden (D-OR) and Representative Ro Khanna (D-CA) in 2020 introduced a bill aimed to narrow the contentiously broad Section 793(e) of the Act.

²⁰ Government's Motion *In Limine* to Exclude Certain Evidence, Argument, or Comment at Trial at 8, *United States v. Hale*, No. 1:19-cr-59 (E.D. Va., Sept. 16, 2019).

²¹ See Daniel Hale, Letter to District Judge Liam O'Grady, *United States v. Hale*, No. 1:19-cr-59 (E.D. Va., July 22, 2021) (expressing motivations for serving the public interest, in an emotional hand-written letter).

²² Allie Malloy, *Trump in 2016: 'I love WikiLeaks,' Trump now: 'I know nothing about WikiLeaks.'* CNN Politics (July 24, 2019).

²³ Charlie Savage, *Major News Outlets Urge U.S. to Drop Its Charges Against Assange*, N.Y. Times (Nov. 28, 2022) ("In a joint letter, news organizations warned that the indictment of Julian Assange 'sets a dangerous precedent' that could chill reporting about matters of national security").

on journalists and whistleblowers tomorrow. And in the meantime, disappointingly, Biden is not promising much better, as his administration has not relented in its prosecution of Assange.