

JAMES ORENSTEIN'S ORDER SETS UP CONGRESSIONAL HEARING

As Rayne noted this morning, yesterday James Orenstein released his order stating that the government can't use the All Writs Act to force Apple to unlock the phone of a meth dealer, Jun Feng, who has already pled guilty. My favorite part of the order comes in the middle where he argues that those who passed the All Writs Act in 1789 were substantially the same people who wrote the Constitution guaranteeing Congress the right to legislate. He argued it would be unlikely that those same men would so quickly hand off that authority to the courts.

It is wholly implausible to suppose that with so many of the newly-adopted Constitution's drafters and ratifiers in the legislature, the First Congress would so thoroughly trample on that document's very first substantive mandate: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. Art. I, § 1. And yet that is precisely the reading the government proposes when it insists that a court may empower the executive to exercise power that the legislature has considered yet declined to allow.

I'm sad that that argument, which is probably the first in a series of court rulings that will end up at SCOTUS, won't have Scalia there to enjoy it.

Ultimately, though, Orenstein makes the very same argument he made back in October when he asked Apple to weigh in on this issue, updated with the point that I made – the same day the

government asked for this order Jim Comey told Congress they don't need legislation to get the same result.

It is also clear that the government has made the considered decision that it is better off securing such crypto-legislative authority from the courts (in proceedings that had always been, at the time it filed the instant Application, shielded from public scrutiny) rather than taking the chance that open legislative debate might produce a result less to its liking. Indeed, on the very same day that the government filed the ex parte Application in this case (as well as a similar application in the Southern District of New York, see DE 27 at 2), it made a public announcement that after months of discussion about the need to update CALEA to provide the kind of authority it seeks here, it would not seek such legislation. See James B. Comey, "Statement Before the Senate Committee on Homeland Security and Governmental Affairs," (Oct. 8, 2015), <https://www.fbi.gov/news/testimony/threats-to-the-homeland> ("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.").

Whether because it knew it would lose (and had lost), or because it wanted to pretend it respected encryption when in fact it did not, the Obama Administration adopted a strategy by which it told Congress it didn't need new legislation, all while asking the courts to rewrite CALEA in secret.

Whether accidentally or not (I suspect it is no accident), Orenstein's order comes at a particularly useful time, hours before the House Judiciary Committee will have what will be one of the more important hearings on this debate, featuring Jim Comey first, and then NY District Attorney Cy Vance, Apple's General Counsel Bruce Sewell, and rock star academic Susan Landau. It is likely to be the one hearing to which Apple will willingly provide a witness, and the committee is made up of a mix of former US Attorneys, skills for law enforcement, but also defenders of privacy and online security.

In his testimony for the hearing, Sewell said much the same thing Orenstein did:

The American people deserve an honest conversation around the important questions stemming from the FBI's current demand:

Do we want to put a limit on the technology that protects our data, and therefore our privacy and our safety, in the face of increasingly sophisticated cyber attacks? Should the FBI be allowed to stop Apple, or any company, from offering the American people the safest and most secure product it can make?

Should the FBI have the right to compel a company to produce a product it doesn't already make, to the FBI's exact specifications and for the FBI's use?

We believe that each of these questions deserves a healthy discussion, and any decision should be made after a thoughtful and honest consideration of the facts.

Most importantly, the decisions should be made by you and your colleagues as representatives of the people, rather than through a warrant request based on a 220 year old-statute.

For years, the government has stopped short of demanding legislation, presumably because they knew they wouldn't get what they wanted. They're finally being called on it.