ANOTHER SECRET OLC OPINION: THIS ONE ON INFORMATION SHARING

As MadDog and I were discussing on this thread, the May 6, 2004 Jack Goldsmith opinion on the warrantless wiretap program references an OLC opinion that appears not to have been publicly released or, even in the course of FOIA, disclosed.

> Thus, this Office will typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President's Commander-in-Chief powers. Cf, id. at 464-66 (applying avoidance canon even where statute created no ambiguity on its face). Only if Congress provides a clear indication that it is attempting to regulate the President's authority as Commander in Chief and in the realm of national security will we construe the statute to apply.19
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> 19. For example, this Office has concluded that, despite statutory restrictions upon the use of Title III wiretap information and restrictions on the use of grand jury information under Federal Rule of Criminal Procedure 6(e), the President has an inherent constitutional authority to receive all foreign intelligence information in the hands of the government necessary for him to fulfill his constitutional responsibilities and that statutes and rules should be understood to include an implied exception so as not to interfere with that authority. See Memorandum for the Deputy Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Effect of the Patriot Act on Disclosure to the

> President and Other Federal Officials of Grand Jury and Title III Information Relating to National Security and Foreign Affairs 1 (July 22, 2002);

This is probably a memo examining what kind of limits section 203 of the PATRIOT Act impose on Executive Branch officials. That section permits the sharing of Grand Jury and Title III wiretap information with the intelligence community—even information pertaining to US persons. But it requires that, "any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information."

On April 11, roughly three months before this memo was released, John Ashcroft issued a memo ordering DOJ's investigative entities to build more robust databases. In it, he describes Section 203 this way:

> Section 203 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, authorizes the sharing of foreign intelligence and counterintelligence obtained as part of a criminal investigation, including through grand jury proceedings and Title III electronic surveillance, with **relevant Federal officials to assist in the performance of their duties**. The officials receiving such information may use it only as necessary in the conduct of their official duties and subject to any limitations on the unauthorized disclosure of such information. The Criminal Division has developed and distributed model forms to be used to notify the supervising court when grand jury information has been shared pursuant to section 203.

> [snip]
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> I hereby direct the Assistant Attorney General for Legal Policy, in consultation with the Criminal Division, FBI, and other relevant components, to draft, for my consideration and promulgation, procedures, guidelines, and regulations ot implement sections 203 and 905 of the USA PATRIOT Act in a manner that makes consistent and effective the standards for sharing of information, including sensitive or legally restricted information, with other Federal agencies. Those standards should be directed toward, consistent with law, **the dissemination of all relevant information to Federal officials who need such information in order to prevent and disrupt terrorist activity and other activities affecting our national security**. At the same time, the procedures, guidelines, and regulations should seek **to ensure that shared information is not misused for unauthorized purposes**, disclosed to unauthorized personnel, or otherwise handled in a manner that jeopardizes the rights of U.S. persons, and that its use does not unnecessarily affect criminal investigations and prosecutions. [my emphasis]

Note that Ashcroft was already sliding off the standards from section 203. Rather than discussing sharing information with discrete officials who need to know the information, Ashcroft envisions the dissemination of "all relevant information" to Federal officials who need it, and rather than reiterating the limit that those officials should only use the information as necessary to the conduct of their official duties, Ashcroft directs DOJ to establish procedures to ensure that shared information is not misused for unauthorized purposes. That is, in a memo talking about

expanding databases, Ashcroft orders primarily that the shared information not be misused.

Presumably, it was with an understanding that databases would be widely shared, that Bybee (or whatever lawyer actually wrote the opinion) assessed what limits on disclosure the PATRIOT Act set.

In September of that year, Ashcroft issued Guidelines on Information Sharing describing some of the protections on US Person privacy that resulted from his earlier order.

> **Solution #1: Under the USA PATRIOT Act, Federal Law Enforcement Agencies Are Now Permitted to Share with Other Federal Officials Information Regarding Foreign Intelligence and Counterintelligence Obtained in a Grand Jury Proceeding or Through Electronic, Wire, or Oral Interceptions.**
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> - ***The Attorney General Has Issued Guidelines for Section 203 of the USA PATRIOT Act, Which Permits Information Sharing:*** *Pursuant to the authority contained in section 203, the Attorney General issued guidelines governing the disclosure of grand jury and electronic, wire, and oral interception information that identifies U.S. persons. Section 203 of the USA PATRIOT Act permits the sharing of grand jury and wiretap*

information regarding foreign intelligence and counterintelligence with federal law-enforcement, intelligence, protective, immigration, national defense and national security personnel.

- ***The Section 203 Guidelines Provide Important Privacy Safeguards:*** *The procedures established under these guidelines provide important safeguards to U.S. citizens identified in information disclosed under section 203. These procedures require that all information identifying a U.S. person be labeled by law enforcement agents before disclosure to intelligence agencies. Moreover, upon receipt of information from law enforcement that identifies a U.S. person, intelligence agencies must handle that information pursuant to specific*

> *protocols designed to prevent inappropriate use of the information. These protocols, for example, require that information identifying a U.S. person be deleted from intelligence information except in specified circumstances.*

Now, Ashcroft clearly put minimization guidelines on this information.

But Goldsmith's description of the logic behind the memo suggests that OLC interpreted section 203 (if that's what this memo pertains to) more broadly. That is, only if the statute makes clear that it is trying to limit the President will OLC (and did it, in the case of this undisclosed memo) interpret it to mean it places any limits on the President's authority as Commander in Chief.

So while we don't know whether (heh) or how Bush defied the limits implied in section 203 (again, assuming my guess is correct), Goldsmith at least implies that OLC gave him the green light to defy those limits.

As this online debate between Kate Martin and Viet Dinh and this NPR summary makes clear, PATRIOT critics worried that the government would interpret section 203 as authorization to keep vast warehouses of data on Americans. Here's Martin:

> While effective counterterrorism requires that agencies share relevant information, congressional efforts have uniformly failed to address the real difficulties in such sharing: How to

> determine what information is useful for counterterrorism; how to determine what information would be useful if shared; how to identify whom it would be useful to share it with; and how to ensure that useful and relevant information is timely recognized and acted upon. To the contrary, the legislative approach—which can fairly be summarized as share everything with everyone—can be counted on to obscure and make more difficult the real challenge of information sharing.Widespread and indiscriminate warehousing of information about individuals violates basic privacy principles. Amending the Patriot Act to require targeted rather than indiscriminate information sharing would restore at least minimal privacy protections and substantially increase the likelihood that the government could identify and obtain the specific information needed to prevent terrorist acts.

Martin goes on to express the concern that the government would collect "virtually all information about any American's contacts with any foreigner or foreign group, including humanitarian organizations," which given the investigation into peace activists' ties with Palestinian and Colombian humanitarian organizations seems to have born out. And more generally, we know Americans have been targeted based on initial Suspicious Activity Reports about such innocuous things as taking photographs. Remember, too, that our government now tracks people who buy acetone or hydrogen peroxide. These are all the kinds of activity that would result from a very permissive interpretation of the limits included in the PATRIOT Act.

We don't know what this opinion says and don't even know whether it pertains to section 203. But Goldsmith seems to make clear that back in

2002, OLC interpreted the already scant limits on information sharing in the PATRIOT Act not to apply to the Commander in Chief.