

WHEN FBI DIRECTOR JIM COMEY ATE 20 JOURNALISTS FOR LUNCH, NSL EDITION

Yesterday, charismatic FBI Director Jim Comey had what was alternately described as a “lunchtime interview” and a “roundtable” with a bunch of journalists. (See NYT, ABC, AFP, NPR, McClatchy, HuffPo, LAT, WSJ, Politico, AP)

Where he proceeded to eat them for lunch.

While he addressed many topics, it appears one of his key goals was to lobby to keep National Security Letter authority as is rather than adopt the NSA Review Group’s recommended changes.

Here’s how Politico described it (I don’t mean to pick on Josh Gerstein; his was one of the most thorough reports of what Comey said, even in spite of writing one of the single bylined stories; the outlets above all published some version of this story.)

“The national security letter is not only **among the most highly regulated things the FBI does**, but a very important building block tool of our national security investigations,” Comey said. “What worries me about their suggestion that we impose a judicial procedure on NSLs, is that it would actually make it harder for us to do national security investigations than bank fraud investigations.”

Comey said applying to a judge for a letter to track down an internet user who made a post indicating an interest in carrying out a terrorist bombing would take days or perhaps weeks, even if more judges were added to the court.

“Being able to do it in a reasonably

expeditious way is really important to our investigations. So one of my worries about the proposal in the review group is it would add or introduce a delay," he said. The director did say he believed there was merit to the review panel's suggestion that such national security letters not come with a permanent bar on the recipient discussing the order with anyone other than legal counsel.

"We ought to be able to work something out that adopts a nondisclosure regime that is more acceptable to a broader array of folks than the one we have now," he said.

Comey acknowledged that the FBI process for issuing such letters was too lax several years ago, but insisted **it has since been fixed and is now rigorous and heavily audited**. "No doubt the process for NSLs was broken in some ways six years ago or longer. It is not broken today. And so I don't know why we would make natioanls [sic] security investigations harder in that respect than criminal investigations," he said. He also said doing so would likely encourage his agents to go through prosecutors to get a grand jury subpoena instead—a process that doesn't require the same number of approvals. [my emphasis]

Here's the problem with this (aside from the hilarious claims that a program with no external oversight is the most "highly regulated" thing the FBI does, as bolded).

The journalists all, without an exception I've found, permitted Comey to misrepresent the Review Group's two recommendations pertaining to National Security Letters (though HuffPo did include additional reporting noting that two of the Review Group members were Comey's law

professors and he thinks their emphasis is on gag orders preventing recipients from discussing the orders).

I described what the Review Group's NSL recommendations were here (Julian Sanchez also did a good post).

But to understand why this is important enough for me to be an asshole over, it helps to see Review Group Recommendation 1, affecting the Section 215 dragnet, next to Review Group Recommendation 2, affecting NSLs.

Recommendation 1

We recommend that section 215 should be amended to authorize the Foreign Intelligence Surveillance Court to issue a section 215 order compelling a third party to disclose otherwise private information about particular individuals only if [it finds that

(1)] the government has reasonable grounds to believe that the particular information sought is relevant to an authorized investigation intended to protect "against international terrorism or clandestine intelligence activities" and

(2) like a subpoena, the order is reasonable in focus, scope, and breadth.

Recommendation 2

We recommend that statutes that authorize the issuance of National Security Letters should be amended to permit the issuance of National Security Letters only upon a judicial finding that:

(1) the government has reasonable grounds to believe that the particular information sought is relevant to an authorized investigation intended to

protect “against international terrorism or clandestine intelligence activities” and

(2) like a subpoena, the order is reasonable in focus, scope, and breadth.

[punctuation and spacing altered in brackets]

That is, Recommendation 1 (affecting Section 215) and Recommendation 2 (affecting NSLs) are – in the clauses changing the standard of review to eliminate bulk collection – substantively **exactly the same**. And while the NSLs require judicial review to **get** to any enforceable of standard of review – which is definitely one huge proposed change to the NSLs – viewed together like this, it is clear that at least as significant a goal of the Review Group is to end bulk collection under any authority.

Particularly when you consider Recommendation 3, which recommends real minimization procedures for NSLs.

The Review Group recommended judicial review of NSLs, sure. But it also recommended either preventing or (given the likelihood this has been going on) eliminating bulk collection.

And yet a room full of – in some cases – very good journalists allowed the FBI Director to criticize what they all reported as the Review Group’s recommendation that NSL’s undergo judicial review without even mentioning he misrepresented the recommendation, addressing only a fraction of what the Review Group recommended.

Now maybe I’m wrong and the Review Group is not at all concerned about NSL bulk collection in spite of recommending eliminating it as their second recommendation. Maybe the voracious journalist-eating FBI Director really is concerned exclusively about judicial review (and willing to budge on gag orders).

Except by ignoring the bulk collection

recommendation pertaining to NSLs, the journalists have allowed the Administration to eliminate the most important part of this debate.

Already, the press is portraying the resolution of the Section 215 collection as a decision between third party retention and telecom retention (with AT&T and Verizon still holding and being able to contact-chain most calls that occur in the country). When you combine that with the complete silence about the recommendation that bulk NSLs be eliminated, the journalists are not mentioning that the Administration's proposed solutions for the phone dragnet (third party or telecom) and for NSLs (no change) preserve most of the aspects of bulk collection.

Jim Comey invited journalists from the nation's top media outlets in for lunch, and he ate them for lunch them on bulk collection. With the result that the Review Group's (and Leahy-Sensenbrenner's) central recommendation to eliminate dragnets has all but disappeared from discussions of what will happen to the dragnet.

Update: See NSArchive's call for NSL reform.