JAY BYBEE WROTE MEMO PERMITTING BROAD SHARING OF INTELLIGENCE-RELATED GRAND JURY INFORMATION

In March 2011, I noted a previously unreleased OLC memo mentioned in Jack Goldsmith's May 6, 2004 illegal wiretapping memo seemingly giving the President broad authority to learn about grand jury investigations.

> 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)

The Brennan Center has now liberated that memo (though they don't yet have it linked). And it shows that in July 2002, Jay Bybee interpreted a section of the PATRIOT Act that expanded

information-sharing to include sharing grand jury information, with no disclosure, with the President and his close aides.

> The notion that grand jury testimony should be secret dates back to at least the seventeenth century. The rules governing disclosure of grand jury proceedings are set by the Federal Rules of Criminal Procedure; prior to the PATRIOT Act, those rules declared that grand jury information could be shared only under certain circumstances, such as when the material was necessary to assist a prosecutor. However, disclosures had to be reported to a judge, and everyone receiving the information had to be told of its confidentiality.
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> The PATRIOT Act changed these rules significantly. Government lawyers could now share "any grand-jury matter involving foreign intelligence, counterintelligence …, or foreign intelligence information" with nearly any federal official, including those working in law enforcement, intelligence, immigration, national defense, or national security. Even records about a grand jury's deliberations or a particular grand juror's vote were apparently fair game. And the standard for sharing the information was not whether the material was "necessary" to the official's duties; instead, the information need only "assist" the official in some way.
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> First, although the rule expressly requires that disclosures of grand jury information be reported to the court, Bybee advised that disclosures to the president need not be reported lest they "infringe on the presumptively confidential nature of presidential

> communications." (OLC had previously decided that similar disclosures to the president would be reportable in some circumstances but not in others.) In addition, disclosures to the president's "close advisors" – including the president's chief of staff, the vice president, and counsel to the president – could be kept secret as well. While only "information that is actually necessary for the President to discharge his constitutional duties" could be secretly disclosed to the president or his advisors, that requirement is highly unlikely to be tested in practice.
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> Permitting the content of deliberations or a grand juror's vote to be shared secretly with the vice president is surprising enough. The memo goes much further, however. Once an attorney for the government has shared grand jury information with anyone – the president, one of his close advisors, or any other federal official whose duties are listed above – the person receiving the information can share it with anyone else without reporting to the court. That later disclosure, according to the memo's crabbed reasoning, is not a disclosure "under" the rule, and therefore is not bound by the reporting requirement.
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> And there's more: the recipient of one of those subsequent distributions can use the information for any purpose. Because these down-the-line releases are not technically disclosures "under" the rule, the "official duties" constraint does not apply.

I'll have more to say about this once I get the memo.

But imagine how it might be used in, say, the Valerie Plame or the Thomas Drake

investigations. They were, after all, investigations about the unauthorized disclosure of foreign intelligence information. They also happened to be investigations into Dick Cheney's law-breaking, but they were ostensibly about leaks of precisely the kind of information Jay Bybee permitted be shared with the President and … the Vice President. And in the case of the Plame leak, once Cheney got a hold of the information, he could share it with Karl Rove who could do whatever the fuck he wanted with it.

Mind you, once Pat Fitzgerald got put in charge, I doubt such sharing happened on the Plame case—at least not before August 2005, when Jim Comey retired. After that, who's to say what David Margolis, the master of institutional self-preservation, might have done with grand jury information implicating top White House officials?

And, yes, by all appearances, this memo remains operative.

Update: Here's the memo. And here's the operative passage:

> Although the new provision in Rule 6(e) requires that any such disclosures be reported to the district court responsible for supervising the grand jury, disclosures made to the President fall outside the scope of the reporting requirement contained in that amendment, as do related subsequent disclosures made to other officials on the President's behalf.