From Spies to Leakers: The History of the Espionage Act

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[00:00:00] Jeffrey Rosen: Hello, friends I'm Jeffrey Rosen, president and CEO of the National Constitution Center and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, we're sharing an episode from our companion podcast, Live at the National Constitution Center. In this episode, Heidi Kitrosser and Sam Lebovic join me to explore the origins, history and constitutional legacy of the Espionage Act of 1917. The program was streamed live on December 4th, 2023. Enjoy the show.

[00:00:55] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center and to today's convening of America's town hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Before we start, let's inspire ourselves as always for the discussion ahead by reciting together the National Constitution Center's mission statement. Here we go.

[00:01:15] Jeffrey Rosen: The National Constitution Center is the only institution in America chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a nonpartisan basis. It is an honor to introduce our pane.l Heidi Kitrosser is William W. Gurley professor of law at Northwestern University. She is an expert on constitutional law and on secrecy, on separation of powers and is the author of Reclaiming Accountability: Transparency, Executive Power, and the US Constitution.

[00:01:48] Jeffrey Rosen: And Sam Lebovic is professor in the Department of History and Art History at George Mason University. He's the author of the award-winning Free Speech and Unfree News, A Righteous Smokescreen, Postwar America and the Politics of Cultural Globalization. And his most recent book which we're here to discuss is State of Silence: The Espionage Act and the Rise of America's Secrecy Regime. Welcome and thank you so much for joining Heidi Kitrosser and Sam Lebovic.

[00:02:18] Jeffrey Rosen: Sam, let's start with you, because your book was just out last week. Tell us about the genesis of the Espionage Act. It's passed in 1917. There's war in the air and

concern about foreign policy scandals like the Zimmermann Telegram, a secret diplomatic communication issued from the German Foreign Office proposing a military alliance between Germany and Mexico to take back Texas, Arizona and New Mexico, and because of this and other concerns, Congress and President Wilson passed the Espionage Act. One of the subjects of our discussion tonight. What, what caused the Espionage Act? What was it trying to achieve? And how was it initially applied?

[00:02:59] Sam Lebovic: Sure. So I mean the context of World War One is crucially important. The sort of fears about German spies infiltrating the US in 1917 and in the period before the US is entering the war when the US is neutral there were sort of Germans in the US trying to prevent munitions from reaching the front and so forth. But actually the origins of what we call the Espionage Act today lie even further back.

[00:03:21] Sam Lebovic: So the key clauses of the Espionage Act that prosecute spies and that keep information secret, actually are transferred into the Espionage Act of 1917 from an earlier law, the Defense Secrets Act of 1911, essentially unchanged. And that law is passed in the context of really a moral panic about Japanese spies on the West Coast that's kind of beaten up by a few politicians who see that there's a sort of advocating a rising American Naval supremacy in the Pacific and are very concerned about Japanese spies in places like the Philippines and Hawaii.

[00:03:54] Sam Lebovic: And so, there's a panic that there's Japanese spies up and down the West Coast. And this is part of a kind of transnational moment of fears about spying that ricochet all around the empires of the period the Dreyfus affair in France and Britain has its own fears of German spies.

[00:04:11] Sam Lebovic: And so, all the major powers pass new secrecy laws in these years and the United States in 1911 is doing the same thing. Once the war begins in Europe there's concern that that 1911 law maybe isn't tough enough and we'll need a new Espionage Act that will cover even more things not just keeping secrets but also protecting the broader kind of security of the nation and that means that there are things in the Espionage Act like regulations against interfering with the draft or interfering with the war effort, which will ultimately during the war become mechanisms used not to prevent spying but actually to prosecute dissidents, often socialists who are critical of the war and this will sort of lead to a new type of censorship during the war.

[00:04:53] Jeffrey Rosen: That's such an important thing to note, the expansion as you say of the law from an effort to prosecute spying to prosecute dissidents. Heidi Kitrosser, what can you tell us about the history of the act? I'm curious about whether there was any connection between the Espionage Act of 1917 and the Alien and Sedition Act of 1798. It was the major federal statute passed after Alien and Sedition but anything more to say about its antecedence? And then, how was it initially applied?

[00:05:24] Heidi Kitrosser: Yeah. So I guess two things that I think are particularly important to note at this point. One with respect to any connection to the Alien and Sedition Act which of course was the infamous act in the late 18th century that essentially punished criticisms of the government, right?

[00:05:41] Heidi Kitrosser: Now even early on as early as the Jefferson Administration as it's now well-known that act was, became infamous pretty quickly. And came to be seen as a regrettable overreach. Now the, the aspects of this act that Sam was referring to toward the end of his comments that is of the Espionage Act the aspects of the act that went beyond revealing secrets, but also punish things like interfering with the draft, interfering with the war effort as well as the 1918 Sedition Act, which was sort of an add-on along the same lines.

[00:06:18] Heidi Kitrosser: That although it didn't derive directly from the Alien and Sedition Acts in many ways was very much in the same spirit and as I think we'll probably get into in a little bit there are a handful of famous cases starting from around 1919 in which the Supreme Court considered what limits, if any, the First Amendment placed on Congress's ability to punish criticism of government and as we'll get into the Supreme Court at the time adopted a pretty generous view of the extent to which government had the power to punish criticism on the theory that at least at wartime certain types of criticisms could present a quote, "clear and present danger of hindering the war effort," etcetera.

[00:07:07] Heidi Kitrosser: So even though it didn't stem directly from the Alien and Sedition Act, I think those aspects of the act and the free speech cases that arose out of it in, in some senses followed in that tradition thus kind of unlearning at least for a while the lessons that seem to have been learned in the earlier days after the Alien and Sedition Act.

[00:07:25] Heidi Kitrosser: In terms of the aspects of the act that are most relevant today provisions, particularly provisions 793[d] and [e], which are the provisions that criminalize passing on so-called national defense information. I think the one thing I would add to what Sam talked a lot about the genesis and those aspects of the law and its genesis, in particular, in a fear of spies.

[00:07:53] Heidi Kitrosser: The only thing I would add to that is that for a law that as Sam said was indeed meant to be directed toward spies and arose out of a fear of spying and a fear of important secrets going to the enemy. The language of the act ended up being remarkably capacious, remarkably confusing. In many ways it cross-purposes with what seemed to be the intent at the time to the extent that one could define define an intent which leads to a lot of the messes that, that we'll get into today regarding uncertainties about how the act should be applied and concerns to this day that the act's really tramples on First Amendment freedoms.

[00:08:38] Jeffrey Rosen: Thank you for flagging that crucial issue and we will indeed talk about those issues once we get through the 20th century, which we need to do by beginning with

as you said those seminal free speech cases. Sam, you have a whole chapter on the Deb's case, the speech crimes of Eugene Debs who ran for president of the United States from a jail cell, because the Supreme Court upheld his sedition conviction. Tell us about Debs and his case and this crucial dissenting opinions of Oliver Wendell Holmes and Louis Brandeis.

[00:09:13] Sam Lebovic: Sure. So, the logic of the prosecutions at the time is that criticizing the war is going to interfere with the ability to conduct the war, so why is it any different for a spy to say blow up a munitions depot or blow up a transport bringing a troop to the front than it is for someone to kind of advocate a criticism of the war that will create disaffection among the troops?

[00:09:37] Sam Lebovic: And so, there's about 2000 prosecutions during the war, about a thousand people go to jail for criticizing the war and they're going to jail for very mild things. You know, Rose Pastor Stokes says, "I'm for the people not for the government because the government's fighting the war on behalf of the rich." She gets 10 years in jail.

[00:09:54] Sam Lebovic: And so, a lot of leading members of the Socialist Party who are sort of pacifists end up prosecuted. They can't claim a right to free speech, because the prevailing idea at the time is that if you say words that have a bad effect on the society well, then you don't have a right to free speech. You're abusing what the right to free speech should entail.

[00:10:12] Sam Lebovic: And Eugene Debs who is sort of the perennial socialist presidential candidate in the early 20th century, the most important public advocate for socialism. He's actually sick through most of the first year of the war and not speaking publicly, but in 1918, he begins to give speeches publicly. One of them is in a park in Canton, Ohio where he speaks to picnicking members of the Socialist Party and he really gives a standard socialist speech, but during that speech he criticizes the fact that some of his colleagues, some of his comrades have been sent to jail for criticizing the war and kind of makes fun of those prosecutions.

[00:10:45] Sam Lebovic: And there's a conservative journalist in the crowd listening and he gets on the phone to his friend at the local Prosecutor's Office and says, "I've got Debs making fun of the war. We should prosecute him for viola- for interfering with the draft." The prosecution proceeds very smoothly Debs is sentenced to 10 years in jail. Debs then appeals the case to the Supreme Court, and Oliver Wendell Holmes in the spring of 1919 pens a unanimous decision saying that Debs does not have the right to criticize the war that the government has the right to put him in jail because what he's doing is basically not free speech but abusing that right.

[00:11:23] Sam Lebovic: And that's the law of the land in 1919. That's what sort of everyone expects is gonna be the outcome except for a few radicals on the fringes who believe that the First Amendment should protect political dissent in a wartime. And those dissidents will begin to criticize Holmes over the following summer and say that the Debs' decision along with two others he had made at the same time, the Frohwerk decision and the Schenck decision.

[00:11:46] Sam Lebovic: Schenck is where Holmes famously says, "You can't shout fire in a crowded theater." And what he's saying is the socialists are just like people falsely shouting fire in a crowded theater. They shouldn't be allowed to do that. These critics of those decisions write to Holmes, begin kind of lobbying with him and try to convert him to the cause of free speech.

[00:12:04] Sam Lebovic: And in the fall of 1919, in a Sedition Act case called Abrams, which is about the prosecution of a group of anarchists who are calling for a general strike in New York. Holmes changes his mind and Holmes and Brandeis dissent from the previous decisions. Dissent from the rest of the court who are following the precedent set in the spring and it's in dissent in 1919 in Abrams that Holmes first talks about the free marketplace in ideas and that there's a First Amendment that we should protect.

[00:12:31] Sam Lebovic: And that's really the kernel, the birth of the modern First Amendment. It will take decades of activism by those same civil liberties groups to expand it, but there's a kind of sea change in the summer of 1919, a rethinking of the mistakes of the war.

[00:12:46] Jeffrey Rosen: Such a great telling of the story which you also tell so well in your book and you describe how Holmes was inspired by his reading of Zechariah Chafee, the Harvard law professor and John Stuart Mill to create this new understanding of free speech. Brandeis, of course, is reading Thomas Jefferson's Virginia Declaration of Religious Freedom and they both move away as you said from the old idea that you could punish speech that had a bad tendency to promote lawbreaking to this new requirement that you can only punish speech that's intended to and likely to cause imminent lawless action or violence.

[00:13:20] Jeffrey Rosen: And as you said that's not until the 1960s that the Supreme Court embraces that view. Heidi, tell us about where the Espionage Act stood in the wake of those 1919 decisions and how was it applied in the '20s, '30s and '40s to punish spies?

[00:13:40] Heidi Kitrosser: As Sam was so comprehensively recounting the famous 1919 decisions to the extent that they related to the Espionage Act related to the aspects of the act that could punish speaking, right? Could punish saying things that might end up hindering war recruitment efforts etcetera, but then there's also the question of the provisions, you know, the ones I referenced before that today or 793 uh, [d] and [e] that punished the communication of what the act calls national defense information.

[00:14:12] Heidi Kitrosser: And these are the provisions that most obviously are meant to relate to spying in the sense that they're meant to keep information sort of from coming out and presumably from going to an enemy. The problem is as I mentioned the language is extremely capacious right from 1917 and there were a couple of small changes over the years to the act, but the basic language remained the same and I actually have it in front of me.

[00:14:40] Heidi Kitrosser: So just the relevant parts that I'm referring to, this is sort of separate from the parts of the act that might pertain to someone speaking and potentially convincing people to to violate the draft, etcetera but rather the parts of the act that relate to passing on information as opposed to opinions.

[00:15:00] Heidi Kitrosser: So the key language and it's remarkably broad simply refers to one either having lawful or unlawful possession. There are two separate provisions so it could apply to individuals who work within the government and have lawful possession in the first instance of closely held information or people theoretically if you just look at the words like journalists who aren't supposed to have access to the information at all, people who have such information quote "relating to the national defense," if they willfully pass that or I should say referring to tangible information like documents, etcetera.

[00:15:40] Heidi Kitrosser: If it relates to the national defense and if they willfully communicate it, which courts have interpreted to mean if they communicate it knowing it's against the law, then that essentially amounts to a violation. Now in the earlier days until the 1950s, the first couple of decades of the Espionage Act's existence to the extent that, that this aspect of the law is utilized in the way I think most people anticipated it would be utilized back in 1917, which is to go after people who are engaged in what you might consider classic spying.

[00:16:13] Heidi Kitrosser: And in that context so for example, in a case called Gorin in the early 1940s, where the Supreme Court faced an appeal from somebody who essentially had been engaging in pretty classic spying, passing on information meant to go to another nation in secret, but the person who was facing a conviction essentially said, "The problem is if you look at the act the language is so broad there's no real definition of what national defense information make, means."

[00:16:45] Heidi Kitrosser: And the Supreme Court essentially said, "You know, in our view it's not terribly broad particularly because you could read into it a couple of limitations such as the information being closely held." For example courts following with that over time went on to elaborate a little bit and say, "Well, we could read into the term relating to the national defense that it's closely held. We can also read into it that it may be potentially damaging to the United States or potentially useful to an enemy of the United States."

[00:17:13] Heidi Kitrosser: And so, narrowed, it's really not too broad and it's not in a front of the First Amendment. Now the problem with that is that it may seem kind of intuitive when you're talking about a classic spying scenario but that could potentially go on to be applied much more broadly.

[00:17:28] Jeffrey Rosen: Thank you for describing that potential danger and also for flagging the Gorin case, which was so important. Sam, you have a chapter that focuses on Gorin, the creeping scope of secrecy laws and you also talk about the Nazi spy who wasn't in the 1940s.

And then, you take us up to the expansion of classification rules, which is such an important part of our history in the Truman Administration in the '50s. Tell us a little bit more about the Gorin and Nazi cases. Were those good applications of the law? Were they troubling in any way on civil liberties grounds? And maybe introduce this crucial expansion of classification under Truman.

[00:18:11] Sam Lebovic: Sure. I mean in both cases these are people who are spying. The Gorin case is someone sharing naval intelligence information with a, a Soviet spy on the West Coast in the 1930s, and the Nazi spy who wasn't is a guy, Edmund Carl Heine, who's convicted as part of the Duquesne spy ring. One of the largest spy rings in US history. 33 Nazi spies arrested in 1941 just before Pearl Harbor.

[00:18:38] Sam Lebovic: But I think what's interesting about both of these cases is they capture a problem that Heidi's been talking about already, which is that the Espionage Act basically in its form says it's illegal to give information related to the national defense to someone who's not authorized to receive it. The problem is that the Espionage Act doesn't define either what information relating to the national defense is or a process by which someone might be authorized to receive it.

[00:19:02] Sam Lebovic: The reason for that is that those clauses seem to be originally, in 1917 as drafted by the Wilson administration, were supposed to be defined by the president. And Wilson's Congress didn't wanna give Wilson that much power to decide the sort of scope of this potential censorship law. So they cut them from the bill, but never replace them.

[00:19:23] Sam Lebovic: So you've got this kind of huge hole in the middle of the Espionage Act after 1917, which has all these prohibitions, you can't do things with information related to national defense but it doesn't define them. And then there's this 30-year window in which there's kind of experimentation to try to work out what those clauses mean and both the Gorin and the Hines cases are really important moments of the court grappling with it.

[00:19:43] Sam Lebovic: So Gorin says the information I've given is not that important. That can't possibly be spying." And the, and the Supreme Court says, "Well, no, national defense has a kind of generic understanding and this is national defense information so you are guilty." and then, Hines says something even more interesting. He says, "Sure. I gave a bunch of information about American aviation capacity to the Nazis, but I never got a single piece of secret information. I read newspapers. I went to air shows. I spoke to people. And if that public information is secret," his lawyers argue, "Well, then how could anyone ever talk publicly about national defense? How could you have any meaningful discussion about foreign policy if even circulating publicly available information to someone unauthorized to receive it could violate the Espionage Act?"

[00:20:31] Sam Lebovic: And on those grounds, actually, an appeals court lets Hines out of jail in 1945. His case, his conviction is overturned. He's let free. And the Justice Department appeals that case to the Supreme Court. It's not granted a hearing and it appeals on the grounds that you've just gutted the Espionage Act. You've said that only secret information can be enforced as by the Espionage Act and if you're gonna leave the law like that, we're gonna have no choice but to start declaring more and more information secret."

[00:21:00] Sam Lebovic: And that's actually what will then happen. So in 1947, there's draft orders released or leaked, actually, ironically of a new plan to establish peacetime classification throughout the government. It's a controversial leak and it's scotched for a couple of years, but in 1951, in executive order 10290, Harry Truman institutes a new executive order that lays out there are certain classes of classified information, they're familiar to us now, top secret, confidential, and there are rules for who can access it and there are rules for how administrators can stamp things a secret in the federal bureaucracy, and it says crucially, this is information that if it circulates outside the executive branch is information relating to the national defense of the sort that would be a violation of the Espionage Act.

[00:21:46] Sam Lebovic: So in 1951, Harry Truman establishes by executive order a new system that allows the government to decide what is secret and what is not. It's really like a plugin to the Espionage Act from 1917, and that's the system that's been in place to this day. And I think one of the ironies is that Woodrow Wilson's Congress didn't wanna give Wilson the power to do that. Harry Truman just took the power by executive order and there was barely a peep of protest and we've lived with that classification system under unilateral executive order ever since.

[00:22:16] Jeffrey Rosen: So interesting that expansion of classification was in part a response to the Hines appeal and that it had these remarkable unintended consequences. Heidi, you talk about the tremendous significance of the expansion of classification under Truman. Tell us about how it happened and what some of those consequences were.

[00:22:38] Heidi Kitrosser: Yeah. Well, you know, as Sam suggested, it was not until the Truman Administration that we had the start of the effectively permanent and government wide classification that we know today. It wasn't until prior to Truman, it wasn't until the Roosevelt administration that we had a classification executive order establishing by presidential order a classification system but that was during wartime.

[00:23:04] Heidi Kitrosser: And then, as was often the case at, in the pre-World War II days I think the expectation was that, well, after the war things will sort of go back to normal. We'll sort of draw down the military and also, you know, probably rein in the secrecy system. But what Truman did in 1951 really was quite remarkable, because it did establish our first peacetime classification system and as Sam said that's the system we've continued to have ever since.

[00:23:30] Heidi Kitrosser: Now at the time as I think Sam alluded to, a few years prior to this 1951 order Truman had tried to roll out an earlier order doing the same thing. This was met with a lot of very bad publicity, newspaper publishers were extremely concerned that this would rein in their ability to report.

[00:23:49] Heidi Kitrosser: In 1951, I think partly because people's attentions were turned elsewhere, partly because the administration had sort of convinced newspapers. "Look, this is going to be about checking. This is going to be about protecting what we have internally but we're not going to limit your ability to sort of report what you will, whatever you're able to discover on your own." There just wasn't as much of an outcry.

[00:24:12] Heidi Kitrosser: So one remarkable thing about the 1951 order perhaps the most fundamental and very important thing about it was the fact that, again, it established a classification system not just in wartime but one that remained permanent. I think the second thing that is really important for the audience to understand, we keep referring to this as Truman's executive order. People might be wondering, "Well, wait. So was this entirely a product of the president? Did Congress have any involvement in this?"

[00:24:38] Heidi Kitrosser: In fact the classification system as established by Truman and as has been the case ever since is almost entirely a product of presidential order. There are some statutes, certainly the Espionage Act itself as Sam said the classification system in some ways is, is what you might call a plug-in to the Espionage Act. So we have the Espionage Act, there have been statutes here and there that seek to protect particular very specific categories of information such as CIA officer identities, for instance, but in terms of sort of the bulk of the system for create, for classifying information across the government labeling it into one of the categories Sam mentioned confidential, secret, top secret.

[00:25:23] Heidi Kitrosser: That's a product of executive order and although some presidents have retained the executive order of their predecessor some presidents have created new classification executive orders and made tweaks here and there but this is largely a product of the executive branch and the other aspect I think that's important to realize is how much the system has expanded over the years.

[00:25:44] Heidi Kitrosser: Although there has been some ebb and flow, the system shrunk a little bit in the post, the immediate post-Cold War years prior to 9/11, for example. But overall the system, the secrecy system has gotten bigger and bigger and bigger.

[00:26:00] Jeffrey Rosen: Absolutely fascinating. Well, we're approaching the '60s and '70s and the Pentagon paper case, which you talk about in chapter 8 and the rise of the secrecy state in the '70s all the way up to the war on terror after 9/11. So give us a sense if you would about some of these crucial milestones.

[00:26:22] Sam Lebovic: I think the basic fact that Heidi has already pointed out attention to is that classification is an internal bureaucratic process. It has all sorts of its inertia built in. And so, you're going to get millions and millions of documents being classified by the 1960s and 1970s and whole new branches of the state will be highly secretive within that kind of environment.

[00:26:42] Sam Lebovic: So these are the years, obviously, when the CIA begins to take on, ask new powers to kind of engineer coups, to do psychological experiments to run propaganda campaigns, and the NSA. These are the years of J. Edgar Hoover's FBI running sort of disruption campaign secretly to interfere with the civil rights movement, blackmailing Martin Luther King Jr. and so forth.

[00:27:03] Sam Lebovic: And you've got a kind of by the Vietnam War, which is really in many ways a product of so much secrecy in the executive branch. It's a war whose plans are forged in secret whose kind of information is dribbled out, has spun what people at the time referred to as the credibility gap emerges because of the amount of secrecy about Vietnam policy. In the context of the anti-war movement, right? And the new left and its critique of what seems to have gone wrong in American foreign policy in the late 1960s and early 1970s, you begin to get quite spectacular leaks and disclosures of secrets.

[00:27:36] Sam Lebovic: People wanting to speak truth to the public about what's been happening behind closed doors. Daniel Ellsberg's leak of the Pentagon Papers is the most famous of those but there's also other leaks some CIA, former CIA employees begin publishing sort of tell-all memoirs. As a result of the Watergate Scandal, there's a kind of internal investigation within the CIA which collates all the examples of illegality of the CIA has been up to for the last few years.

[00:28:02] Sam Lebovic: And that's all put into one document, which is not the best managerial practice if you're trying to keep things under wraps because that document then pretty quickly leaks to the New York Times. And so, you get the Pentagon Papers leak in 1971 which leads to what should have been really the major constitutional case testing the secrecy regimes as they've been patched together since the Espionage Act was passed.

[00:28:23] Sam Lebovic: And then, the classification system was layered on top, but actually that case turns out to be an entirely different sort of case because the Nixon Administration tries to use the Espionage Act not to prosecute the leaker, Ellsberg, in the first instance, but to prevent the newspapers from publishing in the first place and censoring them.

[00:28:40] Sam Lebovic: And that's the famous Pentagon Paper Supreme Court case that we have motion pictures about like All the President's Men and The Post, and the press wins the right to publish, which is terrific for the press, but doesn't tell us much about the secrecy system. And in fact, a lot of the judges in the decision said, "You know, Nixon's gone about this the wrong way. You shouldn't have tried to censor the press, you should have tried to prosecute the

press legally." And it's not really clear whether the Espionage Act could have been used to punish the press for publishing.

[00:29:09] Sam Lebovic: The second thing that doesn't happen is that Ellsberg doesn't go to jail and he doesn't go to jail not because he has a right to leak secrets or because he's not in violation of the Espionage Act. He doesn't go to jail because the Nixon Administration formed the plumbers later to be famous for the Watergate break in. To break into Ellsberg's psychiatrist's office to try to discredit him in the public eye. And actually that's the reason that they're called the plumbers.

[00:29:31] Sam Lebovic: One of them says to his, I think mother-in-law or aunt, "I've got a new job for the White House. I'm trying to plug leaks." And she says, "Oh, it's great to have a plumber in the house." And that's the birth of the plumbers of Watergate fame. And so, Ellsberg's case is thrown out of court and you're left after 1971 with this sense of, "Well, what are the laws actually in this arena?"

[00:29:50] Sam Lebovic: The Pentagon papers case was such a mess, it sort of sets no important precedent. And in the next wave of disclosures that come out that lead to the year of intelligence, the church committee hearings, the pipe committee hearings, all the investigations of the abuses of the secret state for quite straightforward political reasons in the 1970s they don't really grapple with the core of the secrecy regime.

[00:30:13] Sam Lebovic: They leave the Espionage Act actually unrevised entirely. They don't put the classification system on a statutory basis. They instead settle for a few kind of weak patches for transparency. They passed the Freedom of Information Act, which has some flaws and I'd be happy to talk about it to people who are interested.

[00:30:29] Sam Lebovic: They create oversight committees they do a few other kind of bits and bobs around the edges but there's no holistic effort made in the 1970s to reimagine what's been created and it just kind of lives on and continues to kind of grow with new patches and new inertia through the 1980s and into the 1990s.

[00:30:49] Jeffrey Rosen: Very interesting. Heidi, we're now in the '80s, and, and indeed the '90s and I think we're approaching 9/11. So do you want to take us over that crucial landmark and tell us about some of the post-9/11 cases that many people remember from the news including Chelsea Manning and Edward Snowden and Julian Assange, and how they were treated by the courts.

[00:31:13] Heidi Kitrosser: Yeah. Absolutely. First just to back up, to lay a little bit more of the doctrinal groundwork leading up to where we find ourselves by 9/11 so as Sam said in 1973 or the early 1970s, I should say it the Ellsberg case, at least the criminal case, the prosecution

against him might have presented an opportunity to shed some light on whether in fact the Espionage Act can be used to go after media sources, but that fell apart.

[00:31:42] Heidi Kitrosser: Prior to that but that was the very fact that the government went after a media source particularly such a celebrated one itself raised the question of is this something the Espionage Act is for? Right? Which, as we've talked about the language of the act, is so capacious. It seems to leave something open for that. On the other hand, going back to 1917 it doesn't seem that was an initial expectation at all and in fact until the 1950s, the act had never been used to try to prosecute a media source.

[00:32:14] Heidi Kitrosser: Sam does a beautiful job in his book of talking about that first prosecution against someone named Nickerson. And as he I'll sort of, I won't get into details of that other than to say that prosecution largely fell apart, ended up being pled down to another offense, but as Sam notes in his book, we barely remember that prosecution today which speaks to how in so many ways it was such an anomaly. It was sort of forgotten by history to the point where most people in studying the history of Espionage Act prosecutions against media sources actually pegged the Ellsberg prosecution as the very first one ever.

[00:32:52] Heidi Kitrosser: So anyway, as of the '70s, it's still very unclear to what degree does the Espionage Act really apply to media sources or to the media itself. Are there potential First Amendment defenses still applied? That actually brings us to the late '80s to the case that is still the only federal appellate court case speaking to these issues and that's a case called United States versus Morrison in which a guy Sam Morrison who worked for the navy sought to sell photographs to a British publication called Jane's Fighting Ships that he had come across during, during his work for the navy, not the most attractive set of facts from Morrison's perspective because he was, you know, doing this in the context of trying to get a job and trying to get some remuneration.

[00:33:35] Heidi Kitrosser: On the other hand, he was in a strict sense serving as a media source. He wasn't spying. He wasn't trying to do this secretly. And so, he made a First Amendment argument. The government this was the third prosecution under the Espionage Act after Nickerson and Ellsburg and since the government prosecuted him and he's convicted, he appeals to the US Court of Appeals for the Fourth Circuit and said, "I'm a media source. My First Amendment interests are you know, are raised here."

[00:34:02] Heidi Kitrosser: And in a pretty landmark decision, the US Court of Appeals for the, the Fourth Circuit essentially said, "I don't really see a First Amendment problem here. This is more akin to theft as opposed to speech." And that said, there were interestingly there were two concurrences out of the three judges on the panel who both expressed a little bit more reticence and indicated, "Well, you know sometimes people might leak information that actually is important for the public to know, sometimes there might be First Amendment implications, but we trust that prosecutors and juries will deal with that if they come to it."

[00:34:40] Heidi Kitrosser: So as of the post-9/11 period there's very little law in the books, but to the extent that there is any legal statement about whether the Espionage Act can use to go after media sources, it's pretty damaging for sources and it stems from this Fourth Circuit Morrison case.

[00:34:58] Heidi Kitrosser: And so then we have after a long hiatus of not, the government not using the act in this way we have the George W. Bush administration for the first time in sort of a complicated case involving a leak, not to the media, but to lobbyists by a government employee. The George W. Bush administration prosecuting under the act in a similar way for leaking in this case to lobbyist where the judge in that case also suggested this only went to the district court, but similarly he didn't see very significant First Amendment limits here, and this all set the stage for a slew of cases in the Obama administration.

[00:35:37] Heidi Kitrosser: One thing I don't think we've mentioned yet since we're just getting to the post-9/11 era but one thing that surprises people a lot when they hear about it is that the Obama administration actually really broke new ground in prosecuting media sources under the Espionage Act. So up to the Obama administration there had been a grand total of I guess it's three, four if you count the one in the George W. Bush administration prosecutions of sources, media sources under the act or people who you might call media sources but the the George W. Bush administration case is a little fuzzier.

[00:36:12] Heidi Kitrosser: The Obama Administration brought a total of eight prosecutions. So twice as many as in all American history at that point and in those cases defendants found themselves, defendants like Thomas Drake or or Edward Snowden and the handful of cases from the Obama administration defendants all found themselves faced with an act that seemed to cover just about everything, right?

[00:36:40] Heidi Kitrosser: I talked about the specific wording before without getting back into the weeds of that, suffice it to say the language of the act is so broad and the handful of judicial interpretations had allowed which left defendants facing an act that seemed to cover just about every passing on of classified information even if it's to the media, even if there's an excellent argument that it's in the public interest because the act didn't have exceptions, didn't have, for example, public interest defense.

[00:37:07] Heidi Kitrosser: So you had a bunch of defendants being charged finding they didn't really have any basis to defend themselves. moSt of them simply pled for that reason. This is the era when, when Snowden ends up fleeing to Russia and he makes the argument that I would face the music in the US if I could make a public interest defense but I can't because under the act it's irrelevant.

[00:37:30] Heidi Kitrosser: And then, in the Trump administration the rate of prosecutions remains the same, actually ramps up a little bit.

[00:37:36] Jeffrey Rosen: So interesting and thank you for flagging the Snowden case and the record of the Obama and George W. Bush and Trump prosecutions. Well, let's now talk about not the prosecution of President Trump that I wanna save for the next beat, but some of those post-9/11 prosecutions including Snowden and Julian Assange, which you call the most important case in the coming years will be the long delayed prosecution of Julian Assange. Tell us, if you would, what are some of the issues raised by the Assange, Snowden, Chelsea Manning prosecutions? Do other countries have public affairs exceptions and how are they being treated in the courts Sam?

[00:38:27] Sam Lebovic: I think the basic framework to understand those cases is to acknowledge, as Heidi has mentioned, it's a really surprising development that it's 90 years later than, that the Espionage Act since it's passed it's now being really aggressively used for a new purpose, which is to prosecute people who are leaking information to the press that they think is in the public interest.

[00:38:48] Sam Lebovic: As late as 2000, conservatives in Congress were saying the Espionage Act is not sufficient for this purpose. They were asking for a new law that would actually allow them to prosecute media sources. And then, in 2004, 2005 in the Bush administration they say, "Actually, we've had another look at the Espionage Act and it is perfectly good to go. We can just begin bringing prosecutions." And they get a lot of success because it turns out that the language of the court of the law is sufficient.

[00:39:12] Sam Lebovic: And the reason that's really important is that by the time they're bringing those prosecutions, they're using them to shore up what has been a real escalation in the con- the conduct of foreign policy and national security policy in secret in the early war on terror. So the first things that are beginning to leak that lead to the kind of rediscovery of the Espionage Act news sort of the stories leaking out about torture in the black sites and in Guantanamo and they're the warrantless wiretapping stories the first round, the ones that are released into the New York Times.

[00:39:47] Sam Lebovic: What you get are a sequence of people working within the security branches who working on the war on terror for the first years of the war on terror and begin to say, "The American public doesn't realize exactly what's been going on here." Like in the first rush of fear and anger and anxiety after the attacks, we gave the executive branch a lot of powers to keep us secure. They've abused those powers and the American public has a right to know what's being done in its name.

[00:40:17] Sam Lebovic: And the Bush administration, and then the Obama administration argues that actually the individual employee has no right to kind of go outside normal channels and to take this information to the public and they begin prosecuting to keep sort of the information under wraps. And so, Chelsea Manning famously releases a large transcripts of documents to WikiLeaks a kind of an anonymous source online and most people when they think

about the Wikileaks think about it as a kind of new and scary breakthrough in transparency technology.

[00:40:47] Sam Lebovic: Ellsberg had to take the documents himself to a journalist and there was something kind of safe and secure in that mechanism of the journalists vetting the information, but Wikileaks is a type of chaos. I mean any individual employee can take that information themselves online. And I think that story is wrong in two ways.

[00:41:06] Sam Lebovic: The first is that the reason that that anonymous sort of website is created to allow the source to kind of dump information without that individual connection is because of the effective and aggressive prosecution of media sources by the Bush and Obama administrations. So Wikileaks is a reaction, right? The first to radicalize are actually those who are keeping secrets within the state and the transparency radicalism is a reaction to that.

[00:41:30] Sam Lebovic: The second is WikiLeaks in the first instance actually took those documents to traditional news organizations like The Guardian, The New York Times, and had them kind of vet it. And Snowden very famously did not dump directly online. He worked with The Guardian and others, and The Washington Post and Glenn Greenwald to vet and release that information and he said himself, "I'm not responsible for what's in the public interest. I think the public has a right to know but I want to sort of run that through journalists."

[00:41:57] Sam Lebovic: But the Espionage Act doesn't care about those things. All the Espionage Act cares about is did you disclose information to someone who wasn't authorized to receive it? And Snowden admitted that. I mean he went public. He didn't do it anonymously. And so, he has no way of making an argument that actually the American public had a right to know that there was a process happening within the executive branch that they could not have understood and there were reforms to the NSA's procedures that came out of the Snowden disclosures, right?

[00:42:24] Sam Lebovic: So there is a direct public benefit that flows and this is how American democracy is supposed to work but the leaker, the source has no real rights. Now the long reason for that I think is that over the course of the 20th century, the security state and its employees who are mostly concerned with keeping the public secure really want to kind of keep information close to the vest, sometimes they're worried about spies, you have to assume as well there's also kind of more cynical reasons to keep things secret, you don't want embarrassing information to get out. It gives you power to kind of give favorite information to journalists and kind of carry favor and so forth.

[00:43:00] Sam Lebovic: But every time a secret leaked, they wanted to prosecute both the press and the source, and whenever they tried to prosecute the press, civil liberty's groups and the newspaper industry were incredibly effective at protecting their own rights and using the First Amendment to give them a shield, but what they, the civil liberty's groups and the press were not

as vigorous in protesting was when the state prosecuted its own employee, who gave that information to the press in the first place.

[00:43:27] Sam Lebovic: And so, we've had a kind of balancing act where the courts have said, "The press can publish secrets if it can get it, but secret, but leakers of secrets can be prosecuted by the government if they can be found." And that's sort of the way America has decided to handle this tense balancing act between security and liberty.

[00:43:45] Sam Lebovic: The reason the Assange case is very important in the history of that balancing act is that what Assange is being prosecuted for is really for acting like the press side of that equation. He's being prosecuted for receiving secret information from Chelsea Manning or for acting in cahoots with Chelsea Manning to extract the information. If Assange is guilty under the Espionage Act of that crime, it's very hard to see how you would distinguish a news organization like the New York Times or The Washington Post who also received in secret information from a source from being guilty of the Espionage Act.

[00:44:20] Sam Lebovic: So I think that the Assange prosecution is the kind of test case for whether the line that was developed over the 20th century will still continue to hold or whether the Espionage Act will begin to expand into the rights of the press to publish for the first time. And I think however that goes is crucially important for the broader landscape of secrecy and transparency and media freedom, but I will say whatever happens with the Assange case it doesn't tell us anything about the rights of the leaker to give information to the public in the first place and that's the kind of thing that Heidi has written very eloquently about that there is a need for a public interest defense to not just protect the press if they can get secrets, but also to provide protections for the source who gives that information to the press if it's in the public interest.

[00:45:02] Jeffrey Rosen: Thank you for that important discussion of the states of the Assange case and as you said, Heidi has indeed written on this question of what an amended version of the Espionage Act might look like. Heidi in your post at lawfare about the Espionage Act after the Mar-a-Lago indictment, which you published last June. You say that an amended version of the Espionage Act should make the public's interest in any leaked information a relevant factor, whether by prescribing a balancing test for the courts to apply or creating a public interest defense against liability.

[00:45:37] Jeffrey Rosen: And you also have a very thoughtful discussion of the Trump indictment itself, which you compare to some of those that the Trump administration itself brought in the eight cases where it charged individuals for leaking information with the press. So tell us everything we need to know about the Trump indictment and its broader implications.

[00:46:00] Heidi Kitrosser: So first I think that it's very important to look at the Trump indictment in the context of the Trump administrations record in prosecuting leakers. As you just

noted and as I talk about in that piece Trump, not the Trump administration, not only prosecuted leakers at a rate even slightly above the extremely prolific rate of the Obama administration prosecutions but Trump went one further rhetorically, he made the prosecution of leakers a signature issue.

[00:46:33] Heidi Kitrosser: I don't have any of the quotes right in front of me but I do quote them in the lawfare piece. One does not have to look far to find any number of things that Trump said indicating that he's the one who's tough on leaks of classified information and it is particularly stunning in retrospect now that he himself has been indicted under the Espionage Act for improperly retaining classified information, but he said things to the effect of, "Look, in my Administration no one is above the law. You leak or unlawfully retain or mishandle classified information, you go to jail. It's that simple."

[00:47:06] Heidi Kitrosser: Early in his administration, he made a point of saying that he had directed then Attorney General Jeff Sessions to look into leaks or improper retention of classified information. Sessions brag that he had, at this point, I think he said three times as many investigations opened into these matters than had the Obama administration.

[00:47:26] Heidi Kitrosser: And so Trump evinced an enormous amount of awareness and attention to the aspects of the Espionage Act particularly section 793[d] and [e] that pertain to unlawful retention or communication of quote, "national defense information." Which, again, is a statutory language to one not entitled to receive it, throughout his administration. He was very gung-ho about using these aspects of the act. And it's important to remember this when we see Trump as defendant saying as he's now publicly said on a number of occasions usually in the context of rallies or the like that the Espionage Act is this moth baled old relic that the Justice Department, or I should say, that that Special Counsel Jack Smith is wielding against him solely as political retribution.

[00:48:16] Heidi Kitrosser: I recall seeing footage of something at a rally that Trump said to the effect of, you know, he was kind of ginning up the crowd saying something to the effect of, "Can you believe what they've come up with now? The 1917 Espionage Act, where did they get this stuff?" Right? Clearly, he was very aware of it as president.

[00:48:33] Heidi Kitrosser: The other striking comparison between Trump's indictment and the indictments that his own administration brought against people for unlawfully retaining or leaking classified information in several cases as media sources is that Trump certainly from all of the reported information out there, there's no indication that Trump was seeking to serve the public interest or serving as a whistleblower or enlightening the public, in that sense, certainly, his case arguably is far less sympathetic than those of the media sources that he prosecuted during his administration.

[00:49:09] Heidi Kitrosser: And perhaps most notably, and this is the aspect of Trump's case and the indictment and the underlying facts that people probably have heard the most about, another very important distinction is the volume of information at issue as well as the brazenness with which Trump has handled the information, right?

[00:49:29] Heidi Kitrosser: Many people who have just followed news coverage of his indictment are probably familiar by now with the painstaking month-long process by which the National Archives asked if he had classified information, the the amount of times Trump or, and/or attorneys of his said, "Nope. We don't have any or we've given you everything there is."

[00:49:48] Heidi Kitrosser: The reported movement of documents in order, apparently, to sort of hide the classified information that he had. That's something that in terms of the statute causes real trouble for Trump. And that it's very hard for him to say he didn't act willfully and certainly hard for him to say he was unaware of this law given its use during his presidency. But it also paints a far more unsympathetic set of facts, I'd say than many of the individuals he prosecuted.

[00:50:14] Jeffrey Rosen: Many thanks for that. Sam, you have a very timely discussion of the Trump case in the last chapter of your book. You say at the time of writing it's too soon to see what will come of the affair if the Trump administration as has been charged violated rules or falsified record, it should be held accountable, but you say the Espionage Act is a poor tool for the task and liberal critics say the fact that Trump is being investigated seemed true that he'd endangered security, but that presumes that there wasn't over classification and his defenders say that he could declassify the documents by thinking about it and it's a bureaucratic fiction to prosecute him. Sorry to summarize all that from your last chapter, but it's such a powerful take on the case.

[00:50:56] Jeffrey Rosen: Tell us more about the arguments for and against the prosecution, the best way you think to hold President Trump accountable including and I'll now stop this set up, because I think this is the last intervention. Give us a sense of the reforms that you think would be most salutary for fixing the Espionage Act.

[00:51:19] Sam Lebovic: Sure. So it's really too soon to tell with the Trump prosecution, in part because we don't know what the information that was classified in the question at hand was. Now I agree completely with Heidi that there are laws about document retention and the president handing over documents to the National Archives and that set of laws should be applied, those rules need to be followed for transparencies and history's sake.

[00:51:44] Sam Lebovic: The Espionage Act rules though really a democracy needs to be able to keep something secret and it doesn't want individual members of an administration or bureaucracy either giving secrets to foreign powers with malevolent purposes at heart or just selling secrets for cash for their own benefit, benefiting off the public. So I think you do want a

law like the Espionage Act that would make it illegal to kind of keep information in a less secure function.

[00:52:10] Sam Lebovic: The problem is that the ramshackle way the law has developed over the last 100 years means that way too much information is getting declared secret that should never be classified in the first place. And since the 1950s when Truman first established the classification system, internal defense department reviews have repeatedly said things like 90% of the documents that are classified should never have been, that they could see the light of day.

[00:52:32] Sam Lebovic: That is a bureaucratic problem. It costs America $18 billion to keep it secrets at the moment, massive drain on public resources. It also creates spaces for abuse where things that the public does have a right to know about are being deliberately kept away from it. And it also when you trying to keep that much information secret, it's very hard to stop those kind of nefarious leaks that you shouldn't want to happen in the first place. That you try to keep hundreds of millions of documents secret.

[00:52:59] Sam Lebovic: It's easy for some to slip out. Four and a half million Americans need a security clearance to do their jobs, right? Which just means that you're sort of doing security theater more than kind of keeping these secrets really close to the vest. So I think that what we need to do is sort of start from the beginning, right? And think about the, rather than patching together a 1917 law with a 1951 classification system with a 1966 and 1974 Freedom Information Act with some 1980s whistleblowing protections with some other kind of administrative workarounds that I document in the book, we really need one kind of public information law that makes it very clear that if there's something that's secret that's been determined to be secret by a rational bureaucratic process, and I have some ideas about how to make it less likely that the secrecy stamps will be abused, then you wanna make that a crime but you want to have an important carve out for information that should be in the public interest.

[00:53:50] Sam Lebovic: And when it comes to the Trump case you know, I think on the Espionage Act charges, whether or not he is guilty of the crime of breaking the Espionage Act will depend in part on what happens, what turns out to be in those documents itself, whether he's actually endangered national security will turn a lot on what's actually in the documents, but for me the big takeaway is that I can't imagine an Espionage Act prosecution of Trump that's really going to have great legitimacy in the American public, not just because of the general polarization of the American people, but also because if we cast our mind back to Hillary Clinton's emails, and this is not to draw a false equivalence between Trump's email, Trump's documents and Hillary's emails or to play up the irony of the lock her up coming back to roose, but just to say when Trump accused Hillary of endangering the national security, Obama said, "Well, there's classified and there's classified. Just because something bears a stamp doesn't mean it necessarily is violating the Espionage Act."

[00:54:49] Sam Lebovic: And that idea that some leaks are okay and some leaks are, and that some security is important, and some are not actually creates huge legitimacy problems in the American government. It allows officials to leak some classified information like false information about weapons of mass destruction in the lead up to Iraq without ever facing prosecution. It allows other critics of the government policies to face severe penalties for trying to inform the public. And that's not a kind of viable place for democracy to be in. So if we believe that the public has a right to know a lot about what the government is doing but there's also a right for a government to keep secrets, the current stitch together laws don't help us solve that problem and we kind of need to reimagine the system more holistically.

[00:55:31] Jeffrey Rosen: So thoughtful and both of you have helped us understand how this law originally supposedly passed to prosecute spies was extended first to political dissidents, and then to journalists because of its overly expansive language and the need as you both put it for a public interest exception. Heidi last word to you in this great discussion, both of you are sympathetic to the public interest model of the legal scholar, Yochai Benkler, which would require a leaker to prove that they had a reasonable belief the leak discloses a substantial violation of the law that they took efforts to avoid causing imminent specific harms and that they communicated their disclosure to a channel likely to result in actual exposure. Maybe tell us a little more about that model and others that you think could thoughtfully protect liberty and security better than the current Espionage Act.

[00:56:25] Heidi Kitrosser: I do like the Benkler model a lot. I suppose without getting too much into the weeds of how that might work or his proposal, in, in particular I guess for purposes of tying everything together I would say rather step back and put that in context with what new approaches that allow the public interest to be taken into account if there were to be new statutes passed or if judges were to kind of look anew what are the panoply of possibilities? Right?

[00:56:57] Heidi Kitrosser: So one is the Benkler proposal, which would most naturally be passed by statute, right? I think that the idea of allowing consideration of which would ultimately take the form of prosecutors considering in the first instance these factors in deciding whether to use prosecutorial discretion to go after someone or not or judges considering whether the factors are met in applying the statute.

[00:57:25] Heidi Kitrosser: This would not amount to a free-for-all where every bureaucrat could be a law to themselves but it would provide some counterbalance to what is currently a nearly unfettered executive power both to wield the classification stamp and however mistakenly or whether for nefarious purposes or, you know, whether simply out of an abundance of caution, better to keep the secret than to let something out if you're not sure.

[00:57:55] Heidi Kitrosser: It's some counterbalance to that virtually unfettered power to wield the classification stamp and to decide under the capacious Espionage Act to bring charges. So it

would allow for some counterbalance. Now often times when you talk about something like a public interest defense folks who are wary of that will say, "Well, do you really want an individual bureaucrat making these decisions?" But again, the public interest defense as you've described it in the Yochai Benkler version, isn't an unfettered bureaucratic power to leak whatever you want, but it provides some safeguards oriented around the public defense the public interest.

[00:58:29] Heidi Kitrosser: Another possibility which is not mutually exclusive with that, but I'd like to see occur separately would be for judges. Perhaps as these cases arise to be willing to look more deeply into the First Amendment problems than they have in the past and in a law review article that I wrote with Dave Schultz we pointed out that, in fact, although courts have been relatively cavalier in our view about the First Amendment implications of prosecutions of media sources that there are distinctions that can be drawn from the handful of existing cases that still give courts some leeway even without, you know, acting inconsistently with those prior cases to say in a future case, let's take a closer look at the First Amendment interest and perhaps adopt some sort of balancing test.

[00:59:20] Heidi Kitrosser: There's also room at the sentencing phase quite a bit of room and discretion for sentencing judges even once someone has been convicted under the Espionage Act as a media source to take into account the public interest in determining how significant the sentence should be. So there are a host of possibilities none of them are mutually exclusive from the other but again, I guess I would come back to the main point that I think the instinct that most many people tend to have when you suggest that perhaps, when one suggest that perhaps there ought to be some sort of public interest element or some sort of balancing test as opposed to the current status quo of a relatively unbridled executive power to classify, and then to prosecute.

[00:59:59] Heidi Kitrosser: When you suggest that there should be some departure to that, the, the kind of classic instinct to say, "Oh, that sounds really dangerous." You'd be empowering any bureaucrat to just decide what they think the public should know. I think the most important thing to realize is that none of these proposals would do that, none of these proposals would amount to an unfettered, unchecked right to leak.

[01:00:19] Heidi Kitrosser: It would just provide some counterbalance against the current system, which is tilted entirely to the executive.

[01:00:27] Jeffrey Rosen: Thank you so much Sam Lebovic and Heidi Kitrosser for a substantive, comprehensive and, and wonderful discussion of the history of the Espionage Act. Thank you, friends, for taking an hour from your, away from your evenings to learn about this important topic and please complete and continue our learning together by reading these great books. Heidi Kitrosser's Reclaiming Accountability: Transparency, Executive Power, and the US Constitution. And Sam Lebovic's new book just out, the State of Silence: The Espionage Act and the Rise of the American Secrecy Regime.

[01:01:04] Jeffrey Rosen: Sam, Heidi, thank you so much for joining.

[01:01:07] Heidi Kitrosser: Thank you.

[01:01:07] Sam Lebovic: Thank you.

[01:01:09] Jeffrey Rosen: This episode was produced by Lana Ulrich, Bill Pollock and Tanaya Tauber. Was engineered by Dave Stotz and Bill Pollock. Research was provided by Yara Daraiseh, Cooper Smith, Samson Mostashari and Lana Ulrich. Check out the full lineup of programs in 2024 and register to join us at constitutioncenter.org and recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter. Remember, our nonprofit status and as a mark of your commitment to the mission in the New Year, please donate any amount, $5, $10 or more. You can do that at constitutioncenter.org/membership or at constitutioncenter.org/donate. In these challenging times, it's so meaningful to be learning with you and trying to model civil dialogue on which the future of the Republic depends. On behalf of the National Constitution Center, I'm Jeffrey Rosen.