

WHAT DID BUSHCO HIDE BY NOT REVEALING SURVEILLANCE ACTIVITIES?

Via Threat Level, I see the EPIC has written a letter to Pat Leahy complaining about the Bush Administration's failure to comply with requirements that it release details on the number of "pen register" and "trap and trace" orders.

As a reminder, "pen registers" are when the government collects the metadata from your telecom contacts—the phone numbers you call and the length of calls, as well as whom you email—to figure out who you're talking to. And "trap and trace" orders are when the government figures out who is calling (or emailing) you. In addition, the EPIC letter explains that law enforcement has recently been using "hybrid" orders to pinpoint cell phone (and therefore, your) location.

Law enforcement agents use "hybrid" orders for cellular location information. Hybrid orders seek to determine a suspect's past and future location based on non-content data transmitted by the suspect's cellular phone. The government has engaged in this type of surveillance by invoking a combination of authorities under the Pen Register Act and the Stored Communications Act.

For pen registers and trap and trace, the government doesn't have to get a warrant (the hybrid stuff is still up in the air). Instead, since 1986, DOJ has been required to report how much of this stuff is going on.

But, as EPIC explains, DOJ didn't release the report publicly for the years 1999 through 2003,

and only gave incomplete information to Congress at all in November 2004. And DOJ appears not to have released reports at all since 2004.

You probably see where I'm going with this.

We know, of course, that Bush's illegal wiretap program involved some kind of data mining aspect. It appears that they were doing pattern analysis based on things like length and recipient of call—precisely the kind of thing you get from pen registers—to determine whom to further wiretap.

Yet we have only incomplete information from the first three years of Bush's illegal wiretap program. EPIC explains that DOJ did not include the suspected offenses that law enforcement officers were trying to investigate, nor did it list which officers were doing the investigations.

And then we have nothing—no data—for the years after Jim Comey and Jack Goldsmith supposedly put the illegal wiretap program back on legal footing (and remember—the data mining aspect of the program was reportedly one of the things that Comey et al went crazy over).

Now, the failure to report any information may be at least an attempt on the part of the Bush Administration to hide abuses of these authorities (How useful would it be, for example, to learn precisely how often Chris Christie—who is running for governor in NJ—used these "hybrid" orders and on whom?). But I'm more interested in whether, after the Comey rebellion, they decided to justify data mining using an expansive application of pen registers; I've already shown that they actually used a hybrid approach to justify the program itself, and I would be unsurprised if an abuse of pen registers is part of it.