

~~SECRET~~UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE  
COURT OF REVIEWFILED WITH THE  
COURT SECURITY OFFICER  
CSO  
DATE 6/30/08

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

No. 08-01

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

UNDER SEAL

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

1 [REDACTED]

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

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

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

DATED: June 30, 2008



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## CERTIFICATE OF SERVICE

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

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COURT REPORTER  
CSC: [Signature]  
DATE: 6/30/08

No. 08-01

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IN THE UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

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

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On Appeal from the United States Foreign Intelligence Surveillance Court

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REPLY BY YAHOO! TO SUPPLEMENTAL BRIEFING

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

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

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

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

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

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

[REDACTED]<sup>2</sup> *Id.* at 1.

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

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

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

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

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

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<sup>2</sup> See also *id.* at n.2

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

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

[REDACTED] Reply at 17.

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

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[REDACTED] *Id.*

at 16 n.15.

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

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

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

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

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

<sup>3</sup> [REDACTED]

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

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

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

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

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

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

[REDACTED]

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

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

[REDACTED]

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

[REDACTED]

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

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

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

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

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

Respectfully submitted,

  
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B

United States Foreign Intelligence Surveillance  
Court of Review

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

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

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

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

Mechanical Steno - Transcript by Computer



1 Present:

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

5 Marc J. Zwillinger, Esquire

6 [REDACTED]  
7 Jacob Summers, Law Clerk  
[REDACTED]

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

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

15 MR. GARRE: Yes.

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

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

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

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

3 MR. GARRE: Well, I think -- oftentimes, this is sort  
4 of an academic question in the sense that oftentimes, and this  
5 is true under the FISA process, the government knows an  
6 individual by the [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

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

1       classified --

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

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

6               JUSTICE ARNOLD: All right. Thank you.

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

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

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

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

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

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