



NSA 101

Guest: Ben O'Neill

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WOODS: I have told people about this four-part series that you've done, and this podcast is like your four-part series for the busy person who has a commute and can listen to the key ideas in it. So I want to start right from the beginning, except I want to skip over the discussion of the President's speech about privacy because I'm sure you agree with me: I don't care what he has to say. I don't believe a word he has to say. I don't think he has the slightest concern about this. His only concern is that his administration has been caught doing this. So instead, let's talk about the preliminary ruling in the case of *Klayman vs. Obama*. Can you tell us what that case was all about, and then what the ruling said?

O'NEILL: Sure. Klayman is one of the plaintiffs that's challenged the NSA surveillance practices, and he's gone to court to ask the court to remove him from the NSA database, or rather to order the NSA to remove him from the NSA database, and he's had some initial success. There's been a preliminary ruling by Judge Leon in that case, where he said that he believes that the NSA's actions are probably unconstitutional, and he's issued quite a scathing ruling, and that is now going forward further to trial. So hopefully within the next six months we'll hear more on that case.

WOODS: But now there's another case, *ACLU vs. Clapper*, that comes to more or less the opposite conclusion.

O'NEILL: Yeah, that's correct. So the judge in the *ACLU* case accepted the NSA's arguments and accepted their arguments that their actions are not unconstitutional or that the ruling in the other case was not something that they shared the view with. But we have, I suppose, conflicting rulings at this stage, and it will be interesting to see how this pans out as it goes further up the judicial food chain.

WOODS: In the United States, and probably in other countries, people have a view of the judiciary that is, I think, fairly laughable in that they think of judges as being, I don't know, almost like Platonic forms. They are completely disinterested. They are utterly unaffected by current events and by public pressure. They are just, in a disinterested way, trying to assess the evidence and reach conclusions. But the fact is, judges are as human as anybody else. You write the following in your article: "For seven years the NSA's Prism program was under the oversight of the same judiciary and subject to the same checks and balances as now. For most of those years it was under the direction of the current president. Why is it that the program now ruled to be most likely unconstitutional in one case has been proceeding unimpeded for so long under the very same system of 'oversight' and checks and balances, and challenges from previous litigants have been shot down in flames in case after case? Well, we all know what has happened to make such a difference. Edward Snowden appeared. The one antidote for the previously operating regime of secret law has been the leaking of classified documents from within the NSA revealed to the public by this whistleblower and 'lawbreaker,'" and you go on to say, "The *Klayman* case represents the first post-Snowden case against the NSA, a situation where the judiciary now has to come to terms with a hostile public which is well aware of what is hidden by the legal walls erected around the NSA."

So in other words, it's I presume your view that the nods and winks that have been given to this program in the past by the judiciary have been nods and winks that have occurred within a context in which the judiciary knows that nobody knows about these programs, and so it's a heck of a lot easier to turn a blind eye, or even look favorably upon them.

O'NEILL: Oh, absolutely, and there have been plenty of cases challenging the NSA's activities prior to the Snowden leaks, and some of them have gone quite high in the judicial system. There have been previous cases ruled on by the Supreme Court, and they have been really quite pathetic in their approach. In one of the ACLU cases it didn't get to the merits of a constitutional challenge because the Supreme Court ruled that they didn't have standing because they couldn't prove that they were being surveilled by the NSA. What's interesting is that nowhere in the court system does the court ever require the NSA actually to give affidavit evidence or any kind of sworn testimony suggesting that the person that they are litigating against is actually outside the scope of their programs. It's just simply because the plaintiffs are impeded from proving that they are within the scope of the NSA programs—because, of course, this is classified information. They are then treated as lacking standing. The Supreme Court have been quite bad on that. In fact, very recently, I think just within the last week, the Supreme Court has come out and—Justice Scalia on the Supreme Court has referred to themselves as being the institution least qualified to decide on the matter, which is just a total derogation of duty. Justice Ginsberg has said the Court can't run away and say well, we don't know much about the subject, so we won't side. In actual fact, that is exactly what they have done for the entire period. So the idea that the Supreme Court is some kind of font of wisdom here is belied by the many previous cases that they have dealt with and where they have completely neglected their role of constitutional oversight.

WOODS: The last article in your series, actually, is called “How the NSA Made Your Legal Defense Illegal.” So maybe we ought to skip ahead to that. Let's say a little something more, though, for people who are unfamiliar with the concept of standing. You've explained that it means that even if something may seem harmful or may even be legally questionable, if you can't demonstrate that you yourself have been harmed by it, then you lack standing and can't bring suit. Have I explained it correctly?

O'NEILL: Basically. The basic idea of one of the aspects of the kind of common law approach to the judicial system is that the court only adjudicates actual disputes and controversies. It doesn't deal with abstract questions of law unless they come to it in the form of an actual dispute, and so they have taken the approach that a plaintiff, before you get to the argument, has to show that they are affected somehow by the wrongdoing they are talking about. So I can't come to court, for example, to complain about a wrongdoing done to you. You would have to go to the court for that. This is the idea of having standing. So this is one of the things that's impeded a lot of plaintiffs in making complaints against the actions of the NSA.

WOODS: So now having explained that and then having also mentioned now the Snowden leaks and now the fact that we have much, much, more knowledge about what the NSA is up to, how does this affect the ability of somebody to launch a suit? How does this affect the courts' ability to deny someone's ability to bring suit on the grounds that he lacks standing? In other words, if we now know that we're all being spied on, don't we all have standing?

O'NEILL: Well, that's right. This is effectively what was special about the *Klayman* case: because his case came to court after the Snowden leaks, he was able to then use those leaks that yes, indeed, he is within the scope of the programs. He can demonstrate that to the court, and therefore he does have standing, and the court essentially took that approach to say yes, this material does demonstrate that plaintiff Klayman has standing.

WOODS: So where do you think this goes legally? Is it in fact going to wind up in the Supreme Court, or as you say, is there a possibility that there will be justices who will try to weasel out of it?

O'NEILL: Well, I think it's likely. The Supreme Court have indicated that they are likely to rule on the matter eventually, and I think they are kind of forced to in terms of face saving because they have dealt with past challenges to the NSA program, and they have knocked them off at the standing stage, and as I said, I think they have been quite derelict. I mean, a lot of these programs have been running for a long period of time under their supposed oversight. So I think just simply from a face-saving point of view, you may see them take on the cases. I really couldn't speak to what kind of outcome you could expect, but I am not all that hopeful from a legal perspective that this gets better.

WOODS: Well, and of course, it unfortunately seems to be the case that justices appointed by Republican presidents tend to defer to the executive and tend to defer to government secrecy, and it's the terrible justices, on the left, who tend to be better on these issues, and then you have the worst of the worst: I don't know where Stephen Breyer will come down, but he strikes me as the worst of the worst. I think he favors the president *and* he favors wealth redistribution. I have no sympathy for him whatsoever. We'll have to see

where that goes.

What I'm interested in, though, is this legal doctrine called the third-party doctrine, which you saw starting in the late '70s, but it was only applied in very rare and unusual cases. Now it's being applied in dragnet fashion to authorize all kinds of nasty things that the NSA has been up to.

O'NEILL: Yeah, that's right. If I could just go back to your previous point: I believe Judge Leon, who was the judge in the *Klayman* case, may have been appointed by Reagan, so perhaps there is some hope on the side of Republicans. I would have to look that up, but I believe he was. [TW note: Ben wrote to me after our discussion to note that Judge Leon had in fact been appointed by George W. Bush.]

WOODS: I am happy to give credit where it's due. I am talking about Supreme Court justices. They always disappoint when it comes to stuff like this, yes.

O'NEILL: That's right, yeah. With respect to the third-party doctrine, this was something that arose in the late '70s in a couple of police cases where police had suspects for crimes where they had probably a reasonable amount of belief that these people were committing crimes and possibly could have had probable cause if they had gone for a warrant, but in a couple of these cases police dealt with third-party holders of records for a suspect rather than seeking a warrant from the court. There was a case called *United States vs. Miller* in 1976 where the police went to the suspect's bank and obtained bank records without securing a warrant from the court, and there was a case called *Smith vs. Maryland* in 1979 where the police installed what's called a pin register which basically records number that are being called on a phone, on a suspect's phone, by getting permission from the phone company essentially rather than going to court. Now both of these were challenged by the suspects who were eventually taken to court for these crimes on the basis that there was no warrant, and the court essentially held that the Fourth Amendment did not protect them since the government had obtained the information through a third party which they had voluntarily given the information to, so in the first case the criminal suspect had given information to their bank in the course of their dealings with the bank, and the police obtained it from there, and in the second case the suspects had given information to the phone company, and the police obtained it from there.

Now essentially this sowed the seed for this idea that any time you have private information, if you give it to a third party voluntarily, a non-government third party, even with expectations of confidentiality, the third-party doctrine says that the government can then take that information with the permission of the third party without requiring a warrant and without being constrained in any way by the Fourth Amendment. It's really quite a ridiculous doctrine.

WOODS: Let me read this passage that you quote from Judge Leon about this. He says, "The Fourth Amendment typically requires a neutral and detached authority be interposed between the police and the public, and it is offended by general warrants and laws that allow searches to be conducted indiscriminately and without regard to their connection with a crime under investigation. I cannot imagine a more indiscriminate and arbitrary invasion than the systematic and high-tech collection and retention of personal data on virtually every citizen for purposes of querying and analyzing it without prior judicial approval."

Let me depart from the legal argument for a moment, though, and ask you about the type of claims that the government would make when cornered about a program like this—and in fact, arguments that it has made, and arguments that the courts have been quite sympathetic to—which is that the program is necessary to protect the general public against terrorism. Now let's say for the sake of argument that the terrorist threat is as great as they claim it is, and that you have people who desire to blend into a free society, and then using the benefits of the free society and the privileges they enjoy, to undermine it from within and to plan and plot horrific attacks. This requires some kind of dragnet surveillance if we're not going to be subject to ongoing attacks. What's the response to that from a libertarian point of view?

O'NEILL: Well, it never has required indiscriminate dragnet surveillance in the past, and generally the appropriate response to criminal wrongdoing has been to obtain probable cause on a suspect, obtain a warrant for whatever searches are required and then carry out those searches. I think that's a procedure that is fairly well in keeping with a libertarian view of the kinds of powers an investigatory agency would have. So I think the idea that you need dragnet surveillance, you need mass surveillance of the entire population just so that you will pick up the criminal activities of various people, is very wrongheaded.

WOODS: Yeah, I think it's a case of they do it because they can.

O'NEILL: Yeah, look, the objection here, at least from my point of view, is not that no one should be surveilled ever. The objection is to the kind of indiscriminate mass surveillance that leads to government tyranny. There's a world of difference between a legal system in which police and other investigatory agencies target their investigations to known suspects, obtain probable cause for searches, obtain warrants in that classical fashion, and then execute their searches accordingly, and one which just simply attempts to own all communications by all people in the world—engage in mass surveillance in the hope that you Hoover up everything for when you need it. Those are two very different things.

WOODS: By the way, I saw that in your article. Is that an Australian expression?

O'NEILL: Which expression is that?

WOODS: To Hoover up.

O'NEILL: Perhaps, I don't know. I am not well-traveled enough to know what's not an Australian expression.

WOODS: Is it borrowed from the Hoover vacuum cleaner company?

O'NEILL: Yeah, that's correct.

WOODS: Okay, all right, well, I am going to start using that here, and just let the chips fall where they may. See if people understand me or not. I love that expression.

O'NEILL: Yeah, you'll have to excuse my colloquialisms.

WOODS: No, I love them. That's why we have you here. It makes us seem cosmopolitan to have all these expressions on the show.

O'NEILL: Oh, wonderful. Well, I have never been accused of being cosmopolitan, but thank you.

WOODS: (laughs) I am not choosing my words carefully. Let's back up and talk about FISA courts. Now this is a fundamental issue because the whole discussion always rests on the FISA courts, and I bet there are a lot of people who hear this expression over and over, and they don't know what these courts are.

O'NEILL: Yeah, well, I mean it's honestly very dubious even to call them courts. I mean they are not courts in the classical sense of what we usually think of as a court. So the FISA court or Foreign Intelligence Security Court—FISC is the actual acronym, but it's sometimes called the FISA court after the name of the act. In any case, this is a court which meets in secret with only the government represented. So the NSA brings cases where they want a warrant to the FISA court. They are the only party attending the court hearing. There are no other parties. No other parties know that the hearing is going on. The NSA then makes their arguments to the court. There are no counter-arguments. The court then goes away and can come back and ask for clarifying decisions from the NSA or often they might ask them to amend their request and suggest ways that they might amend their requests to get a more favorable outcome, and then ultimately the court makes a decision for the NSA as to whether it grants the warrant or not, and they've been extremely forthcoming with warrants.

Also, all of these rulings are secret as well. None of these rulings are made public. A few have leaked out, obviously, through the disclosures, but these are secret rulings as well. So it's a court in the same sense that the English Star Chamber was a court, these kind of secret institutions where only one party is represented, people are not allowed to face their accuser, people are not aware that the hearing is going on affecting their interests, not represented there, not given the court's judgments—all of this is very un-courtlike. So really, it's a court in name only.

WOODS: I want to read a passage from one of the articles in your series. "In order to deal with a large number of warrant applications, the powers of the FISA court have expanded to the point that it has undertaken quasi-constitutional proceedings, allegedly validating the surveillance programs as being within the constitutional powers of the U.S. government. Even in this latter function, the hearings have been closed to the public and have been conducted with only the government giving arguments to the court. Hence the government has had free reign to be the only party represented at hearings which have been purported to determine its own legal powers under the U.S. Constitution. For this reason one commentator has noted that, 'In truth the FISC has basically become a parallel Supreme Court, but one which operates in almost total

secrecy.””

I don't know if comment is necessary, but feel free to do so.

O'NEILL: This is one of the great machinations the NSA have done over the years. They have realized that because they have access to this secret court, and they are the only representative there, it makes sense for them to attempt to establish a series of precedents which will lay an alleged constitutional foundation for what they do. So they go to the court, and in order to try to argue for the warrants they want they engage in some assertions to the court about what is constitutionally allowable, and they appeal to this third-party doctrine we talked about, and they get the court to essentially make rulings which talk about the limits of the constitutional power and so on. And so these do end up being essentially a quasi-constitutional precedents that will now, if this ends up going to the Supreme Court, those judgments will obviously be considered at that stage. And the NSA no doubt will argue that those things constitute precedents in their favor. Now, of course, those precedents were obtained with no other party being present, which is very advantageous for them. It's much easier to make a legal case when you have no opposition.

WOODS: Well, no doubt. Before I let you go, you have another piece on Edward Snowden, obviously in defense of him. Why don't you give us just the *Reader's Digest* overview of what you're driving at there?

O'NEILL: There's a lot of talk, I suppose, about Edward Snowden having acted illegally and having stolen, in inverted quotes, government information and so on, and even a lot of people who are very sympathetic to Snowden will sometimes say he's a whistleblower, but he's a lawbreaker, but he's kind of a good lawbreaker. This takes a strange approach to really what we would consider lawful in terms of kind of a natural law. If we were looking at, say, how the government operates when it investigates a criminal agency, it investigates criminal wrongdoing. One of the examples I give in my article about Snowden is a guy called Joseph Stone, who was an FBI agent that infiltrated the mafia decades ago. Their agents will infiltrate this criminal organization. They will give assurances, obviously, of secrecy to their mafia colleagues and give these false assurances of confidentiality, all the while gathering evidence of wrongdoing, and then when they finally spring the trap, obviously they don't regard those assurances of confidentiality as being in any way legally or morally binding because they are done in the course of investigating this criminal wrongdoing

The same kind of approach is applied to Snowden. You see that his activities are really no different than this. He went into a situation as a contractor for the NSA, where he gave assurances of confidentiality no doubt through his employment, but he was gathering evidence of what is ultimately criminal wrongdoing by the U.S. government. So for him to turn around and leak that information and bring it public is really no different from, say, an FBI agent infiltrating the mafia, and then breaking his promise to the mafia and divulging that information. We don't complain in that case, and in fact the government very much defends that. It's simply obvious that that's legitimate to do. And yet that's all that Snowden's done. So I think when we compare his actions to the kind of actions that the government itself undertakes when it's investigating wrongdoing, we see that in fact his actions are really quite innocuous and quite reasonable.