YAHOO'S LAWYER'S TAKE ON THE YAHOO TROVE

Even back in 2009, when Russ Feingold made it clear that Yahoo had no access to the data it needed to aggressively challenge the Protect American Act orders it received, I realized what a tough legal fight it was to litigate blind. That has only been made more clear by the document trove released last week.

Which is why Mark Zwillinger's comments about the trove are so interesting.

First, ZwillGen points out that the challenge to the PAA directives may not have helped Yahoo avoid complying, but it did win an important victory allowing providers to challenge surveillance orders.

> [I]n this fight, the government argued that Yahoo had no standing to challenge a directive on the basis of the Fourth Amendment rights of its users. *See* Government's Ex Parte Brief at pages 53-56.Although the government was forced to change its position after it lost this issue at both the FISC and the FISCR – and such standing was expressly legislated into the FAA – had the government gotten its way, surveillance orders under § 702 would have been unchallengeable by any party until the fruits of the surveillance were sought to be used against a defendant in a criminal case. That would have given the executive branch even greater discretion to conduct widespread surveillance with little potential for judicial review. Even though Yahoo lost the overall challenge, winning on the standing point was crucial, and by itself made the fight personally worthwhile.

ZwillGen next notes that the big numbers reported in the press — the $250K fines for non-compliance — actually don't capture the full extent of the fines the government was seeking. It notes that the fines would have added up to $400 million in the second month of non-compliance (it took longer than that to obtain a final decision from the FISCR).

> Simple math indicates that Yahoo was facing fines of over $25 million dollars for the 1st month of noncompliance, and fines of over $400 million in the second month if the court went along with the government's proposal. And practically speaking, coercive civil fines means that the government would seek increased fines, with no ceiling, until Yahoo complied.

Finally — going directly to the points Feingold made 5 years ago — Yahoo had no access to the most important materials in the case, the classified appendix showing all the procedures tied to the dragnet.

> The *ex parte*, classified appendix was just that: a treasure trove of documents, significantly longer than the joint appendix, which Yahoo had never seen before August 22, 2014. Yahoo was denied the opportunity to see any of the documents in the classified, *ex parte*appendix—even in summary form. Those documents bear a look today. They include certifications underlying the § 702 directives, procedures governing communications metadata analysis, a declaration from the Director of National Intelligence, numerous minimization procedures regarding the FBI's use of process, and, perhaps most importantly, a FISC decision from January 15, 2008regarding the procedures for the DNI/AG Certification at issue, which Yahoo had never seen. It examines those procedures under a "clearly

> erroneous" standard of review — which is one of the most deferential standards used by the judiciary. Yahoo did not have these documents at the time, nor the opportunity to conduct any discovery. It could not fully challenge statements the government made, such as the representation to FISCR "assur[ing the Court] it does not maintain a database of incidentally collected information from non-targeted United States persons, and there is no evidence to the contrary." Nor could Yahoo use the January 15, 2008 decision to demonstrate how potential flaws in the targeting process translated into real world effects.

This blind litigation is, of course, still the position defense attorneys challenging FISA orders for their clients are in.

Yahoo actually made a pretty decent argument 6 years ago, pointing to incidental collection, collection of Americans' records overseas (something curtailed, at least in name, under FISA Amendments Act), and dodgy analysis underlying the targeting decisions handed off to Yahoo. But they weren't permitted the actual documentation they needed to make that case. Which left the government to claim — falsely — that the government was not conducting back door searches on incidentally collected data.

For years, ex parte proceedings have allowed the government to lie to courts and avoid real adversarial challenges to their spying. And not much is changing about that anytime soon.