

# **“The Federal Role in Privacy Protection”**

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# Overview

- Intro & background
- My role as Chief Counselor for Privacy in the (first?) Clinton Administration
- Privacy under George W. Bush
- Looking ahead to the next Administration
  - What to say in a Transition Team report on privacy?

# I. My Background

- Currently, Professor of Law
  - Moritz College of Law, Ohio State
  - 2007 book for IAPP, CIPP exam
  - Faculty Editor, I/S “Privacy Year in Review”
    - Megan Engle, Carla Scherr here
    - A group of great law students trained in privacy
- Fellow, Center for American Progress
  - [www.thinkprogress.org](http://www.thinkprogress.org)

## II. Privacy in the Clinton Admin.

- 1999 to early 2001, Chief Counselor for Privacy in U.S. Office of Management & Budget
  - Led privacy policy for public & private sectors
  - Federal data: lead by example
  - Health care: HIPAA
  - Financial: GLBA
  - Surveillance: 2000 proposal on Patriot Act issues
  - Other issues & coordinating role

# Federal Government Privacy

- 6/99 OMB memorandum to post clear privacy policies on agency sites
- 6/00 OMB memorandum presumption against cookies on federal sites & reports to OMB on privacy in the budget process
- 12/00 OMB memorandum on agency data sharing, including push for privacy impact assessments
- Federal CIO Council privacy committee

# Medical Privacy Rule

- HIPAA statute in 1996
- Congress deadline for privacy law by 8/99
- Proposed rule 10/99
- 52,000 comments by 2/00
- Final rule 12/00
- Executive Order 12/00: limits on using health oversight records for law enforcement

# Financial Privacy

- Clinton speech 5/99
- House bill with much of that 6/99
- Significant Administration push for privacy
- Gramm-Leach-Bliley 11/99
- Administration proposal for more, 4/00
- GLB regs written 2000

# National Security & Surveillance

- John Podesta leadership on updating surveillance rules for the Internet age
- Asked me to chair W.H. Working Group
  - 14 agencies, all the 3-letter agencies
- Proposal to Congress summer 2000
  - Bring email privacy up to phone calls
  - Update on many issues later in Patriot Act
- Ah, politics! Congress objected, said too much surveillance
- Basis for my 2004 article on FISA

# Some Other Privacy Actions

- Crypto policy change, 1999
- Genetic discrimination E.O., 2000
- NAS study on authentication & privacy
- Bankruptcy & privacy study, 1/01: public records and privacy
- Safe Harbor with Europe
- Network Advertising code, now in the news again
- Privacy archives at [www.peterswire.net](http://www.peterswire.net)

# Conclusion on This Period

- Leadership from senior officials, including the President & the Chief of Staff
- A policy-level official to coordinate across agencies and help overcome obstacles
- The timing was ripe – Internet bubble and privacy as a “hot” issue
- Result – updating of structures for handling PII in many sectors

# III. Privacy Under George W. Bush

- During campaign, Bush supported privacy
  - Suggested opt in for marketing
- In April, 2001 Bush overruled his advisors and decided not to cancel HIPAA rule
- But, decision pretty early not to fill any White House role for privacy

# Sept. 11 “Changed Everything”

- Bush speech to Congress: “we woke up in a different world in which everything was changed”
- Security as 1<sup>st</sup> (and 2<sup>d</sup>, and 3<sup>d</sup>) priority
- Essentially have had no privacy policy initiative from Executive Branch since that time
  - Recent DOJ internal oversight announcement
- Almost no involvement on data breach or other private-sector initiatives

# Congress Has Acted Sometimes

- E-Gov Act of 2002
  - Required privacy impact assessments for new government computer systems
- Homeland Security Act
  - Congress insisted on statutory Chief Privacy Officer
- More CPOs for DOJ, ODNI, and other agencies

# Congress Tried to Create More

- Intelligence Reform law in 2005 called for White House Privacy & Civil Liberty Board
  - Delay in naming members
  - Not clear much was accomplished
  - Lanny Davis resigned this spring due to W.H. edits of the supposedly independent report
- New Board in law enacted this summer
  - Full-time chair
  - Some subpoena power
  - Perhaps one limit on intelligence community surveillance

# Flaws in Current Privacy Structure

- Information Sharing as major theme
  - Send PII among agencies
  - Get data out of silos so it can be useful
- But they silo privacy protection
  - CPOs are agency-by-agency
  - No W.H. or other coordinated way to design privacy protections
- Bad design for governing privacy problems
- “Privacy & Information Sharing in the War Against Terrorism”
  - Due diligence list for assessing new info sharing programs

# The NSA Program(s)

- Other speakers have addressed the many privacy issues around
  - National security data collection
  - Data mining
  - Effects on communications of U.S. persons
- We are still in the dark
  - AG Gonzalez and we do not do warrantless wiretaps under “this program”
  - FBI Director Mueller & direct contradiction on whether one or more “programs”

# Privacy in the Next Administration

- Backlog of policy issues
  - New issues & new info systems keep occurring
  - Should have sensible policy response to these
- Major topics
  - National/homeland security
  - Medical
  - FTC
  - Identity
  - Other emerging issues

# National/Homeland Security

- *Lots* more collection
  - Pervasive computing & pervasive sensors
  - From known spies to unknown terrorists
- More focus on governance structures
  - WHPCLB, other oversight
  - Role of FISC and other courts
  - Immutable audit
- Due process at the moment we target an identified individual in the database
- Need a new, stable paradigm to replace 1978/FISA and 2001/Patriot Act

# Medical Privacy

- HIPAA addressed shift from paper to electronic for health payments
- Next phase: electronic clinical records
  - EHRs: electronic health records, issues of how to run the hospitals, RHIOs, infrastructure
  - PHRs: personal health records, issues of how individuals go online to manage their records

# The Policy Gap for EHRs

- Polls & focus groups show privacy & security as greatest obstacle to adoption of EHRs
- Lots of public support for “I’m on vacation and am unconscious in the ER and they can pull up my medical records”
  - Frequency: .000001 of health encounters
- The case to consumers often weak
- The case to providers, given reimbursement system, is often weak
- Benefits for system costs, quality, research, etc., much higher

# How to Speed EHRs & PHRs?

- Let “the market” do it not a great answer in healthcare
  - Pricing & insurance very complex
  - 50% of the \$ are federal
  - Hard to get system benefits when a mediocre case for participation by patients & providers

# Preemption as the Hardest Privacy Issue

- HIPAA is a baseline
  - Stricter rules in the states also apply
  - Makes it hard to run a 50-state system
- State laws are key for sensitive records
  - HIV/AIDs & other STDs
  - Mental health
  - Reproductive activity
  - Genetic
- If we harmonize on HIPAA, then we repeal all these important privacy protections
- Will require a serious process & federal leadership to fix

# FTC & the Private Sector

- Spam, phishing, spyware, bots, cookies
  - Technology is key to protecting consumer privacy & security
- Proposal:
  - The FTC has Bureau of Economics to help with antitrust
  - Going forward, have a Chief Technology Officer or Bureau of Information Technology to provide strategic guidance on security, privacy & consumer protection

# FTC & Privacy Legislation

- House hearing 2006 for Consumer Privacy Legislation Forum
  - Supporting federal, preemptive privacy law
  - Online and offline
  - Other issues in Congress instead this year
- Global companies, online companies already doing these privacy practices
- May see movement in next Administration

# Identity & Authentication

- Identity theft a huge political driver for change
  - Real harm to real people
  - No magic bullet
- Real ID proposed rule moving ahead
  - Significant opposition in states & Congress
  - Test vote in immigration debate indicated that level of opposition

# Identity & Authentication

- Politics of stronger authentication very hard
- Democrats:
  - Favor: national/homeland security; immigration
  - Oppose: computer security; voting; privacy
- Republicans:
  - Favor: national/homeland security; immigration
  - Oppose: NRA, religious groups, libertarians

# Other Emerging Issues

- Location data
- Search privacy
- RFID & other pervasive sensors
- Biometrics
  - Tempting, but weaker in long run than most realize
  - Leave fingerprints on a glass or at checkout, \$5 to mimic
  - Once fingerprint is compromised, *really* hard to get a new finger
  - So, will need multi-factor authentication, and possibly legal rules around (mis)use of biometrics

# Summary on Next Administration

- We have a backlog of PII issues that have not been solved
- We will have new issues emerging
- Better outcomes will require coordination among federal agencies, not silos
- Will need leadership at the political level
  - How to get electronic medical records *and* privacy
  - How to get NSA success *and* safeguards
  - How to do authentication/identity

# Conclusion

- There is a growing community of people trained in building systems & institutions that have privacy & information security
- This conference is part of building that community
- Consider how you can contribute to these national issues, to build systems you are proud to have for your institution & your country
- Thank you

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