IN RE SEALED CASE AND THE GOLDSMITH MEMO

In addition to what I laid out here, comparing the 2006 White Paper with the May 6, 2004 Goldsmith memo on the warrantless wiretap program made me realize that the White Paper relies more frequently on In re: Sealed Case than Goldsmith does, at least in the unredacted portions. By my count, the White Paper refers to In re Sealed Case 9 times, whereas Goldsmith refers to it just 3 times (see pages 34, 47, 48; though technically one citation includes three quotes from it).

So I wanted to see why that might be—and what it might say about the program generally and the redacted sections of Goldsmith's memo.

In Re Sealed Case: How Did the Patriot Act Change the "Wall" between Criminal and Intelligence Investigations?

In the PATRIOT Act, Congress expanded the limit on how the information sought in a FISA warrant could be used. It had required that foreign intelligence be the primary purpose of collection; in an attempt to break down the wall between criminal and intelligence investigations, PATRIOT allowed that foreign intelligence only be a "significant" purpose of the collection. In response to that change, Attorney General Ashcroft issued a memo finding that meant law enforcement could be the primary purpose of such collection and holding that criminal prosecutors could consult on the terms of the wiretaps to be used.

The FISA Court, noting that the FBI had misrepresented its goals in FISA collection in a number of recent instances (but citing only those from before 9/11) invoked its role in ensuring FISA collection meet certain minimization guidelines. It ruled that the government had to keep the Office of Intelligence and Policy Review in the loop in

conversations between criminal and intelligence personnel, and criminal personnel could not direct wiretaps.

The FISA Court of Review reversed that decision, finding that the two functions were so intertwined as to permit the involvement of criminal personnel in planning wiretaps.

But its ruling also considered whether the change—allowing the government to use FISA to investigate "intelligence crimes"—was Constitutional under the Fourth Amendment. That discussion, while somewhat inconclusive, lays out some guidelines for what might be a reasonable search for a foreign intelligence purpose. It's that discussion that provides ripe material for Goldsmith's and the White Paper's project of trying to claim the warrantless wiretap program was legal. But also, likely, caused big problems for the warrantless program as well.

The In Re Sealed Case Citations

Here's how the unredacted parts of Goldsmith and the White Paper rely on In re Sealed Case.

Proof that "the wall" was a problem independent of 9/11

In attempts to dismiss the argument that the modifications Congress made to FISA after 9/11 prove Congress still intended the Administration to rely on its, both papers point to the discussion in In re Sealed Case about the problem of a "wall" between criminal investigations and intelligence. (Goldsmith 34, White Paper 28fn)

A claim that the opinion treats foreign wiretapping as an inherent authority

In a discussion of the President's inherent authority to conduct warrantless searches of foreign intelligence, both papers cite In re Sealed Case on past Circuit discussions of the President's power to use warrantless wiretaps to obtain foreign intelligence. Goldsmith does so

in one discussion.

> The Foreign Intelligence Surveillance Court of Review recently noted that all courts to have addressed the issue have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." In re Sealed Case, 310 F 3rd 717, 742 (Foreign Intel. Surv. Ct. or Rev. 2002). On the basis of that unbroken line of precedent, the Court "[took] for granted that the President does have that authority," and concluded that, "assuming that is so, FISA could not encroach on the President's constitutional power." (Goldsmith 48)

The White Paper cites the first quote on page 31 and again on 37, the second on page 8, and the third on page 35.

In addition to the general use of In re Sealed Case to argue inherent authority, there's a footnote in In re Sealed Case that dismisses concerns Laurence Silberman raised during the original debate on FISA about the non-adversary process laid out in it; Goldsmith noted that footnote did not extend to Silberman's larger complaints about inherent power. (Goldsmith 47fn)

Discussion of how "special needs" would permit the use of FISA for criminal wiretaps

The White Paper, unlike Goldsmith in his unredacted discussion of times when "special needs" allow the government to avoid a warrant, relies on In re Sealed Case's discussion on the topic. The White Paper includes this quote:

> One important factor in establishing "special needs" is whether the Government is responding to an emergency that goes
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> beyond the need for general crime

> control. See In re Sealed Case, 310 F.3d at 745-46. (page 38)

It repeats that very reference later on the same page.

> In re Sealed Case, 310 F.3d at 745-46 (noting that suspicionless searches and seizures in one sense are a greater encroachment on privacy than electronic surveillance under FISA because they are not based on any particular suspicion, but "[o]n the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning").

It cites the same passage again, claiming the FISCR had concluded that that passage held that foreign intelligence fit the definition of special needs.

And then borrows from what it claims the FISCR concluded.

> As explained by the Foreign Intelligence Surveillance Court of Review, the nature of the "emergency" posed by al Qaeda "takes the matter out of the realm of ordinary crime control." In re Sealed Case, 310 F.3d at 746. (page 39)

In other words, the unredacted sections of Goldsmith do not rely on In re Sealed Case to claim warrantless wiretapping qualifies as a special need, whereas the White Paper does. Mind you, he does discuss special needs and his discussion covers most of the same cases as the White Paper—notably on page page 39 and to some degree on 105. But he doesn't cite FISCR.

"The Government … Has Affirmatively Argued that FISA Is Constitutional"

Now, obviously, we can only compare the unredacted parts of Goldsmith's memo with what

the White Paper uses. And there are definitely places in his memo where it appears likely that he discussed In re Sealed Case in currently redacted passage.

For example, two pages following Goldsmith's use of In re Sealed Case to claim FISCR had endorsed warrantless wiretapping as part of the President's inherent authority are redacted.

I'm guessing that Goldsmith might have felt obliged to address this part of In re Sealed Case:

> The government, recognizing the Fourth Amendment's shadow effect on the FISA court's opinion, has affirmatively argued that FISA is constitutional.

In the government's initial brief in this case, they argued that FISA meets Keith's invitation to provide for more flexibility, the need for which "applies with even greater force to surveillance (or searches) directed at foreign threats to national security." In the hearing on the case, Judge Laurence Silberman effectively invited the government to return to the question of constitutionality, not just with regards to the **changes** to FISA, but the statute itself.

> You're responding to my constitutional questions by coming up with very good answers from FISA, but I'm raising the question whether I'm inclined to think it's necessary for us to address the constitutional arguments. It surely can be argued that the Congressional adoption of **or even the original statute** or its adoption of significant was unconstitutional. And I for one would like a brief on the constitutionality question. [my emphasis]

In response to which, the government expanded its claims on constitutionality to include an argument about reasonableness (the same standard Goldsmith ultimately uses) as well as an

assertion that,

> In considering the constitutionality of the amended FISA, it is important to understand that FISA is not required by the Constitution. Rather, the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority.

It's worth pausing for a moment to look at the personalities involved in this case. The names on these briefs were: John Ashcroft, who was briefed on the warrantless wiretap program but misleadingly so on some parts; Larry Thompson, who was not briefed on it; Ted Olson, who (according to Eric Lichtblau's *Bush's Law*) was not briefed on it; David Kris, who was not briefed on it; James Baker, who was briefed on it but had big problems with it; and Jonathan Marcus, who I assume was not briefed on the program. But both David Addington and John Yoo attended the hearing and presumably kept a close eye on the briefing in this case. And while Laurence Silberman surely didn't need prompting to try to use this opportunity to eliminate FISA altogether, as the chief protector of illegal Republican Presidential actions in the DC Circuit for decades, I also don't rule out the possibility that Addington had read him into the program.

In other words, there's this weird tension where a bunch of lawyers—starting with Olson—are arguing for a maximalist interpretation of the use of FISA warrants, even while (presumably without their knowledge), Addington and Yoo may have been trying to make sure nothing argued here endangered the legal claims for the warrantless wiretap program.*

It's that tension, I imagine, that produced such lines in the supplemental brief as this one.

> This Court need not decide whether the "primary purpose" test would govern unilateral Executive Branch surveillance conducted today, because the surveillance at issue here is governed by FISA's extensive procedural protections.

In any case, that tension still carries over to the FISCR's opinion, even before any disagreements between the judges on this per curiam opinion were ironed out.

I think all this tension explains why Goldsmith cited the Silberman footnote. Here's the footnote from the opinion.

> In light of Morrison v. Olson and Mistretta v. United States, 488 U.S. 361 (1989), we do not think there is much left to an argument made by an opponent of FISA in 1978 that the statutory responsibilities of the FISA court are inconsistent with Article III case and controversy responsibilities of federal judges because of the secret, non-adversary process. See Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, 9745, 7308, and 5632 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess. 221 (1978) (statement of Laurence H. Silberman).

And here's Goldsmith insisting that that footnote doesn't mean Silberman (and by association, whether there's evidence or not, the complete panel) backed off his beliefs about inherent authority.

> The 2002 per curiam opinion of the Foreign Intelligence Court of Review (for a panel that included Judge Silberman) noted that, in light of intervening Supreme Court cases, there

> is no longer “much left to an argument” that Silberman had made in his 1978 testimony about FISA’s being inconsistent with “Article III case or controversy responsibilities of federal judges because of the secret, non-adversary process.” [citation omitted] That constitutional objection was, of course, completely separate from the one based upon the President’s inherent powers.

(If you’re missing the irony, btw, the “Olson” in Morrison v. Olson is Ted Olson. In that case on the unitary executive, Olson’s side—he was then head of OLC under Reagan—lost.)

Particularly given Goldsmith’s reliance on Silberman to argue that FISA had been unconstitutional from the start (see this post), I’d imagine he included this quote to try to pull the aspects of the opinion that most strongly represented Silberman’s views from the opinion.

With all that in mind, consider how the FISCR opinion was actually more nuanced than what Goldsmith (and the White Paper) use for the public versions of their argument. The context of the FISCR’s presumption of inherent authority is this one (this is in the context of Truong, which threw out some wiretaps used for criminal purposes, but for which the wiretaps were collected before the passage of FISA).

> It was incumbent upon the court, therefore, to determine the boundaries of that constitutional authority in the case before it. We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power. The question before us is the reverse, does FISA amplify the President’s power by providing a mechanism that at least approaches a classic warrant and which

> therefore supports the
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> government's contention that FISA searches are constitutionally reasonable.

That is, even as the FISCR invoked inherent authority, it admitted there were "boundaries" to it, which is what much of the second half of the opinion explores. In the part leading into the two redacted pages after his invocation of an abbreviated version of this passage, Goldsmith wrote,

> Although the statement was made without extended analysis, it is the only judicial statement on point, and it comes from the specialized appellate court created expressly to deal with foreign intelligence issues under FISA.

I suspect at least some portion of the two pages following this statement explain why some of the ambiguities in the FISCR opinion—which after all only support a broad view of the President's powers under FISA—don't necessarily hurt his argument that—in spite of what the Bush Administration said about FISA's constitutionality in 2002—it was unconstitutional in 2004.

FISCR's Definition of Reasonable

Which brings us, finally, to the major use of In re Sealed Case in the White Paper that doesn't appear in the unredacted sections of Goldsmith: to argue that the program was reasonable under the Fourth Amendment.

Throughout this discussion, remember that FISCR found the government's use of FISA to conduct wiretaps for a primarily intelligence-criminal purpose was constitutional, though even under FISA, the opinion suggested it was a close call (note, this is one of those passages that lead me to suspect that Silberman may have been read into the program, since it brackets inherent

authority in a way consistent with what we know of Yoo's authorization of the program).

> We acknowledge, however, that the constitutional question presented by this case—whether Congress's disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer.
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> [snip]
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> Even without taking into account the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance, we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close.

But the White Paper uses that discussion to argue that the warrantless wiretap program, with none of the judicial review of FISA, was constitutional.

Not surprisingly, then, the White Paper only focuses on the second half of the FISCR's discussion of the issue, which considered whether warrantless wiretapping program qualified as a "special needs" search.

The real problem for the White Paper (and the reason I think we don't see any discussion of FISCR's discussion of reasonableness in the unredacted sections of Goldsmith) comes from the first part of the FISCR's discussion, in which it argues that FISA serves as the kind of relaxed standard warrant envisioned in Keith.

That discussion starts by noting that the warrant clause requires three things:

- Review by a neutral disinterested judge
- A demonstration of probable cause

- Specificity as to the things to be searched and seized

It then takes roughly 8 pages (four times as long as the special needs discussion) arguing that FISA generally meets these criteria.

Of particular note, it cites from the legislative record of FISA to assert that FISA would not allow for the surveillance of a range of people, some of whom (journalists in particular; note if Jane Harman was wiretapped under a FISA warrant that would be a problem here was well, though there's no indication she was surveilled under the warrantlses program) we know the warrantless wiretap program to have surveilled.

> Under the definition of "agent of a foreign power" FISA surveillance could not be authorized
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> > against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people. This definition would not authorize surveillance of ethnic Americans who lawfully gather political information and perhaps even lawfully share it with the foreign government of their national origin. It obviously would not apply to lawful activities to lobby, influence, or inform Members of Congress or the administration to take certain positions with respect to foreign or domestic concerns. Nor would it apply to

> > lawful gathering of information preparatory to such lawful activities.
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> H. REP. at 40. Similarly, FISA surveillance would not be authorized against a target engaged in purely domestic terrorism because the government would not be able to show that the target is acting for or on behalf of a foreign power. As should be clear from the foregoing, FISA applies only to certain carefully delineated, and particularly serious, foreign threats to national security.

In addition, the opinion notes that FISA requires specificity with regard to the facilities tapped.

> FISA requires probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent. 50 U.S.C. § 1805(a)(3)(B).

I guess Goldsmith could argue that by Hoovering up all the signals entering the country, the warrantless program was directed specifically at facilities alleged terrorists were going to use (our telecom backbone) but that's a stretch.

In any case, this passage, which focuses on the importance of an independent review of whether or not the target was an appropriate one, ends with this passage.

> We do not decide the issue but note that to the extent a FISA order comes close to meeting Title III, that certainly bears on its reasonableness under the Fourth Amendment.

In other words, the White Paper's use of In re Sealed Case cherry-picked the bits that helped

their case, but ignored how FISCR gave very ambivalent approval for the use of FISA for criminal searches **with the judicial review and specificity required as part of the FISA process**. The warrantless program, of course, had none of that.

Does Goldsmith Dedicate an Entire Section to Deal with FISC Problems?

The point is that In re Sealed Case presented a lot of problems with regards to the legality of the warrantless program as we understand it to have existed in 2002-2003. Some of those problems may have been what purportedly got fixed in 2004. But others remained.

Which is why I think (revising my earlier wildarsed guess) that one of the criteria by which Goldsmith reviewed the legality of the program but which is entirely redacted in this release of the memo is whether it was legal according to the analysis in this opinion.

At the very least, after all, Goldsmith would have to explain how it was that FISCR had found the issue of using FISA wiretaps for a primarily criminal investigative purpose might only "come close" to Fourth Amendment standards, but that in the absence of the judicial review in FISA, the warrantless program would be clearly legal.

Which is, I suspect, one of the reasons he had to bootstrap the inherent authority onto the AUMF; had he not done so, he would have had a much harder case on the reasonableness issue.

But that left a number of other problems: the collection of data from the telecom backbone, which would violate FISCR's interest in specificity of facilities. The clarity that these targets were really agents of a foreign power, particularly when their selection came from data mining traffic patterns (though Lichtblau says that practice is one of the ones that was discontinued with this opinion). The involvement of an independent judge.

Ultimately, though, one of the most damning

passages in the FISCR opinion—and one I suspect he dealt with in redacted discussion—is this one, cited in part by the White Paper. First, the opinion emphasizes that a recent SCOTUS case envisioned the prevention of an "imminent" terrorist attack to be grounds for an "appropriately tailored road block."

> The Court specifically acknowledged that an appropriately tailored road block could be used "to thwart an imminent terrorist attack."

And then they find comfort in the comparative intrusiveness of wiretaps because, in the case of FISA, they're based on particularized suspicion.

> The Supreme Court's special needs cases involve random stops (seizures) not electronic searches. In one sense, they can be thought of as a greater encroachment into personal privacy because they are not based on any particular suspicion. On the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning

Of course, none of these were evidently the case with the warrantless program. It'd be easy to argue the collection program was not "appropriately tailored," being (like some of the road blocks found unconsitutional) too far from a border to be tied to the threat they were trying to guard against (though I wouldn't be surprised if Goldsmith argued that, by picking up signals at backbones coming into the US, they were the functional equivalent of borders). And the warrantless program, by design, collected content from people against whom there was no particular suspicion, meaning they had the intrusiveness of a wiretap with the greater encroachment of lacking particularity.

As I said, the last passage was actually quoted

in the White Paper, only in a way that really didn't support its case. I suspect all of the White Paper references to In re Sealed Case on special needs searches show up in a currently redacted discussion of Goldsmith's. But it's one that has a great deal more rationalization to show how a program with none of the safeguards of FISA could be even as constitutionally sound as FISCR found the "close" case of FISA to be.

Laurence Silberman has helped Republican Presidents get out of legal problems for decades. But a per curiam opinion in which he participated appears to present as many problems as—in a much more limited area—it solved.

I would imagine Goldsmith's efforts to get out of the problems created would rather amusing reading, if we were ever allowed to read it.

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*Remember that when Olson resigned in June, 2004 (after the government lost the Rasul and Hamdi cases) the WaPo reported it was because he had not been read into OLC memos on torture.

> Olson is known inside the Justice Department to be unhappy that he was not informed about controversial memos authored by the Office of Legal Counsel on the use of harsh interrogation methods on detainees overseas, according to a department official who declined to be identified because of the sensitivity of the issue.

The torture memos—two of which had been publicly released by this point—had put Paul Clement in a terrible position when SCOTUS asked him if we torture. But the warrantless wiretap program—and the memos underlying it—had not yet been made public (and if Lichtblau is right that Olson wasn't read into the program, then he wouldn't have seen the memos either). If I were Ted Olson, I'd be at least as pissed about the fact that I had been made to argue blind in this case as I would be that my subordinate had had to do

so in detention cases.