

~~SECRET~~UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE
COURT OF REVIEWFILED WITH THE
COURT CLERK
CSO
DATE 10/30/08IN RE DIRECTIVES TO YAHOO!
INC PURSUANT TO SECTION 105B
OF THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT

No. 08-01

MOTION FOR LEAVE TO
FILE REPLY TO THE
GOVERNMENT'S
SUPPLEMENTAL BRIEFING
INSTANTER

UNDER SEAL

Yahoo! hereby moves this Court for leave to file *instante*r its reply to the Government's Supplemental Briefing. Yahoo! believes that its reply will substantially assist the court in resolving this case for the following reasons. First, the government's supplemental briefing mischaracterizes the record below and the record on appeal in asserting that Yahoo! has waived any challenge to the [REDACTED] of the directives and Yahoo!'s reply identifies where in the record this issue has been raised. Second, the government's supplemental briefing has failed to cite recent relevant Court of Appeals authority regarding [REDACTED] which is discussed in Yahoo!'s reply.¹ Third, the government's brief and supporting amendments introduce an

¹ [REDACTED]

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entirely new argument into the case related to the ripeness of Yahoo!'s challenge, and Yahoo!'s reply identifies why the issue remains ripe.

Yahoo!'s proposed reply does not exceed the page length afforded to the government for its reply and will not delay the litigation because it is being submitted simultaneously with this motion.

WHEREFORE, Yahoo! asks that the Court grant its Motion for Leave to File Reply to the Government's Supplemental Briefing *Instantly*, and accept the attached reply brief.

DATED: June 30, 2008



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th Day of June 2008, I provided 5 true and correct copies of Yahoo!'s **Motion For Leave To File Reply To The Government's Supplemental Briefing *Instant*** to an Alternate Court Security Officer, who has informed me that he will deliver one copy of the Briefing to the Court for filing, and a second copy to the:

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FILED WITH THE
COURT SEALING OFFICE
CSC: [Signature]
DATE: 6/30/08

No. 08-01

IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT

On Appeal from the United States Foreign Intelligence Surveillance Court

REPLY BY YAHOO! TO SUPPLEMENTAL BRIEFING

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In its filing, the government misstates the record by contending that Yahoo! waived any challenge to the directives based on [REDACTED] of U.S. persons' accounts. This mischaracterization is puzzling given that Yahoo! devoted half of an entire brief to this issue below. Second, the government also omitted key recent case law in arguing that an individual's reasonable expectation of privacy in [REDACTED] [REDACTED] is limited or diminished.¹ Finally, despite having defended vigorously its right to acquire the communications of U.S. persons, the government now argues that Yahoo's challenge is not ripe because the government has not yet sought such surveillance. But Yahoo!'s argument is certainly ripe – affirming the order compelling Yahoo! to comply with the directives would require Yahoo! to perform [REDACTED] surveillance on all subsequently identified Yahoo! accounts, even for U.S. persons. The government has not limited its directives to exclude such surveillance, nor represented that it will not target such accounts in the future. Because Yahoo! can only challenge a directive, not the daily tasking orders identifying the accounts [REDACTED] Yahoo! will likely have no opportunity for a later challenge. Thus, the issue is ripe for resolution now.

I. Yahoo! Has Not Waived its Challenge to [REDACTED]

Yahoo! repeatedly challenged the constitutionality of [REDACTED] before the FISC and in the briefing that preceded oral argument. Before the FISC, Yahoo! discussed the issue at length in its Supplemental Briefing on Fourth

¹ [REDACTED]

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Amendment Issues. *See* Ex. A. Section II of that brief is devoted to demonstrating that [REDACTED]

[REDACTED] *See id.* at 7-11.

In the introduction to that brief, Yahoo! expressly challenged the government's right to "seek[] access to [REDACTED]

[REDACTED]² *Id.* at 1.

In its ruling, the FISC recognized that [REDACTED] were at issue, but analyzed [REDACTED]. The court described the information sought by the government as including [REDACTED]

[REDACTED] the targeted account." J.A. at 188. It then defined the term "surveillance" to "refer generically to the acquisition of foreign intelligence information, [REDACTED]

[REDACTED] J.A. 189 n. 71. Thus, it acknowledged and rejected Yahoo!'s claim that it was unconstitutional for the government to acquire [REDACTED] under the PAA merely upon a showing that [REDACTED]

[REDACTED] *See* J.A. 173, n.54 & 188.

Not only did Yahoo! brief the constitutionality of [REDACTED] before the FISC, it raised the issue in this Court before oral argument. In its opening brief, Yahoo! defined the issue on appeal as whether "the U.S. Constitution allows the government to engage in warrantless surveillance of Yahoo!'s communications facilities to gain access to private communications of United States persons"

² *See also id.* at n.2

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Appellant's Br. at 7. Similarly, in its Statement of Facts, Yahoo! stated that in complying with the directives it [REDACTED] and [REDACTED]

[REDACTED] *Id.* at 25. Yahoo! also pointed out the PAA is not limited to "foreign" activities. *Id.* at 42. In Section II, Yahoo! specifically addressed "*searches*" under the PAA, stating that "Even if the *searches* conducted pursuant to the PAA do not require an actual warrant, the FISC erred in finding that those *searches* met the Fourth Amendment's reasonableness requirement." *Id.* at 46. Furthermore, Yahoo! did not limit the relief sought to exclude [REDACTED] instead it asked "that this Court reverse the FISC's judgment and find that the surveillance authorized by the directives is not 'otherwise lawful'" *Id.* at 62. Finally, in its reply, Yahoo! described [REDACTED]

[REDACTED] Reply at 17.

Of course, Yahoo! had no reason to address [REDACTED] acquisition [REDACTED] in detail on appeal because the FISC had accepted that Yahoo! users enjoy a reasonable expectation of privacy in the information sought by [REDACTED] surveillance. J.A. at 130. And none of Yahoo!'s briefs can be read to suggest that Yahoo! has challenged only [REDACTED] under the directives. Instead, Yahoo! has consistently claimed that [REDACTED]

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[REDACTED] *Id.*
at 16 n.15.

The government's claim appears to be that, until oral argument, Yahoo! had not offered a specific hypothetical involving [REDACTED]

[REDACTED] But Yahoo!'s failure to present that precise hypothetical in the briefs cannot be waiver. Yahoo! has consistently argued that the [REDACTED] of a U.S. citizens' Yahoo! account under the PAA is unconstitutional – whether or not [REDACTED]

[REDACTED] The fact that Yahoo!'s counsel described a particularly persuasive example of the unconstitutionality of [REDACTED] during oral argument is evidence of good oral advocacy, not prior waiver.³

II. Yahoo! Users Have a Reasonable Expectation of Privacy in [REDACTED]

Yahoo!'s users' privacy interests in [REDACTED] are not "limited" or subject to diminished Fourth Amendment protection.⁴ [REDACTED]

³ [REDACTED]

⁴ The prior briefing on this issue can be found at Ex. A. The court accepted this argument, and found the government had conceded the applicability of the Fourth Amendment, in part, to the [REDACTED] at issue. *See* J.A. 189.

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[REDACTED] in *United States v. Heckencamp*, 482 F.3d 1142, 1146 (9th Cir. 2007), the Ninth Circuit held that a limited access policy did not diminish students' reasonable expectation of privacy in their internet communications and activities.⁵

⁵ [REDACTED]

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Likewise, while Yahoo!'s terms of service provide certain circumstances under which communications can be turned over to law enforcement,⁶ it does not reserve the right to access and monitor all communications for any reason. Instead, like the limited policy at issue in *Heckenkamp*, 482 F.3d at 1147, it roughly parallels the statutory right of access that system providers have under federal law. *See* 18 U.S.C. § 2511(2)(a)(i). It does not require users to waive of their Fourth Amendment rights. Any other conclusion would render the holding of *Katz v. United States*, 389 U.S. 347 (1967) a nullity, because the right of providers to access real-time calls and stored voicemails on their network would preclude any reasonable expectation of privacy in the modern phone system.

III. The Government's Claim That It Has Not Yet Requested [REDACTED] is Irrelevant.

For the first time, the government contends that the case is not ripe because it has not yet sought to acquire [REDACTED] of U.S. persons. The Government did not assert this below, and has made no promise not to do so in the future. To the contrary, it has persistently argued for the right to acquire communications of U.S. persons abroad without any limit other than E.O. 12333.

The fact that the Government claims to have not yet sought the [REDACTED]

[REDACTED] of a U.S. person in this case does not resolve the issue because the

[REDACTED]

⁶ Yahoo!'s TOS is cited in full at Ex. A at 10, n. 16.

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directives under review clearly allow for such surveillance.⁷ J.A. 21-26. As the latest directive states, [REDACTED]

[REDACTED] J.A. 26 (emphasis added). The directives require Yahoo! [REDACTED]

[REDACTED] *Id.* An order compelling Yahoo! to comply with the directives would require Yahoo! to [REDACTED] on any later-identified accounts, even for U.S. citizens.

Even in declaratory judgment actions, when those cases involve “fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were ‘predominantly legal’ and did not require additional factual development.” *Peachlum v. City of York*, 333 F.3d 429, 435 (3d Cir. 2003) In the absence of a directive, challenging [REDACTED] of U.S. persons’ accounts might well only be a “conceivable” application of the statute. Here, however,

⁷ Although the government makes a sweeping statement to this effect in its introduction, the discussion on pages 2-7 and the [REDACTED] Declaration suggest this statement has been qualified, but the qualification has been redacted.

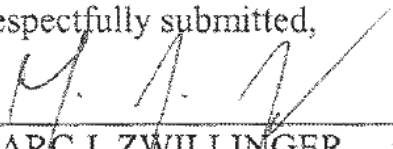
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where the directives expressly provide for such [REDACTED] the issue is ripe, because compelling compliance with the directives forces Yahoo! to [REDACTED] [REDACTED] of the accounts of all persons – whether U.S. or otherwise – whenever requested to do so.

Furthermore, the Government's admissions at oral argument demonstrate it often does not know in advance whether it is targeting a U.S. person. The Government admits that it often knows the targets only by their email account and not their "formal name." Tr. at 38. But an email address is not specific enough to demonstrate that a target is not a U.S. person. Because it appears that E.O. 12333 and the FBI OGC procedures come into play only when there is reason to believe the target is a U.S. person, surveillance will likely begin without these procedures being applied because the government lacks information on the target. Thus, neither these procedures nor the government's representation that it has not knowingly targeted a U.S. person resolves the constitutional issue.

Respectfully submitted,



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B

United States Foreign Intelligence Surveillance
Court of Review

In re: Directives to Yahoo, Inc.)
pursuant to Section 105B of the) Case No. 08-01
Foreign Intelligence Surveillance Act)

BEFORE: The Presiding Honorable Bruce M. Selya
Honorable Ralph K. Winter, Jr.
Honorable Morris S. Arnold

United States District Court
Courtroom No. 3
One Exchange Terrace
Providence, Rhode Island
June 19, 2008, 10:30 a.m.

[REDACTED] RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
[REDACTED]

Mechanical Steno - Transcript by Computer

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Present:

Gregory G. Garre, Acting Solicitor General
J. Patrick Rowan, Acting Assistant Attorney General
Mathew G. Olsen, National Security Division
[REDACTED] Office of Legal Counsel
[REDACTED] National Security Division
for the Government

Marc J. Zwillinger, Esquire
[REDACTED]
Jacob Summers, Law Clerk
[REDACTED]

1 briefing with high-level officials to the Attorney General, and
2 there may be additional back and forth on the question of
3 whether this person is a foreign agent. At that point, the
4 Attorney General, as he did with respect to the U.S. persons in
5 this case, would make a probable cause determination under
6 Section 2.5 that the target is reasonably believed to be an
7 agent of a foreign power. That's only the first part of the
8 procedures in place. After that, you've got additional checks
9 in place. You've got the targeting procedures that by statute
10 were required to be approved by the FISA Court and that were
11 approved by the FISA Court. I would direct your Honors'
12 attention --

13 JUSTICE SELYA: Do any of those procedures go to Mr.
14 Zwillinger called linkage?

15 MR. GARRE: Yes.

16 JUSTICE SELYA: [REDACTED] links up with
17 that?

18 MR. GARRE: The targeting procedures require the
19 government to ensure that the [REDACTED]
20 [REDACTED] an individual, whose outside the United
21 States, and that is a particular linkage and a point your Honor
22 is to, I believe, it's EA -- well, actually, the FISC Court
23 discussed that at page 93 of its decision.

24 JUSTICE SELYA: But what linkage -- but even assuming
25 that is used by the person outside the United States, who could

1 presumably could be a United States citizen, what then links
2 that [REDACTED] with the -- the agent of a foreign power?

3 MR. GARRE: Well, I think -- oftentimes, this is sort
4 of an academic question in the sense that oftentimes, and this
5 is true under the FISA process, the government knows an
6 individual by the [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] There is additional
18 particularity findings that are made as part of the
19 determination to [REDACTED]. The
20 government applies foreign intelligence factors, and those
21 factors are discussed at page -- I believe EA 12 of the -- the
22 ex parte joint appendix. Where there are particular factors
23 that are approved at the time that a certification is approved
24 by the Attorney General that limits the government's discretion
25 in determining whether [REDACTED] will have foreign

1 classified --

2 JUSTICE ARNOLD: I've read it. I'm just -- I'm having
3 difficulty -- okay. That's in the EA?

4 MR. GARRE: That's in the EA, that's right, your
5 Honor.

6 JUSTICE ARNOLD: All right. Thank you.

7 MR. GARRE: So, you've got the probable cause finding,
8 the targeting procedures, the minimization procedures. On top
9 of that, you also have the requirement, the statutory
10 requirement, that the Attorney General and the director of
11 national intelligence find that significant purpose of the
12 acquisition is to obtain foreign intelligence information. And
13 here again, the executive has gone further, because they not
14 only have made that finding at the certification stage, but
15 they've qualified it in an important respect by establishing
16 foreign intelligence factors that channel the discretion of the
17 analysts, [REDACTED]

18 [REDACTED] and again those procedures are
19 discussed at EA 12.

20 Let me talk a little bit about the location of the
21 surveillance, because this was another emphasis of Mr.
22 Zwillinger.

23 We think that the pertinent constitutional point is
24 the only surveillance at issue in this case is surveillance by
25 U.S. persons, who are outside the United States. That

1 surveillance is with respect to communications that are taking
2 place that are initiated outside the United States; and in that
3 respect, although it's true that e-mail is collected by Yahoo
4 at the Sunnyvale, California office, that is no different than
5 surveillance that has been conducted for decades outside of
6 FISA with respect to satellite communications.

7 When FISA was enacted in 1978, the definition of
8 electronic surveillance carved out radio communications, i.e.,
9 satellite communications, where one user is outside of the
10 country; and so under FISA you've had for decades, and this is
11 what the FISA Court said about this, on page 83 of its
12 decision: "Without question Congress is -- Congress is aware
13 and has been for quite some time that the intelligence
14 community conducts electronic surveillance of U.S. persons
15 abroad without seeking prior judicial authority." And one
16 aspect of that is the satellite communications, where you have
17 U.S. persons outside the United States communicating by
18 satellite, and those messages are picked up at a satellite dish
19 inside the United States. And for decades those communications
20 have been outside the FISA process, and no one has argued that
21 the warrant requirement applies to those communications. And
22 that makes sense when you think about it, and I think it was
23 Judge Whener, I think, who made this point that the focus ought
24 to be on the targets themselves where the communications are
25 taking place. If you had foreign to foreign email