JAMES ORENSTEIN CALLS OUT JIM COMEY ON HIS PREVARICATIONS ABOUT DEMOCRACY

At a 10 AM Senate Homeland Security hearing on October 8, Jim Comey read prepared testimony that reiterated his claim that encrypted devices are causing FBI problems, but stated that the Administration is not seeking legislation to do anything about it.

> Unfortunately, changing forms of Internet communication and the use of encryption are posing real challenges to the FBI's ability to fulfill its public safety and national security missions.. This real and growing gap, to which the FBI refers as "Going Dark," is an area of continuing focus for the FBI; we believe it must be addressed given the resulting risks are grave both in both traditional criminal matters as well as in national security matters. The United States Government is actively engaged with private companies to ensure they understand the public safety and national security risks that result from malicious actors' use of their encrypted products and services. However, the Administration is not seeking legislation at this time.

That statement got the Administration a lot of good press, with the WaPo declaring "Obama administration opts not to force firms to decrypt data — for now" and the NYT, even after this ruling had been unsealed, reporting, "Obama Won't Seek Access to Encrypted User Data." In the actual hearing, Comey was more clear that he did intend to keep asking providers for data and

that the government was having "increasingly productive conversations with industry" to get them to do so, inspired in part by government claims about the ISIS threat. Part of that cooperation, per Comey, was "how can we get you to comply with a court order."

Sometime that same day, on October 8, government lawyers submitted a request to a federal magistrate in Brooklyn to obligate Apple to help unlock a device law enforcement had been unable to unlock on their own.

> In a sealed application filed on October 8, 2015, the government asks the court to issue an order pursuant to the All Writs Act, 28 U.S.C. § 1651, directing Apple, Inc. ("Apple") to assist in the execution of a federal search warrant by disabling the security of an Apple device that the government has lawfully seized pursuant to a warrant issued by this court. Law enforcement agents have discovered the device to be locked, and have tried and failed to bypass that lock. As a result, they cannot gain access to any data stored on the device notwithstanding the authority to do so conferred by this court's warrant.

The next day the judge, James Orenstein, deferred ruling on whether the All Writs Act is applicable in this case (though he did suggest it probably wasn't) pending briefing from Apple on how burdensome it would find the request. Orenstein released his memo after giving the government opportunity to review his order.

This is not the first time the government has tried to use the All Writs Act to force providers (Apple, in at least one of the known cases) to help unlock a phone. EFF described two instances from last year in a December post. It also reviewed a 2005 ruling where Orenstein refused to allow the government to use All Writs Act to force telecoms to provide cell site location in real time.

Of course, as Lawfare seems to suggest, it has taken a decade for the decision Orenstein made in that earlier ruling — that the government needs a warrant to get cell tracking from a phone — to finally get fully developed into a debate and some Supreme Court (US v. Jones) and circuit rulings. That's because in the interim, plenty of magistrates continued to compel providers to give such information to the government.

It's quite possible the same is true here: that this is not just the third attempt to get a court to issue an All Writs Act to get Apple to provide data, but that instead, a number of magistrates who are more compliant with government wishes have agreed to do so as well. Indeed, as Orenstein noted, that's a suggestion the government made in its application when it claimed "in other cases, courts have ordered Apple to assist in effectuating search warrants under the authority of the All Writs Act [and that] Apple has complied with such orders."

What Orenstein did, then, was to make it clear this continues to go on, that even as Jim Comey and others were making public claims (and getting public acclaim) for not seeking legislation that would compel production of encrypted data the government — including, presumably, the FBI — was seeking court orders that would compel production secretly. The key rhetorical move in Orenstein's order came when Orenstein compared Comey's public statements claiming to support debate on this issue to the attempt to claim the government had to rely on the All Writs Act because no law existed. In a long footnote, Orenstein quoted from Comey's Lawfare post,

> Democracies resolve such tensions through robust debate …. It may be that, as a people, we decide the benefits here outweigh the costs and that there is no sensible, technically feasible way to optimize privacy and safety in this particular context, or that public

> safety folks will be able to do their job well enough in a world of universal strong encryption. Those are decisions Americans should make, but I think part of my job is [to] make sure the debate is informed by a reasonable understanding of the costs.

Then Orenstein pointed out that relying on the All Writs Act would undercut precisely the democratic debate Comey claimed to want to have.

> Director Comey's view about how such policy matters should be resolved is in tension, if not entirely at odds, with the robust application of the All Writs Act the government now advocates. Even if CALEA and the Congressional determination not to mandate "back door" access for law enforcement to encrypted devices does not foreclose reliance on the All Writs Act to grant the instant motion, using an aggressive interpretation of that statute's scope to short-circuit public debate on this controversy seems fundamentally inconsistent with the proposition that such important policy issues should be determined in the first instance by the legislative branch after public debate — as opposed to having them decided by the judiciary in sealed, *ex parte* proceedings.

To be fair, even as the government was submitting its secret request to Orenstein, Comey was disavowing his former pro-democratic stance, and instead making it clear the government would try to find some other way to get orders forcing providers to comply.

But, given Orenstein's invitation for Apple to lay out how onerous this is on it, Comey might get the democratic debate he once embraced.

Update: When I wrote this in the middle of the

night I misspelled Judge Orenstein’s name. My apologies!