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SCOTUS Says Domestic Spying Is Too Secret to be Challenged in Court

Officials shield government abuses from litigation by claiming "national security." The Supreme Court declined to weigh in.

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Global Research, March 01, 2023
Reason 27 February 2023

Region: USA
Theme: Intelligence, Law and Justice

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Abusive government behavior has again been found to be too sensitive to national security to face legal challenges in the court system. Last week, the U.S. Supreme Court declined to review a lower court's dismissal of the Wikimedia Foundation's lawsuit against a National Security Agency surveillance program revealed a decade ago by Edward Snowden. With "state secrets privilege" barring litigation, that leaves upcoming congressional debates over renewal of the law authorizing the program as the only recourse for civil liberties advocates.

> "The U.S. Supreme Court today denied the Wikimedia Foundation's petition for review of its legal challenge to the National Security Agency's (NSA) 'Upstream' surveillance program," Wikimedia announced February 21. "Under this program, the NSA systematically searches the contents of internet traffic entering and leaving the United States, including Americans' private emails, messages, and web communications. The Supreme Court's denial leaves in place a divided ruling from the U.S. Court of Appeals for the Fourth Circuit, which dismissed Wikimedia's case based on the government's assertion of the 'state secrets privilege.'"
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> "This decision is a blow to the rule of law," commented Alex Abdo, of the Knight First Amendment Institute at Columbia University, which worked with Wikimedia and the American Civil Liberties Union (ACLU). "The government has now succeeded in insulating from public judicial review one of the most sweeping surveillance programs ever enacted. If the courts are unwilling to hear Wikimedia's challenge, then Congress must step in to protect Americans' privacy by reining in the NSA's mass surveillance of the internet."

The "Upstream" surveillance program at issue collects "communications 'to, from, or about'" a foreign target designated under Section 702 of the Foreign Intelligence

Surveillance Act, according the NSA. In the clearer language of the Electronic Frontier Foundation, "upstream surveillance involves collecting communications as they travel over the Internet backbone, and downstream surveillance (formerly PRISM) involves collection of communications from companies like Google, Facebook, and Yahoo."

As Edward Snowden revealed and the NSA conceded, this broad surveillance may be authorized against foreign targets, but frequently scoops up Americans—often deliberately. "The government is increasingly using these broad and intrusive spying powers in run-of-the-mill criminal investigations against Americans, circumventing their Fourth Amendment rights," the ACLU warned in 2020.

Wikimedia argues that the NSA's surveillance discourages people from using Wikimedia's Wikipedia to research sensitive topics for fear of attracting government attention. The organization points to a 2016 article in the *Berkeley Technology Law Journal* that reported "a statistically significant immediate decline in traffic for [privacy-sensitive] Wikipedia articles after June 2013, but also a change in the overall secular trend in the view count traffic, suggesting not only immediate but also long-term chilling effects resulting from the NSA/PRISM online surveillance revelations."

But in court, federal attorneys insisted that the NSA's surveillance programs are such secret-squirrel stuff that national security would suffer if the nation's snoops were compelled to explain how their activities can possibly square with constitutional protections for individual rights. The court bought it.

"In a divided ruling on Wednesday, the 4th U.S. Circuit Court of Appeals said that the lawsuit must be dismissed after the government invoked the 'state secrets privilege', which meant that a full exploration of the issue in a court would damage national security," Reuters reported in 2021. That decision was left to stand last week by the Supreme Court.

As I've pointed out before, state secrets privilege has a sketchy history, evolving from bad official behavior after a 1948 plane crash that killed several civilian observers. When the observers' widows sued in *United States v. Reynolds*, the government argued that information about the plane was too super-secret to be revealed in court (a complete lie concealing official negligence, by the way). The Supreme Court agreed that some things are too sensitive to reveal in legal proceedings and gave officialdom a free pass to invoke the phrase "national security" as a shield against accountability. That disturbs even some modern members of the Supreme Court.

While not entirely questioning the existence of state secrets privilege, it "is no blunderbuss and courts may not flee from the field at its mere display," Justice Neil Gorsuch wrote last year in a dissent joined by Justice Sonia Sotomayor to the majority's invocation of the privilege in *United States v. Zubaydeh*. "Recent history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence from public view."

That case involved detention and torture at a black site in Poland under circumstances the government clearly found embarrassing. The Wikimedia lawsuit involves allegations of widespread domestic snooping that also reflect poorly on the powers that be. Political inconvenience is a lousy reason for preventing legal challenges to unconstitutional and criminal government conduct.

Unfortunately, the Supreme Court's decision leaves little recourse for determining the extent of domestic surveillance by the NSA and seeking its end. The spy agency *says* it cut back after "inadvertent compliance incidents related to queries involving U.S. person information." But that leaves the public taking the NSA at its word and wondering just what is going on behind the scenes.

Edward Snowden revealed just how far we should trust the intelligence apparatus.

The Foreign Intelligence Surveillance Act's Section 702, which authorizes the Upstream surveillance at issue in Wikimedia's litigation, is up for reauthorization this year, and the NSA very much wants to retain its broad power. It faces calls for reform from civil libertarians outside government, but also from Republicans and Democrats concerned about intrusive spying on Americans.

> "While surveilling foreign targets under the Foreign Intelligence Surveillance Act (FISA), the US government collects exabytes of data pertaining to American citizens," Rep. Thomas Massie (R-Ky.) objected earlier this month. "The Constitution requires a warrant to query that vast database for Americans. End warrantless spying now."

Similarly, Sen. Ron Wyden (D-Ore.) has long called for the intelligence community to reveal how many Americans it sweeps up, and for curbs on such snooping.

With litigation against domestic spying thwarted by the invocation of "state secrets privilege," Congress, for all its many faults, may be the last line of defense.

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