FBI STILL INVENTING NEW WAYS TO SURVEIL PEOPLE WITH NO OVERSIGHT

Marisa Taylor has an important update on the OLC exigent letter opinion. Last year, DOJ's now-retired Inspector General Glenn Fine released a report revealing how the FBI had used exigent letters to get call data information from telecoms with no oversight. Ryan Singel noted a reference to an OLC opinion that basically melted away the problems created by use of these exigent letters (see pages 264-266 of the report).

> On January 8, 2010, the OLC issued its opinion, concluding that the ECPA "would not forbid electronic communications service providers [three lines redacted]281 In short, the OLC agreed with the FBI that under certain circumstances [~2 words redacted] allows the FBI to ask for and obtain these records on a voluntary basis from the providers, without legal process or a qualifying emergency.

Taylor FOIAed the opinion.

And while DOJ refused to release the opinion, they did apparently reveal enough in their letter explaining their refusal to make it clear that the FBI maintains that it does not need any kind of court review to get telephone records of calls made from the US to other countries.

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> [snip]
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EFF's Kevin Bankston provides some context.

> "This is the answer to a mystery that has puzzled us for more than a year now," said Kevin Bankston, a senior staff attorney and expert on electronic surveillance and national security laws for the nonprofit Electronic Frontier Foundation.
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> "Now, 30 years later, the FBI has looked at this provision again and decided that it is an enormous loophole that allows them to ask for, and the phone companies to hand over, records related to international or foreign communications," he said. "Apparently, they've decided that this provision means that your international communications are a privacy-free zone and that they can get records of those communications without any legal process."

Now, I'm trying to get some clarification as to precisely what language DOJ used (see update below). But the revelation is interesting for two reasons.

As I argued last year, the opinion probably serves to clean up a lot of the illegal stuff done under the Bush Administration. I think it likely that this includes Cheney's illegal wiretap program. If I'm right, then this claim would be particularly interesting not least because of all the discussions about US to international calls during the debate around

FISA Amendments Act.

Then of course there's the even bigger worry. When Fine released his report, the FBI assured him that it wouldn't actually use this opinion. "No, Dad, I have no intention of taking the Porsche out for a spin, so don't worry about leaving the keys here."

But the fact that DOJ seems to be doubling down on this claim sort of suggests they are relying on the opinion.

Also, I can't help but note about the timing of this FOIA response: Conveniently for DOJ, they didn't respond to McClatchy until after Russ Feingold and Glenn Fine, the two people most likely to throw a fit about this, were out of the way.

Update: Via email, Kevin Bankston told me this is the clause the government is using to find its loophole: 18 USC 2511(2)(f).

> (f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.