

THE SHELL GAME THE GOVERNMENT PLAYED DURING YAHOO'S PROTECT AMERICA ACT CHALLENGE

In his opinion finding Protect America Act constitutional, Judge Reggie Walton let his frustration with the way the government kept secretly changing the program at issue show.

For another, the government filed a classified appendix with the Court in December 2007, which contained the certifications and procedures underlying the directives, but the government then inexplicably modified and added to those certifications and procedures without appropriately informing the Court or supplementing the record in this matter until ordered to do so. These changes and missteps by the government have greatly delayed the resolution of its motion, and, among other things, required this Court to order additional briefing and consider additional statutory issues, such as whether the P AA authorizes the government to amend certifications after they are issued, and whether the government can rely on directives to Yahoo that were issued prior to the amendments.

The unsealed classified appendix released today (the earlier released documents are [here](#)) provides a lot more details on the shell game the government played during the Yahoo litigation, even with Walton. (It also shows how the government repeatedly asked the court to unseal documents so it could share them with Congressional Intelligence Committees or other

providers it wanted to cooperate with PAA).

I mean, we expected the government to demand that Yahoo litigate blind, as it did in this February 26, 2008 brief arguing Yahoo shouldn't be able to see any classified information as it tried to represent the interests of its American customers. (PDF 179)

In the approximately thirty years since the adoption of FISA, no court has held that disclosure of such documents is necessary to determine the legality of electronic surveillance and physical search. Similarly, there is of course a long history of ex parte and in camera proceedings before this Court. For almost three decades, this Court has determined, ex parte and in camera, the lawfulness of electronic surveillance and physical search under FISA. See 50 U.S.C. § 1805(a) ("the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance" upon making certain findings); 50 U.S.C. § 1824(a) (same with respect to physical search).

Under the Protect America Act, then, the government has an unqualified right to have the Court review a classified submission ex parte and in camera which, of course, includes the unqualified right to keep that submission from being disclosed to any party in an adversarial proceeding before this Court.

But we shouldn't expect a FISC judge presiding over a key constitutional challenge to have to beg to learn what he was really reviewing, as Walton had to do here. (PDF 159-160)

The Court is issuing this ex parte order to the Government requiring it to provide clarification concerning the impact on this case of various government filings that have been made

to the FISC under separate docket.

[snip]

It is HEREBY ORDERED that the government shall file a brief no later than February 20, 2008, addressing the following questions: 1. Whether the classified appendix that was provided to the Court in December 2007 constitutes the complete and up-to-date set of certifications and supporting documents (to include affidavits, procedures concerning the location of targets, and minimization procedures) that are applicable to the directives at issue in this proceeding. If the answer to this question is "yes," the government's brief may be filed ex parte. If the government chooses to serve Yahoo with a copy of the brief, it shall serve a copy of this Order upon Yahoo as well.

2. If the answer to question number one is "no," the Government shall state what additional documents it believes are currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. The government shall file copies of any such documents with the Court concurrent with filing its brief. The government shall serve copies of this Order, its brief, and any additional documents upon Yahoo, unless the government moves this Court for leave to file its submission ex parte, either in whole or in part. If the government files such a motion with the Court, it shall serve a copy of its motion upon Yahoo. The government shall also serve a copy of this Order upon Yahoo, unless the government establishes good cause for not doing so within the submission it seeks to file ex parte.

This is what elicited the government's indignant brief about actually telling Yahoo what it was

arguing about.

As a result of the government's successful argument Yahoo had to argue blind, it did not learn – among other things – that CIA would get all the data Yahoo was turning over to the government, or that the government had basically totally restructured the program after the original expiration date of the program, additional issues on which Yahoo might have challenged the program.

Perhaps more interesting is that it wasn't until Walton ruled on March 5 that he would not force the government to share any of these materials with Yahoo that the government finally provided the last relevant document to Judge Walton, the Special Procedures Governing Communications Metadata Analysis. (PDF 219)

On January 3, 2008, the Attorney General signed the "Department of Defense Supplemental Procedures Governing Communications Metadata Analysis," which purported to supplement the DoD Procedures ("Supplement to DoD Procedures"), a copy of which is attached hereto as Exhibit A. The Supplement to DoD Procedures concerns the analysis of communications metadata that has already been lawfully acquired by DoD components, including the National Security Agency (NSA). Specifically, the Supplement to DoD Procedures clarifies that NSA may analyze communications metadata associated with U.S. persons and persons believed to be in the United States. The Supplement to DoD Procedures does not relate to the findings the Attorney General must make to authorize acquisition against a U.S. person overseas

This is particularly suspect given that one of the changes implemented after the original certification was to share data with CIA,

something directly addressed in the memo justifying SPCMA to the Attorney General's office (and a detail the government is still trying to officially hide).

Now, to be fair, in the original release, it was not clear that the government offered this much explanation for SPCMA, making it clear that the procedural change involved making American metadata visible. But the government very clearly suggested – falsely – that SPCMA had no Fourth Amendment implications because they didn't make Americans overseas more likely to be targeted (which the government already knew was the key thrust of Yahoo's challenge).

The opposite is true: by making US person metadata visible, it ensured the government would be more likely to focus on communications of those with whom Americans were communicating. These procedures – which were approved more than two months, one document dump, and one court order agreeing to keep everything secret from Yahoo earlier – were and remain the key to the Fourth Amendment exposure for Americans, as was argued just last year. And they weren't given to even the judge in this case until he asked nicely a few times.

This was the basis for the dragnet that still exposes tens of thousands of Americans to warrantless surveillance. And it got briefed as an afterthought, well after the government could be sure it'd get no adversarial challenge.