12 YEARS LATER, DOJ IS STILL STRUGGLING THROUGH DRAGNET DISCOVERY ISSUES

As I noted earlier, Charlie Savage describes how, after Don Verrilli made false representations to the Supreme Court about whether defendants get an opportunity to challenge FISA Amendments Act derived evidence, it set off a discussion in DOJ about their discovery obligations.

> Mr. Verrilli sought an explanation from national security lawyers about why they had not flagged the issue when vetting his Supreme Court briefs and helping him practice for the arguments, according to officials.
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> The national security lawyers explained that it was a misunderstanding, the officials said. Because the rules on wiretapping warrants in foreign intelligence cases are different from the rules in ordinary criminal investigations, they said, the division has long used a narrow understanding of what "derived from" means in terms of when it must disclose specifics to defendants.
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> In national security cases involving orders issued under the Foreign Intelligence Surveillance Act of 1978, or FISA, prosecutors alert defendants only that some evidence derives from a FISA wiretap, but not details like whether there had just been one order or a chain of several. Only judges see those details.
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> After the 2008 law, that generic approach meant that prosecutors did not disclose when some traditional FISA

> wiretap orders had been obtained using information gathered through the warrantless wiretapping program. Division officials believed it would have to disclose the use of that program only if it introduced a recorded phone call or intercepted e-mail gathered directly from the program — and for five years, they avoided doing so.
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> For Mr. Verrilli, that raised a more fundamental question: was there any persuasive legal basis for failing to clearly notify defendants that they faced evidence linked to the 2008 warrantless surveillance law, thereby preventing them from knowing that they had an opportunity to argue that it derived from an unconstitutional search? [my emphasis]

It's not entirely true that only judges learn if there are a series of orders leading up to a traditional FISA that incriminates a person. For example, we know it took 11 dockets and multiple orders to establish probable cause to wiretap Basaaly Moalin, the one person allegedly caught using Section 215. We also know there was a 2-month delay between the time they identified his calls with (probably) Somali warlord Aden Ayrow and the time they started wiretapping him under traditional FISA. Even before that point, Ayrow would have been — and almost certainly was — a legal FISA Amendments Act target. Meaning it'd be very easy for the government to watch Moalin's side of their conversations in those two months to develop probable cause — or even to go back and read historical conversations (note, Ken Wainstein may have signed some of the declarations in question, which would make a lot of sense if they took place during the transition between Attorneys General earlier in 2007).

But Moalin's attorneys didn't — and still haven't — learned whether that's what happened. (Note, I'm overdue to lay out the filings in the

case since I last covered it; consider it pending.)

One of the most insightful comments in Savage's story came from Daniel Richman, who noted that DOJ should have had (and presumably settled) this debate in the past.

> "It's of real legal importance that components of the Justice Department disagreed about when they had a duty to tell a defendant that the surveillance program was used," said Daniel Richman, a Columbia University law professor. "It's a big deal because one view covers so many more cases than the other, and this is an issue that should have come up repeatedly over the years."

We know it did — at least in similar form.

After all, the source of leverage the FISA Court has over DOJ and NSA — one that John Bates used as recently as 2011 — pertains to what judges will accept in submissions to the Court. It's what Royce Lamberth and Colleen Kollar-Kotelly used to put some limits on the use of the illegal wiretap collection. It was a still pressing issue when the Internet dragnet moved under FISC authorization.

> In April 2004, NSA briefed Judge Kollar-Kotelly and a law clerk because Judge Kollar-Kotelly was researching the impact of using PSP-derived information in FISA applications.

And we know a bit about early and more recent debates about DOJ's discovery obligations.

> The DOJ OIG reviewed DOJ's handling of PSP information with respect to its discovery obligations in international terrorism prosecutions. DOJ was aware as early as 2002 that information collected under the PSP could have implications for DOJ's litigation responsibilities

> under Federal Rule of Criminal Procedure Rule 16 and Brady v. Maryland, 373 U.S. 83 (1963).
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> Analysis of this discovery issue was first assigned to OLC Deputy Assistant Attorney General Yoo in 2003: However, no DOJ attorneys with terrorism prosecution responsibilities were read into the PSP until mid-2004, and as a result DOJ continued to lack the advice of attorneys who were best equipped to identify and examine the discovery issues in connection with the PSP.
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> Since then, DOJ has taken steps to address discovery issues with respect to the PSP, which is discussed in the DOJ OIG classified report. 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. [my emphasis]

To be clear, this only pertains to PSP information, not the transitional information from 2007, and not the Protect America Act and

FISA Amendments Act derived collection (which are only somewhat more legal because they have FISC sanction, but the Fourth Amendment issues would be the same). But some of the cases in question probably do derive from PSP and transitional information (which may be why DOJ has used such a restrictive approach to discovery). And given that they hadn't dealt with PSP-derived information on this front by 2009, it seems likely they were operating on a similar standard with transitional and PAA/FAA collection.

There's also the question of whether DOJ has been expansive enough in its search of dragnet information to meet discovery obligations. At least under the PSP, for example, DOJ searched only finalized intelligence product, not the underlying collection itself. If that's still the case, there's likely to be a great deal of exculpatory information not being turned over to defendants.

Either because John Yoo years ago said criminal discovery didn't have to look into the PSP collections, because all the illegal fruit still make such discovery problematic going forward, or because DOJ doubts the legality of the kluged dragnet intelligence it gets to prosecute terrorists, they still are only now defining discovery broadly enough to be meaningful to defendants.

And I'm skeptical DOJ will be making decisions on the true discovery obligations rather than those that won't disclose problematic legal theories.

Update: In a very timely case of ACLU FOIAing in March what Charlie Savage would be covering in October, the ACLU is suing to enforce a FOIA they filed on this issue over six months ago.