FISC ALREADY INVENTED THAT DATABASE-AND-MINING PRECEDENT IN SECRET

Almost 18 months ago, I suggested that the Amnesty v. Clapper suit challenging the government's Section 702 collection might invent what I called a "database-and-mining" precedent.

> Over at Lawfare, Steve Vladeck noted that this case would likely decide whether and what the "foreign intelligence surveillance" exception to the Fourth Amendment, akin to "special needs" exceptions like border searches and drug testing.
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> > ***Third***, if the Court affirms (or denies certiorari), this case could very well finally settle the question whether the Fourth Amendment's Warrant Clause includes a "foreign intelligence surveillance exception," as the FISA Court of Review held in the *In re Directives* decision in 2008. That's because on the merits, 50 U.S.C. § 1881a(b)(5) mandates that the authorized surveillance "shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States." Thus, although it is hard to see how surveillance under § 1881a could violate the Fourth Amendment, explication of the (as yet unclear) Fourth Amendment principles that govern in such cases would necessarily circumscribe the government's authority under this provision going forward (especially if *In*

> *re Directives* is not followed…).
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> I would go further and say that this case will determine whether there is what I'll call a database-and-mining exception allowing the government to collect domestic data to which no reasonable suspicion attaches, store it, data mine it, and based on the results of that data mining use the data itself to establish cause for further surveillance. Thus, it will have an impact not just for this warrantless wiretapping application, but also for things like Secret PATRIOT, in which the government is collecting US person geolocation data in an effort to be able to pinpoint the locations of alleged terrorists, not to mention the more general databases collecting things like who buys hydrogen peroxide.

Unsurprisingly, the FISA Court already invented that precedent. In secret.

> In more than a dozen classified rulings, the nation's surveillance court has created a secret body of law giving the National Security Agency the power to amass vast collections of data on Americans while pursuing not only terrorism suspects, but also people possibly involved in nuclear proliferation, espionage and cyberattacks, officials say.
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> [snip]
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> In one of the court's most important decisions, the judges have expanded the use in terrorism cases of a legal principle known as the "special needs" doctrine and carved out an exception to the Fourth Amendment's requirement of a warrant for searches and seizures, the officials said.

> The special needs doctrine was originally established in 1989 by the Supreme Court in a ruling allowing the drug testing of railway workers, finding that a minimal intrusion on privacy was justified by the government's need to combat an overriding public danger. Applying that concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment, the officials said.
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> [snip]
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> The officials said one central concept connects a number of the court's opinions. The judges have concluded that the mere collection of enormous volumes of "metadata" — facts like the time of phone calls and the numbers dialed, but not the content of conversations — does not violate the Fourth Amendment, as long as the government establishes a valid reason under national security regulations before taking the next step of actually examining the contents of an American's communications.
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> This concept is rooted partly in the "special needs" provision the court has embraced. "The basic idea is that it's O.K. to create this huge pond of data," a third official said, "but you have to establish a reason to stick your pole in the water and start fishing."

Here's the thing though: it's not just that the government has done all this in a court with no antagonist. It's that the government has gone to great lengths to make sure regular courts wouldn't review these decisions, doing things like:

- Making no mention of the intentional-incidental

collection of US person data
- Promising SCOTUS — but then reneging on that promise — that defendants charged with FISA-collected intelligence be alerted to the source of that evidence
- Lying about how easily ~~targeted~~ incidentally collected US persons would be to avoid standing

Effectively, the government has been refusing to let issues that affect a great number of Americans be reviewed in courts with real judicial process.

And then calling the result “law” and “legal” in spite of the fact that almost no Americans know about it.