

~~SECRET~~FILED WITH THE  
COURT SECURITY OFFICER  
CSO: [REDACTED]  
DATE: 5-29-08

No. 08-01

---

IN THE FOREIGN INTELLIGENCE SURVEILLANCE  
COURT OF REVIEW

---

YAHOO!,

*Appellant*

V.

UNITED STATES,

*Appellee.*

---

On Appeal from the Foreign Intelligence Surveillance Court

---

**[PROOF] BRIEF OF APPELLANT YAHOO!**

---

Marc J. Zwillinger  
Sonnenschein Nath & Rosenthal, LLP  
1301 K Street, N.W.  
Suite 600 East Tower  
Washington, D.C. 20005  
(202) 408-6400  
*Counsel for Yahoo!*

May 29, 2008

~~SECRET~~



~~SECRET~~**CORPORATE DISCLOSURE STATEMENT**

Yahoo! Inc. is a publicly held corporation. As of March 31, 2008, Capital World Investors, a privately held company, indicated in an SEC filing that it was the beneficial owner of 10.1% of Yahoo! stock. No other organization holds 10% or more of Yahoo! stock.

~~SECRET~~

~~SECRET~~**STATEMENT REGARDING ORAL ARGUMENT**

Appellant Yahoo! requests oral argument in this matter. As the FISC observed, this case is a “complicated matter of first impression.”<sup>1</sup> It is also a case of tremendous national importance. The issues at stake in this litigation are the most serious issues that this Nation faces today—to what extent must the privacy rights guaranteed by the United States Constitution yield to protect our national security. Moreover, there was no hearing below. The absence of such a hearing may have contributed, in part, to the FISC’s fundamental misunderstanding as to how erroneously targeted surveillance could affect United States persons. Accordingly, Yahoo! believes that oral argument in this matter would provide substantial assistance to this Court.

---

<sup>1</sup> Memorandum Opinion, filed April 25, 2008 at 3 (“Mem. Op.”) [J.A. \_\_\_\_]. Pursuant to an Agreement with the government and Fed. R. App. P. 30 (c)(2)(B), all cites to the Joint Appendix will be filled in after the government completes the assembly of the Joint Appendix and serves a copy on Yahoo!. At that time, Yahoo! will file its final brief.

~~SECRET~~

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
STATEMENT REGARDING ORAL ARGUMENT .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF JURISDICTION.....	1
I.    This Court Has Jurisdiction Over The Denial Of Any Application Made Under Chapter 36 of Title 50 of the United States Code.....	1
II.   The Government’s Motion to Compel and Yahoo!’s Response Are Functionally Equivalent to a Petition and Should Be Treated As Such .....	3
III.  Due Process Compels This Court To Interpret The PAA As Providing Yahoo! With An Appellate Right .....	4
STATEMENT OF THE ISSUES .....	7
STATEMENT OF CASE.....	8
I.    The Nature of the Case .....	8
II.   Congress’s Response to Foreign Intelligence Surveillance.....	9
III.  The Protect America Act .....	11
IV.  The Issues Litigated Below.....	13
V.    The FISC Ruling .....	17
STATEMENT OF FACTS .....	25
SUMMARY OF ARGUMENT .....	26
STANDARD OF REVIEW .....	29
ARGUMENT .....	30



I.	The FISC Erred in Finding That the Surveillance Authorized By the PAA . Falls Under A Foreign Intelligence Exception to the Warrant Requirement.....	30
A.	Much of the Communications at Issue are Protected by the Fourth Amendment .....	30
B.	The Court Should Not Recognize A Foreign Intelligence Exception to The Warrant Requirement for U.S. Persons Using U.S. Communications Facilities.....	33
C.	If the Court Does Recognize a Foreign Intelligence Exception to the .. Warrant Requirement It Should Not Apply Here .....	37
D.	No Other Exceptions to the Warrant Requirement Apply .....	44
II.	The FISC Applied the Wrong Legal Standard in Assessing the Reasonableness of the Requests .....	46
A.	The FISC Erred by Ignoring Several Relevant Factors in Measuring the Reasonableness of the Surveillance Under the Fourth .. Amendment.....	47
1.	The Fourth Amendment Requires Prior Judicial Scrutiny..... of Surveillance Targeting U.S. Persons .....	51
2.	The PAA Does Not Require a Finding of Particularity that the .... Targeted Facility is, or is About to Be Used, By the Target of the Surveillance .....	53
B.	The Surveillance Authorized By The Directives Is Unreasonable.....	58
	CONCLUSION .....	62
	CERTIFICATE OF COMPLIANCE WITH RULES 32(A) .....	63

## TABLE OF AUTHORITIES

### CASES

<i>Arrastia v. United States</i> , 455 F.2d 736 (5th Cir. 1972).....	5, 6
<i>Bauman v. United States District Court</i> , 557 F.2d 650 (9th Cir. 1997).....	6
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979) .....	45
<i>Berger v. State of New York</i> , 388 U.S. 41 (1967).....	55, 56
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967).....	59
<i>In re Chambers Development Co.</i> , 148 F.3d 214 (3d Cir. 1998) .....	9
<i>Chimel v. California</i> , 395 U.S. 752 (1969).....	51
<i>City of Indianapolis v. Edmond</i> , 531 U.S. 32 (2000) .....	45
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971) .....	50, 51
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	15
<i>Dalia v. United States</i> , 441 U.S. 238 (1979) .....	51
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) .....	5
<i>Green v. Georgia</i> , 442 U.S. 95 (1979) .....	5, 6
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956).....	5
<i>Harman v. Pollock</i> , 446 F.3d 1069 (10th Cir. 2006).....	57
<i>Katz v. United States</i> , 389 U.S. 347 (1967) .....	<i>passim</i>
<i>In re Sealed Case</i> , 310 F.3d 717 (For. Intel. Surv. Ct. 2002).....	<i>passim</i>
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968) .....	45



<i>United States v. Bedford</i> , 519 F.2d 650 (3d Cir. 1975) .....	57
<i>United States v. Bianco</i> , 998 F.2d 1112 (2d Cir. 1993).....	29
<i>United States v. Biasucci</i> , 786 F.2d 504 (2d Cir. 1986) .....	47
<i>United States v. Bin Laden</i> , 126 F. Supp. 2d 264 (S.D.N.Y. 2000) .....	<i>passim</i>
<i>United States v. Bonner</i> , 808 F.2d 864 (1st Cir. 1986).....	56
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975).....	45
<i>United States v. Brown</i> , 484 F.2d 418 (5th Cir. 1973) .....	27
<i>United States v. Cavanagh</i> , 807 F.2d 787 (9th Cir. 1987) .....	11
<i>United States v. Carter</i> , 413 F.3d 712 (8th Cir. 2005) .....	56, 57
<i>United States v. Clay</i> , 430 F.2d 165 (9th Cir. 1976) .....	27
<i>United States v. Darensbourg</i> , 520 F.2d 985 (5th Cir. 1975) .....	57
<i>United States v. Disanto</i> , 86 F.3d 1238 (1st Cir. 1996).....	29
<i>United States v. Duggan</i> , 743 F.2d 59 (2d Cir. 1984) .....	11, 41
<i>United States v. Falls</i> , 34 F.3d 674 (8th Cir. 1994).....	47
<i>United States v. Gitcho</i> , 601 F.2d 369 (8th Cir. 1979) .....	57
<i>United States v. Harbin</i> , 250 F.3d 532 (7th Cir. 2001) .....	5
<i>United States v. Johnson</i> , 952 F.2d 565 (1st Cir. 1991) .....	11
<i>United States v. Karo</i> , 468 U.S. 705 (1984) .....	32
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976).....	45
<i>United States v. Mendiola</i> , 42 F.3d 259 (5th Cir. 1994).....	5

<i>United States v. Mesa-Rincon</i> , 911 F.2d 1433 (10th Cir. 1990).....	47
<i>United States v. Mousli</i> , 511 F.3d 7 (1st Cir. 2007) .....	57
<i>United States v. Pelton</i> , 835 F.2d 1067 (4th Cir. 1987) .....	11, 41
<i>United States v. Randolph</i> , 364 F.3d 118 (3d Cir. 2004) .....	11, 40
<i>United States v. Sattar</i> , No. 02 CR 395 JGK, 2003 WL 22137012 (S.D.N.Y. Sept. 15, 2003) .....	41
<i>United States v. Sklaroff</i> , 323 F.Supp. 296 (S.D. Fla. 1971) .....	57
<i>United States v. Singletary</i> , 268 F.3d 196 (3d Cir. 2001).....	20
<i>United States v. Tortorello</i> , 480 F.2d 764 (2d Cir. 1973) .....	32
<i>United States v. Truong Dinh Hung</i> , 629 F.2d 908 (4th Cir. 1980) .....	<i>passim</i>
<i>United States v. United States District Court ("Keith")</i> , 407 U.S. 297 (1972) .....	<i>passim</i>
<i>United States v. Vega-Figuerosas</i> , 234 F.3d 744 (1st Cir. 2000).....	57
<i>Vernonia Sch. District 47J v. Acton</i> , 515 U.S. 646 (1995).....	45
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973).....	5, 6
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	15
<i>Zweibon v. Mitchell</i> , 516 F.2d 594 (D.C. Cir. 1975).....	36, 37

#### **STATUTES, EXECUTIVE ORDERS, AND LEGISLATIVE HISTORY**

28 U.S.C. § 1651 .....	6
50 U.S.C. § 1801 .....	<i>passim</i>
50 U.S.C. § 1802 .....	<i>passim</i>



50 U.S.C. § 1803.....	<i>passim</i>
50 U.S.C. § 1804.....	<i>passim</i>
50 U.S.C. § 1805.....	<i>passim</i>
50 U.S.C. § 1805a.....	<i>passim</i>
50 U.S.C. § 1805b.....	<i>passim</i>
50 U.S.C. § 1805c.....	<i>passim</i>
Exec. Order 12,333 (Dec. 4, 1981).....	<i>passim</i>
Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 522 (2007).....	<i>passim</i>
U.S. Const. Art. II, § 2.....	36
U.S. Const. Amend. IV.....	<i>passim</i>

### OTHER

THE OXFORD DICTIONARY OF ENGLISH (revised edition). Ed. Catherine Soanes and Angus Stevenson. (Oxford University Press, 2005 Oxford Reference Online.) 19 May 2008 <i>available at</i> <a href="http://www.oxfordreference.com/views/ENTRY.html?subview=Main&amp;entry=t140.e3328">http://www.oxfordreference.com/views/ENTRY.html?subview=Main&amp;entry=t140.e3328</a> .....	2
--	---

~~SECRET~~**STATEMENT OF JURISDICTION**

This Court has jurisdiction under 50 U.S.C. §§ 1803(b) and 1805b(i), because Yahoo! has appealed the denial of an application made to the Foreign Intelligence Surveillance Court ("FISC") and Yahoo!'s response to the government's motion to compel is functionally equivalent to a petition filed pursuant to 50 U.S.C. § 1805b(h)(1). Moreover, this court should avoid interpreting the PAA in a way to deny Yahoo! the right to appeal a decision that the government can appeal because it would create significant due process concerns and is contrary to congressional intent.

**I. This Court Has Jurisdiction Over The Denial Of Any Application Made Under Chapter 36 of Title 50 of the U.S. Code**

This Court has jurisdiction over "*any application made under this chapter.*" 50 U.S.C. § 1803(b) (emphasis added). *See also In re Sealed Case*, 310 F.3d 717, 721 (For. Intel. Surv. Ct. 2002). Congress authorized motions to compel and review of directives in 50 U.S.C. § 1805b, which is part of the same chapter as the jurisdictional provision contained in 50 U.S.C. § 1803(b). Neither FISA nor the FISC Rules of Procedure, which apply to all proceedings before the FISC, define what constitutes an "application," but Rule 8 of the FISC Rules of Procedure, entitled "Form of Applications for Court Order," does not limit "applications" to any particular type of court order. The ordinary meaning of application is "a

~~SECRET~~



~~SECRET~~

formal request to an authority.”<sup>1</sup> That meaning, coupled with § 1803(c)’s broad jurisdictional provision, supports the conclusion that “application” encompasses requests made of the court under all sections of Chapter 36.<sup>2</sup>

Here, two “applications” were made to the FISC, the government’s request to compel Yahoo! to comply with the directives, and Yahoo!’s request to have the court declare the directives and the PAA unconstitutional.<sup>3</sup> While the FISC denied Yahoo!’s request, and substantially granted the government’s request, the decision qualifies as a denial of both applications. With regard to Yahoo!, Yahoo! requested to set aside the directives was denied. That denial confers appellate rights.

Moreover, in granting the government’s motion, the FISC placed certain restrictions on the government, including the requirements that: (1) the government follow the Executive Order 12333, § 2.5 procedures; (2) the Attorney General

---

<sup>1</sup> THE OXFORD DICTIONARY OF ENGLISH (revised edition). Eds. Catherine Soanes and Angus Stevenson. (Oxford University Press, 2005 Oxford Reference Online.) 19 May 2008 *available at* <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e3328>>

<sup>2</sup> This interpretation would not render 50 U.S.C. § 1805b(i) superfluous, because § 1805b(i) provides additional timing requirements not present under § 1803(b) for review of directives on a direct petition.

<sup>3</sup> See Yahoo!’s Mem. in Opp. To Mot. to Compel at 6, [J.A. \_\_] (filed Nov. 30, 2007) (summarizing why the directives violate the Fourth Amendment).

~~SECRET~~

~~SECRET~~

(“AG”) must reauthorize the surveillance every 90 days whenever it is reasonable to believe the target is a U.S. person; (3) the amendments made to the certifications must remain in force; (4) the government must notify the court of any changes to an authorization. Order Compelling Compliance with Directives (filed Apr. 25, 2008) at 2-3 [J.A. \_\_\_]. In *In re Sealed Case*, this Court interpreted § 1803(b) and held that the conditions placed on an application the government submitted—rather than outright denial—were sufficient to establish appellate jurisdiction. 310 F.3d at 721. Under § 1803(b), therefore, this Court has jurisdiction to review that FISC decision, no matter who brings the appeal.

## **II. The Government’s Motion to Compel and Yahoo!’s Response Are Functionally Equivalent to a Petition and Should Be Treated As Such**

As indicated in Yahoo!’s Petition for Review, 50 U.S.C. § 1805b(3)(i) and 50 U.S.C. § 1805b(g), when read in tandem, make clear that Congress did not intend the FISC to be the final arbiter of the constitutionality of directives issued under the Protect America Act of 2007 (the “PAA”). The government’s motion to compel has the same functional effect as a petition filed by the recipient of a directive under 50 U.S.C. § 1805b(h)(1)(A): it places the constitutionality of a directive issued under the PAA before the FISC. Yahoo! could have responded to the motion to compel by styling its response as a petition for review under § 1805b(h)(1)(A). Under 50 U.S.C. § 1805b(3)(i), this Court has jurisdiction to

~~SECRET~~

~~SECRET~~

review a decision issued under subsection (h). Thus, if Yahoo! responds to a motion to compel by filing a petition, or perhaps by titling its response as a petition—jurisdiction exists in this court. In *In re Sealed Case*, this Court stated that its jurisdictional analysis would not “elevate form over substance and deprive the government of judicial review of the minimization procedures imposed by the FISA court.” *Id.* at 721. The Court should follow that reasoning and hold that the title and technical form of Yahoo!’s response is not controlling, and treat its response to the motion to compel as a petition for purposes of appellate review. Denying jurisdiction in this case would place the form of the challenge—an appeal from a decision on a motion to compel—ahead of the substance—a constitutional challenge to a directive, and it would condition a recipient’s right to appeal on who files first and the form of the response.

### **III. Due Process Compels This Court to Interpret the PAA as Providing Yahoo! with an Appellate Right**

Due process concerns should also compel this Court to find that Yahoo! has a right to appeal. As discussed above, the government’s motion to compel constitutes an “application made under this chapter” for purposes of § 1803(b) and provides this Court with appellate jurisdiction if it is denied. Under *In re Sealed Case*, the conditions placed on the government in granting its motion are sufficient to convey appellate jurisdiction. 310 F.3d at 721.

~~SECRET~~

~~SECRET~~

Although the government may argue that only the *applicant* may appeal the partial denial of its application, limiting appellate rights to the government cannot stand in the face of due process. The right to appeal “‘is fundamental to the concept of due process of law,’ and therefore has constitutional implications.” *United States v. Mendiola*, 42 F.3d 259, 260 n. 1 (5th Cir. 1994) (quoting *Arrastia v. United States*, 455 F.2d 736, 739 (5th Cir. 1972)). While there is no constitutional obligation to grant a right to appeal, if a statute “create[s] appellate courts . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection clauses of the Constitution.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). “When [rights,] . . . are granted by statute, the question becomes whether it violates due process to allow only one party to exercise” those rights. *United States v. Harbin*, 250 F.3d 532, 540 (7th Cir. 2001).

In *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973), the Supreme Court held that due process requires certain rights, such as a prosecution’s right to discovery from the defense regarding alibi evidence, to be met with a reciprocal obligation to the defense. *Id.* at 475-76.<sup>4</sup> In so holding, the Court recognized that it “is

---

<sup>4</sup> See also *Green v. Georgia*, 442 U.S. 95, 97 (1979) (trial court’s exclusion of defense testimony pursuant to the state’s hearsay rules violated due process where

~~SECRET~~



~~SECRET~~

fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidences which he disclosed . . . ." *Id.* at 476-77.

Here, it would be fundamentally unfair to interpret the PAA to deny Yahoo! the right to appeal the FISC's ruling—a right "*fundamental* to the concept of due process of law"—while granting the government that same right. *Arrastia*, 455 F.2d at 739 (emphasis added). If that were the case, a provider could never appeal a contempt penalty, but the government could seek review of any condition imposed on one of its applications, even in the same order. Such a disparity in power is fundamentally unfair and inconsistent with the Protect America Act, which otherwise provides the government and providers with equal access to the courts. *See* 50 U.S.C. § 1805b(i) (providing both the government and providers with a right to appeal).<sup>5</sup>

---

the state's rules allowed the government to introduce the same evidence in a co-defendant's trial).

<sup>5</sup> This Court could also issue a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651, gives "all courts established by acts of Congress," including this court, the power to issue all writs appropriate in "aid of their respective jurisdiction." In *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1997), the 9th Circuit set forth a list of factors to consider when deciding whether a writ of mandamus is warranted. Of those, at least three are present here: (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) The petitioner will be damaged or prejudiced in a way

~~SECRET~~

~~SECRET~~**STATEMENT OF THE ISSUES**

1. Whether the Fourth Amendment of 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 reasonably believed to be located outside the United States, where gathering foreign intelligence is not the primary purpose of the surveillance and where the statute requires no finding that the U.S. persons under surveillance is an agent of a foreign power.

2. Whether surveillance of U.S. persons located overseas who are communicating through U.S. communications facilities is reasonable under the PAA, where such surveillance is conducted without any prior judicial review and when there has been no showing that the facilities to be surveilled have been or are about to be used by the target of the surveillance.

---

not correctable on appeal \* \* \* (5) The district court's order raises new and important problems, or issues of law of first impression.

~~SECRET~~

~~SECRET~~**STATEMENT OF THE CASE****I. The Nature of the Case**

This appeal arises from Yahoo!'s efforts to safeguard the Fourth Amendment rights of its customers and subscribers against a program of warrantless surveillance authorized by the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 522 (2007) ("PAA"). This case presents the core issue that this court was created to answer – to what extent must the privacy rights of U.S. persons yield to interests of national security. After receiving [REDACTED] PAA directives on November 8, 2007 from the AG and DNI, Yahoo! served a written objection on the government, explaining its reluctance to initiate surveillance without a court order due to the deficiencies it had identified in the directives and the PAA.

After extensive discussions between Yahoo! and the government, the government moved the FISC to compel Yahoo! to comply with the directives and Yahoo! responded by asking the FISC to find that the directives were not "otherwise lawful" because they violated the Fourth Amendment.<sup>6</sup> Mot. to

---

<sup>6</sup> One of the issues in these discussions involved whether Yahoo! would file a petition under 50 U.S.C. § 1805b(h) or whether the government would initiate the litigation via a motion to compel. Both parties attempted to structure a briefing schedule that would not force the parties and the court to brief and decide these complicated issues in the compressed timeframe provided by the PAA for litigation related to a petition under 50 U.S.C. § 1805b(h). Ultimately, the government commenced the litigation, noting Yahoo!'s request for the opportunity to brief the

~~SECRET~~

~~SECRET~~

Compel Compliance at 6-13 (filed Nov. 30, 2007) [J.A. \_\_\_\_] Five months of litigation ensued, during which the FISC requested additional briefing on a multitude of issues. The result of the litigation was the FISC's April 25, 2008 Order and Memorandum Opinion compelling Yahoo! to comply with the directives. The FISC denied Yahoo!'s motion to seek a stay of compliance with directives while this appeal was pending, and Yahoo! began complying with the directives on May 12, 2008, under direct threat of civil contempt.<sup>7</sup>

## **II. Congress's Response to Foreign Intelligence Surveillance**

The issue of the legality of foreign intelligence surveillance has been a vexing constitutional and statutory problem, which Congress first took up thirty years ago when it passed the Foreign Intelligence Surveillance Act of 1978 ("FISA"), codified at 50 U.S.C. §§ 1801 *et seq.* FISA provides a series of procedures designed to protect the privacy interests of individuals while enabling federal officers, authorized by the AG, to obtain orders from the Foreign Intelligence Surveillance Court ("FISC") to conduct "electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign

---

issues and proposing an agreed upon briefing schedule. *See* Mot. to Compel Compliance at 7-8 [J.A. \_\_\_\_].

<sup>7</sup> Order, dated May 9, 2008 at 2 [J.A. \_\_\_\_].

~~SECRET~~



~~SECRET~~

intelligence information.” 50 U.S.C. § 1802(b).<sup>8</sup> On its face, FISA applies to all communications that are sent to or from a person in the U.S., if the acquisition occurs in the U.S.. 50 U.S.C. § 1801(f)(2).

In order to obtain a FISA Order authorizing electronic surveillance, the applying officer must state the “facts and circumstances relied upon by the applicant to justify his belief that—(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power,” 50 U.S.C. § 1804(a)(4), and an executive official must, among other things, certify that a significant purpose<sup>9</sup> of the surveillance is to obtain foreign intelligence information that cannot reasonably be obtained using normal investigative techniques. 50 U.S.C. § 1804(a)(7). The FISC reviews that application to determine, among other things, whether probable cause exists to believe that the target is a foreign power or

---

<sup>8</sup> The terms “foreign power,” “agent of a foreign power” and “foreign intelligence information,” are defined terms meant to ensure that the targets subject to surveillance and the information sought by that surveillance are generally related to either foreign governments, political organizations, entities or terrorists. 50 U.S.C. § 1801(a),(b),(e).

<sup>9</sup> The phrase “a significant purpose” replaced “the purpose” in the amendments made to FISA by the USA PATRIOT ACT. This Court found this change to be constitutional, in part, because all of the procedural protections of FISA remained in place. *See* 310 F.3d at 746.

~~SECRET~~

~~SECRET~~

its agent and each of the facilities or places at which the electronic surveillance is directed is being used by a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a)(3). If the target is a U.S. person, the FISC engages in an additional level of judicial review regarding the nature and purpose of the surveillance. 50 U.S.C. § 1805(a)(5).<sup>10</sup>

### III. The Protect America Act

Despite the careful balance that FISA reflected, on August 4, 2007, Congress passed the PAA and, recognizing the haste with which it passed the statute, included a sunset provision which caused the statute to lapse after 180 days. PAA § 6(c).<sup>11</sup> The PAA provided the executive branch with substantial new authority to require U.S.-based communications providers to assist the government in acquiring the private communications of persons, including U.S. citizens, who are reasonably believed to be located overseas, whether or not such individuals have engaged in wrongdoing or are agents of a foreign power.

---

<sup>10</sup> Numerous courts have approved of the procedures for obtaining a court order under FISA. *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984); *United States v. Cavanagh*, 807 F.2d 787, 789-90 (9th Cir. 1987); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Johnson*, 952 F.2d 565, 573 (1st Cir. 1991); *In re Sealed Case*, 310 F.3d at 746.

<sup>11</sup> On January 31, 2008, Congress extended this period to 195 days. See Pub. L. 110-182, §1, 122 Stat. 605. Thus, the PAA expired on February 16, 2008.

~~SECRET~~

~~SECRET~~

The PAA does this, in part, by excluding from FISA's definition of "electronic surveillance" surveillance directed at persons reasonably believed to be outside the U.S. Instead of the prior judicial review FISA provides, the PAA allows the DNI and the AG to direct providers to intercept and disclose communications of their users after certifying to the FISA court, that:

- (1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to section 1805c of this title;
- (2) the acquisition does not constitute electronic surveillance;<sup>12</sup>
- (3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider, custodian, or other person . . . who has access to communications, either as they are transmitted or while they are stored . . . ;
- (4) a significant purpose of the acquisition is to obtain foreign intelligence information; and

---

<sup>12</sup> "Electronic surveillance" is defined in FISA, and generally includes the acquisition by "electronic, mechanical, or other surveillance device" of wire or radio communications. 50 U.S.C. § 1801(f). The PAA specifically states that "[n]othing in the definition of electronic surveillance under section 1801(f) of this title shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States." Nevertheless, acquisitions to be performed under the PAA constitute "surveillance" as that term is commonly understood. See 50 U.S.C. § 1805a; Mem. Op. at 10 [J.A. \_\_\_\_] (Using the term "surveillance" to encompass all modes of acquisition under the directives.)

~~SECRET~~

~~SECRET~~

(5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 1801(h) of this title.

50 U.S.C. § 1805b(a).

Under the PAA, the certification is “not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.” 50 U.S.C. § 1805b(b). Once a certification is filed, the government can issue a directive to any provider requiring it to “immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition.” 50 U.S.C. § 1805b(e)(1).

#### **IV. The Issues Litigated Below**

In its initial motion to compel, the government argued that the directives served on Yahoo! should be enforced because they complied with the terms of the PAA and were otherwise lawful and consistent with the Fourth Amendment. Mot. to Compel Compliance at 4-5 [J.A.\_\_\_\_].

Yahoo! responded by arguing that the directives served upon it – as well as the PAA itself – were unconstitutional because they permitted warrantless surveillance of U.S. persons’ private communications without prior judicial review, and were not reasonable. Yahoo!’s Mem. in Opp. to Mot. to Compel at 6 [J.A.\_\_\_\_]. Yahoo! also argued that the directives did not comply with the terms of the PAA, because the directives required Yahoo! to conduct surveillance on an

~~SECRET~~



~~SECRET~~

unlimited number of targets that had not yet been identified by the government at the time the certifications were filed, making it impossible for the government to have certified that the interception “does not constitute electronic surveillance” as required by 50 U.S.C. § 1805b(a)(2). *Id.* at 24. Finally, Yahoo! raised a separation of powers issue related to the PAA’s attempt to specify a “clearly erroneous” standard of review to be used by the FISC when reviewing the government’s targeting procedures under the PAA. *Id.* at 21.

In its response, the government argued that the surveillance authorized by the PAA was acceptable under the foreign intelligence exception to the Warrant Clause, and that the directives were “reasonable” because of: (1) its compelling interest in obtaining foreign intelligence information; (2) the scope and duration of the surveillance; and (3) privacy protections for U.S. persons found in minimization procedures and in the government’s commitment to obtain AG authorization prior to targeting a U.S. person using the procedures set forth in Executive Order 12333, section 2.5. Mem. in Supp. of Gov’t. Mot. to Compel at 13-21 (filed Dec. 13, 2007) [J.A.\_\_\_\_]. The government also claimed that Congress had intended to allow the government to initiate surveillance on targets who had not been identified at the time the certifications were filed with the FISA court. *Id.* at 22-23 [J.A.\_\_\_\_].

~~SECRET~~

~~SECRET~~

The government also argued that Yahoo! lacked standing under Article III to vicariously assert the rights of its customers. *Id.* at 5-7. This contention prompted the FISC to order Yahoo! to file a surreply addressing the standing issue. Authorization for Sur-Reply, dated Dec. 14, 2007. In it, Yahoo! asserted that the government had erroneously conflated questions of Article III standing with the judicially-created doctrine of prudential standing. Under the “case or controversy” requirement of Article III, Yahoo! had standing to defend itself from the government’s attempt to force it – under penalty of contempt – to comply with a directive.<sup>13</sup> Yahoo! Sur-Reply (filed Dec. 21, 2007). As to prudential standing issues, Yahoo! argued that such limitations were not appropriate because Congress expressly directed the court to consider, without any limitations, whether the directives were “otherwise lawful,” and that a statute that violates the Fourth

---

<sup>13</sup> See *Craig v. Boren*, 429 U.S. 190, 194 (1976) (holding that a business which was required to either follow a statute and suffer economic injury or disobey the statute and suffer sanctions had established “the threshold requirements of a ‘case or controversy’ mandated by Art. III.”); *Warth v. Seldin*, 422 U.S. 490, 500-01 & n.12 (1975) (a litigant’s attempt to assert the rights of third parties defensively as bar to judgment against him does not raise any Article III standing problem).

~~SECRET~~

~~SECRET~~

Amendment rights of U.S. person cannot be "otherwise lawful," regardless of whose Fourth Amendment rights are being violated.<sup>14</sup> *Id.* at 2-5.

The court next requested factual and legal submissions from both parties to determine what types of communications would be acquired and whether Yahoo!'s users had reasonable expectations of privacy in these forms of communications. Order, dated Jan. 4, 2008 [J.A. \_\_\_]; Order, dated Feb. 6, 2008 [J.A. \_\_\_]. Each party submitted affidavits and additional briefs, but substantially agreed<sup>15</sup> that the information requested by the government included communications in which U.S. persons have a legitimate expectation of privacy under the Fourth Amendment.<sup>16</sup>

Following the supplemental Fourth Amendment briefing, the FISC requested additional briefing on certain statutory issues under the PAA arising from the government's effort to amend the certifications upon which the directives served

---

<sup>14</sup> The government was directed to file a further surreply to address the prudential standing issues raised by Yahoo! but introduced no new arguments. Order, dated Dec. 28, 2007 [J.A. \_\_\_].

<sup>15</sup> In its submission, Yahoo! also asserted that users also have a legitimate expectation of privacy in the content of certain types of [REDACTED] on its network. See Yahoo!'s Supp. Br. on Fourth Amendment Issues, filed Feb. 15, 2008.

<sup>16</sup> See Government's Supplemental Briefing on the Fourth Amendment, filed Feb. 15, 2008 at 4 [J.A. \_\_\_] ("at least with respect to electronic communications of U.S. persons [REDACTED] the Government does not contest that the acquisition contemplated by the directives would implicate the reasonable expectation of privacy of U.S. persons.").

~~SECRET~~

~~SECRET~~

on Yahoo! were based. Order Directing Further Briefing on the PAA, dated March 5, 2008. Specifically, the court questioned whether the government can amend certifications; whether an amendment is tantamount to the issuance of a new certification; whether new certifications require new directives; whether there are limits on the types of amendments the government can make without issuing new directives; and, whether new procedures for surveillance can be submitted at any time. *Id.* Yahoo! and the government took competing positions on these questions and on whether the directives served on Yahoo! were still valid.

Finally, in its briefing related to the changes to the certifications, Yahoo! argued that the FISC no longer had jurisdiction to compel Yahoo! to comply with the government's directives following the February 16, 2008 expiration of the PAA. Yahoo! assert that because the law was intended to be a temporary statute and contained no explicit savings clause with regard to cases pending at the time of its sunset, the FISC could no longer compel Yahoo! to comply with directives. Yahoo!'s Supp. Br. on PAA Statutory Issues (filed Mar. 19, 2008) at 13-16.

## **V. The FISC Ruling**

In a 98-page ruling, the FISC addressed all of the procedural, jurisdictional, statutory and constitutional arguments raised by the parties. First, the court found that it retained jurisdiction to compel Yahoo! to comply with the directives because Section 6 of the PAA provides that acquisitions under the PAA "shall be governed

~~SECRET~~



~~SECRET~~

by the applicable provisions of such amendments,” and that the “applicable provisions” included all of the authorities and immunities included as part of the amendments to FISA contained in the PAA, including Section 1805b(g). Mem. Op. at 5-12 [J.A.\_\_\_\_].<sup>17</sup>

Next, the FISC rejected Yahoo!’s non-Fourth Amendment objections to the PAA, including the questions the court had raised *sua sponte* regarding the effect of the government’s modification of the certifications.<sup>18</sup> *Id.* at 14-43 [J.A.\_\_\_\_]. In doing so, the FISC rejected Yahoo!’s argument that 50 U.S.C. § 1805b(a)(2) – which requires the AG and the DNI to certify that “the acquisition does not constitute electronic surveillance” – requires the government to know the identity of any of the targets before submitting their certification. Yahoo! had argued that two separate certifications pertaining to targeting are required by the PAA: (1) “there are reasonable procedures in place for determining that the acquisition of foreign information . . . concerns persons reasonably believed to be located outside the U.S.,” and (2) that the planned interception “does not constitute electronic

---

<sup>17</sup> Because this provision affects the subject matter jurisdiction of the FISC and this Court, the Court must, as a jurisdictional matter, review the determination of the FISC that its jurisdiction survived the sunset of the PAA.

<sup>18</sup> Yahoo! is not challenging the court’s rulings on the statutory interpretation of the PAA, nor can it effectively do so because much of the holding on pages 26–31 and 37-39 of the Memorandum Opinion has been redacted. These statutory interpretations inform the reasonableness analysis.

~~SECRET~~

~~SECRET~~

surveillance.” See 50 U.S.C. § 1805b(a).<sup>19</sup> For these certifications not to be redundant, the (a)(2) certification – that the interception “does not constitute electronic surveillance” – must mean something other than that there are reasonable targeting procedures in place. Without knowing the identity of the targets, the government cannot make the second certification meaningful. Therefore, all it can certify is that there are reasonable procedures in place for determining that the individual users *will be* located outside the U.S. at the time they are specified to the provider.<sup>20</sup> Yahoo!’s Mem. in Opp. to Mot. to Compel at 24-25.

In rebuffing Yahoo!’s argument, the FISC found that it would be inconsistent with Congressional intent to require new certifications for each newly identified target, holding that “if Congress had intended a limitation of this magnitude on the flexibility it otherwise intended to confer when it passed into law the PAA, one would expect a much clearer statement of such intent.”<sup>21</sup> But the

---

<sup>19</sup> To fall outside the definition of electronic surveillance, the interception has to be directed at a target reasonably believed to be located outside the U.S..

<sup>20</sup> This certification requirement is required by 50 U.S.C. § 1805b(a)(1).

<sup>21</sup> Mem. Op. at 24 [J.A. \_\_\_\_].

~~SECRET~~

~~SECRET~~

FISC did not indicate what, if anything, the (a)(2) certification means beyond the existence of reasonable targeting procedures under (a)(1).<sup>22</sup>

As to the Constitutional arguments, the FISC found that Yahoo! had the right to raise the Fourth Amendment rights of its customers in challenging the directives. Mem. Op. at 43-54. The FISC found no Article III standing concerns because the case had been brought by the government and Yahoo! was raising the Fourth Amendment argument defensively in responding to the motion to compel. *Id.* at 44. Second, the court ruled that any prudential limitations on raising the constitutional rights of others were inapplicable because Congress specifically directed the FISC to consider whether the directives were “otherwise lawful” before granting a motion to compel. *Id.* at 45. Moreover, allowing a provider to contest the constitutionality of a directive under the Fourth Amendment would likely be the only means to protect the Fourth Amendment rights of the third parties at issue. *Id.* at 47-48.

Next, the FISC found that the PAA implicated the Fourth Amendment rights of U.S. persons located overseas, and that such persons have a reasonable expectation of privacy in some of the communications that the government seeks

---

<sup>22</sup> As discussed in Section II, *infra*, this holding bears on the unreasonableness of the Fourth Amendment analysis, and the lack of procedural protections for U.S. persons.

~~SECRET~~

~~SECRET~~

to obtain. But the FISC found that the Fourth Amendment's Warrant Clause was inapplicable, because the government's acquisitions fell within the foreign intelligence exception to the Warrant Clause. *Id.* at 56-59.

Although the Supreme Court has never recognized a foreign intelligence exception to the warrant requirement, the FISC found that this Court in *In re Sealed Case* had implicitly accepted the premise that such an exception existed, because it upheld the constitutionality of electronic surveillance under FISA, even though it did not decide whether a FISA order constituted a "warrant" contemplated by the Fourth Amendment.<sup>23</sup> *Id.* at 58. The court reasoned that had this Court not accepted the notion of a foreign intelligence exception, it would have been forced to decide whether a FISA Order was a "warrant." *Id.*

Turning to the contours of the exception, the FISC relied on *United States v. Truong Dinh Hung*, 629 F.2d at 908, 915-16 (4th Cir. 1980); *United States v. Bin Laden*, 126 F.Supp. 2d 264, 277 (S.D.N.Y. 2000), and *In re Sealed Case*, 310 F.3d at 742-43, to arrive at its conclusion that the foreign intelligence exception now has two requirements: (1) that the acquisition be for a significant purpose of acquiring

---

<sup>23</sup> *But see* 310 F.3d at 746 ("even without taking into account the President's inherent authority to conduct warrantless foreign intelligence surveillance we think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment standards, certainly come close.")

~~SECRET~~

~~SECRET~~

foreign intelligence and (2) that a sufficiently authoritative official must find probable cause to believe that the target of the search or surveillance is a foreign power or its agent. *Id.* at 59. The court found both of these criteria were satisfied in this case because the certification by the AG and DNI satisfied the first prong, and the certifications underlying the directives requiring the AG to make certain findings under Section 2.5 of Executive Order 12333 before targeting a U.S. person satisfied the second. *Id.* at 60-68. Although the court recognized that the certification required by the AG was slightly different than a finding that a U.S. person was an agent of a foreign power for purposes of FISA, the court still found the AG certification.<sup>24</sup> *Id.* at 67.

Finally, the court turned to whether the directives were reasonable under the Fourth Amendment. In the 28 pages devoted to this topic, the court compared the reasoning of two opinions, this Court's decision in *In re Sealed Case* and the decision of the U.S. District Court for the Southern District of New York in *United States v. Bin Laden*. After identifying the six factors that this Court analyzed to

---

<sup>24</sup> For example, the AG determination would include a U.S. person who is an officer or employee of a [REDACTED] while the FISA definition would not. Compare Dep't of Defense Procedures (December 1982) ("DOD Procedures"), Ex. 1 to Mem. in Supp. of the Gov't's Mot. to Compel Compliance with Directives of the Director of National Intelligence and Attorney General, filed Dec. 13, 2007 [J.A. \_\_\_\_] with 50 U.S.C. § 1801(b).

~~SECRET~~

~~SECRET~~

determine reasonableness in *In re Sealed Case* – prior judicial review, probable cause, particularity, necessity, duration and minimization, and the three factors utilized in *Bin Laden* – duration, minimization, and use of targeted facilities, the court eschewed both tests and devised its own 4-factor test for reasonableness. *Id.* at 72- 86. According to the court, the factors to be evaluated when analyzing the reasonableness of surveillance under the PAA are: (1) minimization; (2) duration; (3) authorization by a senior government official, and (4) identification of facilities to be targeted. *Id.* at 86.

Based on these factors, the court concluded that the surveillance to be conducted under the PAA was reasonable. As to the first three factors, the government was following reasonable minimization procedures; the AG would follow the provisions of Executive Order 12333 limiting surveillance of U.S. persons to 90 days, and that the directives were subject to AG and DNI approval. But the court devalued the fourth factor of its own test, finding that in the context of the PAA, if the government “mistakenly targets an [erroneous] account . . . the likelihood is that the person whose privacy interests are implicated is a person who does not enjoy the protection of the Fourth Amendment.” *Id.* at 93.

Based on this analysis, the court upheld the reasonableness of the surveillance under the Fourth Amendment. With regard to U.S. persons who were not targeted (and thus not protected by the Executive Order), the FISC found that

~~SECRET~~



~~SECRET~~

any additional harm that may be suffered by non-targeted U.S. persons who may be communicating with the target would be “incidental” and addressable through the government’s minimization procedures. *Id.* at 95-97.

~~SECRET~~

~~SECRET~~**STATEMENT OF FACTS**

The factual record in this case consisted only of the Affidavits of [REDACTED] of the Federal Bureau of Investigation (filed Jan. 14, 2008) and [REDACTED] and [REDACTED] of Yahoo! (filed Jan. 23, 2008). [J.A. \_\_] These affidavits concerned the types of communications being sought pursuant to the directives in this case. As described in the [REDACTED] Declaration, the information currently being transmitted to the government includes [REDACTED]

[REDACTED]

[REDACTED] Dec. ¶¶ 13-14 [J.A. \_\_]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶¶ 15-18 [J.A. \_\_].

~~SECRET~~

~~SECRET~~**SUMMARY OF ARGUMENT**

The PAA allows warrantless surveillance of private communications in which U.S. persons have a legitimate expectation of privacy. This could happen where the surveillance targets U.S. persons who are abroad, even temporarily; and where the surveillance captures communications of U.S. persons at home who are communicating with a target. In those two situations, PAA-authorized surveillance invades the reasonable expectation of privacy of U.S. persons and therefore must comply with the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 352 (1967) (telephone surveillance must comply with the Fourth Amendment).

The court's decision below that the PAA, as modified by Section 2.5 of Executive Order 12333, does not offend the Fourth Amendment was the result of significant errors in its constitutional analysis. First, the court erred by finding that the foreign intelligence exception to the warrant requirement applies to the surveillance of U.S. persons using U.S. communications facilities. Neither this Court nor the Supreme Court has ever recognized such an exception to the warrant requirement, nor defined its parameters. In *United States v. United States District Court ("Keith")*, 407 U.S. 297 (1972), the Supreme Court *refused* to find such an exception for domestic surveillance for national security reasons. *Id.* at 321. Many of the factors that the *Keith* court cited in support of rejecting such an

~~SECRET~~

~~SECRET~~

exception are equally applicable here because FISA provides the availability of a court with adequate security safeguards, familiarity with the issues at hand and capable of making informed determinations with regard to the surveillance of U.S.-based facilities. No Circuit court case has found the existence of a foreign intelligence exception applicable to interceptions in the U.S. of communications of U.S. persons after the passage of FISA.<sup>25</sup>

The court next erred in finding that if such an exception exists, it applies to surveillance here. Contrary to prior case law, the court found that the exemption applies even where the primary purpose of the surveillance is not to gather foreign intelligence information and where there is no prior judicial finding that the target was acting as an agent of a foreign power. *See Truong*, 629 F.2d at 915-96; *Bin Laden*, 126 F. Supp. 2d at 277; *Keith*, 407 U.S. at 321-22. Instead, the FISC held that the Executive's *voluntary* agreement to make such a finding was sufficient—even though that certification is broader than that required under FISA—to render the statute constitutional.

Most importantly, the court erred by employing a novel test for reasonableness under the Fourth Amendment that rejected some of the most

---

<sup>25</sup> *United States v. Clay*, 430 F.2d 165 (9th Cir. 1976); (pre-FISA surveillance of a U.S. person); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973) (same).

~~SECRET~~

~~SECRET~~

important aspects of the reasonableness analysis employed in this Court's ruling in *In re Sealed Case*, 310 F.3d at 736-42. Although the four-factor test the FISC employed borrowed minor aspects from this Court's decision in *In re Sealed Case*, it relied more heavily on the reasoning of *Bin Laden*, and eschewed the most important factors, such as "prior judicial review," and "particularity," that were key to this Court's prior analysis. In so doing, the FISC deviated substantially from the Supreme Court's guidance that "'reasonableness' derives content and meaning through reference to the warrant clause." *Keith*, 407 U.S. at 309-10.

The FISC's error was due, in part, to the fact that the court misunderstood the nature of the surveillance at issue. Here, the facilities the government is targeting are, for the most part, ***located in the U.S. and regularly used by U.S. persons***. Notwithstanding the physical location of the intended target, if the wrong communications facility—here, a Yahoo! [REDACTED]—is targeted, the privacy intrusion will likely be experienced in the U.S. by a U.S. person. Therefore, "prior judicial review" and "particularity" are essential parts of the reasonableness analysis. The court's failure to consider these factors in its determination of reasonableness was reversible error.

When this Court considers the correct Fourth Amendment factors, it should conclude that the broad surveillance authorized by the PAA and the directives is unreasonable because the PAA allows the government to initiate surveillance on an

~~SECRET~~

~~SECRET~~

unlimited number of targets, with no prior judicial review, no requirements of particularity and no findings of necessity. Furthermore, the provisions of Executive Order 12333 do not rescue the otherwise unreasonable surveillance because Executive branch promises are insufficient to substitute for prior judicial review, the provisions of the Order differ from the provisions of FISA, and the Order has no protections for the non-targeted U.S. persons whose communications will be obtained.

### **STANDARD OF REVIEW**

Courts of Appeal review determinations of the constitutionality of a statute *de novo*. *United States v. Bianco*, 998 F.2d 1112, 1120 (2d Cir. 1993) ("Since the constitutionality of a statute is a legal issue, our review is *de novo*."); *United States v. DiSanto*, 86 F.3d 1238, 1244 (1st Cir. 1996) ("We review a determination of the constitutionality of a federal statute *de novo*.").

~~SECRET~~



~~SECRET~~**ARGUMENT****I. THE FISC ERRED IN FINDING THAT THE SURVEILLANCE AUTHORIZED BY THE PAA FALLS UNDER A FOREIGN INTELLIGENCE EXCEPTION TO THE WARRANT REQUIREMENT***A. Much of the Communications at Issue are Protected by the Fourth Amendment*

The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Fourth Amendment rights of U.S. persons are implicated in two ways: (a) surveillance that targets U.S. persons who are temporarily abroad; and (b) surveillance that captures communications of U.S. citizens at home who are communicating (perhaps even unbeknownst to them) with non-U.S. targets of the surveillance. The application of the Fourth Amendment to the type of surveillance at issue is essentially undisputed. Yahoo! contends, and the government conceded below, that U.S. persons using Yahoo! services have legitimate expectations of privacy in their [REDACTED] communications, even when such persons are located overseas. See Government's Supp. Br. on the Fourth Amendment at 4 [J.A. ]

~~SECRET~~

~~SECRET~~

("at least with respect to electronic communications of U.S. persons [REDACTED] [REDACTED] the Government does not contest that the acquisition contemplated by the directives would implicate the reasonable expectation of privacy of U.S. persons.").

The Supreme Court has consistently applied the Fourth Amendment to require prior judicial approval for the electronic surveillance of U.S. citizens. In *Katz v. United States*, the Court held that warrantless electronic surveillance of a call made from a public telephone booth violated the Fourth Amendment. 389 U.S. at 356-357. The Court placed particular emphasis on the lack of a warrant, holding that even if the officers "did no more here than they might properly have done with prior judicial sanction," there was nevertheless a constitutional violation because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject to only a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 356-57.

Although the FISC recognized the "weighty concerns" related to the privacy of U.S. persons who are targeted by the surveillance,<sup>26</sup> the FISC erred in

---

<sup>26</sup> See Mem. Op at 71 [J.A. \_\_\_] ("extremely sensitive, personal information could be acquired through the directives, akin to electronic eavesdropping of telephone conversations.")

~~SECRET~~

~~SECRET~~

dismissing the Fourth Amendment concerns of U.S. person when they communicate with a non-U.S. target. In doing so, the court improperly relied on *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973) because *Tortorello* involved law enforcement surveillance under Title III, and therefore law enforcement had already established probable cause that the target was engaging in criminal activity and the surveillance was limited to communications related to those criminal acts. *Id.* at 775. But the target in *Tortorello* was a U.S. person entitled to the same level of protection under the Fourth Amendment as the party whose communications were incidentally intercepted. *Id.* Here, the government may engage in surveillance of a target who is entitled to far less protection under the Fourth Amendment than the U.S. person with whom he or she communicates. Thus, the cases sanctioning incidental interceptions of private communications pursuant to judicially-sanctioned surveillance are inapposite.

None of the protections of the Executive Order that apply when a U.S. person is targeted apply to targets who are not U.S. persons. Therefore, beyond the framework of the PAA, there is no extra Fourth Amendment protection provided for the U.S. persons with whom the foreign target communicates. But such person's communications are entitled to Fourth Amendment protection even if the other party is overseas. In *United States v. Karo*, 468 U.S. 705, 716 n.4 (1984) (plurality opinion), the Court held that the fact that a guest could bring a tracking

~~SECRET~~

~~SECRET~~

device into someone's home did not lower the homeowner's expectation of privacy. Similarly, the fact that a person with whom a U.S. citizen is corresponding travels abroad – especially when such travel would not necessarily be detected by a U.S. person who sends emails to the same yahoo.com email account as when the correspondent was in the U.S. – does not lower the expectation of privacy for the U.S. person who remains at home. Thus the surveillance of the U.S. persons' communications, whether incidental or intentional, must also be reasonable under the Fourth Amendment.

*B. The Court Should not Recognize a Foreign Intelligence Exception to the Warrant Requirement for U.S. Persons Using U.S. Communications Facilities*

The FISC erred in concluding that there is an established foreign intelligence exception to the Fourth Amendment's warrant requirement. The Supreme Court has not specifically recognized such an exception, and its most directly relevant precedent on the creation of exceptions to the Fourth Amendment's warrant requirement — *Keith* — strongly indicates that no such exception is warranted. In *Keith*, the Supreme Court noted that exceptions to the warrant requirement “are few in number and carefully delineated.” 407 U.S. at 318. The Supreme Court also noted that “[e]ven while carving out those exceptions, the Court has reaffirmed the principle that the ‘police must, whenever practicable, obtain

~~SECRET~~

~~SECRET~~

advance judicial approval of searches and seizures through the warrant procedure.” *Id.* (citation omitted).

In *Keith*, the arguments rejected by the Supreme Court in considering a domestic security exception to the Warrant Clause also apply to a foreign intelligence exception. The Government in *Keith* had argued that: the warrant requirement “would obstruct the President in the discharge of his constitutional duty” to protect the nation’s security; the surveillance is “directed primarily to the collecting and maintaining of intelligence” and not criminal prosecution; that “courts as a practical matter would have neither the knowledge nor the techniques necessary;” and that submission of surveillance requests to Court could create a danger of “leaks.” *Id.* at 318-319 (internal quotations omitted).

The *Keith* Court found that the involvement of the judiciary protects those subject to executive exercises of power and reassures the public that “indiscriminate wiretapping and bugging of law abiding citizens cannot occur.”

*Keith*, 407 U.S. at 321. As the Supreme Court stated:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech . . . . The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

~~SECRET~~

~~SECRET~~

Id. at 317.

Notwithstanding the difference between foreign intelligence gathering and domestic security, the arguments for an exception to the Fourth Amendment's warrant requirement are even less compelling in this case than in *Keith*. Congress addressed the practical concerns the government raised in *Keith* by passing FISA. The FISA process (prior to the enactment of the PAA) provides a speedy, secret mechanism for the government to obtain prior judicial authorization for surveillance and searches from a specially-created court with expertise in addressing national security concerns and extraordinary security precautions to preserve secrecy. In *Keith*, the Court rejected the argument that "internal security matters are too subtle and complex for judicial evaluation." *Keith*, 407 U.S. at 320. Today, the FISC is more familiar with foreign intelligence issues than the ordinary district courts that the Supreme Court decided *Keith*. Despite the clear parallels between *Keith* and this case, the Government has taken the position that *Keith* should be ignored because it is confined to "domestic security." Mem. in Supp. of Gov't Mot. to Compel. at 11 [J.A. \_\_]. Similarly, the FISC ignored the Court's

~~SECRET~~



~~SECRET~~

analysis in *Keith*, suggesting that the decision was irrelevant to the question of whether a foreign intelligence exception should be recognized.<sup>27</sup> Both are wrong.

The Supreme Court's discussion of the extremely high bar that is set for exceptions to the Fourth Amendment's warrant requirement applies with equal force here. The basis for the potential foreign intelligence exception comes from the same source as the domestic security exception at issue in *Keith*: the specifically enumerated Article II powers of the executive. U.S. Const. Art. II, § 2. Thus, the essential question should be the same as the question posed in *Keith*, but asked in the foreign intelligence context:

whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would frustrate the efforts of government to protect itself from acts of subversion and overthrow directed against it,

*Id.* at 315.

At least one court has employed the *Keith* balancing test to conclude that a prior judicial review was essential before authorizing surveillance for foreign intelligence purpose. The United States Court of Appeals for the District of Columbia Circuit, in a plurality opinion, concluded in *Zweibon v. Mitchell*, 516

---

<sup>27</sup> The FISC's disregard of *Keith* was plain error, given that *Keith*'s balancing test was the basis for this Court's holding in *In re Sealed Case*, 310 F.3d at 746 ("applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorizes are reasonable").

~~SECRET~~

~~SECRET~~

F.2d 594 (D.C. Cir. 1975) that the *Keith* factors—such as judicial competence, secrecy and expediency—were insufficient to justify creating a wholesale exception to the warrant requirement that would allow the government to bypass judicial review. *Id.* at 641-51. In particular, the D.C. Circuit found that even though the executive branch has “peculiar powers” in the area of foreign affairs and despite the importance of national security concerns, the decision of whether a search is justified must be “made by a neutral and disinterested magistrate or judge rather than by an executive official,” *id.* at 614-16. In fact, the court in *Zweibon* suggested (in dicta) that “No wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny irrespective of the justification for the surveillance or the importance of the information sought.” *Id.* at 651.

*C. If the Court Does Recognize a Foreign Intelligence Exception to the Warrant Requirement, It Should Not Apply Here*

Even if a foreign intelligence exception exists, the FISC erred in concluding that the surveillance authorized by the PAA would qualify for that exception. In order to curb executive discretion and balance privacy interests with executive power, the courts that have held that a foreign intelligence exception exists have required the Government to satisfy two elements for its invocation. First, they have required the government to show that its *primary* purpose in seeking the information be the acquisition of foreign intelligence information. Second the

~~SECRET~~

~~SECRET~~

target of the surveillance must be a foreign power or its agent. *See e.g. Truong*, 629 F.2d at 915-96; *Bin Laden*, 126 F. Supp. 2d at 277. The FISC erred in finding that the surveillances authorized by the PAA met these requirements.

Here, without any case support, the FISC modified the test for the first prong of a foreign intelligence exception – taking the standard “primary purpose” language from *Truong* and *Bin Laden*, and adapting it to the “significant purpose” test set forth in FISA.<sup>28</sup> Although the FISC was correct that this Court, in *In re Sealed Case*, upheld the constitutionality of the “significant purpose” test when analyzing whether a FISA Order approximated a Title III order, Congress drafted that language specifically in the context of the surveillance order provisions of the FISA statute. What the FISC did is entirely different – it accepted the premise that a foreign intelligence exception to the Warrant requirement existed based on prior caselaw, but then disavowed the test set forth in the same caselaw in favor of a new test based on the statutory language of FISA. This Court’s decision in *In re Sealed Case* does not dictate that result. 310 F.3d at 746. That case accepted the “significant purpose” test only in light of the other statutory safeguards offered by FISA Orders. That decision does not lead to the conclusion that surveillance under

---

<sup>28</sup> The phrase “a significant purpose” replaced “the purpose” due to the amendments made to FISA by the USA PATRIOT ACT. *See In re Sealed Case*, 310 F.3d at 728-29.

~~SECRET~~

~~SECRET~~

the foreign intelligence exception to the Warrant Clause should be generally available, without FISA-order type safeguards, when criminal prosecution is the primary purpose of the surveillance..<sup>29</sup>

The second prong, a finding of probable cause that the target of the surveillance is an agent of a foreign power, is also vital to protecting the Fourth Amendment rights of law-abiding U.S. citizens. Indeed, it ensures that the persons who are subjected to surveillance belong to a category of individuals who are entitled to little or no protection under the Fourth Amendment. In evaluating whether someone qualifies as an agent of a foreign power, FISA dictates a different level of analysis for U.S. persons than non-U.S. persons. 50 U.S.C. § 1805(b). A U.S. person may be found to be an agent of a foreign power if only he or she: (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities, which activities involve a violation of the criminal statutes

---

<sup>29</sup> If this modification of the first prong is permissible, the lowering of the standard should be considered when evaluating the reasonableness of the surveillance. For example, where Congress allowed lesser showings in the context of FISA, it provided additional safeguards not present in Title III. *See In re Sealed Case*, 310 F.3d at 739. Here, the court relaxed the showing for qualifying for a foreign intelligence exception and then further relaxed the factors it considered for the reasonableness determination.

~~SECRET~~

~~SECRET~~

of the United States; (C) knowingly engages in sabotage or international terrorism, for or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, assumes one while in the United States, (E) knowingly aids or abets or conspires with any person in the conduct of activities described above. *Id.*

By contrast, non-U.S. persons may be found to be agents of a foreign power if they are employees of that foreign power. 50 U.S.C. § 1801(b)(1). As this Court observed in *In re Sealed Case*, “where a U.S. person is involved, an ‘agent of a foreign power’ is defined in terms of criminal activity.” 310 F.3d at 738. “Under [this] definition of ‘agent of a foreign power’ FISA ... ‘would not authorize surveillance of ethnic Americans who lawfully gather political information and perhaps even lawfully share it with the foreign government of their national origin.’” 310 F.3d at 739 (quoting H. Rep. No. 95-1283 (1978) at 40).

Thus, even the cases recognizing a foreign surveillance exception to the warrant requirement only permit less Fourth Amendment protection when a U.S. person engages in “clandestine intelligence gathering,” or “knowingly engages in sabotage or international terrorism” — i.e. criminal acts rooted in the gathering of foreign intelligence.

The FISC failed to appreciate the significance of Congress’s failure to require a prior judicial determination that the target is an “agent of a foreign

~~SECRET~~

~~SECRET~~

power.” Without such a review, a U.S. person could have his Fourth Amendment rights reduced solely at the Executive’s discretion. Court decisions regarding whether there is a foreign intelligence exception have relied on the requirement of a prior judicial determination that the target of the surveillance is an agent of a foreign power in concluding that the surveillance authorized by FISA is constitutional. *See, e.g., Pelton*, 835 F.2d at 1075 (“FISA requires judicial review prior to the initiation of the type of surveillance conducted here and sets careful limits on its exercise.”); *Duggan*, 743 F.2d at 73 (finding FISA searches constitutional because, *inter alia*, “the Act requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power.”); *United States v. Sattar*, No. 02 CR 395 JGK, 2003 WL 22137012, \*14 (S.D.N.Y. Sept. 15, 2003) (holding that “[t]his Court’s *ex parte*, *in camera* review of the FISA applications and orders . . . satisfies the Fourth Amendment”).

The prior *judicial* determination that the target of the surveillance is an agent of a foreign power was also a key component to this Court’s decision upholding the constitutionality of FISA searches. *See* 310 F.3d at 738 (“With limited exceptions not at issue here, both Title III and FISA require prior judicial scrutiny of an application for an order authorizing electronic surveillance. And there is no dispute that a FISA judge satisfies the Fourth Amendment’s requirement for a neutral and detached magistrate.”) The reliance placed by these Courts on the

~~SECRET~~



~~SECRET~~

existence of an ex-ante judicial determination regarding whether the target is an agent of a foreign power strongly suggests that the FISC erred in failing to find that such a determination is required by the Fourth Amendment.

Notably, the PAA is not limited to "foreign" activities. In this case, the Government is seeking communications involving U.S. persons, not merely foreign citizens, and some of the parties to the communications may be in the U.S. with no knowledge that their Internet communications are even being retrieved overseas. Moreover, Yahoo! will be setting the surveillance in Sunnyvale, CA, not in a foreign land. In fact, the process of setting up the surveillance on Yahoo!'s part is similar to what is done in criminal cases by the same compliance team that handles criminal process. *See* Isley Decl. at ¶ 2 [J.A.\_\_\_\_]. The intelligence gathering requires no coordination with foreign governments or foreign officials. In short, intercepting Yahoo! email traffic is a "domestic" activity that should not qualify for a foreign intelligence exception to the Warrant requirement.

Below, the FISC erred in finding that the Government could save the PAA from constitutional infirmity by voluntarily making findings similar, but not equivalent, to the foreign power determination under Executive Order 12333, § 2.5 (Dec. 4, 1981). *See* Mem. Op. at 62-68 [J.A.\_\_\_\_]. Those provisions state that before the use "of any technique for which a warrant would be required if undertaken for law enforcement purposes," the AG must determine "in each case

~~SECRET~~

~~SECRET~~

that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power.” The FISC’s reliance on these Executive Orders was error for three reasons.

First, the FISC ignored that Yahoo! has challenged the constitutionality of the PAA on its face. The statute itself does not require a probable cause finding that an individual is acting as an agent of a foreign power. 50 U.S.C. § 1805b. The statute’s constitutionality is not saved by the government’s agreement to do what the law should require it to do. *Katz*, 389 U.S. at 356-57. As the *Katz* court observed, “It is apparent that the agents in this case acted in restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, *not by a judicial officer.*” *Id.* at 356 (emphasis added). The Supreme Court enunciated the same principle in *Keith*, holding that “[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.” 407 U.S. at 317.

Second, the probable cause determination required by the case law is narrower than the certification under Executive Order 12333. Mem. Op. at \_\_ [J.A. \_\_]. That certification draws no distinction between U.S.-persons and non-U.S.-persons regarding the determination whether those individuals are working as

~~SECRET~~

~~SECRET~~

agents of a foreign power.<sup>30</sup> Moreover, unlike the traditional test, the Government's self-imposed test allows surveillance of U.S. persons who have committed no crime and are "lawfully gather[ing] political information" and sharing it with the foreign government. In such cases, there is no justification for finding that the Fourth Amendment rights of such U.S. persons have been lessened by their own conduct.

Finally, the Executive Order does not apply to the U.S. persons who are communicating with the target. Thus, there will have been no finding, by anyone, that these innocent U.S. persons are agents of foreign powers. The foreign intelligence exception to the Warrant Requirement is therefore entirely inapplicable to them.

*D. No Other Exceptions to the Warrant Requirement Apply*

While the FISC rested its decision on the applicability of the foreign intelligence exception, no other exceptions apply that would provide an alternative ground for its holding. Of the other "specifically established and well-delineated exceptions" to the warrant requirement, *Katz*, 389 U.S. at 357, the only one that arguably could apply here is the "special needs" doctrine, which authorizes warrantless searches that are undertaken for purposes beyond the normal need for

---

<sup>30</sup> See e.g. DOD Procedures, *supra* note 24.

~~SECRET~~

~~SECRET~~

law enforcement. Nevertheless, the PAA does not qualify for any of those narrowly drawn exceptions to the warrant requirement.

First, the “special needs” cases typically involve situations where there is a limited search or a reduced expectation of privacy, not cases that involve the surveillance of private communications.<sup>31</sup> Second, “special needs” cases typically involve situations where the execution of the search involves little discretion and is of a limited duration. The surveillance here, however, is trusted to the broad discretion of the executive branch, especially with regard to its ability to target unlimited numbers of individuals for up to one year. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (refusing to apply special needs to a search that was “solely at the discretion of Border Patrol officers”). Third, because the PAA potentially authorizes ordinary law enforcement surveillance that also has a foreign intelligence purpose, it is not narrowly directed at a “special need.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding that where government’s *primary* purpose is to uncover evidence of criminal wrongdoing, a highway checkpoint did not fit within special needs exception).

---

<sup>31</sup> *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (stop-and-frisk); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border searches); *Bell v. Wolfish*, 441 U.S. 520 (1979) (prisons); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (student drug tests).

~~SECRET~~

~~SECRET~~

## II. The FISC Applied the Wrong Legal Standard in Assessing the Reasonableness of the Directives

The directives served on Yahoo!, which provide that [REDACTED]

[REDACTED]

[REDACTED] cannot survive Fourth Amendment scrutiny under any standard. 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. The existence of an exception to the warrant requirement—even on the grounds of national security—does not allow the Fourth Amendment to be ignored. “[A]ssuming *arguendo* that FISA orders are not Fourth Amendment warrants, the question becomes, are the searches constitutionally reasonable.” *In re Sealed Case*, 310 F.3d at 744; *see also Truong*, 629 F.2d at 916 (“Even if a warrant is not required, the Fourth Amendment requires that the surveillance be ‘reasonable.’”).

Although the FISC performed a detailed constitutional analysis, it reached the wrong conclusion because it found that three of the six factors relied upon by this Court for assessing reasonableness in *In re Sealed Case* were not appropriate for measuring the reasonableness of the instant surveillance. Not only are these factors relevant, but their consideration is constitutionally required.

~~SECRET~~

~~SECRET~~

*A. The FISC Erred by Ignoring Several Relevant Factors in Measuring the Reasonableness of the Surveillance under the Fourth Amendment*

The FISC should not have rejected the six factor test set forth in *In re Sealed Case*, in favor of the four-factor test it amalgamated from *In re Sealed Case* and *Bin Laden*. In *In re Sealed Case*, this Court concluded that even if a FISA order was not a “warrant” for purposes of the Warrant Clause of the Fourth Amendment, the procedures for obtaining such an order satisfied the “reasonableness” requirement of the Fourth Amendment. *Id.* at 746. This Court believed that it should examine the question of reasonableness by determining how closely the relevant procedures approximate the requirements for a warrant under Title III.<sup>32</sup> *Id.* at 737 (“obviously, the closer those FISA procedures are to Title III procedures, the lesser are [the] constitutional concerns”).<sup>33</sup>

---

<sup>32</sup> Several courts have recognized that the core elements of Title III, namely, (a) probable cause, (b) particularity of description, (c) necessity of means employed, (d) limited duration, and (e) minimization, embody the requirements of the Fourth Amendment. *See, e.g., United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994) (looking to Title III for “guidance in implementing the Fourth Amendment with regard to video surveillance”); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1438 (10th Cir. 1990) (looking to Title III “for guidance in implementing the fourth amendment in an area that Title III does not specifically cover”); *United States v. Biasucci*, 786 F.2d 504, 510 (2d Cir. 1986) (“we borrow the statutory standards quoted above [from Title III] as a measure of the government’s constitutional obligation”).

<sup>33</sup> Unlike the FISC’s analysis, this Court’s ‘reasonableness’ test in *In re Sealed Case* was faithful to the Supreme Court’s guidance that “‘reasonableness’ derives

~~SECRET~~



~~SECRET~~

In making the comparison to the Title III procedures, the Court observed that "beyond requiring searches and seizures to be reasonable, the Supreme Court has interpreted the warrant clause to require three elements," namely, (a) issuance by a neutral magistrate, (b) a showing of probable cause, and (c) particularity. *Id.* at 737-38. In concluding that the procedures and government showings required under FISA came close to meeting the Fourth Amendment standards the Court found the following six factors important:

1. "prior judicial scrutiny" of the surveillance;
2. "probable cause that the target is a foreign power or an agent of a foreign power;"
3. a certification "approved by the Attorney General or the Attorney General's deputy" to "designate the type of foreign intelligence information being sought, and to certify that the information sought is foreign intelligence information;"
4. "probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent;"
5. "a 'necessity' provision, which requires the court to find that the information sought is not available through normal investigative procedures;" and
6. "minimization of what is acquired, retained and disseminated."

310 F.3d at 738-741.

---

content and meaning through reference to the warrant clause." *Keith*, 407 U.S. at 309-10.

~~SECRET~~

~~SECRET~~

Only two of these factors—a certification by the AG, and minimization—are required by the PAA. More specifically:

- the PAA mandates no prior review of any part of the directive;
- the limited review provided by the PAA is only a review of the procedures set forth for determining the likely location of the target, and is not a review of the type of information sought, 50 U.S.C. § 1805c;
- there is no review of whether the facilities to be surveilled are being used or are likely to be used by a target of the surveillance;
- no showing of probable cause of any kind is ever required by the PAA; and
- no showing regarding necessity of using the PAA's procedures is ever required by the PAA;

Thus when Congress enacted the PAA, it essentially eliminated most of the safeguards that made FISA constitutional. The safeguards that Congress eliminated—prior judicial scrutiny, probable cause to believe that a facility is being used or about to be used by an agent of a foreign power, and necessity—are fundamental to the Fourth Amendment's protections against unreasonable search and seizure. In rejecting these factors in its analysis, the FISC recognized that it was deviating from this Court's binding precedent, but did so nonetheless:

It is not clear from the FISC opinion how much importance the Court attached to each of the above-described factors. For that reason, it is difficult to discern what effect the modification or removal of one of the factors would have on the overall determination of reasonableness. Nor is there clear guidance on how the

~~SECRET~~

~~SECRET~~

requirements of reasonableness might vary for targets who are United States persons

Mem. Op. at 77 [J.A. \_\_].

While some variation from this Court's analysis may be appropriate in certain cases, the FISC departed dramatically by finding that the only four factors it should consider in this context were: (1) minimization; (2) duration; (3) authorization by a senior government official, and (4) identification of facilities to be targeted. That test contains but three of the six requirements of this Court's controlling decision. By departing radically from the prior caselaw, the FISC's "reasonableness" analysis became untethered from the Warrant Clause of the Fourth Amendment. But in order to determine the reasonableness of a search, however, a court should examine "the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause." *Keith*, 407 U.S. at 309-310; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 473-484 (1971). By not directly to the Fourth Amendment for the key factors, the FISC's new test abandoned the core protections of the Fourth Amendment:

[A] general "reasonableness" standard without reference to the warrant clause . . . [is] "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point."

~~SECRET~~

~~SECRET~~

*Id.* at 315 n. 16 (quoting *Chimel v. California*, 395 U.S. 752, 764-65 (1969)).

1) The Fourth Amendment Requires Prior Judicial Scrutiny of Surveillance Targeting U.S. Persons.

This Court focused on the importance of prior judicial scrutiny in *In re Sealed Case*, and this safeguard has long been a cornerstone of the Supreme Court's Fourth Amendment jurisprudence.<sup>34</sup> In upholding FISA, this Court observed that "[w]ith limited exceptions not at issue here, both Title III and FISA require prior judicial scrutiny of an application for an order authorizing electronic surveillance." *Id.* at 738. This Court also specifically pointed to 50 U.S.C. § 1805, which in subsection (a) requires that a FISA "judge . . . enter an ex parte order" as a prerequisite to "electronic surveillance."

Although the FISC was bound by the holding in *In re Sealed Case*, it employed a reasonableness analysis that did not include this "critical element" of the Court's reasonableness assessment:

However, given that the FISC highlighted prior judicial review as one of the three essential requirements of the Fourth Amendment Warrant Clause, **it seems apparent that the FISC considered this to be a critical element in its reasonableness assessment.**

\* \* \* \*

---

<sup>34</sup> See 310 F.3d at 738 (discussing *Dalia v. United States*, 441 U.S. 238, 255 (1979)).

~~SECRET~~

~~SECRET~~

This Court finds the reasoning of the District Court [in *Bin Laden*] persuasive and therefore accepts as a general principle, that prior judicial approval of an acquisition of foreign intelligence information targeted against a United States person abroad **is not an essential element for a finding of reasonableness under the Fourth Amendment.**

Mem. Op. at 73, 83-84 [J.A. \_\_] (emphasis added).

The court's choice to follow *Bin Laden* and not *In re Sealed Case* was based on a faulty assumption – that *Bin Laden* was more relevant because it involved the surveillance of an American citizen living in Kenya, whereas *In re Sealed Case* addressed the circumstances of domestic interception. Although the PAA applies only to those individuals believed to be located overseas, the directives are being implemented in the U.S., on Yahoo! accounts offered by Yahoo! through facilities located in the U.S.

The lack of recognition that the directives target U.S. communications facilities is apparent from the FISC's dismissal of prior judicial review. Mem. Op. at 83-84 [J.A. \_\_]. The FISC downplayed the importance of prior judicial review, claiming that Congress had been aware that the intelligence community conducts surveillance of U.S. persons abroad without seeking prior judicial authorization and that when it passed FISA, Congress "excluded overseas surveillance from the statute." *Id.* This analysis is incorrect. Much of the [REDACTED] surveillance covered by these directives would otherwise fall within the definition

~~SECRET~~

~~SECRET~~

of "electronic surveillance" under FISA because the acquisitions are **taking place in the U.S.** See 18 U.S.C. § 1801(f)(2) (acquisitions occurring in the U.S. and involving one person located in the U.S. are covered by FISA). Thus, the surveillance covered by the directives is not part of the long history of unsupervised warrantless foreign intelligence collection recited by the FISC, but rather, was under the supervision of the FISC prior to the passage of the PAA. This key difference makes *Bin Laden* less relevant.

2) The PAA Does Not Require a Finding of Particularity that the Targeted Facility is, or is About to Be Used, By the Target of the Surveillance.

The FISC's failure to consider the consequences of wrongly targeted surveillance also contributed to its decision to mostly abandon the particularity requirement in its analysis. In passing the PAA, Congress eliminated the requirement for "probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent." This requirement, as set forth in FISA, 50 U.S.C. § 1805(a)(3)(B), was part of the reasonableness determination in both *In re Sealed Case* and *Bin Laden*.<sup>35</sup> But, under the PAA, the surveillance need not be directed at any specific facility or place at all. In devising its new reasonableness test, the

---

<sup>35</sup> Mem. Op. at 84 [J.A. \_\_\_\_].

~~SECRET~~



~~SECRET~~

FISC substantially discounted this factor, based on the erroneous belief that "in the overseas context, there is less of a need to require a prior showing of probable cause to believe that a properly targeted individual is using or is about to use a specific targeted facility."<sup>36</sup>

But the FISC is wrong. This case involves the use of [REDACTED] [REDACTED] that are operated by a U.S. electronic communications service provider in the U.S., primarily, but not exclusively, for the use of U.S. persons. Those accounts are typically identified by an alphanumeric Yahoo! ID such as "Johndoe212." That account will be assigned to a different user than the users of "Johndoe2I2" and "Johndoetwo12." To the extent that the government is off by a single digit, letter or word, such as by confusing the number "1" with the letter "I" in the example above, or the numeral "2" with the word "two," a person other than the intended target will be placed under surveillance. Without requiring the government to link the intended target with the User ID to be surveilled, there is a significant risk of violating the privacy of innocent users in the U.S.. Moreover, with no particularity requirements placed on the government, the government could lawfully add all three of the potential matching Yahoo! IDs to its

---

<sup>36</sup> See *Id.* at 85 & n.79 [J.A. \_\_\_\_].

~~SECRET~~

~~SECRET~~

surveillance list, based solely on a promise to later minimize the erroneously intercepted communications.

Accordingly, notwithstanding the physical location of the intended target, if the wrong communications facility—here, a Yahoo! account—is targeted, the privacy intrusion will often be experienced by U.S. person. Title III and FISA both protect U.S. citizens from unlawful searches and seizures consistent with the Fourth Amendment by mandating some level of prior judicial review of the probable cause finding that the facilities to be surveilled are being used by the target of the surveillance or to commit a crime. By contrast, the PAA fails to require either any form of prior judicial review or any mechanism to link the target to the targeted facilities.

Where interceptions of private communications through a *United States-based facility* are at issue, the particularity requirement of the Fourth Amendment concerns of U.S. persons is of paramount importance. “The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping.” *Berger v. New York*, 388 U.S. 41, 56 (1967). The *Berger* court held that “broadside authorization” of electronic surveillance, even by a detached and neutral authority, was not the equivalent to a warrant as it was not carefully circumscribed, but permitted general searches by electronic devices. *Id.* at 58. Without a warrant that

~~SECRET~~

~~SECRET~~

met the particularity requirements of the Fourth Amendment, the Court concluded that the statute violated the “command of the Fourth Amendment,” and was therefore unconstitutional. *Id.* at 64.

The particularity requirement of the Fourth Amendment is not just important for the protection of the target of the surveillance, but it is essential to “prevent wide-ranging general searches by the police.” *United States v. Bonner*, 808 F.2d 864, 866-67 (1st Cir. 1986) (holding that case presented “no risk that federal agents would be confused and stumble into the wrong house, or would take advantage of their unforeseeable windfall and search houses indiscriminately.”) Thus, a crucial purpose of the particularity requirement is to preclude the possibility that the Fourth Amendment rights of innocent U.S. persons will be disturbed. “To determine a warrant’s compliance” with the particularity requirement, courts ask “whether the place to be search is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and *whether there is any reasonable probability that another premise might be mistakenly searched.*” *United States v. Carter*, 413 F.3d 712, 715 (8th Cir.

~~SECRET~~

~~SECRET~~

2005) (emphasis added) (quoting *United States v. Gitcho*, 601 F.2d 369, 371 (8th Cir. 1979)).<sup>37</sup>

These cases make clear that the particularity requirement of the Fourth Amendment mandates that surveillance in the U.S. be carefully circumscribed and not pursued in a manner that would put innocent persons at risk of unreasonable surveillance. But the surveillance activities the PAA allows are neither reviewed by a detached and neutral magistrate nor contain the required particularity to survive Fourth Amendment scrutiny. The “procedures” to be certified by the AG, and reviewed by the FISC under the PAA relate only to the determination of whether the acquisitions conducted under the PAA do not constitute electronic surveillance, not that the facilities be connected to the target.<sup>38</sup> See 50 U.S.C. § 1805b(c). The PAA does not provide for any judicial review that the U.S. facilities

---

<sup>37</sup> See also *United States v. Mousli*, 511 F.3d 7, 12 (1st Cir. 2007); *United States v. Vega-Figueroa*, 234 F.3d 744, 756 (1st Cir. 2000); *United States v. Darensbourg*, 520 F.2d 985, 987 (5th Cir. 1975) (quoting *United States v. Sklaroff*, 323 F.Supp. 296, 321 (S.D. Fla. 1971)); *Harman v. Pollock*, 446 F.3d 1069, 1078 (10th Cir. 2006); *United States v. Bedford*, 519 F.2d 650, 654-655 (3rd Cir. 1975), *cert. denied* 424 U.S. 917.

<sup>38</sup> To the extent that the FISC opinion references some procedures related to the targeted facilities themselves, see Mem. Op. at 94 [J.A. \_\_\_], such procedures are not required by statute and do not appear to be described in the redacted form of the opinion Yahoo! received. If the government is relying on these procedures, Yahoo! requests that they be described generally at classification level of Top Secret or below so that Yahoo! can review them.

~~SECRET~~

~~SECRET~~

targeted for surveillance are being used by the target located abroad.<sup>39</sup> The absence of particularity is a critical flaw in the FISC's reasonableness analysis.

*B. The Surveillance Authorized By The Directives Is Unreasonable.*

Had the FISC assessed the reasonableness of the surveillance authorized by the PAA using all of the relevant factors, as this Court should do, it could not have avoided the conclusion that the surveillance is unreasonable. Moreover, the minimal protections added by the government's commitment to follow Section 2.5 of Executive Order 12333 does not adequately protect U.S. persons.

As an initial matter, the reasonableness inquiry has to begin by considering how the foreign intelligence exception was invoked. Here, the FISC ruled that so long as any significant purpose of the interception is for foreign intelligence purposes, the exception to the Warrant requirement applies. Thus, in assessing the reasonableness factors, the Court should presume that the interception involved is principally for criminal investigative purposes, with a significant foreign intelligence component. Under these circumstances, the safeguards drawn from the Warrant Clause are even more important.

---

<sup>39</sup> Furthermore, any findings required by Section 2.5 of Executive Order 12333 appear to pertain to the target of the surveillance, not the facilities used by the target.

~~SECRET~~

~~SECRET~~

Fourth Amendment protections are unreasonable because they provide inadequate protections for U.S. citizens.

The government has long since ceased trying to defend the constitutionality of the surveillance authorized by the PAA itself. Instead, it argues, and the FISC found, that the government's commitment to follow its own Executive Order is sufficient, under the circumstances, to qualify the surveillance under the directives as reasonable. While Executive Order 12333 (if not repealed), provides some additional protections, it is still not enough. The order only prevents the government from targeting U.S. persons located abroad unless the AG first makes a determination that the person qualifies (under a separate Executive Branch standard) as an agent of a foreign power. And it requires the AG to reauthorize surveillance targeting U.S. persons every 90 days, in his sole discretion. But it provides no protections whatsoever to U.S. persons who may be communicating with a target. Moreover, the Executive Order does not provide a layer of judicial review, nor does it mandate sufficient particularity findings before surveillance can

---

great care to overhear only the conversations of the petitioner himself." *Katz*, 389 U.S. at 354.

~~SECRET~~

~~SECRET~~

commence.<sup>42</sup> Thus, to the extent that it is even appropriate to examine the protections in the Executive Order that are not statutorily required, the scales of the reasonableness determination sway but do not tip towards reasonableness, especially in light of the loosening of the standard to qualify for the foreign intelligence exception in the first place.

Even under the Executive Order, once the government has filed a certification, it can issue any number of directives, and for each directive it can identify an unlimited number of individual targets at any time over the period of one year, and for each target an unlimited number of Yahoo! accounts to surveil,<sup>43</sup> with no judicial review of whether the targets are agents of foreign powers, or whether the Yahoo! accounts are substantially linked to the targets. This type of wholesale authorization, and unrestricted Executive Branch discretion when directed at a U.S. communications facility, creates an unacceptable risk that the Fourth Amendment rights of U.S. persons will be adversely affected. This type of surveillance cannot be squared with the Fourth Amendment.

---

<sup>42</sup> Yahoo! has not been provided an unredacted version of the opinion of the FISC, and therefore does not have access to the full particularity discussion contained on page 93 of the Memorandum Opinion.

<sup>43</sup> More than [REDACTED] Yahoo! accounts were placed under surveillance in the 48 hours after Yahoo! began complying with the directives.

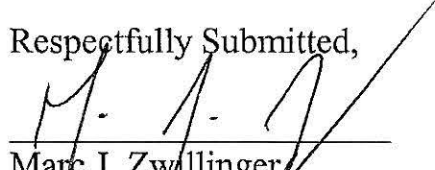
~~SECRET~~



~~SECRET~~**CONCLUSION**

For the foregoing reasons, Yahoo! requests that this Court reverse the FISC's judgment and find that the surveillance authorized by the directives is not "otherwise lawful" and grant such other relief as the Court deems appropriate.

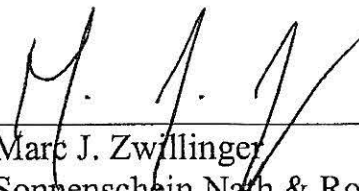
Respectfully Submitted,

  
\_\_\_\_\_  
Marc J. Zwillinger  
Sonnenschein Nath & Rosenthal, LLP  
1301 K Street, N.W.  
Suite 600 East Tower  
Washington, D.C. 20005  
(202) 408-6400  
*Counsel for Appellee Yahoo!*~~SECRET~~

~~SECRET~~**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,956 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Times New Roman font.



---

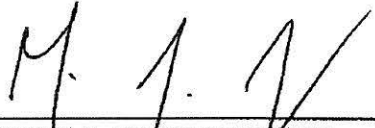
Marc J. Zwillinger  
Sonnenschein Nath & Rosenthal, LLP  
1301 K Street, N.W.  
Suite 600 East Tower  
Washington, D.C. 20005  
(202) 408-6400

~~SECRET~~

~~SECRET~~FILED WITH THE  
COURT SECURITY OFFICER  
CSO: [REDACTED]  
DATE: 12-21-08**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> Day of May 2008, I provided three true and correct copies of **Yahoo! Inc.'s Appellant Brief** (the "Proof Brief") to a [REDACTED] an Alternate Court Security Officer, who has informed me that he will deliver four copies of the Motion to the Court for filing, and a copy to the:

United States Department of Justice  
National Security Division  
950 Pennsylvania Ave., NW  
Room 6150  
Washington, D.C. 20530

  
\_\_\_\_\_  
MARC J. ZWILLINGER  
Sonnenschein Nath & Rosenthal LLP  
1301 K Street, N.W.  
Suite 600; East Tower  
Washington, DC 20005  
Tel: (202) 408-6400  
Fax: (202) 408-6399  
mzwillinger@sonnenschein.com  
*Counsel for Yahoo! Inc.*

~~SECRET~~



