

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, ET AL.,)
Plaintiffs - Appellees/Cross-Appellants,)
v.) Nos. 06-2095, 06-2140
NATIONAL SECURITY AGENCY, ET AL.,)
Defendants - Appellants/Cross-Appellees.)

**GOVERNMENT’S REPLY IN SUPPORT OF ITS
SUPPLEMENTAL SUBMISSION DISCUSSING THE IMPLICATIONS
OF THE INTERVENING FISA COURT ORDERS OF JANUARY 10, 2007**

Plaintiffs effectively concede that in light of the FISA Court’s recent orders, there is no longer any live controversy over the lawfulness of the alleged surveillance activities that gave rise to this suit. By plaintiffs’ own admission, the only question that remains “is whether the President can authorize electronic surveillance outside of FISA *in the future*.” ACLU Resp. 20 (emphasis added). Under well-established Article III principles, however, the federal courts do not sit to issue advisory opinions on such hypothetical questions. That is true in run-of-the-mill cases. It is especially true in cases, such as this, presenting extraordinary constitutional questions

concerning the separation of powers between coordinate Branches. The Court should order that this action be dismissed and the district court's judgment be vacated.^{1/}

I. THIS COURT LACKS ARTICLE III JURISDICTION

A. This Case Is Moot

Plaintiffs' only argument on mootness is that the Government voluntarily ceased the conduct at issue. ACLU Resp. 6-11. That argument fails.

1. At the outset, the Government has not ceased the underlying conduct (*i.e.*, surveillance), voluntarily or otherwise. Instead, an intervening event—the FISA Court orders—has eliminated the central legal premise for plaintiffs' claims. Plaintiffs have challenged surveillance in the absence of FISA Court approval (see, *e.g.*, Compl. ¶¶ 1, 38 [JA 18, 29]); they have asserted no basis for challenging surveillance that is subject to the approval of the FISA Court. That is presumably why plaintiffs do not dispute that this case is moot under ordinary mootness principles, but instead rely solely on the voluntary cessation exception.

But plaintiffs' invocation of the voluntary cessation exception erroneously conflates the challenged conduct (surveillance) with the legal basis for their challenge (prior absence of FISA Court approval). If a landowner were sued by a neighbor for

^{1/} The Government will separately respond, within the time permitted by Federal Rule of Appellate Procedure 27, to plaintiffs' separate Motion to Unseal Secret Materials. That response will address, among other things, the classified nature of the FISA Court's orders.

building a house without a permit, and a permit were subsequently issued by local authorities, one would not say that the landowner had voluntarily ceased the conduct when he continued to build his house; instead, the local authorities' issuance of the permit would be an intervening event that mooted the case by eliminating the predicate for a legal challenge based on the absence of a permit. Similarly, if an organized-crime figure challenged ongoing warrantless surveillance by the Government on the ground that a warrant was required, and a warrant were subsequently issued to continue the surveillance, one would not say that the Government had voluntarily ceased its conduct; instead, an intervening court would have eliminated the legal basis for challenging the underlying conduct. So too here, the Government has not ceased the challenged conduct—an intervening legal event has eliminated the central basis for plaintiffs' legal challenge.

Conversely, in the typical voluntary cessation case, the defendant simply ceases his allegedly unlawful conduct without any intervening legal authority supporting his position. For example, a company engaged in allegedly monopolistic activities may simply terminate those activities, without any intervening change in legal authority. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953). That is fundamentally different from the situation here, where the challenged conduct (surveillance) will still be conducted—subject to the intervening legal authority

provided by the FISA Court, which provides the Government with the necessary speed and agility to monitor al Qaeda's international communications.

2. Even apart from the question whether the Government has ceased the relevant conduct, plaintiffs err in assuming that this case is governed by the same voluntary-cessation principles that apply to the unilateral actions of private parties. “[A] presumption of regularity attaches to the actions of Government agencies.” *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); accord *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Thus, as the *en banc* D.C. Circuit explained in rejecting a plaintiff's voluntary-cessation argument, “[a]t least in the absence of overwhelming evidence (and perhaps not then), it would seem inappropriate for the courts either to impute * * * manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.” *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (*en banc*); accord *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997).

There is no basis for finding, much less assuming, any manipulative intent on the part of the Executive here. Far from “manipulating” the judicial process, the Government has simply given effect to intervening legal authority provided by another Article III court (the FISA Court). Moreover, as the Government has explained, the FISA Court orders are the culmination of a process that began before

this litigation was filed, and before the TSP was even publicly disclosed. Nor is there anything inappropriate about the Executive's decision to pursue FISA Court approval. Although the President determined that the TSP was lawful and in accordance with both FISA and his inherent constitutional authority when he first authorized the program, he also recognized that there is considerable value in ensuring that all three Branches supported the vital foreign intelligence gathering program at issue.

The fact that the President has not disavowed his authority to reauthorize the TSP in the event that the FISA Court orders are not renewed is also beside the point. The question is not whether the parties disagree about abstract questions of law (they do); it is whether the underlying controversy remains live (it does not). There is no rule that a party must disavow his legal position for Article III's mootness limitation to apply. Moreover, notwithstanding plaintiffs' rhetoric that "the President has threatened to violate FISA again" (ACLU Resp. 21), there is no reason to assume that the FISA Court orders will not be reauthorized. Likewise, as the Government has explained, even if the FISA Court did not reauthorize its orders in some part and the President determined to reauthorize the TSP, there is no guarantee that the *same* controversy would recur.

Plaintiffs are also wrong to accuse the Government of an "abrupt reversal of its position." ACLU Resp. 1. The Government's position has been that the al Qaeda threat demands "speed and flexibility in conducting surveillance beyond that

traditionally available under the FISA.” Gov’t Br. 38 (emphasis added). Now that a lengthy process has culminated in innovative and complex orders from the FISA Court, the Government has simply availed itself of that new authority. Moreover, while the Executive long ago determined to explore the possibility of FISA Court approval, its decision to implement the TSP was based on its determinations that the TSP was lawful when it was first implemented, the Nation needed to put this vital early warning system in place to detect and prevent future al Qaeda attacks, and the Nation could not afford to sacrifice speed and agility in responding to terrorist attacks by following the traditional FISA procedures.

3. Even setting the presumption of regularity to the side, this is not a voluntary-cessation case because the FISA Court’s issuance of its recent orders was an intervening change in legal authority by a coordinate Branch of Government. When new legislation resolves a dispute prospectively, the voluntary-cessation exception is “narrow,” and generally has been held to apply only where it is ““virtually certain”” that the legislature will repeal the new law. *Chemical Producers & Distributors Ass’n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006); see *National Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997). As the Ninth Circuit explained, “[t]he principle that legislation is attributable to the legislature alone is inherent in our separation of powers.” *Chemical Producers*, 463 F.3d at 879. There is no reason to give *less* credence to a court authorization than a

legislative enactment for that purpose. In either event, the Executive Branch is acting pursuant to an intervening change in legal authority by a coordinate Branch.

While plaintiffs argue that the Government sought the FISA Court's approval, that does not distinguish intervening judicial approval from intervening legislation, which may be the result of lobbying efforts. Moreover, at the time the President authorized the TSP, traditional FISA procedures were not a viable option because they were insufficiently flexible for surveillance of al Qaeda, and the FISA Court had not yet authorized the complex and innovative approach embodied in its January 10 orders, which were the result of a lengthy process. In addition, the Executive could not direct when, much less whether, the FISA Court chose to issue the January 10, 2007 Orders. The particular timing of the FISA Court's issuance of its orders therefore is no reason for this Court to render an advisory opinion.

4. If there were any doubt about the applicability of the voluntary-cessation exception, the doctrine of constitutional avoidance would resolve it. For more than two hundred years, until the unprecedented district court decision in this case, no court had found that the President lacked authority to conduct a foreign intelligence program in wartime, even though all wartime Presidents have authorized such intelligence. Instead, every court to address the issue had either held that the President has such authority or taken for "granted" that he does. *In re Sealed Case*, 310 F.3d 717, 742 & n.26 (FIS Ct. Of Review 2002). There is no reason for this

Court to reach out and resolve that important constitutional issue in circumstances where events have mooted the underlying controversy.

Now that the FISA Court has provided independent legal authority for the surveillance challenged by plaintiffs, it would contravene settled principles of constitutional avoidance to adjudicate the important legal questions presented by this case. Reinforcing that point is the fact that those questions may never again arise in their current posture. Even if a President determined in the future that the defense of the Nation required electronic surveillance without the FISA Court's involvement, the context could be materially different. While plaintiffs advance the sweeping contention that all foreign-intelligence surveillance that is "outside of FISA" is invariably unlawful (ACLU Resp. 10), the underlying facts are relevant to the President's authority under the Constitution and the Authorization for the Use of Military Force (see, *e.g.*, Gov't Reply Br. 40-41, 45), and the relevant congressional enactments might also be different if a similar issue arose again. For that reason as well, constitutional avoidance counsels in favor of dismissal.

B. Plaintiffs Lack Standing

Even putting the intervening FISA Court orders to the side, the courts have never had Article III jurisdiction over this case—from the outset—because plaintiffs lack standing. As discussed in the Government's prior submissions, plaintiffs lack standing under *Laird v. Tatum*, 408 U.S. 1 (1972), and *Sinclair v. Schriber*, 916 F.2d

1109 (6th Cir. 1990), because their claimed injuries are based on a subjective chilling effect stemming solely from surveillance. *E.g.*, Gov't Br. 25-30. Plaintiffs have not alleged any "specific instances of misconduct *beyond* surveillance." *Sinclair*, 916 F.2d at 1115 (discussing *Ghandi v. Police Dep't*, 747 F.2d 338, 347 (6th Cir.1984)) (emphasis added). Under settled Supreme Court and Sixth Circuit law, plaintiffs have therefore failed to meet their burden of establishing standing.

While plaintiffs contend that they have suffered professional injuries stemming from government surveillance (ACLU Resp. 17-18), those injuries are wholly derivative of a subjective chilling effect: plaintiffs allege that people they would like to speak with over the telephone have been chilled from communicating with them in that manner. Indeed, because the alleged injury on which plaintiffs ground their claim to standing derives from an alleged chilling effect on *third parties*, it is an even weaker basis for standing than that rejected in *Laird* and *Sinclair*, which involved a chilling effect on the plaintiffs themselves. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("much more" is needed when claim for standing is predicated on actions of third party). Moreover, to establish standing in this context, plaintiffs must show "specific instances of misconduct *beyond* surveillance." *Sinclair*, 916 F.2d at 1115 (emphasis added). They have not even attempted to do that.

Plaintiffs' lack of standing is underscored by the FISA Court's orders. Plaintiffs contend that they "continue to suffer" injuries even after those orders

because of the speculative possibility that the Government could conduct non-FISA surveillance in the future. ACLU Resp. 18. At the outset, that contention only confirms that plaintiffs' theory of standing is based on a subjective chilling effect, because plaintiffs are relying solely on speculation concerning future conduct.

Moreover, plaintiffs argue that injunctive relief against future non-FISA surveillance would redress their injuries because then "plaintiffs would be able to discuss sensitive information again over the telephone and via e-mail." ACLU Resp. 18. That contention cannot be squared with the fact that even before the FISA Court's orders were issued, persons associated with al Qaeda knew that, regardless of whether their communications were intercepted under the TSP, they might be intercepted through other means, such as FISA.

The new FISA orders vividly illustrate that point. The notion that TSP surveillance could create any meaningfully, much less constitutionally, different chilling effect from other forms of surveillance is implausible—especially because any electronic surveillance that was occurring under the TSP is now being conducted subject to the approval of the FISA Court. Thus, even if there were a sufficient chilling effect to support the injury-in-fact and redressability requirements for standing before the FISA Court issued its orders, there would no longer be any injury, much less a redressable one, following the issuance of those orders. At a minimum, plaintiffs have not carried their burden of showing that it is "likely," as opposed to

merely ‘speculative,’ that [an] injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Lack of standing therefore provides an independent and complete basis for disposing of this appeal in the Government’s favor.

II. THIS COURT SHOULD VACATE THE DISTRICT COURT’S JUDGMENT

If this Court reverses the district court’s decision on standing, state secrets, or merits grounds, vacatur of the district court’s judgment (including its injunction) is *automatic*, and plaintiffs do not contend otherwise. If this Court holds that the case is moot, it should likewise vacate the district court’s judgment. Whether to vacate a judgment when the case becomes moot on appeal turns on “the twin considerations of fault and public interest.” *Ford v. Wilder*, 469 F.3d 500, 506 (6th Cir. 2006). Plaintiffs’ contentions on those points essentially restate their arguments concerning voluntary cessation. See ACLU Resp. 13-16. Thus, if this Court finds the case moot, it should vacate the district court’s judgment for the same reasons.

Plaintiffs’ contention that the Government forfeited its right to pursue vacatur by obtaining FISA Court authorization is perverse. See ACLU Resp. 14. In light of the importance of terrorist surveillance to our Nation’s security and the value of avoiding constitutional confrontations whenever possible, exploring the possibility

of FISA Court approval was a prudent and responsible course of action, not a litigation tactic for which the Government should be punished. That is all the more so given that the process that ultimately culminated in the January 10, 2007 orders began well before this action. Moreover, “the respect that courts owe to other organs of government should make them wary of impugning the motivations that underlie” those Branches’ actions. *National Black Police Ass’n*, 108 F.3d at 352. Thus, the Government should not be faulted for the FISA Court orders providing an additional legal authority for a vital wartime program.^{2/}

The public interest also weighs heavily in favor of vacatur. As discussed, throughout our Nation’s history, the courts have consistently upheld the President’s authority to conduct warrantless electronic surveillance of the enemy during wartime, or at least have reserved that question. See, e.g., *In re Sealed Case*, 310 F.3d at 742 & n.26 (citing cases). Now that this case is moot, ordinary constitutional avoidance principles dictate vacatur of the district court’s extraordinary and unprecedented

^{2/} In *Ford*, this Court held that intervening legislation had mooted the controversy, but declined to vacate the district court’s decision because the defendants were the *very same legislators* whose “legislative action mooted a case brought directly against them.” 469 F.3d at 506 n.10. That holding is inapposite because the FISA Court is not a defendant in this case. Indeed, the *Ford* majority agreed with the dissent that a different rule would apply where, as here, “other branches of government stand as defendants, particularly where * * * legislation moots a case brought against members of the executive branch.” *Ibid.* There is no reason to adopt a different rule where, as here, a judicial action moots a case brought against the Executive Branch.

decision. Indeed, “[v]acatur appears particularly appropriate where retention of the precedent creates a gratuitous conflict with a co-equal branch of government.” *Clarke*, 915 F.2d at 708; accord *Black Police Ass’n*, 108 F.3d at 353. Leaving the district court’s extraordinary decision in place would create a “gratuitous” inter-Branch conflict in an area of great importance. Moreover, even plaintiffs have not seriously attempted to defend the district court’s decision on its own terms. See Gov’t Reply Br. 3-4.

Even if this Court did not vacate the district court’s *decision*, the court’s nationwide *injunction* would still have to be vacated. As this Court has explained, “where a case involving an injunction becomes moot on appeal, the case should be remanded to the district court with instructions to vacate the injunction.” *United States v. City of Detroit*, 401 F.3d 448, 451 (6th Cir. 2005). It would be untenable to leave the President subject to an ongoing district court injunction that is not subject to appellate review because of mootness. That is especially true in this case because, as the Government has explained, the injunction is unsupported by Article III standing and erroneous on the merits, and is fatally overbroad in its scope.

In short, whatever the ultimate resolution of the important issues presented by this appeal, the public interest weighs overwhelmingly in favor of leaving them open for resolution by a court presented with a “case or controversy” satisfying Article III.

CONCLUSION

The district court's judgment should be vacated and the case dismissed.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor
General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602

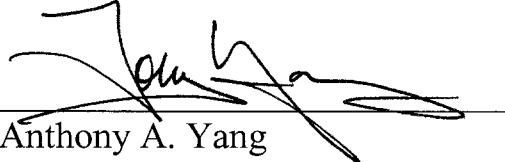
Douglas N. Letter
Thomas M. Bondy
Anthony A. Yang

JANUARY 2007

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 2007, I served one copy of the foregoing reply upon the following counsel by FedEx next-day courier and by electronic mail:

Ann Beeson, Esq. (annb@aclu.org)
Jameel Jaffer, Esq. (JJaffer@aclu.org)
American Civil Liberties Union Foundation
Legal Department
125 Broad Street, 18th Floor
New York, NY 10004



Anthony A. Yang