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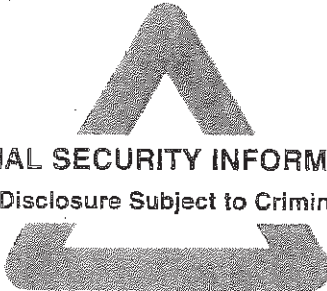
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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC.
PURSUANT TO SECTION 105B OF THE
FOREIGN INTELLIGENCE
SURVEILLANCE ACT. ~~(S)~~

Docket Number: 08-01

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL REPLY BRIEF (U)

The United States of America, through the undersigned Department of Justice attorneys, hereby moves this Court for leave to file the attached supplemental reply brief in the event that the Court grants Yahoo's motion for leave to file a supplemental brief. The grounds for the motion are as follows: ~~(S)~~

1. On June 20, 2008, this Court ordered the Government to file a supplemental brief responding to Yahoo's argument—which as the Court noted was “raised for the first time” on rebuttal at oral argument—that the directives in this matter are unlawful because “the surveillance at issue includes [REDACTED]

[REDACTED]

[REDACTED]” The Court's order specifically noted that the Government

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Classified by:	Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason:	1.4 (c)
Declassify on:	3 July 2033

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was directed to brief the issue because it "did not have an opportunity to respond to this argument" first raised "in rebuttal argument." (S)

2. On June 26, 2008, the government filed the supplemental brief. (S)
3. On June 30, 2008, Yahoo filed a Motion for Leave to File Reply to the Government's Supplemental Briefing Instantly, attaching an eight-page brief. (S)
4. Should the Court grant Yahoo's motion and accept Yahoo's brief, the Government respectfully requests that it be granted leave to file the attached supplemental reply brief. (S)

WHEREFORE the United States of America, by counsel, respectfully requests that should the Court grant Yahoo's motion, the Government's motion for leave to file a supplemental reply brief also be granted. A proposed Order is attached hereto. (S)

Respectfully submitted,



Gregory G. Garre
Acting Solicitor General

John A. Eisenberg

Office of the Deputy Attorney General

Matthew G. Olsen

National Security Division

United States Department of Justice

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO
INC. PURSUANT TO SECTION
105B OF THE FOREIGN
INTELLIGENCE SURVEILLANCE
ACT. ~~(S)~~

Docket Number: 08-01

ORDER

The United States has moved this Court for leave to file a supplemental reply brief in the event that the Court grant Yahoo's motion for leave to file a supplemental brief. The Court having granted Yahoo's motion, and it appearing that the Government's motion should also be granted,

IT IS HEREBY ORDERED, that the motion of the United States is
GRANTED. ~~(S)~~

Signed

Date

Time

Foreign Intelligence Surveillance Court of Review

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No. 08-01 ~~(S)~~
IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW (U)

IN RE DIRECTIVES TO YAHOO INC.
PURSUANT TO SECTION 105B OF THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

ON PETITION FOR REVIEW OF A DECISION OF THE
UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT (U)

EX PARTE SUPPLEMENTAL REPLY BRIEF FOR RESPONDENT ~~(S)~~

Gregory G. Garre
Acting Solicitor General

John A. Eisenberg
[REDACTED]
Office of the Deputy Attorney General

Matthew G. Olsen
John C. Demers
[REDACTED]
National Security Division

United States Department of Justice

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Classified by:	Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason:	1.4 (c)
Declassify on:	3 July 2033

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This brief responds to Yahoo's uninvited response to the supplemental brief the Government filed at the Court's request. If the Court grants Yahoo's motion for leave to file its brief, the Government requests that the Court grant its request to file this brief as well. (S)

1. As the Court's June 20, 2008, order recognized, Yahoo "raised for the first time" in its rebuttal argument the claim that distinct constitutional problems might arise from the possibility that the Government could acquire, from a targeted U.S. person traveling abroad, [REDACTED] [REDACTED] Yahoo did not make this argument at any prior point in this litigation, and it is therefore waived under settled principles governing appellate litigation. (S)

Yahoo now suggests that this new argument was somehow preserved by its argument in a brief before the FISC that U.S. persons have a reasonable expectation of privacy in [REDACTED] See Yahoo Supp. Rep. Br. at 1-2. That point—while relevant to whether the Fourth Amendment is implicated at all by the Government's [REDACTED]—is wholly unrelated to the argument that Yahoo made in its rebuttal and that prompted the Court to request additional briefing from the Government: that the [REDACTED] [REDACTED] presents unique Fourth Amendment issues [REDACTED]

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[REDACTED].¹ The only other passages addressing [REDACTED] that Yahoo identifies (factual descriptions of the range of information subject to the Government's directives) are even less on point, as they contain no legal argument at all. See, e.g., Nat'l For. Trade Council v. Natsios, 181 F.3d 38, 61 (1st Cir. 1999) ("We have repeatedly held that arguments raised . . . in a perfunctory manner are waived.") (collecting cases). Equally importantly, Yahoo never advanced, much less developed, the legal argument that it raised during its rebuttal in any of its briefs before this Court, a point Yahoo essentially concedes in its most recent filing. See Yahoo Supp. Br. at 3 ("Yahoo! had no reason to address [REDACTED] in detail on appeal . . ."). For this reason alone, the argument has been waived. See Surprenant v. Rivas, 424 F.3d 5, 16 (1st Cir. 2005). (S)

2. Even if the argument was not waived, however, the Court should not hold in Yahoo's favor, and thereby disrupt the Government's collection of important foreign intelligence information, given that the Government has not requested from Yahoo the [REDACTED] of a U.S. person. Taking

¹ See Tr. at 56-58; id. at 59 ([REDACTED])

[REDACTED] What are the circumstances that justify that? It's got to be different.") (emphasis added). (S)

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Yahoo's claim as an as-applied challenge,² however, it fails on the merits because the Government's acquisitions under the directives, including its [REDACTED], [REDACTED], comply fully with the Fourth Amendment. As this Court held in In re Sealed Case, there is no warrant requirement for foreign intelligence collection. And, when the limited number of the Government's acquisitions from U.S. persons is combined with the many procedures and policies in place for collections under the directives [REDACTED] [REDACTED]), see Gov't Br. at 34-53; Gov't Supp. Br. at 3-8, these acquisitions are manifestly reasonable. ~~(TS//SI/NF)~~

To the extent the Court believes that the acquisition of [REDACTED] [REDACTED] presents distinct constitutional questions, however, the Court should not resolve those questions at this time. The Government has not sought to collect [REDACTED] of any U.S. person from Yahoo. See [REDACTED] Decl. at 2, 4. Yahoo's challenge to the directives at issue, insofar as it [REDACTED] of U.S. persons [REDACTED] is therefore not ripe. And Yahoo

² Any facial challenge to the directives would necessarily fail because it is undisputed that the directives are constitutional in the vast majority of their applications. See Gov't Br. at 33 n.11 (citing Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190-91 (2007)); J.A. 38 n.7. ~~(S)~~

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lacks standing to challenge the directives in that respect, because its customers (let alone Yahoo itself) have not been injured by a hypothetical possibility that it has not experienced and may not experience.³ (S)

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³ To the extent the Court is concerned about Yahoo's ability to challenge such an acquisition in the future, it could direct the Government to notify Yahoo if the Government [REDACTED]

(S)

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (S)

For these reasons, and those set forth in the Government's briefs, the Court should affirm the ruling of the FISC. (S)

Respectfully submitted,



Gregory G. Garre
Acting Solicitor General

John A. Eisenberg
[REDACTED]
Office of the Deputy Attorney General

Matthew G. Olsen
John C. Demers
[REDACTED]
National Security Division

United States Department of Justice

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~~TOP SECRET//COMINT//ORCON, NOFORN~~**CERTIFICATE OF SERVICE (U)**

I hereby certify that, on July 3, 2008, true and correct copies of the Government's Notice of Filing, a Motion for Leave to File a Supplemental Reply Brief with an attached proposed Ex Parte Supplemental Reply Brief for Respondent to be lodged with the Court for filing should the Court grant the Government's motion, and this Certificate of Service were submitted, by hand delivery, to a Court Security Officer for delivery to the Court. True and correct copies of the Government's Notice of Filing, a Motion for Leave to File a Supplemental Reply Brief with an attached Redacted Supplemental Reply Brief for Respondent, and this Certificate of Service were submitted, by hand delivery, to a Court Security Officer for delivery to counsel of record for Yahoo!, Inc. (S)

Respectfully submitted,


National Security Division
U.S. Department of Justice~~TOP SECRET//COMINT//ORCON, NOFORN~~