HOW TO ENSURE YOU'LL ALWAYS HAVE WAR POWERS TO FIGHT EASTASIA

As we've known for years, the May 6, 2004 OLC opinion authorizing the warrantless wiretap program shifted the claimed basis for the program from inherent Article II power to a claim the Afghanistan AUMF trumped FISA.

But one problem with that argument (hard to fathom now that Afghanistan has once again become our main forever war) is to sustain the claim that we were still at war in 2004, given that so many of the troops had been redeployed to Iraq. And to sustain the claim that the threat to the US from al Qaeda was sufficiently serious to justify eviscerating the Fourth Amendment.

So, they used politicized intelligence and (accidentally) propaganda to support it.

Use of the Pat Tillman Propaganda to Support Case of Ongoing War

As I've noted, Jack Goldsmith made the unfortunate choice to use an article reporting Pat Tillman's death as his evidence that the war in Afghanistan was still going on.

> Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the cooperation of the Northern Alliance, toppled the Taliban regime from power. Military operations to seek out resurgent elements of the Taliban regime and al Qaeda fighters continue in Afghanistan to this day. See e.g., Mike Wise and Josh White, Ex-NFL Player Tillman Killed in Combat, Wash. Post, Apr. 24, 2004, at

> A1 (noting that “there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda”).

That article was not really about the ongoing war in Afghanistan; rather, it told a lie, the lie that war hero Pat Tillman had died in combat, rather than in a friendly fire incident.

> Pat Tillman, the Arizona Cardinals safety who forfeited a multimillion dollar contract and the celebrity of the National Football League to become a U.S. Army Ranger, was killed in Afghanistan during a firefight near the Pakistan border on Thursday, U.S. officials said yesterday.
>
> Tillman, 27, was killed when the combat patrol unit he was serving in was ambushed by militia forces near the village of Spera, about 90 miles south of Kabul, the Afghan capital. Tillman was hit when his unit returned fire, according to officials at the Pentagon. He was medically evacuated from the scene and pronounced dead by U.S. officials at approximately 11:45 a.m. Thursday. Two other U.S. soldiers were injured and one Afghan solider fighting alongside the U.S. troops was killed.
>
> The death of Tillman, the first prominent U.S. athlete to be killed in combat since Vietnam, cast a spotlight on a war that has receded in the American public consciousness. As Iraq has come into the foreground with daily casualty updates, the military campaign in Afghanistan has not garnered the same attention, though there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda.

Now, I say the choice was unfortunate because, in spite of the fact that Tillman's commanding officers knew within 24 hours of his death on April 22 that it was a friendly fire incident, in spite of the fact that General Stanley McChrystal sent an urgent memo within DOD on April 29 that the death was probably friendly fire, and in spite of the fact that the White House learned enough about the real circumstances of Tillman's death by May 1 to make no claims about how he died in a Bush speech, there's no reason to believe that Jack Goldsmith would have learned how Tillman died until it was publicly announced on May 29, 2004.

In other words, it was just bad luck that Goldsmith happened to use what ultimately became an ugly propaganda stunt as his evidence that the Afghan war was still a going concern.

Producing Scary Memos to Justify Domestic Surveillance

I'm less impressed with the description of the role of threat assessments that we're beginning to get.

Goldsmith's memo includes an odd redaction in its description of the threat assessment process.

> As the period of each reauthorization nears an end, the Director of Central Intelligence (DCI) prepares a memorandum for the President outlining selected current information concerning the continuing threat that al Qaeda poses for conducting attacks in the United States, as well as information describing the broader context of al Qaeda plans to attack U.S. interests around the world. **Both the DCI and the [redacted] review that memorandum** and sign a recommendation that the President should reauthorize [redacted name of program] based on the continuing threat posed by potential terrorist attacks within the United States. That

> recommendation is then reviewed by this Office. Based upon the information provided in the recommendation, and also taking into account information available to the President from all sources, this Office assess whether there is a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to authorize the warrantless involved in [redacted, probably name of program]. [my emphasis]

Now, there are any number of possibilities for the person who, in addition to the DCI, reviewed the threat assessment: John Brennan and others who oversaw the threat assessment are one possibility, David Addington or Dick Cheney are another.

But the IG Report provides another possibility or two that makes this whole passage that much more interesting:

> The CIA initially prepared the threat assessment memoranda that were used to support the Presidential Authorization and periodic reauthorizations of the PSP. The memoranda documented intelligence assessments of the terrorist threats to the United States and to U.S. interests abroad from al Qaeda and affiliated terrorist organizations. These assessments were prepared approximately every 45 days to correspond with the President's Authorizations of the PSP.
>
> The Director of the Central Intelligence's (DCI) Chief of Staff was the initial focus point for preparing the threat assessment memoranda. According to the former DCI Chief of Staff, he directed CIA terrorism analysts to prepare objective appraisals

> of the current terrorist threat, focusing primarily on threats to the U.S. homeland, and to document those appraisals in a memorandum. Initially, the analysts who prepared the threat assessments were not read into the PSP and did not know how the threat assessments would be used. CIA's terrorism analysts drew upon all sources of intelligence in preparing these threat assessments.
>
> After the terrorism analysts completed their portion of the memoranda, the DCI Chief of Staff added a paragraph at the end of the memoranda stating that the individuals and organizations involved in global terrorism (and discussed in the memoranda) possessed the capability and intention to undertake further attacks within the United States. The DCI Chief of Staff recalled that the paragraph was provided to him initially by **a senior White House official**. The paragraph included the DCI's recommendation to the President that he authorize the NSA to conduct surveillance activities under the PSP. **CIA Office of General Counsel (OGC) attorneys reviewed the draft threat assessment** memoranda to determine whether they contained sufficient threat information and a compelling case for reauthorization of the PSP. **If either was lacking, an OGC attorney would request that the analysts provide additional threat information or make revisions to the draft memoranda**.
>
> [snip]
>
> NCTC personnel involved in preparing the threat assessments [beginning in 2005] told the ODNI OIG that the danger of a terrorist attack described in the threat assessments was sobering and "scary," resulting in the threat assessments

> becoming known by ODNI and IC personnel involved in the PSP as the "scary memos." [my emphasis]

This passage names one entity personally who reviewed what would later become known as the "scary memos:" the Office of General Counsel. Of course it also mentions an unidentified "senior White House official" (remember, there was a classified version of this report that might have described who it was in more detail) who provided the DCI's Chief of Staff with the language to use for the authorization.

It's the function of OGC here I find particularly interesting (and which might provide a reason why DOJ chose to redact mention of OGC's rule on Goldsmith's memo): lawyers at CIA reviewed the threat assessment "to determine whether they contained … a compelling case for reauthorization of the PSP. If [such a case] was lacking, an OGC attorney would request that the analysts provide additional threat information make revisions to the draft memoranda."

So let's be clear what these two descriptions of the scary memos tell us. It is clear that the entire claim that surveillance in the US was justified was based on the argument that there were dangerous people here in the US who were plotting attacks, in the US. It seems that, either for PR reasons or legal ones (heh), the White House (or maybe DOJ) took this requirement pretty seriously. The IG Report invokes the possibility that "a case for reauthorization" might be "lacking," suggesting someone, at least, wanted to see proof of the threat.

But look at what constituted that proof.

First, a bunch of CIA analysts were asked to do "objective analysis" of the current terrorist threat, focusing on threats to the "US homeland." These analysts, at least for some time, had no idea how their report would be used. After they prepared the report, the DCI COS slapped language that ~~Cheney~~ ~~Addington~~

someone at the White House had told them to slap onto the report, presumably creating the incorrect documentary appearance that the analysts who did the "objective analysis" had bought off on the conclusion that the terrorists they had discussed had the "capability and intention" to commit further attacks in the US, all of which justified vacuuming up all the international phone traffic coming into the US.

Apparently, on at least some occasions, the "objective analysis" did not sufficiently back up the claims slapped on courtesy of ~~Cheney Addington~~ someone at the White House; it was OGC's job to make sure it did. Mind you, if the "objective analysis" did not back up the conclusion, OGC did not issue a report saying, "sorry, Cheney, you're going to have stop wiretapping Americans," but instead, they found information to fluff out the request. Perhaps they went back to the "objective analysts" and told them they had to fearmonger some more about domestic threats. ~~Perhaps they simply "ma[de] revisions" to the "objective analysis" themselves.~~ [Update: Mary has convinced me I misread this—that the analysts, not the OGC lawyers—would make the changes.]

But the result was, apparently, that every time the program was up for renewal, CIA produced a report that claimed there was sufficient danger to the US domestically that they had to continue wiretapping Americans.

As Goldsmith describes, there was one more level of review done within OLC. OLC, you see, did not limit itself to what appeared in writing in the scary memos. Instead, it sometimes supplemented the threats described in the scary memos by considering "information available to the President from all sources." Nothing says the additional information that came from the President was ever documented. Or vetted by actual intelligence professionals. But OLC could and apparently did invoke it in finding the warrantless wiretapping program necessary.

This is, Goldsmith tells us, the review process

they used to ensure “relevant constitutional standards of reasonableness under the Fourth Amendment.”

It was, of course, a classic case of politicized intelligence, a Team B operating in secret, serving as the only check on abuse of the Fourth Amendment.

“All Sources,” Including Tortured Confessions

The IG Report says the “objective” analysts “drew upon all sources of intelligence” to write their scary memos.

Goldsmith says OLC also took “into account information available to the President from all sources.”

And he also says this:

> As explained in more detail below, since the inception of [redacted program name] intelligence from various sources (**particularly from interrogations of detained al Qaeda operatives**) has provided a continuing flow of information indicating that al Qaeda has had, and continues to have, multiple redundant plans for executing further attacks within the United States. These strategies are at various stages of planning and execution, and some have been disrupted. They include plans for [several lines redacted; my emphasis]

Ahem.

Before I point out the obvious problem with relying “particularly” on detainee interrogations to justify the illegal wiretap program, let me note that the passage where Goldsmith “explain[s] in more detail below” the intelligence that has justified the scary memos does not appear in the unredacted parts of the memo. So between the several lines redacted here, and what must be Goldsmith’s more extensive discussion redacted somewhere else in this memo, there’s a whole bunch of alleged

threats to the US that DOJ doesn't really want us to read.

But we don't have to guess, entirely, at what kind of threats to the US the scary memos were reporting that detainees had said. We can refer to one of Dick Cheney's two favorite reports on detainee reporting, the report "Khalid Sheikh Muhammad: Preeminent Source on Al-Qa'ida" released on July 17, 2004, not long after Goldsmith wrote this memo. Here's what that report said about threats to the US:

> KSM steadfastly maintains that his overriding priority was to strike the United States but says that immediately after 11 September he realized that a follow-on attack in the United States would be difficult because of new security measures. As a result, KSM's plots against the US homeland from late 2001 were opportunistic and limited, including a plot to fly a hijacked plane into the tallest building on the US West Coast and a plan to send al-Qa'ida operative and US citizen Jose Padilla to set off bombs in high-rise apartment buildings in a US city.
>
> [snip]
>
> Striking the United States. Despite KSM's assertion that a post-11 September attack in the United States would be difficult because of more stringent security measures, he has admitted to hatching a plot in late 2001 to use Jemaah Islamiya (JI) operatives to crash a hijacked airliner into the tallest building on the US West Coast. From late 2001 until early 2003, KSM also conceived several low-level plots, including an early 2002 plan to send al-Qa'ida operative and US citizen Jose Padilla to set off bombs in high-rise apartment buildings in an unspecified major US city and an early 2003 plot to employ a network of Pakistanis—including

> Iyman Faris and Majid Khad—to target gas stations, railroad tracks, and the Brooklyn Bridge in New York. KSM has also spoken at length about operative Ja'far al-Tayyar, admitting that al-Qa'ida had tasked al-Tayyar to case targets in New York City in 2001.
>
> [snip]
>
> KSM stated that he had planned a second wave of hijacking attacks even before September 2001 but shifted his aim from the United States to the United Kingdom because of the United States' post-11 September security posture and the British Government's strong support for Washington's global war on terror.

So the guy whom Dick Cheney himself considered to be the best detainee source on al Qaeda's plans at the time Goldsmith wrote this memo said that the threats to the US consisted of the Library Tower plot that was canceled before 2002, Jose Padilla's purported dirty bomb plot that ultimately amounted to filling out an application to join al Qaeda by the time it got to the courts, Iyman Faris' plot to bring down the Brooklyn Bridge with a blowtorch, and Ja'far al-Tayyar, who may have cased NY subways three years before Goldsmith wrote the memo (and ultimately may have had ties with Najibullah Zazi). But actually—Cheney's favorite detainee source kept insisting—he had given up on attacking the US, and had instead focused on the UK.

Nevertheless, detainee reporting like this served as one particularly important source, Goldsmith tells us, for the scary memos that created the justification for illegally wiretapping American citizens.

One more thing. Goldsmith published this report on May 6, 2004. The very next day, CIA's Inspector General would publish the report that Goldsmith had been discussing for weeks, which

showed, among other things, that CIA's "preeminent source" had been waterboarded 183 times. CIA's IG would also raise questions about the efficacy of the intelligence (though he did say it revealed plots in the US). Goldsmith knew of the problems in the detainee interrogation program when he wrote about the role of detainee interrogations in this memo.

They tortured the detainees to get claims of plots against the US. And then—even though the detainees insisted they had stopped planning against the US—they used intelligence about canceled or absurd plots to write scary memos so they could continue to use their illegal wiretap program. Mind you, now they use entrapment to do the same thing. But back in the day KSM's tortured confessions gave Dick Cheney his excuse to wiretap you.

DICK, THE MINISERIES

Congratulations to Barton Gellman, whose book on Cheney's abuse of the Constitution, Angler, will serve as the basis for an HBO miniseries.

> HBO has optioned the book *Angler: The Cheney Vice Presidency* by Pulitzer-Prize winning journalist Barton Gellman for a miniseries to be executive produced by Paula Weinstein.
>
> The mini, which will be based on the bestselling book and the Frontline documentary *The Dark Side*, tells the story of Richard Bruce Cheney from his early days as Donald Rumsfeld's protégé in the Nixon administration, to the nation's youngest Chief of Staff under President Ford, to serving as Secretary of Defense under George H.W. Bush, through two controversial terms as Vice

> President under President George W. Bush. According to the producers, the project will center on Cheney's "single-minded pursuit of enhanced power for the Presidency (that) was unprecedented in the nation's history."

May the story of this abusive thug be just as popular as the Sopranos.

Gellman is on twitter taking suggestions for a lead to play Cheney. Me, I'm more interested in finding the perfect actress to play the Constitution, some damsel in distress type who needs to be saved from the evil villain.

Since I'm a pop culture failure, I'm happy to hear your suggestions in comments.

THE MARCH–AND APRIL OR MAY–2004 CHANGES TO THE ILLEGAL WIRETAP PROGRAM

Apologies in advance. I'm going to be in the weeds reading the May 6, 2004 Goldsmith opinion for a little bit.

In this post, I want to point to some details of timing that, I think, suggest that the changes DOJ made to Cheney's illegal wiretap program in 2004 included, first, a limitation on collection to people with actual alleged terrorist ties (but **not** just with al Qaeda), and second, a shift of the data-mining part of the program under other parts of the PATRIOT Act.

What follows is largely a wildarsed guess.

The Half-Redacted Timing of the Post-Hospital Changes

As I noted in my working thread, DOJ has redacted part of the date of the 2004 modifications in the table of contents and pages 9 and 11. But on page 16, it has left unredacted a reference to a March 19, 2004 redaction. The opinion itself gives partial explanation for this: Goldsmith refers to "those" modifications, plural, on page 9, and describes a "series of changes" on page 11. The existence of more than one modification is confirmed by the IG Report, which says,

> Notwithstanding Gonzales's letter, on March 17, 2004 the President decided to modify certain PSP intelligence-gathering activities and to discontinue certain Other Intelligence Activities that DOJ believed were legally unsupported. The President's directive was expressed in two modifications to the March 11, 2004 Presidential Authorization.

Though note the slight discrepancy between Goldsmith's reference to a "series" (which to me means more than two) versus the IG reference to two modifications.

Now, the redactions and common sense suggest when at least one of the other changes must have taken place. Since Goldsmith wrote the memo on May 6, the redacted phrase can only be "April" or "May." Given the spacing in the redactions—particularly the one in the second line of the only complete paragraph on page 11, which takes up the same space as the 9 characters "concernin" in the line below—it is unclear which it would be. It might read "and April " or it might read "and May, ". It is worth noting that if the March 11 authorization were a 45-day one, it would have expired on April 25 and left, without this May 6 opinion, the program working without any basis still. Yet SSCI has told us the March 11 authorization was for "not more than 60 days," which would have extended to May 5. For these and other reasons, my guess is May (suggesting that Goldsmith

waited until the last changes were made to write his memo), but that's just a guess. And DOJ, obviously, isn't telling.

[Update: Thanks to William Ockham, who did the kerning work, it looks like "May" is correct.]

The March 19 Modification Limits Content Collection to Terrorist Conversations

On page 16, Goldsmith writes,

> In the March 19, 2004 Modification, the President also clarified the scope of the authorization [~ 6-7 word redaction] He made clear that the Authorization applied where there were reasonable grounds to believe that a communicant was an agent of an international terrorist group

Further down that page, Goldsmith begins the list of the only three things this opinion authorizes. The first is:

> the authority to intercept the content of international communications "for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe … [that] a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group," as long as that group is al Qaeda, an affiliate of al Qaeda or another international terrorist group that the President has determined both (a) is in armed conflict with the United States and (b) poses a threat of hostile actions within the United States;

Goldsmith's language here is remarkably similar to that he used in some of the letters he wrote at precisely the same time limiting the torture program. In both cases, he is trying to impose

limits on a program that has already exceeded those limits. That, plus the reference to Bush's "clarifi[cation]" of the scope of the program suggests the limit on intercepting the **content** of conversations in which one party is a terrorist is new.

I'll have much more to say about this. But note that Goldsmith's limit here does not match the terms of the Afghan AUMF, which is limited to those who were directly tied to 9/11.

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines **planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001**, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. [my emphasis]

In other words, while the requirement that the program collect **content** only from those with a tie to a terrorist may be a new limit imposed in 2004, it also seems to exceed the very AUMF that Goldsmith was newly relying upon to authorize the program.

Goldsmith does have one out for that problem. As he notes elsewhere, the Afghan AUMF language on terrorism is repeated (and actually expanded) in the Iraq AUMF.

> Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on

> September 11, 2001, or harbored such persons or organizations;
>
> Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Did you know that the Iraq AUMF mentions "terrorist" or "terrorism" two more times—19—than it mentions "weapon"—17?

So writing in 2004, I guess, Goldsmith could claim that a still-active AUMF authorized war against terrorism more generally. Now, we apparently just avoid written AUMFs altogether.

And with it, he authorized the interception of content of not just al Qaeda affiliates conversations, but of any terrorist who was at war with the United States. I wonder if Hamas and FARC are included in that?

The April or May Change(s)

But that's just the change DOJ is willing (sort of) to let us know about. What about the other changes?

While I can't say for sure, consider the following data points.

First, note that Robert Mueller's chronology of the warrantless wiretap confrontation had what used to seem like a bizarre end date. He shows multiple contacts a day with Jim Comey until March 17. Shortly thereafter on March 19, it appears, Bush at least narrowed the content collection to actual alleged terrorist conversations. But then there's a March 23 meeting between Mueller and Dick Cheney, at the Vice President's request and in his office.

Next, remember there's a great deal of evidence—including reporting during the Protect America Act debate—to suggest that data mining was one of, if not the key, problem behind the hospital confrontation.

> A 2004 dispute over the National Security Agency's secret surveillance program that led top Justice Department officials to threaten resignation involved computer searches through massive electronic databases, according to current and former officials briefed on the program.It is not known precisely why searching the databases, or data mining, raised such a furious legal debate. But such databases contain records of the phone calls and e-mail messages of millions of Americans, and their examination by the government would raise privacy issues.

Then, note that the day after Mueller's meeting with Cheney, FBI moved toward actually using Section 215 of PATRIOT, which they had not done previously.

Finally, consider some of the changes made to the way Section 215 and NSLs were used that year—effectively using them to collect call data—and Section 215 specifically to support a secret program in 2005.

So Lichtblau suggests that the big change—the one DOJ won't let us know about—has to do with searches of massive databases of records of phone calls and email messages of millions of Americans. And on they day after a private Mueller meeting with Cheney but probably before the second (at least) big change from spring 2004, FBI starts using the provision they would go on to use, some time in 2004, to collect call data. (And sometime in 2005 Section 215 came to be used to support a secret program unto itself.)

In any case, this is a wildarsed guess. But it

appears likely that DOJ stopped acquiring metadata on calls to use in data mining in one fashion, and instead started using Section 215 and trap and trace requests to get the data.

Given the Bybee memo we've recently discovered which seems to support fairly expansive use of databases, however, I'm guessing they didn't stop doing data mining of the call data.

APPARENTLY, "BLOOD MONEY" NOW INCLUDES "GREEN CARDS"

Last we heard about the families of Raymond Davis' victims, they were held in custody until they agreed to accept the blood money Pakistan offered on our behalf.

Things are looking up for the family members, though. Eighteen of them have been flown to UAE to be resettled.

> A chartered plane carrying 18 family members of Faizan Haider and Faheem Shamshad, the two men killed by Davis, left the Chaklala air base on Friday at 4:30 pm for the United Arab Emirates (UAE), sources said.
>
> The plane landed at the Dubai airport from where the 18 people proceeded to Abu Dhabi where two houses have been rented for them.

In addition, four family members will be granted green cards for the US, with the possibility that the rest of the family will later be sponsored in.

> Four American Green Cards and two residences in the US have also been

> arranged for the two families.
>
> [snip]
>
> According to the deal, four persons from the two families would first go to the US after completing visa formalities. Later, other family members would be considered for permanent residence in the US, the sources said.

Click through for the names of the (?) consular employees who negotiated the blood money.

It appears the court in question may be a bit suspicious about the inclusion of resettlement and green cards in sharia, because it is now demanding an explanation.

> The Lahore High Court (LHC) on Monday directed CCPO Lahore Aslam Tareen to appear in court on March 22 and present a report on the disappearance of the families of Faizan Haider and Faheem, the two young men who were shot dead by CIA contractor Raymond Davis on January 27, DawnNews reported.

Now, I'm all in favor of the families getting some kind of due compensation for the killing of their family member; and they may indeed be at some physical risk themselves at this point.

But I am a little bit worried about what all the American haters are going to say when they learn blood money payments under sharia law now also come with US green cards.

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
>
> 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]

> 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.**
>
> - ***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.

WORKING THREAD ON ILLEGAL WIRETAP MEMO

As I noted in this post, DOJ has released two of the memos used to authorize the illegal wiretap program. I made some brief comments on the November 2, 2001 John Yoo memo here. This will be a working thread on the May 6, 2004 Jack Goldsmith memo.

P1: Note in the TOC (and in later references), DOJ has redacted the date when the program was modified. We know this date is some time after the March 10, 2004 hospital confrontation. Pretty much the only reason to redact that date is to make it harder to know how long the program operated solely with Bush's authorization. And the biggest reason to do that is to hide the detail from al-Haramain's lawyers, because it would add evidence that the phone calls intercepted in early March 2004 were intercepted at a time when the program didn't have DOJ sanction.

P3: The first redaction on the page is interesting because it seems to qualify what they do after they intercept communications in the US; remember that one of the big conflicts at the hospital confrontation was the data mining they were doing (in defiance of Congress specifically defunding data mining of US citizens).

P3: Note the invocation of 18 USC 2510-2521 in addition to FISA. This makes it sort of explicit they were using other authorization processes for some of this. I'll come back to this point. But it's worth noting that the 2010 opinion cleaning up past exigent letter use used 18 USC 2511(2)(f) to do so.

P5-6: Note that footnote 2, which probably describes ongoing air patrol surveillance of the country is redacted. Note, too, that the entire

paragraph is classified Secret. Goldsmith was basically using the black (heh) helicopters patrolling the skies—which we could literally hear and see—as basis to rationalize the claim that it was okay for the military to be operating in the US. And the government believes we shouldn't know that. Moreover, there appears to have been ongoing patrols we weren't supposed to know about in 2004.

P6: Note how Cap'n Jack asserts that 2001 AUMF is still active in May 2004:

> Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the cooperation of the Northern Alliance, toppled the Taliban regime from power. Military operations to seek out resurgent elements of the Taliban regime and al Qaeda fighters continue in Afghanistan to this day. See e.g., Mike Wise and Josh White, Ex-NFL Player Tillman Killed in Combat, Wash. Post, Apr. 24, 2004, at A1 (noting that "there are still more than 10,000 U.S. troops in the country and fighting continues against remnants of the Taliban and al Qaeda").

He could have found any number of sources to support his claim that the 10,000 troops (ah, the good old days) in Afghanistan sustained the AUMF. Instead, he cited a story reporting Pat Tillman was "killed in combat"—itself a story that was the product of elaborate govt propaganda.

P6-7: Note the citation of the Mueller quote from testimony he gave to SSCI on February 24, 2004. That's interesting timing, because at a February 11, 2004 hearing, Ron Wyden had asked whether Total Information Awareness, which had been explicitly defunded for that fiscal year, at which point Michael Hayden said he wanted to answer in closed session.

> Sen. **Ron Wyden**, D-Ore., asked Director of National Intelligence John Negroponte and FBI Director Robert Mueller whether it was "correct that when [TIA] was closed, that several … projects were moved to various intelligence agencies…. I and others on this panel led the effort to close [TIA]; we want to know if Mr. Poindexter's programs are going on somewhere else."
>
> Negroponte and Mueller said they didn't know. But Negroponte's deputy, Gen. **Michael V. Hayden**, who until recently was director of the NSA, said, "I'd like to answer in closed session." Asked for comment, Wyden's spokeswoman referred to his hearing statements."

I wonder if the Mueller briefing Goldsmith cited was from the closed session where DIA and FBI gave their response?

P7: Note the reference to minimization. I believe that's the first we've heard about minimization in the early days of the program. Also note that he directs DOD generally, not NSA specifically, to do the minimization. That's downright odd. [Update: now, we've had discussion about minimization before. See this post.]

P8: Note the fourth redaction on this page, after the words, "without resort to judicial warrants." It appears that warrants is followed by a period, but that doesn't make sense as it appears there are a few more words to that sentence. Judicial warrants … "and oversight," maybe? Any other guesses?

P8: Goldsmith notes that the Gang of Four were briefed on the program "in 2002 and 2003." As I have noted before, there should have been a briefing in January 2004. Much of the rest of that footnote may well explain how they got out of that briefing.

P9: Note the second redaction, hiding who

besides the DCI reviews the threat assessment that justifies the continuation of the program before it goes to OLC. That's particularly interesting given that the Terrorist Threat Integration System was doing the treat assessment in May 2004, when Goldsmith wrote this opinion. And John Brennan, currently Obama's Deputy National Security Advisor, was in charge of the TTIC at the time. In any case, it doesn't seem justifiable to redact who, besides the DCI, does this review. Note that the IG Report also refers OGC attorneys reviewing the the threat assessment to fluff it up if it wasn't sufficient to justify sustaining the program.

P9: Goldsmith writes:

> As explained below, since the inception of [redacted name of program] intelligence from various sources (particularly from interrogations of detained al Qaeda operatives) has provided a continuing flow of information indicating that al Qaeda has had, and continues to hae, multiple redundant plans for executing further attacks with the United States.

See how one illegal program serves to justify another illegal program?

P11: Goldsmith launches his discussion of the changes that took place in March 19 with a discussion of "how the NSA accomplishes the collection activity under [the program]." That might support the datamining aspect, but maybe not.

P15: Note there's a word after the "Commander in Chief Clause" in the description of the basis Bush invoked to authorize the program on March 11. Wonder what that is?

P16: The modification took place on March 19. Note that it pertained to making it clear "there were reasonable grounds to believe that a communicant was an agent of an international

terrorist group …" I'm betting the caveat after that doesn't ultimately say what Goldsmith would, that the terrorist organization has to target the US.

P16: Note Goldsmith authorizes three activities. One is the authority to "intercept the content of international communications 'for which … a party to such communication is a group engaged in international terrorism, or activities in preparations therefor, or any agent of such a group,' as long as that group is al Qaeda, an affiliate of al Qaeda, or another international terrorist group that the President has determined both (a) is in armed conflict with the United States and (b) poses a threat of hostile action within the United States."

P17: Goldsmith lists the following opinions related to this program:

- October 4, 2001
- November 2, 2001, expressly authorizing a November 2, 2001 authorization
- October 11, 2002: confirming the application of prior analysis

Note two things. First, this list doesn't coincide with other lists (Goldsmith ignores the October 23, 2001 4th amendment eliminating one, as well as some "hypothetical ones" in between; the IG Report only talks about the November 4 one, and Bradbury talks about a few more.

Also note the space between the date, October 4, 2001, and the main clause of the sentence, "we evaluated." One thing I'm increasingly convinced is that the program operated under FISA's 15-day window until October 3, 2001. So I wonder if that acknowledges that fact?

P18: Note that Goldsmith starts w/12333. That's the EO that Bush pixie dusted.

P20: The paragraphs that appear in part on this

page appear to be misclassified. They both talk exclusively about published legislation. Neither mentions the name of the program. Yet both are classified TS.

P21: Note how Goldsmith introduces his claim that FISA is not exclusive: "We conclude that the Congressional Authorization is critical for [redacted name of program] in two respects." That reveals how much he reverse his analysis, not looking at what the AUMF said, bu what he needed to justify the program.

P23: My discussion of the newly disclosed OLC opinion discussed in the footnote is here.

P30: The examples Goldsmith uses to show the continuity of SIGINT is terrible cherry picking. How is Jeb Stuart's personal wiretapper, wiretapping commercially run cables, similar to wiretapping private phone calls? MOre damning still is his lack of any treatment of Vietnam era wiretapping, done under cover of war, but targeting speech.

Note too where Goldsmith highlights the phrase "control all other telecommunications traffic" when discussing WWII surveillance. Since that's what we think they were doing here, I find the emphasis notable.

P31: Note that Goldsmith refers to the 15-day exemption under FISA; he says "as noted above," meaning he has already treated this, in what must be a now-redacted section. Particularly given Goldsmith's discussion of the legislative intent—to give Congress time to alter FISA in time of war—his non-discussion of PATRIOT here is nothing short of dishonest. (He does discuss it later, though.) This allows him to say, "The mere fact that the Authorization does not amend FISA is not material," without at the same time acknowledging that Congress was at that moment amending FISA! It's all the more important given the October 4 approval that would have marked the end of the 15-day exemption period.

P31: Note the footnote invoking the Padilla and Hamdi circuit court decisions. On his last day

as AAG, Goldsmith wrote an opinion that reviews whether a recent court decision—almost certainly Rasul—affected his analysis. But we're not being given that opinion.

P32: I wonder how Goldsmith responded to Tom Daschle's op-ed making it clear that Congress specifically refused action in the US, given that he claims the "deter and prevent acts of international terrorism against the US" amounted to carte blanche to operate in the US.

P32: NOte the reference to the Iraq AUMF—and its invocation of terrorism. That's relevant not least bc Goldsmith expands the terms of the Afghan AUMF beyond al Qaeda.

P34: Note that the paragraph of this page, discussing a PATRIOT change, is unclassified. The next, also discussing a PATRIOT change, is classified TS. The only plausible explanation I can think of for the the second is to hide from people outside of the compartment how full of shit that second paragraph is.

[Note: I lost a huge chunk of this post right in here—looking to see if I can reconstruct it]

P39: Check out this tautology Goldsmith uses to argue foreign intelligence doesn't need a warrant:

> In foreign intelligence investigations, the targets of surveillance are agents of foreign powers who may be specially trained in concealing their activities from our government and whose activities may be particularly difficult to detect.

Of course, the whole point of this program is to find people who might be agents of foreign powers; we don't know that they are until the investigation finds them.

P40-41: This is a troubling assertion about Keith:

> In addition, there is a further basis on which Keith is readily distinguished. As

> Keith made clear, one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained, "Fourth Amendment protections become the more necessary when teh targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute when the Government attempts to act under so vague a concept as the power to protect "domestic security." Keith 407 US at 314.see also id at 120 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.") Surveillance of domestic groups necessarily raises a First Amendment concern that generally is not present when the subjects of the surveillance are the agents of foreign powers.

Aside from the obvious fact that the surveillance Goldsmith was justifying almost always had a religious component, a lot of the evidence picked up on alleged domestic Islamic terrorists amounts to speech. And often a disagreement about things like the Iraq war. It's more of the tautological construction, if foreign then not First Amendment, when that is obviously not the case. Note, there's a big redaction after the passage above which I suspect is nonsense.

P41: Goldsmith:

> Second, it also bears noting that in the 1970s the Supreme Court had barely started to develop the "special needs" jurisprudence of warrantless searches

> under the Fourth Amendment.

I'm gonna have to either return to this or just hope bmaz hits it. It's like every section of this opinion Goldsmith chooses to deal with a second, exclusive period of history.

P43: Note how Goldsmith pretends Congress passed FISA in 2001, not 1978.

> To be more precise, analysis of [redacted—name of program] presents an even narrower question: namely, whether, in the context of an ongoing armed conflict, Congress may, through FISA, impose restrictions on the means by which the Commander in Chief may use the capabilities of the Department of Defense to gather intelligence about the enemy in order to thwart foreign attacks on the United States.

Putting aside the fact that this program identified **who the enemy is**, as much as collecting information from that enemy, Goldsmith here betrays his task. Not to see whether Bush acted properly in not asking for legislation to amend FISA, but to suggest that FISA is an addition to the already existing program. Which of course it was not.

This is made more clear a few lines later:

> In almost every previous instance in which the country has been threatened by war or imminent foreign attack and the President has taken extraordinary measures to secure the national defense, Congress has acted to support the Executive through affirmative legislation granting the President broad wartime powers, or else the Executive has acted as exigent circumstances in the absence of any congressional action whatsoever.

In his book Goldsmith repeatedly says Bush's (Cheney's, Addington's) mistake was in not consulting Congress. And that's evident here, too: of course Congress made affirmative legislation. It's called the PATRIOT Act. But for some reason the President refused to ask for these powers.

P46: Note that in his review of enumerated Congressional powers Goldsmith doesn't consider the power to declare war?

P51: Note the reference to the President's threat assessment on March 11, 2004. You'd think that'd mention the Madrid bombing that happened that day. But of course at that point Aznar was pretending that ETA caused the bombing, not an al Qaeda inspired—but not AQ direct—group.

P61: I presume Goldsmith didn't have a straight face when he wrote the last full paragraph trying to distinguish Youngstown—bc Congress gave other alternatives to resolve labor disputes—from FISA, which Congress was actively changing per the Executive's requests in 2001.

P70ff: Note how here Goldsmith argues not just that FISA can't restrict POTUS bc of inherent power, but it can't bc FISA is so onerous that "it 'render[s] it impossible for the President to perform his constitutionally prescribed functions.' [Redacted—curious what this cite is] Several factors combine to make the FISA process an insufficient mechanism for responding to the crisis the President has faced in the wake of the September 11 attacks." It then has a totally redacted discussion about why FISA makes POTUS' job impossible. This strikes me as the reason why Goldsmith's innocuous discussion of the switch to 72-hour warrant requirement is classified TS. Because Congress was working to make it less onerous.

P102: Jack Goldsmith, bleeding heart defender of Wall Street:

> The nation has already suffered one attack that disrupted the Nation's financial center for days and that

> successfully struck at the command and control center for the Nation's military.

Glad to see those 3000 people didn't weigh in here. I'll return to this logic in upcoming days. After all, if the risk of disruption on Wall Street gives the President super-human powers, then shouldn't we be using them to reel in Wall Street now?

P105: Goldsmith's stawmen:

> Thus, a program of surveillance that operated by listening to the content of every telephone call in the United States in order to find those calls that might relate to terrorism would require us to consider a rather different balance here.

Right. They're not taking "content" of every telephone call. They're taking data.

NEWLY RELEASED OLC OPINION REVEALS HOW YOO RELIED ON ELIMINATING FOURTH AMENDMENT TO WIRETAP ILLEGALLY

As Josh Gerstein and Jack Goldsmith note, DOJ just released two of the opinions underlying the warrantless wiretap programs. They both focus on the May 6, 2004 opinion Goldsmith wrote in the wake of the hospital confrontation; I'll have far more to say about that opinion later today and/or tomorrow.

But I wanted to look at what the highly redacted opinion John Yoo wrote on November 2, 2001 tells us.

The opinion is so completely redacted we only get snippets. Those snippets are, in part:

> FISA only provides safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security.
>
> [snip]
>
> Thus, unless Congress made a clear statement that it sought to restrict presidential authority to conduct warrantless searches in the national security area—which it has not—then the statute must be construed to avoid such a reading.
>
> [snip]
>
> intelligence gathering in direct support of military operations does not trigger constitutional rights against illegal searches and seizures.
>
> [snip]
>
> A warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

To understand what those quotes mean, it helps to recall that on October 23, 2001, John Yoo and Robert Delahunty wrote another memo assessing whether the military could deploy in the US in a war against terrorists. It concludes, in part, that,

> Fourth, we turn to the question whether the Fourth Amendment would apply to the use of the military domestically against

> foreign terrorists. Although the situation is novel (at least in the nation's recent experience), we think that the better view is that the Fourth Amendment would not apply in these circumstances. Thus, for example, we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probable cause or to obtain a warrant.
>
> Fifth, we examine the consequences of assuming that the Fourth Amendment applies to domestic military operations against terrorists. Even if such were the case, we believe that the courts would not generally require a warrant, at least when the action was authorized by the President or other high executive branch official. The Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable.

It relies on the hypothetical in which a military commander searches an entire apartment building for the WMD inside.

> Consider, for example, a case in which a military commander, authorized to use force domestically, received information that, although credible, did not amount to probable cause, that a terrorist group had concealed a weapon of mass destruction in an apartment building. In order to prevent a disaster in which hundreds or thousands of lives would be lost, the commander should be able to immediately seize and secure the entire building, evacuate and search the premises, and detain, search, and interrogate everyone found inside.

As I have suggested in the past, it helps to

replace “apartment building” with “email server” to understand the implications of such an opinion given that our wiretapping is done by military commanders at the NSA.

In other words, on October 23, 2001, Yoo wrote an opinion largely justifying searches by military commanders domestically.

And then on November 2, 2001, he interpreted wiretapping as a search (presumably arguing that since we were vacuuming up all data signals, we were obtaining physical possession of them that thereby got around restrictions on electronic surveillance, at least in Yoo’s addled little mind).

Of course, the Fourth Amendment opinion is utterly ridiculous. But they were still relying on it until October 6, 2008, even while equivocating to members of Congress about doing so.

So you see, Cheney’s illegal wiretapping program was totally legal. What you didn’t know, though, is that the Fourth Amendment is just a quaint artifact of time before 9/11.

CHRIS SMITH OPPOSES IRS ENFORCEMENT ON UNDECLARED $$, BUT SUPPORTS IRS ENFORCEMENT ON UNDECLARED BABIES

Chris Smith co-sponsored HR 4, which would overturn the provision of health care reform that required all businesses to issue 1099 forms for goods and services in excess of $600. The

whole point of the 1099 provision was designed to crack down on unreported business income. Given Smith's support for overturning the provision, we have to assume that he opposes the use of IRS to track and police undeclared business income.

Yet Smith authored HR 3, which deputizes the IRS to police abortion funding.

> In testimony to a House taxation subcommittee on Wednesday, Thomas Barthold, the chief of staff of the nonpartisan Joint Tax Committee, confirmed that one consequence of the Republicans' "No Taxpayer Funding for Abortion Act" would be to turn IRS agents into abortion cops—that is, during an audit, they'd have to detemine, from evidence provided by the taxpayer, whether any tax benefit had been inappropriately used to pay for an abortion.
>
> [snip]
>
> "Were this to become law, people could end up in an audit, the subject of which could be abortion, rape, and incest," says Christopher Bergin, the head of Tax Analysts, a nonpartisan, not-for-profit tax policy group. "If you pass the law like this, the IRS would be required to enforce it."

No wonder our government has such a big deficit. Republicans want to alter our entire tax code to police wombs, but not pocketbooks.

NSA'S CLUSTERFUCK

FINANCIAL MANAGEMENT

I'm reading through the Senate Select Committee on Intelligence's report on what it did last Congress. Among a number of interesting details, the report describes really really bad accounting at the National Security Agency (NSA).

The report describes how the Intelligence Authorization Bill of 2002 required that our big intelligence agencies produce auditable financial statements by 2005. Most agencies at least showed improvement; the National Reconnaissance Office (NRO) actually fixed its books so they were auditable. But when the Committee looked at NSA's books in 2009, they were still a complete clusterfuck.

> The NSA's annual financial report was the exception, in that it showed no apparent improvement. In particular, the Committee was concerned about the failed implementation of NSA's new financial system. An NSA Inspector General report found that this system was put into operation before it was adequately tested and that operators were not properly trained to use it. The NSA also made $7 million in duplicative invoice payments, and the agency could not successfully reconcile its financial books at the end of fiscal year 2008. Further, a July 2008 Army Finance Command report, referenced by the NSA IG, found that the NSA's accounting system was in violation of public laws, Treasury Department financial manuals, and DoD regulations, and was inconsistent with the Federal Managers Financial Integrity Act.

After SSCI cracked heads, the NSA claimed it had fixed the problems in June 2009. Only they

hadn’t.

> In June 2009, the Director of NSA wrote to the Chairman and Vice Chairman, claiming that the NSA was now —fully compliant with the laws, regulations, and manuals referenced in the U.S. Army Finance Command report and the Federal Financial Managers Integrity Act. The NSA Director‘s letter also stated that the NSA had been able to reconcile its fiscal year 2008 financial records. In July 2009, the Chairman and Vice Chairman wrote to the Secretary of Defense concerning the NSA Director‘s letter. They stated that in light of the NSA‘s past difficulties in producing auditable financial statements, the Committee believed the progress claimed by the NSA should be independently confirmed by the DoD Inspector General. Specifically, the letter requested that the DoD IG conduct a form and content review of the NSA‘s fiscal year 2009 financial statements to determine whether they were supported by reliable and accounting data and supporting information.
>
> The Committee received the results of the DoD IG‘s review in November 2009, which was very critical of NSA‘s claims. Overall, the IG found that the NSA‘s financial statements were not adequately supported by reliable accounting data and supporting information. An even more disturbing finding was that the NSA‘s —remediation plans do not fully address audit impediments. Specific findings included an inability to reconcile critical general ledger balances, failure to perform required accounting processes, and inconsistencies between the information contained in the notes to the financial statements and the information provided to the IG. The IG‘s findings raised serious questions about

> the assertions made by the NSA Director in his June 2009 letter and the support he is receiving from the administrative staff involved.

The report doesn't actually say whether NSA has since fixed its auditing systems such that someone can actually tell whether the telecoms paid to spy on us are paid what they are supposed to be paid. So the most up-to-date information the report provides is that in late 2009, the NSA wasn't really planning to fix the things that made it difficult to audit its books.

Along the way, some lucky telecoms (or other contractors) got paid twice. Or maybe got paid for stuff that is not on the books, who knows?

Now, $7 million is small potatoes in the great pot of money the NSA doles out to contractors. It's not like they lost $9 billion in cash, like some other entities at DOD.

But at the same time as SSCI was discovering how bad NSA's book-keeping practices were, they were overseeing the assignment to NSA of our Cyber Command. Keith Alexander, the guy who oversaw this book-keeping clusterfuck, is now in charge of even more secret contracts to people who spy on activities that might sweep up Americans.

Call me crazy, but NSA's apparently inability or unwillingness to fix its book-keeping seems rather ripe for abuse.

JUDGE QUESTIONS GOVERNMENT'S PERSECUTION OF DADT

ACTIVISTS

I'm busy watching this hearing today (and trying to watch one that happened last week). It's hard to watch two hearings at once!

But I didn't want you think I was still celebrating St. Paddy's Day, so for the moment I'll direct you to this story, another example where DOJ is taking an unreasonable stance against democratic activists:

> Just got a report from Paul Yandura who is at the Federal Court House where the arraignment is for the 13 DADT protesters. As reported yesterday, the protesters, who were arrested on November 15, 2010 in front of the White House, are facing tougher charges than usual for cases like this. The government's lawyers intend to prosecute the 13 defendants for "violating the orders of a federal law enforcement officer," which could result in jail time. This is the first time DADT protesters have been in federal court. The other defendants were processed for minor misdemeanors in DC's court system.
>
> At today's arraignment, Mark Goldstone, the lawyer for the 13 protesters, explained to Federal Magistrate Judge John M. Facciola that the statute under which the defendants are being charged was unusual. He noted that it had not been used in recent past against people engaging in civil disobedience at the White House. For whatever reason, the government has decided to pursue the more serious criminal charges.
>
> What happened next was surprising to those in the Courtroom. Judge Facciola got up out of his chair, while pacing, gave a speech about the history of the civil rights movement in the United States. He intimated that there were

> trumped up charges back in the 50s and 60s, too. And, he evoked the Shuttlesworth v. Birmingham case, Martin Luther King's "letters from the Birmingham jail" and how civil rights protesters were often brought to court to face stricter charges. The judge clearly linked the protest over Don't Ask, Don't Tell to those earlier civil rights protests.
>
> The Judge asked the government prosecutor a lot of questions, including why the government didn't charge the protesters under the lesser crime of disorderly conduct.

You may remember Facciola from the White House email case, in which he ordered the White House to actually keep its emails.

I'm glad the Magistrate judges are pushing back against DOJ's unreasonable positions.