Unbridled Secrecy

The Supreme Court severely damaged the rule of law in its decision on Tuesday to disallow a lawsuit challenging the federal law that permits broad, secret surveillance and interception of international communications involving Americans. The suit, brought by lawyers, journalists and human rights activists, charged that the 2008 amendments to the Foreign Intelligence Surveillance Act violates their rights to privacy and free speech.

Justice Samuel Alito Jr., writing the 5-to-4 majority opinion, misleadingly presented the court as a model of restraint and its ruling as a narrow one. But, in fact, the decision will likely shut down all judicial review of this pernicious surveillance law, barring anyone from ever challenging its constitutionality in federal court.

The majority ruled that the plaintiffs did not have standing to sue because they cannot show they have been harmed by the surveillance law. This is a classic Catch-22: since the surveillance is secret and no one can say for certain that their calls, e-mails and other communications have been or will be monitored, by the court’s logic no one will ever be able to show standing to bring a lawsuit.

The court’s decision is a clear-cut abdication of its fundamental role in the American constitutional system of checks and balances, which ensures that Congress and the president are not infringing on protected rights.

The Foreign Intelligence Surveillance Act of 1978 generally required the government to get an individual order from a special court before it could engage in electronic surveillance, though that court has too often functioned as a rubber stamp for government requests. The 2008 amendments to the law give the government sweeping power to intercept communications of Americans without individualized suspicions, warrants based on probable cause or any administrative findings of a terrorism connection.

The law does not require the government to identify its surveillance subjects. It exposes every communication between someone in the United States and a non-American abroad to the risk of surveillance. It chills the free speech and privacy rights of people in this country. The law also reduces the special court’s already narrow function to virtually nothing.
The majority overturned a unanimous ruling by three judges of the United States Court of Appeals for the Second Circuit. That court properly found that the plaintiffs had standing to sue because they “established that they have a reasonable fear of injury and have incurred costs to avoid it.” That legal standard is well established under Supreme Court law.

Justice Stephen Breyer, writing in dissent, said that “there is a very high likelihood” that the government “will intercept at least some of the communications” the plaintiffs described in the lawsuit and that the court “has often found standing where the occurrence of the relevant injury was far less certain than here.”

The Supreme Court should have let this case go forward. Its refusal essentially prohibits constitutional review of the 2008 law and whether Congress and the executive branch have undercut fundamental liberties.