USING DOMESTIC SURVEILLANCE TO GET RAPISTS TO SPY FOR AMERICA

The reauthorization of the PATRIOT Act focused a lot of attention on the fact that the Administration is interpreting the phrase "relevant to an authorized [intelligence] investigation" in Section 215 of the PATRIOT Act very broadly. As Ron Wyden and Mark Udall made clear, the government claims that phrase gives it the authority to collect business records on completely innocent people who have no claimed tie to terrorism.

There's something that's been haunting me since the PATRIOT reauthorization about how the government has defined intelligence investigations in the past. It has to do with Ted Olson's claim—during the In Re Sealed Case appeal in 2002—that the government ought to be able to use FISA to investigate potential crimes so as to use the threat of prosecuting those crimes to recruit spies (and, I'd suggest, informants). When Olson made that claim, even Laurence Silberman (!) was skeptical. Silberman tried to think of a crime that could have no imaginable application in an intelligence investigation, and ultimately came up with rape. But Olson argued the threat of a rape prosecution might help the Feds convince a rapist to "help us."

> OLSON: And it seems to me, if anything, it illustrates the position that we're taking about here. That, Judge Silberman, makes it clear that to the extent a FISA-approved surveillance uncovers information that's totally unrelated – let's say, that a person who is under surveillance has also engaged in some illegal conduct, cheating –

> JUDGE LEAVY: Income tax.
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> SOLICITOR GENERAL OLSON: Income tax. What we keep going back to is practically all of this information might in some ways relate to the planning of a terrorist act or facilitation of it.
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> JUDGE SILBERMAN: Try rape. That's unlikely to have a foreign intelligence component.
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> SOLICITOR GENERAL OLSON: It's unlikely, but you could go to that individual and say we've got this information and we're prosecuting and you might be able to help us. I don't want to foreclose that.
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> JUDGE SILBERMAN: It's a stretch.
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> SOLICITOR GENERAL OLSON: It is a stretch but it's not impossible either. [my emphasis]

Olson went on to claim that only personal revenge in the guise of an intelligence investigation should be foreclosed as an improper use of FISA.

> JUDGE SILBERMAN: In your brief you suggested only that the face of the application indicated something was wrong. I don't quite understand what would be wrong though. The face of the application, suppose the face of the application indicated a desire to use foreign surveillance to determine strictly a domestic crime, that would be — but then you wouldn't have an agent, you wouldn't have an agency. You must have some substantive requirement here if significant purpose is given its literal meaning, you must have some logic to the interpretation of that section which falls outside of the interpretation of an agent of a foreign power.

> SOLICITOR GENERAL OLSON: And I suppose if the application itself revealed that there was a purpose to take personal advantage of someone who might be the subject of an investigation, to blackmail that person, or if that person had a domestic relationship and that person was seeing another person's spouse or something like that, if that would be the test on the face of things. In other words, I'm suggesting that the standard is relatively high for the very reason that it's difficult for the judiciary to evaluate and secondguess what a high level executive branch person attempting to fight terrorism is attempting to do.

This is not just Ted Olson speaking extemporaneously. The government's appeal actually makes its plan to use FISA-collected information to recruit spies (and informants), in the name of an intelligence investigation, explicit:

> Although "foreign intelligence information" must be relevant or necessary to "protect" against the specified threats, the statutory definition does not limit how the government may use the information to achieve that protection. In other words, the definition does not discriminate between protection through diplomatic, economic, military, or law enforcement efforts, other than to require that those efforts be "lawful." 50 U.S.C. 1806(a), 1825(a). Thus, for example, where information is relevant or necessary to recruit a foreign spy or terrorist as a double agent, that information is "foreign intelligence information" if the recruitment effort will "protect against" espionage or terrorism.
>
> [snip]

> Whether the government intends to prosecute a foreign spy or recruit him as a double agent (or use the threat of the former to accomplish the latter), the investigation will often be long range, involve the interrelation of various sources and types of information, and present unusual difficulties because of the special training and support available to foreign enemies of this country. [my emphasis]

Ultimately, the FISA Court of Review rejected this broad claim (though without discounting the possibility of using FISA to get dirt to use to recruit spies and informants explicitly).

> The government claims that even prosecutions of *non*-foreign intelligence crimes are consistent with a purpose of gaining foreign intelligence information so long as the government's objective is to stop espionage or terrorism by putting an agent of a foreign power in prison. That interpretation transgresses the original FISA. It will be recalled that Congress intended section 1804(a)(7)(B) to prevent the government from targeting a foreign agent when its "true purpose" was to gain non-foreign intelligence information—such as evidence of ordinary crimes or scandals. See supra at p.14. (If the government inadvertently came upon evidence of ordinary crimes, FISA provided for the transmission of that evidence to the proper authority. 50 U.S.C. 1801(h)(3).) It can be argued, however, that by providing that an application is to be granted if the government has only a "significant purpose" of gaining foreign intelligence information, the Patriot Act allows the government to have a primary objective of prosecuting an agent for a non-foreign intelligence

> crime. Yet we think that would be an anomalous reading of the amendment. For we see not the slightest indication that Congress meant to give that power to the Executive Branch. Accordingly, the manifestation of such a purpose, it seems to us, would continue to disqualify an application. That is not to deny that ordinary crimes might be inextricably intertwined with foreign intelligence crimes. For example, if a group of international terrorists were to engage in bank robberies in order to finance the manufacture of a bomb, evidence of the bank robbery should be treated just as evidence of the terrorist act itself. But the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes. [my emphasis]

Understand what this exchange meant in 2002: the government claimed that it could use FISA to collect information on people that they could then use to persuade those people to become spies or informants. That all happened in the context of broadened grand jury information sharing under PATRIOT Act. Indeed, the FISA application in question was submitted at almost exactly the same time as OLC wrote a still-secret opinion interpreting an "implied exception" to limits on grand jury information sharing for intelligence purposes.

> [OLC] 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);

It seems possible the government was hoping to take grand jury allegations, use FISA to investigate them, and in turn use what they found to recruit spies and informants. The one limit—and it is a significant one—is that the government would first have to make a plausible argument that the potential target in question was an agent of a foreign power.

Of course, at precisely that same time—and apparently unbeknownst to Ted Olson (I have emailed Olson on this point but he did not respond)—the government was using new data mining and network analysis approaches to establish claimed ties between Americans and al Qaeda. And the bureaucracy Royce Lamberth and James Baker had implemented to prevent such claimed ties to form the basis for FISA applications—an OIPR chaperone for all FISA applications—was rejected by the FISCR in this case. So while FISA required the government show a tie between a target and a foreign power, there was little to prevent the government from using its nifty new data mining to establish that claim. And remember, NSA twice explicitly chose not to use available means to protect Americans' privacy as it developed these data mining programs; it made sure it'd find stuff on Americans.

(Interesting trivia? Olson used the phrase "lawful" to describe the limits on what FISA allows the President to do at least 6 times in that hearing.)

Moreover, while the FISCR ruling held (sort of—but probably not strongly enough that John Yoo couldn't find a way around it) that the government couldn't use FISA to gather dirt to turn people into spies and informants, it never actually argued the government couldn't use other surveillance tools, including the PATRIOT Act, to dig up dirt to use to recruit spies and informants, at least not in this FISCR ruling. The limit on using FISA for such a purpose came from court precedents like Keith, not any apparent squeamishness about using government surveillance to dig up dirt to recruit spies.

The Senate Intelligence Committee presumably had what was supposed to be a meeting on the government's very broad interpretation of data it considers "relevant to an authorized [intelligence] investigation" today. We know that one of the concerns is that the government claims it can use Section 215 to collect information on people with no ties to terrorism. Ted Olson's claim we could use FISA to recruit informants make me wonder how they're using the information they collect on people with no ties to terrorism. After all, the ability to collect bank records on someone—or geolocation—might provide an interesting evidence with which to embarrass them into becoming an informant.