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U.S. Foreign Intelligence
Surveillance Court of Review

July 15, 2008

The Honorable Bruce M. Selya
Presiding Judge
United States Foreign Intelligence Surveillance Court of Review
Washington, D.C.

Re: In re Directives to Yahoo Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01 (S)

Dear Judge Selya:

Pursuant to Federal Rule of Appellate Procedure 28(j), the Government respectfully calls the Court's attention to Warshak v. United States, 2008 WL 2698177 (6th Cir. July 11, 2008) (en banc), rev'g Warshak v. United States, 490 F.3d 455 (6th Cir. 2007). (U)

Warshak challenged the constitutionality under the Fourth Amendment of 18 U.S.C. § 2703(d), which authorizes the Government, on less than probable cause, to obtain court orders requiring internet service providers to disclose certain stored electronic communications. The en banc Sixth Circuit vacated the district court's injunction and held that the constitutional claim was not ripe. 2008 WL 2698177, at *1. (U)

Several conclusions of the en banc court support the Government's arguments in this appeal. First, the court concluded that the case was not ripe because it was uncertain whether the Government would again search Warshak's email account, "making this a claim that depends on contingent future events that may not occur as anticipated, or indeed may not occur at all." Id. at *4. The court explained that "[c]oncerns about the premature resolution of legal disputes have particular resonance in the context of Fourth Amendment disputes." Id. at *6. [REDACTED]

[REDACTED] Second, the en banc court rejected the plaintiff's attempt—like that of Yahoo here—to frame the case as raising a facial challenge. See 2008 WL 2698177, at *6; Gov. Br. at 33. Third, the en banc court concluded that an individual's expectation of privacy in emails

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“assuredly shifts from internet-service agreement to internet-service agreement,” and noted pointedly that Yahoo’s user agreement, in particular, provides that “emails will be provided to the government on request.” Id. at *5. This supports the Government’s argument that if there is any expectation of privacy in emails [REDACTED] it is highly diminished. See Gov. Supp. Br. at 7-8. (S)

Sincerely,



Gregory G. Garre
Acting Solicitor General

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