WHY DID THE FBI NEED THE EXIGENT LETTERS OLC MEMO

Note: April 12, 2016: I accessed this today and because of some technical issues am not sure whether I published it back in 2010 or not. I'm republishing it dated to the day I wrote it in its apparently incomplete form.

I've been working on a series of posts on the January 8, 2010 OLC opinion referenced in the Exigent Letters IG Report. The report describes the FBI request and opinion this way:

> [A]fter reviewing a draft of the OIG report the FBI asked the Office of Legal Counsel (OLC) for a legal opinion on this issue. 280 When making the request for an OLC opinion, the FBI stated that [three lines redacted]
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> The FBI presented the issue to the OLC as follows: "Whether Chapter 121 of Title 18 of the United States Code applies to call detail records associated [2.5 lines redacted]
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> 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.

In this post, I looked more closely at the context of the reference in the IG report and drew these conclusions:

- 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 showed how OLC wrote at least four opinions at least partly in response to Fine's reports on exigent letters; that suggests the January 8, 2010 opinion is just one of several opinions written in an attempt to retroactively clean up after abuses using telecommunication records. In a follow-up post, I suggested that FBI may have requested the January 8, 2010 OLC memo not just because of preliminary findings from the Exigent Letters report, but also in response to developments with (including, potentially, Glenn Fine's classified IG report on) warrantless wiretapping.

But all of those posts are simply attempts to answer the question, why? Why did DOJ go to the trouble of getting a fourth (at least) OLC opinion to clean up after abuses committed over four years ago? What is the ongoing danger that required another OLC opinion to establish legal

cover?

My three wildarsed guesses are:

- To eliminate problems with poison fruit used in investigations and prosecutions
- To help avoid legal suits

Eliminating poison fruit