

TSP AND FISA

Yup, still mono-focused on FISA, but mr. emptywheel is clamoring for dinner, so maybe once I step away from the computer, I'll remember all the other things I've been meaning to write on.

I want to object to the way Kevin Drum is referring to the new details of FISA:

Originally, FISA allowed warrantless wiretapping of any communication between two foreigners. It also allowed warrantless surveillance of "foreign powers" (including those on U.S. soil) as long as there was no substantial likelihood that the surveillance would include conversations with U.S. persons. "Foreign powers" did not include terrorist groups.

Democrats and Republicans were both willing to amend FISA to allow limited surveillance of terrorist groups, and both were willing to amend FISA to overcome technical problems that had made it difficult to monitor certain kinds of foreign-to-foreign communications. So what was the disagreement? Originally I thought it was mainly about how to fix one of the technical problems: namely, given modern communications network architecture, what procedures do you need to put in place to ensure a high likelihood that U.S. persons won't be surveilled while at the same time allowing NSA the widest possible latitude to monitor genuine foreign-to-foreign communications?

However, that appears not to be the case. Rather, NSA (and the White House) were specifically looking for new authority to monitor communications that included U.S. persons. And not just communications related to terrorism.

They wanted a free hand for warrantless surveillance of any communication between foreigners and Americans that was related to foreign intelligence in any way.

It's not that Drum is, strictly speaking, wrong (though see AL's cautions in the comments). But he's setting a false, two-part comparison: Pre-Amendment FISA and Post-Amendment FISA, with the only thing that intervened as the Administration's wishes to "modernize" FISA.

This comes, I think, out of the Administration's head-fake, which consisted of naming a small part of the warrantless wireless program the "Terrorist Surveillance Program," which (when we entered into this most recent debate) the Administration claimed it wanted to legalize. Bush affirmed, on repeated occasions, that the "TSP" only consisted of taps that the Administration could ensure were targeted to those with ties to Al Qaeda. And it only consisted of taps for which one of the parties was outside of the country.

But we know the whole "TSP" thing was just a head-fake. While that is all Bush admitted to, we know there are several other aspects the warrantless wiretap program included. These are, at a minimum:

1. The tapping of communication that the Administration can't guarantee involves one party outside of the United States
2. The tapping of communication for which the Al Qaeda tie is tenuous at best
3. The use of data-mining to select the targets of interest
4. The collection of the PEN

data from a huge chunk of
the communications passing
through our country's
telecom networks

Drum suggests that the Administration wasn't asking for 1 and 2—that those things just got thrown into the pot at the last minute. Well, perhaps not in so many words. But that is, in fact, the program the Administration was trying to make legal, so the mistake or confusion arises solely because we treated this debate as one strictly about modernization. Had we treated this debate as one about legalizing the Administration's illegal program, including those aspects that Bush never admitted but we knew were included anyway, those two items would clearly have figured prominently on the list. (Though it's unclear whether the Administration's broad use of "Foreign Intelligence" to describe the target of the taps is designed solely to authorize tapping people whose ties to Al Qaeda are tenuous, or, more likely, whether they want to include intelligence of all stripes, presumably including international industrial intelligence.)

As to the last two, those are the elements that I suggest we really scrutinize this law for. AL suggests, in the comment linked above, that they may have, in fact, thrown in a thin legalization of the data-mining by treating that as surveillance that "concerns" foreign intelligence. Perhaps.

The point is, though, not to let Bush's Orwellian TSP head-fake continue its power. It was never just about tapping Al Qaeda. Treating it as such simply buys the BushCo line about "TSP."