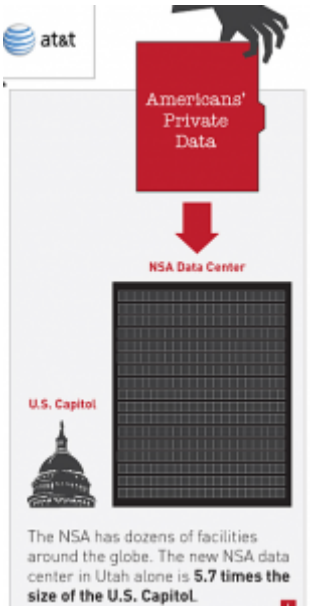
WILL SCOTUS INVENT A "DATABASE-AND-MINING" EXCEPTION TO THE FOURTH AMENDMENT?

As I noted yesterday, the Administration appealed the 2nd Circuit Decision granting review of the FISA Amendments Act to the Supreme Court last week. I wanted to talk about their argument in more detail here.



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.

> *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…).

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.

I make a distinction between foreign intelligence surveillance and "database-and-mining" exceptions because the government is, in fact, conducting domestic surveillance under these programs and using it to collect intelligence on US persons (indeed, when asked about Secret PATRIOT earlier this month, James Clapper invoked "foreign or domestic" intelligence in the context of Secret PATRIOT). The government has managed to hide that fact thus far by blatantly misleading the FISA Court of Review in *In re Directives* and doing so (to a lesser degree) here.

In *In re Directives*, the government misled the court in two ways. First, according to Russ Feingold, the government didn't reveal (and the company challenging the order didn't have access to) information about how the targeting is used. The amendments he tried to pass—and which Mike

McConnell and Michael Mukasey issued veto threats in response to—suggest some of the problems Feingold foresaw and the intelligence community refused to fix: reverse targeting, inclusion of US person data in larger data mining samples, and the retention and use of improperly collected information.

The government even more blatantly misled the FISCR with regards to what it did with US person data.

> The petitioner's concern with incidental collections is overblown. It is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions to not render those acquisitions unlawful.9 [citations omitted] The government assures us that it does not maintain a database of incidentally collected information from non-targeted United States persons, and there is no evidence to the contrary. On these facts, incidentally collected communications of non-targeted United States persons do not violate the Fourth Amendment.
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> 9 The petitioner has not charged that the Executive Branch is surveilling overseas persons in order intentionally to surveil persons in the United States. Because the issue is not before us, we do not pass on the legitimacy vel non of such a practice.

The notion that the government doesn't have this US person data in a database is farcical at this point, as the graphic above showing the relative size of the NSA's data center in UT—which I snipped from this larger ACLU graphic—makes clear (though the government's unwillingness to be legally bound to segregate US person data made that clear, as well). As I suggested when this decision was released, the government must have been offering non-denial denials of having

such a collection of US person data back in 2007.

> Did the court ask only about a database consisting entirely of incidentally collected information? Did they ask whether the government keeps incidentally collected information in its existing databases (that is, it doesn't have a database devoted solely to incidental data, but neither does it pull the incidental data out of its existing database)? Or, as bmaz reminds me below but that I originally omitted, is the government having one or more contractors maintain such a database? Or is the government, rather, using an expansive definition of targeting, suggesting that anyone who buys falafels from the same place that suspected terrorist does then, in turn, becomes targeted?

As I showed yesterday, the government is already doing something similar with this suit, simply ignoring the part of the suit pertaining to the completely legal retention of purely domestic communications, so long as it was ostensibly collected unintentionally.

Their larger argument, too, does something similar, using a definition of "targeting" that tautologically excludes US persons in principle but not in fact.

> Section 1881a does not authorize surveillance targeting respondents or any other United States person, 50 U.S.C. 1881a(b)(1)-(3), and respondents have presented no evidence that their international communications have ever been incidentally acquired by the government in its surveillance of non-United States persons abroad.

Of course, it takes two to communicate, so for

every single targeted conversation, there is a counterparty whose communications are also collected. Nevertheless, the government focuses on authorizations—the word "targeting"—to distract from these counterparties. Note too, here, how once again the government ignores 1881a(b)(4), which permits the retention of incidentally collected domestic communications.

One of the real tells, though, comes in what appears to be a throwaway intended to prove there are people who would have standing to sue under FAA.

> If the government intends to use or disclose any information obtained or derived from its acquisition of a person's communications under Section 1881A in judicial or administrative proceedings against that person, it must provide advance notice of its intent to the tribunal and the person, even if the person was not targeted for surveillance under Section 1881A. 50 U.S.C. 1881e(a); see 50 U.S.C. 1801(k), 1806(c).

The government's reference to the possibility it would use data "even if the person was not targeted for surveillance" admits that it does collect and review the communications of those not targeted, potentially even for law enforcement purposes. But then it suggests that the only way people could be aggrieved is if their communications were used for law enforcement, not intelligence.

Yet the plaintiffs argument for injury is that they cannot do their jobs—NGOs, lawyers, reporters—even if their communications become subject to intelligence, not law enforcement, collection. Their question, of course, is whether domestic intelligence collected under the guise of foreign intelligence constitutes a violation of the Fourth Amendment, whether the government has a database-and-mining exception under the Fourth Amendment.

That may not change SCOTUS' analysis on standing. But it does make it clear that—no matter how the government would like to distract from this point—US person data (even entirely domestic conversations) can be legally collected and analyzed under this law.

So that is what the stakes are. The government would love to have SCOTUS either deny cert or affirm the district finding that the plaintiffs don't have standing, particularly before Jewel, which addresses the underlying issue of dragnet collection. The government would also love to use such a SCOTUS action, in secret, to rule that its use of GPS tracking in the intelligence, which it is busy distinguishing from a law enforcement context under *Jones*, context is legal. The government would also like any challenge to pertain to a specific order (as it would be under 1881e), so it can hide what it does with the data it collects once it goes into the database in UT.

And given what Russ Feingold said back in 2008—that an adversary process would reveal both the potential for abuse, and quite possibly the abuse, the government really really doesn't want this case to move forward.