

COLBERT ON THE SPYVATE SECTOR

Why is it that a couple of comedians are our best political commentators?

BRANDON MAYFIELD GETS HOSED BY THE 9TH CIRCUIT

As Fatster noticed, the Ninth Circuit has ruled against Brandon Mayfield on his attempt to hold the PATRIOT Act declared unconstitutional under the Fourth Amendment.

Mayfield was a former suspect in the 2004 Madrid train bombings. After the Madrid bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The SNP submitted digital photographs of the fingerprints to Interpol Madrid, which subsequently transmitted them to the FBI in Quantico, Virginia. The FBI searched fingerprints in its system and, among other possibilities, produced Mayfield, an US citizen and lawyer from the Portland Oregon area, as an alleged match. FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield's law office, the children's schools, and other family activities. The FBI also applied to the Foreign Intelligence Security Court ("FISC") for authorization to surreptitiously place electronic listening devices in the Mayfield family home; searched the home while nobody was there; obtained private and protected information about the Mayfields from third parties; searched Mayfield's law offices; and placed wiretaps on

his office and home phones. The application for the FISC order was personally approved by John Ashcroft, then the Attorney General of the United States.

The Spanish SNP, however, looked at the FBI evidence and found it lacking evidentiary credibility. In spite of this fact, the FBI submitted an affidavit to a US Federal court, stating that experts considered the identification of Mayfield 100% positive, intentionally failing to advise that the SNP had reached a diametrically opposite conclusion. As a result, Mayfield was arrested and held on a material witness warrant, and the public informed of his identity and supposed involvement in the bombings. Over two weeks later, the SNP conclusively matched the fingerprint to an unrelated Algerian citizen and Mayfield was absolved. Mayfield sued the US Government under numerous theories including that the PATRIOT Act was unconstitutional under the Fourth Amendment. The government, being in an egregiously bad position, settled with Mayfield and even allowed the unusual provision that he could maintain the Fourth Amendment challenge to PATRIOT, but could only obtain declaratory relief, not monetary damages.

Mayfield pressed his complaint seeking a declaration that PATRIOT was unconstitutional under his stipulated facts, and the District Court of Oregon, in denying the government's motion to dismiss and granting Mayfield's motion for summary judgment, agreed with Mayfield and ruled in his favor. The government appealed to the 9th Circuit arguing that the trial court had no jurisdiction because Mayfield had already been compensated, that the court erred in finding PATRIOT unconstitutional and that other matters, in totality, placed the matter outside of the court's power to award redress. These arguments were proffered by the government in spite of it having knowingly and specifically agreeing that Mayfield intended to raise and argue said issues and agreeing in their unusual settlement agreement to let him do so.

The usually enlightened 9th Circuit, this time took it upon itself to contrive and contort a way out of holding the PATRIOT Act unconstitutional:

The government contends that the district court lacked jurisdiction over Mayfield's claims because Mayfield lacks the requisite Article III standing. According to the government, Mayfield's Fourth Amendment claim in the Amended Complaint is based on past injuries and speculation about the possibility of future injuries. Furthermore, as the government argues, the retention of derivative materials obtained from the FISA activities would not be affected by a declaratory judgment because there is no requirement that the government release or destroy the fruits of an unlawful search. The government thus asserts that Mayfield has not demonstrated that his injury is "imminent" or will be redressed by the relief sought. See *Defenders of Wildlife*, 504 U.S. at 560-61.

Standing is a question of law that we review de novo. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). We also review de novo a grant of summary judgment. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). The district court determined that Mayfield alleged an ongoing injury by the very fact of the government's retention of derivative FISA materials. *Mayfield*, 504 F. Supp. 2d at 1034. The court further concluded that a judgment declaring the challenged statutory provisions unconstitutional would likely result in the government's making reasonable efforts to destroy the derivative materials in its possession. *Id.* We agree that Mayfield suffers an actual, ongoing injury, but do not agree that a declaratory judgment would likely

redress that injury. See *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). We therefore reverse the judgment of the district court with regard to standing. We also vacate the district court's judgment on the merits and do not address the question of whether the challenged provisions of FISA, as amended by the PATRIOT Act, are unconstitutional.

The full decision is here.

This appears on its face to be a very ill taken decision. The court has bent over, contrived and contorted to protect the government from action and challenge by Mayfield that the government knowingly and willingly agreed to permit him to carry on when the two parties reached their settlement agreement. Mayfield premised his agreement to settle upon being able to maintain the Fourth Amendment challenge to PATRIOT under the facts and circumstances of his case, the government so agreed and stipulated, Mayfield relied on the same, and the appellate court has come in and wantonly stripped Mayfield of the benefit of his bargain and agreement and unjustly and incredulously awarded the government with a benefit they gave away and were not entitled to. A stunning and curious ruling.

IN HONOR OF OBAMA'S NOBEL "PEACE THROUGH WAR" PRIZE, DONATE TO THE ACLU

I was going to make this pitch somewhat differently. But as the gist of Obama's "Peace

through War” speech has sunk in today, I’ve just gotten more and more frustrated.

First some background. As Glenn points out, the ACLU is in a whole bunch of hurt right now after their biggest single donor told them that cash flow issues prevent him from donating for the foreseeable future.

As *The New York Times* reported yesterday, the ACLU this year, largely without warning, lost its single largest source of funding as a result of the financial crisis. The loss of that individual donor, who had been contributing \$20 million per year, was a major blow to the organization, “punching a 25 percent hole in its annual operating budget and forcing cutbacks in operations.” That loss came on top of substantial fundraising losses last year from the financial crisis and the Madoff fraud, which had already forced the group to lay-off numerous employees and cut back substantially on its activities. The lost donor made clear yesterday that he continues to support the ACLU’s work emphatically but is simply now financially unable to continue his support.

I agree with Glenn that the ACLU has been utterly critical over the last decade in fighting to sustain our Constitution and the rule of law. But this funding set-back puts their ability to maintain their leadership position on these issues in jeopardy. And it sure looks to me like we’re going to continue to need their services in the coming years.

So if you can afford to do so at all, please consider supporting ACLU.

ERIC SCHMIDT: PATRIOT MEANS YOU HAVE NO PRIVACY

Eric Schmidt implies that all your searches are available to the Feds.

CONYERS V. OBAMA: THE “DEMEANING TEAM”

John Conyers is like the rest of progressives who fell in love with Obama the person and not Obama the moderate.

THE NEW SWIFT AGREEMENT

Last night I went to bed before I looked at the new SWIFT Agreement giving the US access to all of Europe’s finance data to track for terrorists. Here’s that agreement and here’s a Q&A document about what the agreement does. The agreement is instructive both for what it suggests about the negotiations between the US and EU, but also for what it suggests about the protections the US is willing to grant citizens of other countries that it is not extending to its own citizens.

This is a temporary extension

This is not a permanent agreement. This is a 9 month extension of the SWIFT agreement from

February 1 of next year for nine months, meaning the new EU government will begin negotiations on a proposed new agreement immediately.

in July of this year the 27 Member States of the European Union unanimously gave the EU Presidency a mandate to negotiate an agreement with the United States to ensure the transfer of the data and thereby the continuation of the TFTP. In July, it was not known when or indeed whether the Lisbon Treaty would come into force. Accordingly, the mandate is based on the legal mechanism of the EU Treaty which will cease to exist on 1 December when the Lisbon Treaty enters into force. To ensure that the European Parliament is able to exercise its new powers under the new Treaty in this regard, the envisaged Agreement is for a maximum duration of 9 months. The Commission will come forward with a new proposed mandate in early 2010 for a subsequent agreement based on the Lisbon Treaty. [my emphasis]

Note that "maximum duration" language. I'm guessing the US is going to try to bulldoze an agreement through ASAP, presumably before the new government (or, more importantly, activists) settles in.

The envisaged Agreement has a short duration in order to ensure that the European Parliament's new powers under the Lisbon Treaty will apply to any possible longer term agreement which might replace the envisaged Agreement.

It'll be interesting to see whether this agreement gets better, or worse, in the coming months.

The agreement claims the data is not used for data-mining

Here's what the agreement claims the US does

with this data.

The [Terrorist Finance Tracking Program] does not involve data mining or any other type of algorithmic or automated profiling or computer filtering. The U.S. Treasury shall ensure the protection of personal data by means of the following safeguards, which shall be applied without discrimination, in particular on the basis of nationality or country of residence.

(a) Provided data shall be processed exclusively for the prevention, investigation, detection, or prosecution of terrorism or its financing;

(b) All searches of Provided Data shall be based upon pre-existing information or evidence which demonstrates a reason to believe that the subject of the search has a nexus to terrorism or its financing;

(c) Each individual TFTP search of Provided Data shall be narrowly tailored, shall demonstrate a reason to believe that the subject of the search has a nexus to terrorism or its financing, and shall be logged, including such nexus to terrorism or its financing required to initiate the search;

(d) Provided data shall be maintained in a secure physical environment, stored separately from any other data, with high-level systems and physical intrusion controls to prevent unauthorized access to the data;

(e) Access to Provided Data shall be limited to analysts investigating terrorism or its financing and to persons involved in the technical support, management, and oversight of the TFTP;

(f) No copies of Provided Data shall be made, other than for disaster recovery back-up purposes;

(g) Provided Data shall not be subject to any manipulation, alteration, or addition and shall not be interconnected with any other database;

(h) Information obtained through this Agreement shall only be shared with law enforcement, public security, or counter terrorism authorities in the United States, European Union, or third states to be used for the purpose of the investigation, detection, prevention, or prosecution of terrorism or its financing;

(i) During the term of this Agreement, the U.S. Treasury Department shall undertake a review to identify all non-extracted data that are no longer necessary to combat terrorism or its financing. Where such data are identified and shall be completed as soon as possible thereafter but in any event no later than 8 months after identification, absent extraordinary technological circumstances;

(j) If it transpires that financial payment messaging data were transmitted which were not requested, the U.S. Treasury Department shall promptly and permanently delete such data and shall inform the relevant Designated Provider and central authority of the request Member State;

(k) Subject to subparagraph (i), all non-extracted data received prior to 20 July 2007 shall be deleted not later than five years after the date;

(l) Subject to subparagraph (i), all non-extracted data received on or after 20 July 2007 shall be deleted not later than five years from receipt; and

(m) Information extracted from Provided Data, including information shared under subparagraph (h), shall be subject to the retention period applicable to the particular government authority according to its particular regulations and record retention schedules.

EU citizens can make sure their data are being protected

Here's one of the most interesting provisions granted to those in the EU but not (presumably) to those whose data is accessed solely in the US:

Any person has the right to obtain, following requests made at reasonable intervals, without constraint and without excessive delay or expense, confirmation from his or her data protection authority whether all necessary verifications have taken place within the European Union to ensure that his or her data protection rights have been respected in compliance with this Agreement, and, in particular, whether any processing of his or her personal data has taken place in breach of this agreement.

The agreement (and the Q&A document) also list a bunch of provisions they claim provide EU persons some kind of redress but really don't (this is from the Q&A document):

The Agreement states that any person whose personal data are mishandled in breach of the Agreement is entitled to seek effective legal redress. Under U.S. law for example, the Administrative Procedure Act allows a person who has suffered harm as a result of governmental action to seek judicial review of the action. Also under U.S. law the Inspector General Act would

allow, for example, the Inspector General of the U.S. Treasury Department to investigate complaints concerning abuses or deficiencies relating to the administration of the TFTP and to report their findings to the Treasury Secretary and to Congress.

The Agreement specifically invokes attacks prevented

The Q&A document invokes three incidences where the SWIFT data sharing has helped prevent terrorist attacks.

- TFTP information provided substantial assistance to European governments during investigations into the Al-Qa'ida-directed plot to attack transatlantic airline flights travelling between the EU and the United States. TFTP information provided new leads, corroborated identities and revealed relationships among individuals responsible for this terrorist plot. In mid-September 2009 three individuals were convicted in the UK, and each was sentenced to at least 30 years in prison;
- In early 2009 TFTP was used to identify financial activity of a Europe-based Al-Qa'ida individual who played a role in the planning of an alleged

attack on aircraft. The information was passed to the governments of European and Middle Eastern countries;

- In summer 2007 the TFTP was used to identify financial activities of members of the Islamic Jihad Union (IJU) in Germany. This information contributed to the investigation and eventual arrest of IJU members plotting to attack sites in Germany. The TFTP continued to provide additional useful information to German authorities following the arrests. The persons subsequently confessed.

Of course, what they don't say is that because the US had control of the data, they were able to trigger the Pakistani liquid airplane plot early, causing the Brits all manner of hassle actually prosecuting it.

ALL YURP'S DATA BELONGS TO US

Remember how the Germans were trying to delay agreement on a deal giving the US access to European bank data until there was time for a debate? They caved.

SPRINT'S 50 MILLION CUSTOMERS HAVE BEEN GEO-TRACKED 8 MILLION TIMES-IN THE LAST YEAR

Sprint's geo-tracking feature has been used 8 million times in the last year.

HOLDER SIGNALS APPROVAL (PREFERENCE?) FOR SJC BILL

Eric Holder's letter to Pat Leahy and DiFi appears to be an attempt to signal his preference for the Senate bill.

LIEBERMAN'S HUNT FOR A LONE WOLF?

In addition to worries that Jim White raises, I'm worried that Joe Lieberman's promise to hold hearings on the Fort Hood attack serves an attempt to expand—rather than sunset—the Lone Wolf provision of the PATRIOT Act.