THE AP GRAB: NSL VERSUS SUBPOENA

Update: In his letter responding to AP's complaints, Deputy Attorney General James Cole says these were subpoenas. Cole tries to argue the scope of the subpoena was fair. But what he doesn't explain is why the government didn't give the AP notice or an opportunity to turn over the contacts voluntarily.

I want to return to a question I introduced in my post describing DOJ's grab of call records from 20 AP phone lines.

The assumption has been that DOJ subpoenaed these call records. While that's probably right, I still think it's possible DOJ got them via National Security Letter, which DOJ has permitted using to get journalist contacts in national security investigations since fall 2011. I'll grant that AP President Gary Pruitt mentions subpoenas twice in his letter, once specifically in connection with DOJ's grab and once more generally.

> That the Department undertook this unprecedented step without providing any notice to the AP, and without taking any steps to narrow the scope of its subpoenas to matters actually relevant to an ongoing investigation, is particularly troubling.
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> The sheer volume of records obtained, most of which can have no plausible connection to any ongoing investigation, indicates, at a minimum, that this effort did not comply with 28 C.F.R. §50.10 and should therefore never have been undertaken in the first place. The regulations require that, in all cases and without exception, a subpoena for a reporter's telephone toll records must be "as narrowly drawn as possible.'' This plainly did not happen. [my

> emphasis]

But the entire point of Pruitt's letter is to call attention to the way in which DOJ did not honor the spirit of its media guidelines, which are tied to subpoenas, not NSLs. That's what the Domestic Investigations and Operations Guide says explicitly (PDF 166) when it talks about using NSLs with journalists: when using NSLs, the rules don't apply.

> Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas. (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) The following approval requirements and specific procedures apply for the issuance of an NSL for telephone toll records of members of the news media or news organizations. [my emphasis]

For a variety of reasons, I think it possible the AP doesn't actually know how DOJ got its reporters' contact information. And thus far, the most compelling argument (one Julian Sanchez made) that DOJ used a subpoena is that they did ultimately disclose the grab to the AP; with NSLs they wouldn't have to do that, at least certainly not in the same time frame.

But Pruitt's emphasis is sort of why I'm interested in this question: either DOJ used a subpoena and in so doing implicitly claims several things about its investigation, or DOJ

used an NSL as a way to bypass all those requirements (and use this as a public test case of broad new self-claimed authorities). Both could accomplish the same objective — getting call records with a gag order — but each would indicate something different about how they're approaching this investigation.

Here are DOJ's own regulations about when and how they can subpoena a journalist or his call records. Some pertinent parts are:

> (b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.
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> (d) Negotiations with the affected member of the news media shall be pursued in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the Attorney General when considering a subpoena authorized under paragraph (e) of this section.
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> (g)(1) There should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime. The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period.

> (g)(3) When the telephone toll records of a member of the news media have been subpoenaed without the notice provided for in paragraph (e)(2) of this section, notification of the subpoena shall be given the member of the news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation. In any event, such notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days. [my emphasis]

US Attorney Ronald Machen statement about the grab largely echoes those parts of the regulations (though somehow he forgot to mention that "subpoenas should be as narrowly drawn as possible").

> We take seriously our obligations to follow all applicable laws, federal regulations, and Department of Justice policies when issuing subpoenas for phone records of media organizations. Those regulations require us to make every reasonable effort to obtain information through alternative means before even considering a subpoena for the phone records of a member of the media. We must notify the media organization unless doing so would pose a substantial threat to the integrity of the investigation. Because we value the freedom of the press, we are always careful and deliberative in seeking to strike the right balance between the public interest in the free flow of information and the public interest in the fair and effective administration of our criminal laws.

So either DOJ used an NSL, which would give them a longer gag, fewer express limits on the scope of the request, and zero expectation of giving notice beforehand (in addition, obtaining NSLs from journalists in national security cases doesn't appear to require Attorney General sign-off). In which case Machen is playing the same kind of word games the DIOG plays, acknowledging there are regulations the spirit of which DOJ appears to have violated.

Or Machen maintains the following about the grab:

- DOJ has already checked the US person call records of the people known to be read into the UndieBomb plot and not found any obviously calls or emails implicating the journalists involved in the story and either hasn't been able to access or hasn't found any obvious clues in the potential Saudi, Yemeni, and British people read into the operation (note, some Saudis were on the record on this within days and Yemenis also appear to have leaked it).
- Notifying the AP that DOJ was going to go

> get journalist contact information for two months, in an investigation that has been widely publicized for an entire year, would pose some threat to the investigation. Normally, such a claim is usually based on the premise that revealing the investigation at all would alert the targets who would otherwise not know about it, but that's obviously not what's going on here, because this has been one of the most public leak investigations in recent years.

- For some reason, DOJ needed call records for a total of 20 AP lines including some of the journalists' personal lines for two full months, in spite of the requirement of a narrow scope.

It's these three claims — claims which DOJ used to make the request they did and in so doing effectively expose all the work these 6 journalists as well as those working on the other lines grabbed — that make this grab so outrageous (even ignoring that John Brennan, who

leaked the worst part of this story, was subsequently made CIA Director, and even ignoring that White House was going to release the information AP did the following day). While it's possible that the AP's sources for the story used adequate operational security such that DOJ couldn't find any record of contact, it's much harder to believe that DOJ couldn't have negotiated with the AP and that DOJ needed all the phone lines of the AP — unless they were looking for something far more broad than just the UndieBomb 2.0 story.

Which brings me to another thing I've been thinking about: jurisdiction. After Eric Holder told Congress last January he had assigned the US Attorneys to conduct this and the StuxNet leak investigation based on some kind of jurisdiction, I asked why he'd appoint Ronald Machen, the US Attorney for DC, to investigate an alleged leak of a CIA operation, especially since as someone known to be very close to Holder, Machen raises more conflict-of-interest issues than Eastern District of VA's US Attorney, Neil MacBride, would.

> *CIA thwarted a plot!!!* the headlines read, until it became clear that it was really a Saudi investigation and it wasn't a plot but a sting. Yet the CIA was definitely involved, at least according to all the reporting on the story. And the US Attorney from EDVA—Neil MacBride—would have a jurisdiction over CIA issues that is just as strong as the US Attorney from MD's jurisdiction over NSA investigations.
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> These spooky agencies like keeping their investigations close to home.
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> So why didn't Holder include MacBride in the dog-and-pony show last week?
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> There are several possibilities, all curious:

> - *FBI has reason to believe the main leak did come from John Brennan's conference call with Richard Clarke and Fran Fragos Townsend, which he placed from the White House*
> - *The op wasn't run out of CIA after all, but was instead liaised with the Saudis through the NSC or State*
> - *The story never really existed, and the Saudis just fed us the story of an UndieBomb to give an excuse to start bombing insurgents in Yemen*
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> Maybe there's some entirely different, completely bureaucratically boring explanation. But Holder's comment about district based selection (he didn't use the word jurisdiction, though) suggests it should have been logical for MacBride to take the lead on UndieBomb 2.0. But he isn't.
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> Why not?

But now I've got another theory as to why Holder had Machen, not MacBride, investigate this case: I suspect DOJ believes the DC Circuit will look more favorably on expansive readings of subpoenaing journalists than the 4th Circuit.

After all, Jeffrey Sterling's leak prosecution under Leonie Brinkema has largely stalled, in

part because the government appealed her ruling that James Risen was entitled to a qualified reporter's privilege, one which hadn't been overcome, particularly given the government's unwillingness to call other spooky witnesses to testify. We're still waiting on the decision regarding that subpoena, but at a hearing almost exactly a year ago, the judges showed some skepticism to DOJ claims.

> At least two members of a three-judge federal appeals court panel appeared to express some skepticism on Friday about prosecutors' request that they overturn a district judge's order protecting a journalist from being forced to identify his confidential sources in the trial of a former Central Intelligence Agency officer.
>
> [snip]
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> One judge, Roger Gregory, sharply criticized prosecutors' contention that the Constitution offers no special protection to a reporter who is a witness to a particular type of crime: the unauthorized disclosure of government secrets to that very reporter by an official.
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> "The king always wants to suppress what they are doing — that is what is troubling," said Judge Gregory, who stressed what he portrayed as the "public interest" in knowing about government misconduct that led the framers of the Constitution to write the First Amendment.

In DC, meanwhile, I believe the most recent decision is the one that forced Judy Miller to testify in the Scooter Libby case. That ruling, too, recognized a qualified reporters privilege, one that Pat Fitzgerald managed to overcome by showing the efforts he had made to find out how Libby leaked Valerie Plame's identity to Miller,

and showing the gravity of the possibility that the Vice President was ordering his aides to out spies like this. If that standard were applied in this case, I suspect the shoddiness of Machen's current claims would mean the government would fail too; DOJ just hasn't done the work Fitzgerald did to shore up the case for needing this contact info, and DOJ also got far more than it appears they needed.

However, the DC Circuit has gotten more conservative in the last 9 years (in part because Obama hasn't prioritized nominating and confirming a few non-radical right judges to the court), which makes it more likely any appeal of this would go before a panel of judges with a great fondness for unfettered Executive Branch authority.

Janice Rogers Brown, I suspect, would froth at the opportunity to help the Obama Administration establish a broad new standard for accessing journalist contacts.

I expect this grab to be reviewed by the courts, once AP figures out what DOJ did and what recourse they now have to put the reporter privacy genie back in the bottle. Ronald Machen is going to have to explain why, in an investigation everyone in the national security field knew about, negotiating with the AP would have damaged the investigation (unless they were after sources for other known AP articles, I suspect the answer to that is quite simple: because DOJ knew they might lose and in any case would be greatly held up by the legal challenge). DOJ may lose that fight in any case, but I suspect they stand a much better chance in the DC Circuit than the 4th Circuit.

I suspect DOJ will have a hard time defending the legitimacy of this grab in any case (which is different from defending its legality). But one reason I'm still not convinced they made this grab using a subpoena is that their legal case might actually be better if they used an NSL than if they used a subpoena (though using NSLs might well expose the use of them more

generally to reversal on Constitutional grounds).