

JIM COMEY SCOLDS THE PRESS FOR REPORTING ON A COURT FILING

Jim Comey, seemingly intent on squandering once limitless credibility in record time, has written a letter to the NYT to explain two of the FBI's deceptive operations reported recently. The one that's getting the attention – his admission that an agent posed as an AP reporter to catch a teenager making bomb threats – actually comes off as the less indefensible response.

Relying on an agency behavioral assessment that the anonymous suspect was a narcissist, the online undercover officer portrayed himself as an employee of The Associated Press, and asked if the suspect would be willing to review a draft article about the threats and attacks, to be sure that the anonymous suspect was portrayed fairly.

[snip]

That technique was proper and appropriate under Justice Department and F.B.I. guidelines at the time. Today, the use of such an unusual technique would probably require higher level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate.

Sure, the FBI decided to dress up as the press to catch someone who hadn't yet done real harm. Sure, they did it to deliver malware, basically a classic hack. Sure, it could have played to this kid's narcissistic tendencies using any number of other fake identities. Sure, this was ultimately going to get made at least as public as a court docket, which does undermine the credibility of a brand name press outlet. But it was a fairly limited operation, that wouldn't

have generated this much attention if Chris Soghoian (in the process of writing a brief to prevent the FBI to hack with even fewer limits) weren't such a meddling hippie.

Having insulted the press by asserting that the FBI playing dress up as the press is legal (though dodging somewhat on whether to do so to catch a teenager would be "proper" today), Comey then responded to the FBI's other recent black eye – being accused of shutting off cable and then pretending to be cable repairmen to access hotel rooms without a warrant – this way.

The Las Vegas case is still in litigation, so there is little we can say, but it would have been better to wait for the government's response and a court decision before concluding that the F.B.I. engaged in abusive conduct.

Every undercover operation involves "deception," which has long been a critical tool in fighting crime. The F.B.I.'s use of such techniques is subject to close oversight, both internally and by the courts that review our work.

"It would have been better to wait for the government's response and a court decision before concluding that the F.B.I. engaged in abusive conduct"???

Now, the reason the press picked up on this story is because the well-heeled defendants have superb lawyers who wrote a brief that is both engaging and chock full of evidence. The brief starts by laying out the stakes that matter for you and I, even if in this case they affect a bunch of Malaysian men who may have ties to Asian organized crime.

The next time you call for assistance because the internet service in your home is not working, the "technician" who comes to your door may actually be an undercover government agent. He will

have secretly disconnected the service, knowing that you will naturally call for help and—when he shows up at your door, impersonating a technician—let him in. He will walk through each room of your home, claiming to diagnose the problem. Actually, he will be videotaping everything (and everyone) inside. He will have no reason to suspect you have broken the law, much less probable cause to obtain a search warrant. But that makes no difference, because by letting him in, you will have “consented” to an intensive search of your home.

Jim Comey thinks the press shouldn't report on this until after the government has had its shot at rebuttal? Does he feel the same about the army of FBI leakers who pre-empt defense cases all the time? Does Comey think it improper for his FBI to have released this press release, upon defendant Wei Seng Phua's arrest, asserting that he is a member of organized crime as a fact and mentioning a prior arrest (not a conviction) that may or may not be deemed admissible to this case?

According to the criminal complaint, Wei Seng Phua, is known by law enforcement to be a high ranking member of the 14K Triad, an Asian organized crime group. On or about June 18, 2013, Phua was arrested in Macau, along with more than 20 other individuals, for operating an illegal sport book gambling business transacting illegal bets on the World Cup Soccer Tournament. Phua posted bail in Macau and was released.

I didn't see the FBI Director complaining about press stories, written in response to the press release, reported before the defense had been able to present their side.

The point is, one reason we have laws governing open access to court documents – which the

government limits all the time (including with claims about a broad need to hide the methods of its deception) – is so both sides get a bid to make their case, both before judges and before the public. Another reason is so that the press can act as a check on something that may be legal, but probably shouldn't be.

It may well be that FBI gets to use the evidence from their cable repairman scheme (given that superstar appellate lawyer Tom Goldstein is on the case, the defendants probably don't think this is as big of a slam dunk as the press has, probably because Caesars, a competitor with the Asian mob in the gambling industry, was a willing participant in the scheme, including turning *off* the cable service). But that's an entirely different question from whether they should, for precisely the reason the brief lays out: because if the FBI can turn off our cable to set up a cable repairman cover, then it undermines the principle of consensual searches.

These guys may or may not be douchebag Asian mobsters. But they are also being tried in the United States, which still subjects its criminal procedure to fairly broad but by no means unlimited press scrutiny.

Which means the press gets to weigh in. The defense gets to make their case, and if they make a compelling case, the press will report it, just as they almost always report FBI press releases on face value, as they did in this case (to say nothing of FBI's leaks).

Jim Comey, himself a master at working the press, should expect that, and if he wants his FBI to remain credible, should ensure their undercover operations are not just "legal" and "proper" but also "wise."