

Report reveals vast scale of US “secret law”

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A new report from the Brennan Center for Justice at New York University School of Law reveals the vast scope of “secret law” in the United States. Secret law refers to laws that are not disclosed to the public, often revealed only to select members of Congress and judges, that nevertheless guide governmental policy.

“Secret law” is a clear contradiction in terms—if something is secret it cannot be properly considered a law, and is simply a cover for arbitrary and tyrannical rule.

The report (“The New Era of Secret Law”) was authored by Elizabeth Goitein, who codirects the Brennan Center for Justice’s Liberty and National Security Program and has authored several other reports on surveillance, over classification and the public’s right to access information.

Goitein notes that secret law as it is known today “emerged after World War II and intensified after 9/11” and “has resulted for the first time [in American history] in the systematic and deliberate concealment of law.”

“National security” is used as a catch-all pretext for classifying significant legal provisions. This extends even to Congress: laws passed sometimes reference and include portions of classified reports, meaning that these reports are granted the status of law without any public disclosure.

The United States also routinely enters into secret agreements with other countries. Most such agreements are pre-authorized by the US Congress and take the form of “congressional-executive agreements” instead of treaties discussed and ratified by the US Senate. Documents obtained through Freedom of Information Act requests by the Brennan Center reveal that the US has “entered into 807 secret agreements with other countries between 2004 and 2014—comprising 42 percent of the international agreements concluded during this time period,” according to the report.

The proliferation of undisclosed agreements harkens back to the days of “secret diplomacy” during the first part of the twentieth century, which played a major role in setting off World War I.

Arguably the most significant—in terms of both the implications for the average person and the vast scope of secret laws—is the use of secret laws by the military-intelligence apparatus to justify surveillance of the population far beyond what public laws, let alone the Constitution, authorize.

These laws and rulings are often kept secret within the federal government or even within the same agency. For example, according to the report, “The Department of Justice refused to share its legal justification for the NSA’s warrantless surveillance programs with the NSA’s General Counsel.” In other words, not even the NSA’s own lawyers knew the pseudo-legal justification for the NSA’s spy programs.

The use of secret laws continued after the end of the Bush administration. In 2015, the *New York Times* revealed that four Obama administration lawyers, “work[ing] in intense secrecy,” had developed the legal justification for extrajudicial killing of Osama bin Laden. This work was so secretive that the lawyers were not permitted to discuss it and the justification with then-Attorney General Eric Holder.

The mere concept of secret law is antithetical to elementary legal principles and democratic rights developed over millennia. The report notes that the Babylonian Code of Hammurabi, the Byzantine Empire’s Twelve Tables and the French Empire’s Code Napoléon all included promulgation either in their text or as an essential part of their function. Philosophers Thomas Aquinas, Thomas Hobbes and Immanuel Kant all held publicity to be a fundamental property of law in a just society.

The American Revolutionaries understood this when they framed the Constitution, which requires that

Congressional deliberations be published, beginning in *The Debates and Proceedings in the Congress of the United States* and now collected into the *Congressional Record*.

During the Cold War, the modern national-security apparatus developed to meet the needs of American imperialism. Over the past quarter century since the dissolution of the Soviet Union and especially over the fifteen years since 9/11, this apparatus has grown to gargantuan proportions, and a bevy of secret laws have developed to grant it new powers and authorize its actions.

The report highlights the Foreign Intelligence Surveillance Act Court's interpretation of the USA PATRIOT Act. The FISA Court interpreted Section 215 of the act to grant authorization for bulk collection of records rather than on a case-by-case basis. This novel interpretation—which clearly violates the Fourth Amendment's prohibition of unreasonable search and seizure—was kept secret until NSA whistleblower Edward Snowden revealed the existence of dragnet surveillance programs.

The Department of Justice disclosed to the Brennan Center for Justice that “25-30 significant FISA Court opinions and orders issued between mid-2003 and mid-2013 remain classified.” These entirely secret decisions likely continue to authorize mass surveillance operations unknown to the American population.

Cases regarding inmates at Guantánamo Bay are so thoroughly redacted as to be unreadable. Not only is the public—and the detainee—deprived of the right to know court proceedings, but censorship is often so pervasive that legal analysts “cannot even discern the legal question the court is answering,” according to the report.

In a particularly Kafkaesque case, the Islamic charity Al Haramain Islamic Foundation sued the Department of Treasury's designation of Al Haramain as a “specially designated global terrorist.” The Ninth Circuit Court of Appeals ruled that while “the government should have provided Al Haramain with an unclassified version of the evidence ... the error was harmless because Al Haramain could not have rebutted the evidence.”

Also of note, the report shows that at least 74 opinions from the Department of Justice's Office of Legal Counsel issued during the Bush administration

remain classified. These pseudo-legal opinions justified torture and other gross violations of international law.

The rise of the surveillance state and the accompanying use of secret law are inextricably bound up with the crisis confronting American imperialism as it attempts to reimpose colonial shackles on the Middle East and prepares for war with Russia and China while suppressing social discontent at home.



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