

## Surveillance Policy Should Not Be Enshrouded in Secrecy



*Mayya Novakovskiy, an MSc student in Politics and Communications at the LSE, summarizes the recent Human Rights Watch report on large scale surveillance and argues that the report does not go far enough to question surveillance policy and government transparency.*

Last month Human Rights Watch **put out a report** analyzing the impact large scale surveillance has had on journalism, the legal profession and American democracy. In conducting interviews with journalists, lawyers and US government officials, they found that as more revelations of mass surveillance come to light, journalists and attorneys are scaling back their use of modern technologies to maintain the legal rights they and their sources/clients are due, but can no longer enjoy freely. The report underscored four major points.

### **The US government is going after whistleblowers and journalists like never before.**

The report highlights a sharp increase in the current administration's use of the Espionage Act to **prosecute government whistleblowers** and **affiliated journalists** as well as the actions they have taken to prevent further disclosures. Following the Snowden revelations, Director of National Intelligence, James Clapper set a directive in place **prohibiting unauthorized contact** between intelligence community employees and the press. The federal government has also introduced the **Insider Threat Program** – a system of training federal employees to identify and report colleagues who pose a risk of releasing information. The program carries penalties that include criminal charges for failing to report a colleague.

### **Surveillance has had a chilling effect on journalists and their sources: “We’re not able to do our jobs if sources are in danger”**

Mass surveillance and government prosecution of whistleblowers has led to a culture of pervasive fear among journalists and their sources. Journalists feel they are no longer able to protect their sources and point to the **Justice Department's use of surveillance records** to investigate leaks. According to one journalist, this has an overall chilling effect on sources' willingness to reveal or confirm even unclassified information, including things like policy failures and bad military decisions. These obstacles have made it more difficult than ever for reporters to obtain information that is of public interest and ultimately essential for the proper function of democratic society to hold state power to account.

### **Surveillance poses a threat to attorney-client privilege and undermines the adversarial process.**

Surveillance has also had a profound impact on the legal profession, especially on attorneys representing individuals accused of terrorism, foreign governments, or major corporations. The revelations earlier this year that the **Australia government handed over to the NSA correspondence between a law firm and a foreign client** prompted the American Bar Association to establish higher standards for attorneys in maintaining client-confidentiality. In response, much like journalists, many attorneys have been forced to increase security efforts of their electronic communications or **have had to forgo digital communications altogether**. But at the center of this is a much larger issue. The report points to a, “broader concern that large-scale electronic surveillance—by introducing a further, massive power asymmetry between the government and its legal opponents—undermines the adversarial process, a core element of the US criminal justice system” (p61).



## The necessity of surveillance for security and public disclosure for effective democracy.

While acknowledging a legitimate need for the government to withhold certain information for the sake of national security, the report finds that two of the major problems at the center of this are government over-classification of information and the **high degree of secrecy of the surveillance programs** and processes. Among other things, it advocates for a more precise definition of the type of information that should be exempt from disclosure and for more transparency of the surveillance programs and legal oversight procedures themselves.

While the report does not go as far as to question the legitimacy of surveillance policy, it is worth bringing the issue into question. The revelation that the Director of National Intelligence James Clapper **lied under oath** to the congressional intelligence committees charged with overseeing the intelligence community sparked a serious debate about the legitimacy of standing surveillance policy and the issue of proper oversight and public consent. Policy enshrouded in secrecy – that is policy born out of secret interpretation of law and overseen by a secret court and secret committees makes it impossible for the public to know about and have a say on the issue of surveillance. Ultimately, such policy robs American citizens of the transparency necessary to properly oversee those who govern them and inhibits their duty to democratically hold those individuals to account.

*This article gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.*

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