

# WHAT THE SCOPE OF THE IG REPORT ON WARRANTLESS WIRETAPPING TELLS US

Remember how when Congress passed the FISA Amendment Act last year, they required that the Inspectors General of the various agencies involved in the warrantless wiretapping produce a report on the program? They did an interim report—basically describing the scope of the report—last September (and produced in unclassified form last November). It took Secrecy News pulling teeth to get this released (six months after the fact), but here is the interim report.

## General Scope

I'm going to show you the whole scope-related section, then unpack it line by line.

The DoJ IG is completing work on a broadly-scoped review of the Program, which the DoJ IG has been conducting over the past 18 months. In accord with its normal procedures and consistent with classification requirements, the DoJ IG will release its report when completed. The DoJ IG's review examines the involvement of the DoJ and the Federal Bureau of Investigation (FBI) in the Program, including the use of and control over Program information; compliance with relevant authorities governing the Program as these authorities changed over time; and the impact and effectiveness of Program information on DoJ's and FBI's counterterrorism efforts. The review also describes various legal assessments of the Program, legal and operational changes to the Program, any use of Program information in the FISA process,

and the transition to Foreign Intelligence Surveillance Court orders related to the Program.

The NSA IG's review will examine the evolution of the Presidential authorization as it affected NSA, the technical operation of the Program, the preparation and dissemination of the product of the Program, and communications with and representations made to private sector entities. The review will address access by NSA to legal reviews and information concerning the Program and will also examine NSA's interaction with the Foreign Intelligence Surveillance Court and the transition of Program activities to operations under court orders. The review will also include a description of NSA's oversight of the Program. To conduct the review of the Program, the NSA IG will both initiate new work and draw upon a substantial body of completed evaluations.

The DoD IG will examine the involvement of the Office of the Secretary of Defense in the establishment and implementation of the Program.

The ODNI IG will examine the involvement of DNI senior leadership in the Program and DNI communication with private-sector entities concerning the Program. The ODNI IG will also examine the role of the National Counterterrorism Center (NCTC) in drafting and coordinating the threat assessments and legal certifications supporting periodic reauthorization of the Program; NCTC's role in identifying targets and tasking Program collection; and NCTC's use of the product to support counterterrorism analysis.

The CIA IG will examine CIA's participation in the program, including

the Agency's role in preparing the threat assessments and legal certifications supporting periodic reauthorization of the Program.

Three points about the general scope. First, it's clear from this description that CIA had the least claimed involvement in the program of the five agencies. And CIA's former IG, John Helgerson, has just resigned (more detail—thanks for the reminder, MD and bmaz). Yet CIA's IG, ~~John Helgerson~~, is managing the reporting for the report (if I'm not mistaken, ~~Helgerson~~ CIA's IG is less independent, at least in theory, than the other IGs). So they may be shielding certain information by having the least knowledgeable agency do this review.

Also, note the absence of Treasury or Office of Foreign Asset Control. From the al Haramain suit, we know that OFAC was involved—at least tangentially—in the program (and my have been involved in preparing threat assessments). But we get no word on Treasury's involvement in the program, if any.

And finally, remember the rules about IG reports in general—that they can't require cooperation from the White House—and this report specifically—that telecom involvement is off limits. So we're not going to learn some of the most important bits about this program, by design.

DOJ Scope

And here's the (almost) line by line:

The DoJ IG is completing work on a broadly-scoped review of the Program, which the DoJ IG has been conducting over the past 18 months.

DOJ started this in March 2006, not long after the discovery of the program. Remember, Bush tried to spike this investigation by refusing clearance for the investigators in OPR.

The DoJ IG's review examines the involvement of the DoJ and the Federal Bureau of Investigation (FBI) in the Program, including the use of and control over Program information; compliance with relevant authorities governing the Program as these authorities changed over time; and the impact and effectiveness of Program information on DoJ's and FBI's counterterrorism efforts. The review also describes various legal assessments of the Program, legal and operational changes to the Program, any use of Program information in the FISA process, and the transition to Foreign Intelligence Surveillance Court orders related to the Program.

Several points here. First, DOJ OIG is investigating whether any information from the program got dumped into FISA warrants later. I'm also curious about the "compliance with relevant authorities," because it suggests that even in an illegal program there may have been abuses (remember how many reports Glenn Fine has done about FBI's abuse of National Security Letters—this is right up his alley).

The big one, of course, is this: "use of and control over Program information." At least last September, Fine was investigating (and had been for a long time) whether or not the information collected pursuant to counterterrorism was used as such. Lucky for us, Fine is the standout among Bush-era IGs.

And then the parallel to OPR's investigation of the torture memos (and I believe this, too, is conducted in conjunction with OPR).

The review also describes various legal assessments of the Program, legal and operational changes to the Program,

Fine is investigating the OLC memos and how they

changed as Cheney's dreams got wider and wider.

#### NSA Scope

Like Fine, NSA's IG (George Ellard) is investigating how the program evolved and how the authorization evolved.

The NSA IG's review will examine the evolution of the Presidential authorization as it affected NSA, the technical operation of the Program, the preparation and dissemination of the product of the Program,

And it'll tell us—or Congress, at least—the technical aspects of the program.

The review will address access by NSA to legal reviews and information concerning the Program and will also examine NSA's interaction with the Foreign Intelligence Surveillance Court and the transition of Program activities to operations under court orders.

It strikes me that the NSA wants to tell Congress that it didn't have access to John Yoo's crappy memos authorizing this. And that it wants to talk about how it worked with FISC—perhaps to retain credibility lost because of this program.

And note that NSA, like DOJ, wants to talk about the transition period. There's something that happened in that transition period (the first half of 2007, basically) that they want to tell us about.

Also like DOJ, NSA had started on this process before Congress ordered it to do a report.

To conduct the review of the Program, the NSA IG will both initiate new work and draw upon a substantial body of completed evaluations.

#### DOD Scope

DOD's side of the investigation is rather limited.

The DoD IG will examine the involvement of the Office of the Secretary of Defense in the establishment and implementation of the Program.

Though this may be interesting in any case for two reasons. First, because Rummy brought John Poindexter in to do Total Information Awareness under DARPA in the first place. And because DOD was prohibited from using funds to do such data mining starting in 2003. But DOD's IG department is not as honest as DOJ or CIA IG, so who knows what we'll actually learn?

ODNI and CIA Scope

Now, the most curious aspect of the ODNI scope is that ODNI was only established by statute in December 2004—after some of the more troublesome known aspects of the warrantless wiretap program.

The ODNI IG will examine the involvement of DNI senior leadership in the Program and DNI communication with private-sector entities concerning the Program.

So what will we learn about communication with telecoms, when most of the really pressing communications happened earlier, in 2001 and 2002, when establishing the program, and 2004, when the telecoms were asked to wiretap based on the say so of President Bush and Gonzales alone? Do we get to learn about those earlier communications?

And then there's this similar scope for both ODNI and CIA.

The ODNI IG will also examine the role of the National Counterterrorism Center (NCTC) in drafting and coordinating the threat assessments and legal certifications supporting periodic reauthorization of the Program; NCTC's

role in identifying targets and tasking Program collection; and NCTC's use of the product to support counterterrorism analysis.

The CIA IG will examine CIA's participation in the program, including the Agency's role in preparing the threat assessments and legal certifications supporting periodic reauthorization of the Program.

Well, this is news. Apparently, the NCTC and CIA (but not the OFAC, if you believe this scope) prepared threat assessments and legal certifications supporting this program. It will be interesting to see how those reports were used. In his declarations in support of state secrets in the al Haramain case, then DNI John Negroponte talked a lot about hiding the true nature of al Qaeda for his rationale for state secrets.

Well, given that it took 6 months to get the scope of this report published, I'm not holding my breath for the report (due in July). But this gives you some idea of what we might learn, come ~~July~~ ~~September~~ ~~December~~ next March.