WHY DID FBI NEED THE EXIGENT LETTERS OLC MEMO? (BACKGROUND POST)

Yesterday, I did a post on what the DOJ IG Report on "Exigent Letters" revealed about the January 8, 2010 OLC opinion exploiting some kind of huge loophole in the Stored Communications Act. Today, I'm going to look at why—three and a half years after the abuse of exigent letters supposedly ended—Obama's DOJ felt the need to get what DOJ Inspector General Glenn Fine appears to believe is a very dangerous opinion from OLC. After all, the FBI told Fine that "it does not intend to rely on" this opinion (or the interpretation of the law it gives). And, as I'll explain at more length below, Fine seems reasonably satisfied with the FBI's efforts to either legally justify or purge much of the data collected under the exigent letter program. So why go to the trouble of getting a new OLC opinion at this late date?

As background, the exigent letter program was a means by which the FBI got call data directly from AT&T, Verizon, and MCI without meeting legal guidelines for getting such information. The paperwork the FBI did give the telecoms was misleading because it claimed that the request was an emergency and it promised a grand jury subpoena to follow which usually never came. Eric Lichtblau reported that one aspect of this program—the community of interest analysis that AT&T provided, in which they would perform a six degrees of Osama bin Laden to find purported associates of terrorists—was a key aspect of Bush's warrantless wiretap program. And since 2006 (perhaps because of the revelation of the warrantless wiretap program, but also, definitely, in response to Fine's investigations of the practice), the telecoms and the FBI have tried to retroactively justify their practice. The OLC opinion appears to have been, at least

partly, an attempt to invent a legal explanation that would finally do just that.

I made the following conclusions yesterday about what the OLC opinion did.

- This OLC opinion may not relate exclusively to the use of exigent letters, not least because Inspector General Glenn Fine appears worried the FBI will use it prospectively, not just to retroactively rationalize abuses from the past.
- Fine appears to suggest the FBI has misrepresented what it was doing with exigent letters in its request for an opinion to the OLC. This is at least the second time they have done so, Fine alleges, in their attempts to justify these practices. In this case, the dispute may pertain to whose phone records they were, what was included among them, and whether they pertained to an ongoing investigation.
- My guess is that the OLC opinion addresses whether section 2701 of the Stored Communications Act allows electronic communication providers to voluntarily provide data to someone above and beyond the narrow

statutory permission to do so in 2702 and 2709 of the Act. (Though see Julian Sanchez' different take here.)

- Whatever the loophole FBI is exploiting, it appears to be a use that would have no protections for First Amendment activity, no requirement that the data relate to authorized investigations, and no minimization or reporting requirements. That is, through its acquisition of this OLC opinion, the FBI appears to have opened up a giant, completely unlimited loophole to access phone data that it could use prospectively (though the FBI claims it doesn't intend to). Much of Fine's language here is an attempt to close this loophole.

In this post, I'm going to look at some background information that reinforces my argument that the OLC opinion may not relate exclusively to the exigent letters report (or what we see of it). In a follow-up post, I'll look at some of the reasons why FBI may have felt the need to get this opinion.

The full Exigent Letters Report includes Top Secret intelligence information

Note that there are three versions of the Exigent Letters IG Report:

> The Office of the Inspector General (OIG) has redacted (blacked out) from the public version of this report information that the FBI and the Intelligence Community considered to be classified. We have provided full versions of our classified reports—a Secret version and a Top Secret/Secure Compartmented Information (SCI) version—to the Department of Justice, the Intelligence Community, and Congressional committees. (PDF 14)

At the very least, this note tells us that there are two more layers to the Exigent Letters Report, even beyond the extensive redactions that appear in the sections on Community of Interest requests and journalists calls. And some of this information—the TS/SCI material—is highly classified.

And compare this notice of classified information on the Exigent Letters IG Report to the equivalent notice used with the 2008 IG Report on Section 215 and the 2008 IG Report on NSLs (the latter of which is intimately related to this report).

> This report includes information that the Department of Justice considered to be classified and therefore could not be publicly released. To create this public version of the report, the OIG redacted (deleted) the portions of the report that the Department considered to be classified, and we indicated where those redactions were made. In addition, the OIG has provided copies of the full classified report to the Department, the Director of National Intelligence, and Congress.

These reports include classified annexes detailing programs not included in the body of the Report, but unlike the Exigent Letters Report, they don't appear to have two separate

classified versions. Furthermore, unlike the Exigent Letters report, those earlier reports identify where all classified information has been redacted; we don't know that OIG has done that with this report. In other words, whereas we can get some outline of the sum of classified information hidden in the earlier reports, we can't do so with this one, though we do know it's highly classified.

The distribution may be different, too, with the Exigent Letters report going to "the Intelligence Community" rather than just the DNI, and with it going to Congressional Committees rather than Congress, as a whole. While I can't be sure, the difference in distribution may suggest that certain people (SSCI, for example, as opposed to SJC) are getting the Top Secret rather than the Classified version of the report (remember, SSCI/SJC member Russ Feingold, SSCI member Ron Wyden, and SJC member Dick Durbin have called on Holder to release the OLC opinion "to Congress"). Or that operational units of the Intelligence Community (there's a redaction on PDF page 38 suggesting that telecom employees at CAU were communicating with other parts of government using their FBI email accounts) are getting versions of the Exigent Letters report whereas only the DNI got the other two reports.

This report was drafted by the time the Combined IG Report on Warrantless Wiretapping report was released

As I noted yesterday, FBI reviewed and responded to a draft of this report by July 2009.

> It is important to note that the FBI acknowledged in its July 2009 comments to a draft of this report that it had never considered or relied upon [several words redacted] when it obtained any of the telephone records at issue in this report.

That happens to be the same month the Combined

IG Report on the Warrantless Wiretap program was released. After reading a draft of this report (though Fine doesn't say it was explicitly a response to the report), FBI asked the OLC for the interpretation of its loophole.

> However, after reviewing a draft of the OIG report the FBI asked the Office of Legal Counsel (OLC) for a legal opinion on this issue.

So FBI presumably had not only a draft of this report, but a draft of the warrantless wiretap report in hand when they requested the OLC opinion.

Now, as a reminder, DOJ IG did its own report on the warrantless wiretap program. It was sufficiently drafted by the time of the Combined report to be cited, repeatedly, in the body of the report. But the report could not have been complete in July 2009, because it still needed to incorporate the results of the OPR report on Yoo's wiretapping memos, and that report was not yet complete (note, I've seen conflicting information on whether this is incorporated into the OPR report on Yoo's torture memos, or is separate; I'm going to try to get some clarity on how these all fit together later).

> Title III of the FISA Amendments Act required that the report of any investigation of matters relating to the PSP conducted by the DOJ Office of Professional Responsibility (OPR) be provided to the DOJ Inspector General, and that the findings and conclusions of such investigation be included in the DOJ OIG review. OPR has initiated a review of whether any standards of professional conduct were violated in the preparation of the first series of legal memoranda supporting the PSP. OPR has not completed its review.

Per the Combined report, the DOJ Warrantless

Wiretap report included significantly more detail on:

- The ways in which the description of the Other Intelligence Activities included in the warrantless wiretapping program John Yoo included in early OLC memos authorizing it were incomplete
- How overly restrictive limitations on the number of DOJ personnel (particularly lawyers) read into the program created problems with the legality of the program and its information-sharing efficacy
- The way in which the presiding FISC judges Lamberth and Kollar-Kotelly were informed of the warrantless wiretap program
- The FBI's participation in the warrantless wiretap program, particularly as a recipient of information collected in it
- How DOJ and the FISC addressed the impact warrantless wiretap derived information had on the FISA process
- DOJ's handling of PSP information with respect to its discovery obligations in

international terrorism prosecutions
- Further details on the Comey-Goldsmith objections to the warrantless wiretapping program
- Details on the transition from the warrantless wiretap program to the FISA-approved program from 2006 to 2007
- An assessment of the value of the warrantless wiretap program to counter-terrorism efforts
- An examination of several cases often cited as warrantless wiretapping successes
- Conclusions about whether or not Alberto Gonzales lied to Congress about the warrantless wiretap program

Several of these issues are closely related to issues Fine treats in the Exigent Letters report, including the failure to give adequate legal review to the CAU program, the use of data collected using exigent letters to get FISA warrants, and efforts to clean up the program starting in 2006. So at the very least, Fine's warrantless wiretap report closely parallels aspects of this one. Though given Lichtblau's reporting that this program is related to the warrantless wiretap program, they are probably actually intimately related.

Of particular potential import with respect to the OLC opinion, the Combined IG Report revealed that the DOJ IG Report on the warrantless wiretap program had the following conclusion:

> Based upon its review of DOJ's handling of these issues, the DOJ OIG recommends that DOJ assess its discovery obligations regarding PSP-derived information, if any, in international terrorism prosecutions. The DOJ OIG also recommends that DOJ carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or Brady material was collected under the PSP, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases. In addition, the DOJ OIG recommends that DOJ implement a procedure to identify PSP-derived information, if any, that may be associated with international terrorism cases currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the government's discovery obligations under Rule 16 and Brady.

As I'll explain below, one of the most likely reasons FBI got the OLC opinion was to give some legal cover for data collections it either refused to, or could not, purge. As I'll show, Fine has ongoing concerns about poison fruit data for only limited aspects of the exigent letter program. But at least last summer, when FBI requested the OLC opinion, he had significant concerns about poison fruit derived from the warrantless wiretap program.

The one FBI official who knew of the exigent letter program likened it to another classified FBI program

The Exigent Letter IG Report reveals that the only CXS official who admitted to knowing of the exigent letter program likened it to another classified FBI program.

> The one FBI [CTD] official who told us that he knew about exigent letters at

> the time they were used was John Chaddic, the Assistant Section Chief of CXS from June 2003 to October 2004. Chaddic told us that in approximately June 2003 Rogers briefed him about exigent letters and described them as a "placeholder so that we could get the toll records and analyze them while we waited on the NSL." Chaddic said he never saw an exigent letter but "wasn't surprised" when he learned about the exigent letter process because the FBI could not afford to wait for the appropriate legal process in emergency situations when lives might be at risk. Chaddic also told us that he had assumed the use of exigent letters was addressed in the FBI's contracts with the communications service providers. He also said that the concept seemed consistent with at least one classified FBI program ongoing at the time.

So we know that there was at least one other FBI program that one of FBI's Counter-Terrorism Divisions managers knew about at the time in which data was collected before the legal process to justify the collection of the data was in place.

These three factors—the existence of a TS/SCI version of the exigent letters report, the evidence that FBI was dealing with poison fruit from both the exigent letter program and, to the extent it could be separated from it, from the warrantless wiretap program, and the description from a CounterTerrorism official that this program had similarities to another one (which may or may not relate to the warrantless wiretap program—are some of the reasons I think the January 8 OLC opinion may not relate solely to the exigent letter program, or at least not the parts of the exigent letter program that are unclassified. Rather, I think it likely that this opinion is one final effort to retroactively clean up the mess of Bush's

warrantless wiretap program.