# FISCR USED AN OUTDATED VERSION OF EO 12333 TO RULE PROTECT AMERICA ACT LEGAL

If the documents relating to Yahoo's challenge of Protect America Act released last month are accurate reflections of the documents actually submitted to the FISC and FISCR, then the government submitted a misleading document on June 5, 2008 that was central to FISCR's ultimate ruling.

As I laid out here in 2009, FISCR relied on the the requirement  in EO 12333 that the Attorney General determine there is probable cause a wiretapping technique used in the US is directed against a foreign power to judge the Protect America Act met probable cause requirements.

> The procedures incorporated through section 2.5 of Executive Order 12333, made applicable to the surveillances through the certifications and directives, serve to allay the probable cause concern.
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> > The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is

> > directed against a foreign power or an agent of a foreign power.
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> 44 Fed. Reg. at 59,951 (emphasis supplied). Thus, in order for the government to act upon the certifications, the AG first had to make a determination that probable cause existed to believe that the targeted person is a foreign power or an agent of a foreign power. Moreover, this determination was not made in a vacuum. The AG's decision was informed by the contents of an application made pursuant to Department of Defense (DOD) regulations. See DOD, Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons, DOD 5240.1-R, Proc. 5, Pt. 2.C. (Dec. 1982).

Yahoo didn't buy this argument. It had a number of problems with it, notably that nothing prevented the government from changing Executive Orders.

> While Executive Order 12333 (if not repealed), provides some additional protections, it is still not enough.
>
> [snip]
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> 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.

Yahoo made that argument on May 29, 2008.

Sadly, Yahoo appears not to have noticed the best argument that Courts shouldn't rely on EO 12333 because the President could always change it: Sheldon Whitehouse's revelation on December 7, 2007 (right in the middle of this litigation)

that OLC had ruled the President could change it in secret and not note the change publicly. Whitehouse strongly suggested that the Executive in fact had changed EO 12333 without notice to accommodate its illegal wiretap program.

But the government appears to have intentionally withheld further evidence about how easily it could change EO 12333 — and in fact had, right in the middle of the litigation.

This is the copy of the Classified Annex to EO 12333 that (at least according to the ODNI release) the government submitted to FISCR in a classified appendix on June 5, 2008 (that is, after Yahoo had already argued that an EO, and the protections it affords, might change). It is a copy of the original Classified Appendix signed by Ed Meese in 1988.

As I have shown, Michael Hayden modified NSA/CSS Policy 1-23 on March 11, 2004, which includes and incorporates EO 12333, the day after the hospital confrontation. The content of the Classified Annex released in 2013 appears to be identical, in its unredacted bits, to the original as released in 1988 (see below for a list of the different things redacted in each version). So the actual content of what the government presented may (or may not be) a faithful representation of the Classified Appendix as it currently existed.

But the version of NSA/CSS Policy 1-23 released last year (starting at page 110) provides this modification history:

> This Policy 1-23 supersedes Directive 10-30, dated 20 September 1990, and Change One thereto, dated June 1998. The Associate Director for Policy endorsed an administrative update, effective 27 December 2007 to make minor adjustments to this policy. This 29 May 2009 administrative update includes changes due to the FISA Amendments Act of 2008 and in core training requirements.

That is, Michael Hayden's March 11, 2004 modification of the Policy changed to the Directive as existed before 2 changes made under Clinton.

Just as importantly, the modification history reflects "an administrative update" making "minor adjustments to this policy" effective December 27, 2007 — a month and a half after this challenge started.

By presenting the original Classified Appendix — to which Hayden had apparently reverted in 2004 — rather than the up-to-date Policy, the government was presenting what they were currently using. But they hid the fact that they had made changes to it right in the middle of this litigation. A fact that would have made it clear that Courts can't rely on Executive Orders to protect the rights of Americans, especially when they include Classified Annexes hidden within Procedures.

In its language relying on EO 12333, FISCR specifically pointed to DOD 5240.1-R. The Classified Annex to EO 12333 is required under compliance with part of that that complies with the August 27, 2007 PAA compliance.

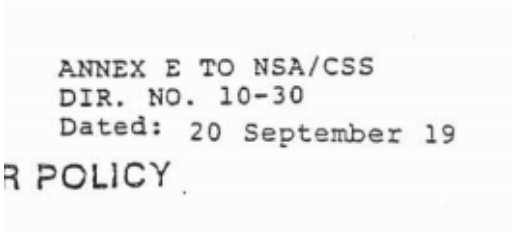
That is, this Classified Annex is a part of the Russian dolls of interlocking directives and orders that implement EO 12333.

And they were changing, even as this litigation was moving forward.

Only, the government appears to have hidden that information from the FISCR.

Update: Clarified that NSA/CSS Policy 1-23 is what got changed.

Update: Hahaha. The copy of DOD 5240.1 R which the government submitted on December 11, 2007, still bears the cover sheet labeling it as an Annex to NSA/CSS Directive 10-30. Which of course had been superseded in 2004.




Note how they cut off the date to hide that it was 1990?

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1988 version hides:

- Permission to intercept air and sea vessel radio communications to pursue international narcotics trade (Section 1)
- FBI's role in intercepting entirely foreign communication within the US (Definitions)
- The definitions of International Commercial Communications and National Diplomatic Communications
- The kinds of things that may be a selection in that definition
- The exclusion of diplomats from the definition of US person
- The inclusion of diplomatic and commercial communication among communications that may be targeted
- Parts of the permission to spy on foreign corporate subsidies in the US
- Parts of the paragraph

permitting 72 hours of SIGINT upon entry into the US

- A paragraph permitting surveillance on communications (?) with terminal in the US targeted at foreigners
- Parts of the paragraph limiting surveillance of voice and fax unless usedexclusively by a foreign power
- All of paragraph g in targeting
- All of paragraph B permitting the collection of international communications of non-resident aliens in the US
- The paragraph permitting interception of foreign interception within the US, with FISA approval

The 2004/2009 version hides:

- The definition of "transiting communications"
- Different parts of permission to spy on foreign corporate subsidies in the US
- Different parts of the paragraph permitting 72 hours of SIGINT upon entry into the US
- Different parts of the

paragraph limiting surveillance of voice and fax unless used exclusively by a foreign power