

COMEY'S EMPHASIS ON EXPIRING PATRIOT PROVISIONS: OTHER 215 USES AND ROVING WIRETAPS

A number of outlets have reported that, in an appearance Wednesday at Georgetown, Jim Comey suggested the other PATRIOT Act provisions expiring on June 1, not Section 215, are the critical ones. Here's one example:

In a speech Wednesday, FBI Director James B. Comey said losing the ability to use roving wiretaps or track lone wolves in terrorism investigations would be a "big problem." The bureau since the 1980s has been able to follow criminal suspects as they changed phones, he said, and the Patriot Act extended that capability to terrorism cases.

"That's going to go away" unless the law is reauthorized, Comey said.

That's not actually what Comey said. (Starting at 20:45) Rather, he said that losing *other uses* of Section 215 – in situations where FBI can't get use a grand jury subpoena or an NSL – would be "a big problem." He did say that losing Roving Wiretap Authority would be "a big problem." About Lone Wolf, he said only that it, "matters."

Significant impact, in ways that we're not talking about much, and I'm trying to make sure we're talking about. A lot of the focus on 215 is on the NSA's telephony metadata – should that be with the NSA, should that be with individual telepho-telephony providers and accessed by the NSA, and that's an important

discussion. That's a useful tool the FBI [shrugs] so it's a conversation I care about, but there are critical tools to the FBI that are going to sunset on June 1 that people don't talk about.

The first is, Section 215 is the vehicle through which the NSA, telephony database, was assembled, but we use Section 215 in individual cases, in very important circumstances fewer than 200 times a year we go to the FISA Court in a particular case and get particular records that are important to a Counterintelligence investigation or a Counterterrorism investigation. If we lose that authority, which I don't think is controversial with folks, that is a big problem. Because we will find ourselves in circumstances where we can't use a grand jury subpoena or we can't use a National Security Letter, unable to obtain information, with the court's approval that I think everybody wants us to be able to obtain, in individual cases, so that's a problem.

The second that's a big problem is the Roving Wiretap Authority is gonna expire on June 1. This is an authority we've had in criminal cases since the early, mid-eighties, where if a drug dealer or a criminal is dropping phones repeatedly, the judge can give us authority to intercept that *individual's* communications, no matter what device they're on, so we don't have to go back and start the process each time they dump a phone. What the PATRIOT Act did in 2001 was extend that authority to international terrorism investigations and counterintelligence investigations. That is not a controversial thing. That's gonna go away June 1 unless it's reauthorized.

And there's one other provision that

matters. And that's the so-called Lone Wolf – that's not a term I like but it's call a Lone Wolf provision by most people. And that is if we can't, if we can establish probable cause that someone in this country is up to terrible no good, they have probable cause to believe they are an international terrorist of some sort, but we can't prove what particular organization they're hooked up with, this provision would allow us – the judge – to authorize the interception, even if we can't say, "well they're Al Qaeda, no they're ISIL, no they're AQAP. That's an important, I think uncontroversial authority, these 3 are going to go away June 1. And I don't want them to get lost in the conversation about metadata.

The emphasis, then, is on the first two – other uses of Section 215 and Roving Wiretaps – and not Lone Wolf as much.

To be fair, Comey is likely obfuscating about all three of these.

We know that when the Internet collection that had formerly (until 2009) been done under NSLs is bulky; the FISC spent a lot of time policing minimization procedures on that collection until FBI finally started complying with the law in 2013. And when Comey says these are "individual cases," he likely means they are things like US-based Jihadist fora encompassing the communications of many individuals, or frequent or critical cyber targets with which many individual people might communicate as well. Indeed, these collection points are probably – like the phone dragnet – tied to enterprise investigations, which would explain why grand jury subpoenas would not be available.

As for the Roving Wiretap, remember that in 2007 the FISC reinterpreted that statute in secret to mean NSA could collect from entire circuits

because al Qaeda targets used many different email and phone addresses served by that circuit. While NSA is likely not relying on that particular opinion anymore (the Protect America Act and FISA Amendments Act replaced that collection), the opinion has likely been repurposed in similar ways to permit NSA to target far more broadly than actual suspect individuals. For example, for a frequent cybersecurity target, I could imagine NSA making an argument that hackers are frequently using (in reality, attacking) those servers, and therefore the FBI can collect on it. Similarly, I could imagine them using Roving Wiretaps to authorize US-based efforts to undermine the Tor network.

The same is almost certainly true of the Lone Wolf provision (in fact it has to be, because for years FBI insisted on extending even though they admitted they had never used it directly). Remember, Lone Wolves are supposed be US-based non-US persons engaged in international terrorism. But for a bunch of reasons, I suspect the provision is used to claim someone with zero tie to a terrorist organization overseas is a Lone Wolf (making him a foreign power) and then use that to claim some young Muslim man in the US "planning" plots with the foreign-based Lone Wolf can be targeted under FISA. (There must be some such explanation because there are lot of young sting targets apparently targeted using traditional FISA orders who have no discernible status as an agent of a Foreign Power.)

For what it's worth, I suspect the extension of WMD trafficking designations under USA F-ReDux to include those who conspire with or abet actual proliferators is intended to work the same way: to expand the Foreign Power definition to encompass many fairly.

All that said, Comey's emphasis was, in large part, on those other use of Section 215, and certainly didn't seem to be on the Lone Wolf provision. And he may well be correct that FBI

can't replace this function easily, if my guess that FBI uses Section 215 to conduct bulky collection for enterprise investigations is correct. Moreover, note that the assessments of agents in the IG Report released yesterday – that they could not “identify any major case developments from the records obtained in response to Section 215 orders” – predates the big spike in use of Section 215 to collect those Internet communications. So the question would need to be asked again about this collection to see if it has been critical.

All that said, if these other uses are so important, than the Intelligence Community shouldn't have played a game of chicken to retain a phone dragnet function which FBI largely duplicates with individualized collection already, which has never been critical to stopping a terrorist plot, and which may well hold up these purportedly critical other uses.