JANUARY 8, 2010: A REMARKABLY BUSY DAY IN TELECOM LAW

I Con the Record has just released a bunch of new documents, showing how (according to Ellen Nakashima) Sprint challenged a dragnet order, and in response got to see the FISA Court opinions authorizing the program. (Well, not really the telecom opinion; rather they mostly authorize the PRTT program.)

The official story goes like this:

> In early 2009, Sprint received an order saying that all customer call records had to be turned over to the government, current and former officials said. Over the summer and fall, the company's executives met several times with Justice Department officials to understand how Section 215, which compelled companies to turn over records relevant to investigations, could be used to mandate the transfer of all call records.
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> Dissatisfied with their answers, Sussmann, the Sprint attorney, wrote a detailed petition to challenge the order. In late 2009, shortly before the petition was to be filed, Robert S. Litt, the top intelligence official for the U.S. intelligence community, pressed officials to provide the legal rationale to the company, according to a former administration official.
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> Intelligence officials then furnished several court rulings, in particular, a 2004 opinion written by Colleen Kollar-Kotelly, then chief judge of the surveillance court, according to the documents released Wednesday. While the opinion related to the collection of e-mail addressing information, the legal

> rationale was identical.

But there are a few more details I find exceedingly interesting.

First, here's what the government declassified in response to Sprint's challenge:

- Colleen Kollar-Kotelly's July 24 [14], 2004 opinion (the government is only now admitting the date)
- Response to Orders for Additional Briefing (it's unclear whether this is PRTT or phone dragnet, but given the order, I'm guessing PRTT)
- Opinion (again, it's unclear whether this is PRTT or phone dragnet)
- The original application for the dragnet, including all exhibits, and the original dragnet order (note, we've not seen all the exhibits)
- The application, including all exhibits, the Primary Order, and Reggie Walton's supplemental order finding the phone dragnet did not violate ECPA

That is, not only the opinions authorizing the "relevant to" bullshit used to justify the program, but also the opinion stating that the dragnet did not violate ECPA.

And here's the other thing I find so interesting. The motion to unseal the records is

dated January 7, 2010. The motion for more time, the order granting it, and the order approving the unsealing of the records were all dated January 8, 2010.

January 8, 2010, January 8, 2010, January 8, 2010.

On January 8, 2010, DOJ's OLC issued an order finding that ECPA permitted telecoms to hand over toll records to the government voluntarily for certain kinds of investigations. OLC wrote that opinion because DOJ Inspector General Glenn Fine had been investigating National Security Letters (and, oh by the way, Section 215) for years, and found big problems, at least, with the paperwork FBI handed 3 telecoms who were living onsite at FBI. We found out about the order almost immediately, when Fine issued his report later that month.

I've long suspected that Reggie Walton only considered the ECPA question both because of Fine's ongoing NSL investigation but, probably, also because of whatever conclusions Fine drew in his examination of the illegal wiretap program (I suspect FISC only considered financial records for the same reason, Fine's 215 investigation in 2010) and potentially his ongoing investigations of Section 215.

And now we know that just as Fine was raising real questions about the legality of the incestuous record-sharing the government and the telecoms had been engaged in for years (one that's about to start again with the new "reformed" dragnet), Sprint not only demanded the underlying records authorizing the dragnet, but even the supplemental opinion finding the dragnet didn't violate ECPA.

Here's what I wrote 4 years ago about that OLC opinion.

> - As I will explain at length later, 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 disagree whether the FBI has represented what it was doing with exigent letters honestly 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.
- 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 open 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 January, EFF lost its bid to obtain that memo in the DC Circuit.

Now, what are the chances that Sprint also didn't get a looksee at the OLC memo authorizing not just what the FISC had approved, but also the violative Section 215 collection that had been in place until early 2009?

What are the chances that that OLC opinion, dated January 8, 2010 and pertaining to ECPA, is unrelated to the decision to declassify the FISC opinion assessing whether the phone dragnet violated ECPA?