

DATA-MINING TWO

Marty Lederman's post on data-mining says what I've been trying to say for two years about the NSA program. Contrary to what the NYT and others suggest, we don't have to look beyond data-mining to find something so horrible that a good conservative like James Comey would object. We just need to get to the point where the US is using data-mining of dubious connections to replace the idea of probable cause in a surveillance program.

Here's the theory, roughly:

There was some sort of data mining program going on. Probably not of content, almost certainly not content reviewed by humans. That is to say, it involved *computers searching through "meta-data" related to calls and e-mails, looking for certain patterns that might suggest connections to Al Qaeda or to suspicious activity that might be terrorism-related.* (I have my theories as to what the programs might have been looking for, but don't want to get into such speculation in this forum. And in any case, my theories are probably way off.)

This data-mining indicated that it might be valuable to do more targeted searches of particular communications "pipelines" (John Yoo's phrase), looking for more specific information. But that's where FISA came in. In order to target a particular U.S. person, or to wiretap a particular "facility," FISA requires that the NSA demonstrate to the FISA court probable cause to believe (i) that the target of the electronic surveillance is a foreign power or an agent of a foreign power, and (ii) that each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a

foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3).

Perhaps, as John Yoo suggests in his book, FISA would have prohibited following up on the leads revealed by the data mining with more targeted wiretaps of suspicious "channels" or "pipelines," "because we would have no specific al Qaeda suspects, and thus no probable cause."Â [Lederman's bold, my italics]

And again, we can be sure that this is one of the things that was going on, because when Bush "confirmed" a program in December 2005—clearly aiming to confirm just that part of the program of undisputed legality—he stressed that the targets for wiretapping were people with clear ties to Al Qaeda. The problem was that the Administration was using data mining (already of dubious legality for reasons I'll get into a second) as their basis for choosing targets to wiretap. They were therefore tapping people whose communication patterns—rather than their actions—suggested they might have terrorist ties.