Nos. 06-2095, 06-2140

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' SUPPLEMENTAL SUBMISSION

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties Union
Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
Telephone: (313) 578-6814

RANDY GAINER
Davis Wright Tremaine LLP
1501 Fourth Avenue Ste 2600
Seattle, Washington 98101-1688
Telephone: (206) 622-3150

ANN BEESON
JAMEEL JAFFER
MELISSA GOODMAN
National Legal Department
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
Telephone: (212) 549-2500

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Until January 17, 2007, the government adamantly insisted upon reversal of the district court's decision enjoining the NSA's warrantless wiretapping of the content of telephone and e-mail messages (the "Program"), arguing that the Program could not be conducted pursuant to procedures required by the Foreign Intelligence Surveillance Act ("FISA"). In an abrupt reversal of its position, the government now claims that the Program *can* be conducted pursuant to FISA and that the President will not reauthorize the Program when its current 45-day authorization expires. The government continues to insist, however, that the

President had and continues to have the authority to conduct the Program outside of FISA. Presumably to protect that supposed power, the government has declined to stipulate that it will comply with the district court's injunction in this case, which merely requires the government to comply with FISA. Moreover, while a judge on the Foreign Intelligence Surveillance Court ("FISC") has apparently approved some form of the government's spying program, the government has refused to disclose the FISC judge's orders. Whatever those orders do, they do nothing to resolve the ultimate issue in this case: whether the President may lawfully conduct electronic surveillance *outside of FISA*.

The government cannot have it both ways. It cannot argue the case is moot because the government is currently in compliance with FISA, and at the same time expressly retain the authority to violate FISA again tomorrow. Because nothing prevents the government from ignoring FISA's requirements after the threat of this litigation has passed, the government has failed to satisfy its heavy burden of showing that this case is moot. And because the government is free to resume the Program at any time, plaintiffs continue to suffer concrete harm. In the face of an express threat of future illegal surveillance by the executive branch, plaintiffs urge the Court to exercise its important duty to uphold the law and protect the rights of Americans from unchecked spying. The injunction preventing

the government from conducting electronic surveillance outside of FISA should be affirmed.

FACTS

In a January 2006 press conference, the President claimed that he could not effectively conduct the Program under FISA.[1] The government made a similar claim to the trial court[2] and made the following representation to this Court:

> Plaintiff's view (Br. 49) that the special needs doctrine does not apply to TSP surveillance because FISA "makes clear" that warrants are "workable" leaps over the question whether *warrants are, in fact, impracticable in the context of the foreign intelligence surveillance conducted by the TSP*. . . . [T]he President and his national security officials have determined that the TSP is necessary to secure essential intelligence information necessary to prosecute the war.

Gov't. Reply Br. 30 (emphasis added).

Less than ten days ago, however, the government abruptly abandoned its claim that it cannot conduct the Program pursuant to FISA. In a letter to Senators Patrick Leahy and Arlen Specter, Attorney General Gonzales wrote "any electronic

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[1] *See* http://www.whitehouse.gov/news/releases/2006/01/20060126.html ("[t]he FISA law was written in 1978. . . . I said, look, is it possible to conduct this program under the old law? And people said, it doesn't work in order to be able to do the job we expect us to do. And so that's why I made the decision I made.").

[2] ("[T]he President has determined that the current threat to the United States demands that signals intelligence be carried out with a speed and methodology that cannot be achieved by seeking judicial approval through the traditional FISA process for the interception of individual communications. . . ."). R 34 [Gov't. mot. to dismiss or for summary judgment, 38].

surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."[3] White House spokesperson Tony Snow confirmed that the Program will continue, only now with the apparent approval of a FISC judge:

> [W]hat's happened is that the FISA court, itself, also had not been presented with the situation quite like this. The FISA court has published the rules under which such activities may be conducted. . . . What happens is that the program pretty much continues -- *the program continues* . . . . Q: In other words, we now have new program called --Mr. Snow: No, *you have the same program* it operates under, but it's really a matter of your legal authority prior to that. It was presidential order. Now in this case, *the program continues*, but it continues under the rules that have been laid out by the court [emphasis added].[4]

The only explanation the government has given publicly for its delay in seeking a FISC judge's approval for the Program is that its applications to the FISC were "very complicated" and the terms of the FISC judge's orders were "innovative."[5]

The government insists that the decision to seek FISC approval for its electronic surveillance was not prompted by any concern that the Program was unlawful, despite the district court holding to that effect in this case. To the

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[3] A copy of the letter is attached as Ex. A to this brief.

[4] *See* http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html ("January 17 White House briefing") (emphasis added).

[5] *Hearing before the Senate Judiciary Committee on Department of Justice Oversight*, 110th Cong., 25 (Jan. 18, 2007) (LEXIS Genfed Library, Fednew File) ("January 18 Judiciary Committee transcript").

contrary, Attorney General Gonzales' letter to Senators Leahy and Specter states, "as we have previously explained, the Terrorist Surveillance Program fully complies with the law . . . ." White House spokesperson Snow said that the President still believes that he has the authority to conduct the Program without using FISA.[6] And Attorney General Gonzales testified to the Senate Judiciary Committee that "[w]e believed, *and believe today*, that what the President is doing is lawful" and that his "belief is, is that the actions taken by the administration, by this President, were lawful in the past."[7]

On January 22, 2007, plaintiffs asked the government to stipulate that it would comply with the district court's injunction in this case,[8] which prohibits electronic surveillance in contravention of FISA.[9] The government refused to stipulate, asserting that "the district court's injunction is not only unprecedented

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[6] January 17 White House Briefing, 7.

[7] January 18 Judiciary Committee transcript, 25, 29 (emphasis added).

[8] A copy of plaintiffs' letter stating their proposed stipulation is attached as Ex. B to this brief.

[9] The government's assertion that it is "an unresolved issue . . . whether any 'electronic surveillance' within the meaning of FISA was being conducted under the TSP at all," Gov't. Supp. Br. 6 n.3, is nonsensical given that FISC's jurisdiction extends *only* to authorizing electronic surveillance. *See* 50 U.S.C. 1801-1871. It is simply not possible for the government to continue the surveillance it previously conducted under the Program—only now with the approval of FISC (*see* Alexander Decl. ¶ 3)—unless that surveillance was electronic surveillance subject to FISA.

but entirely unfounded."[10] In summary, the government still refuses to abide by FISA when conducting intrusive electronic surveillance of Americans.

I. ARGUMENT

A. The Government Has Not Met Its "Heavy Burden" of Proving Its Alleged Voluntary Cessation of the Program Moots This Case.

The Supreme Court has repeatedly held that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations omitted). Indeed, if voluntary cessation of conduct rendered a case moot "courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (quoting *W.T. Grant Co.*, 345 U.S. at 632).

The standard for determining whether a case has been mooted by a defendant's voluntary conduct is "stringent," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). The "*heavy burden* of persuading" the court that the challenged conduct cannot reasonably be expected to start again "*lies with the party asserting mootness*," *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221-22 (2000) (emphasis in original); *accord Friends of Earth*, 528 U.S. at 189 ("formidable burden" rests with

[10] A copy of the government's letter is attached as Ex. C.

defendant). Specifically, a defendant's voluntary cessation of challenged activity moots a suit only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth*, 528 U.S. at 189-90 (quotation marks omitted); *accord Adarand*, 528 U.S. at 221-22.[11]

The government does not even attempt to meet this standard, nor could it given its repeated assertions that surveillance outside of FISA was perfectly lawful and "in accordance not only with statutory authority but also the President's inherent constitutional authority." Gov't. Supp. Br. 2; *accord id.* at 5 ("'the [Program] fully complies with the law'") (quoting Letter to Leahy and Specter); at 7 n.4 ("[t]o be clear, the Government continues to maintain that the TSP was lawful, and, among other things, in accordance with the FISA, the [AUMF], and the President's inherent authority") (citation omitted); at 10 ("plaintiffs claim (erroneously, in the Government's view") that electronic surveillance requires "court involvement"). Indeed, the government insists that the President not only has the *right* to conduct such surveillance but that he has the *duty* to do so when he

[11] Applying this standard in *Friends of the Earth*, the Supreme Court rejected defendant's claim of mootness even though the defendant had achieved compliance with the disputed environmental permit and had closed a challenged facility after the case was filed. 528 U.S. at 193-94. This Court applied the same standard in *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005), and rejected a mootness claim because the defendant failed to meet its "heavy burden" of persuading the Court that it would not revert to an unlawful agreement. *Id.* at 857.

deems it necessary. *See, e.g.*, Gov't. Br. 46 ("If FISA were construed to bar the TSP, it would be an unconstitutional encroachment on the Executive's constitutional authority (and duty) to gather foreign intelligence . . . .").

Not surprisingly, nowhere in its brief does the government come close to stating that it will not resurrect the Program, and it has affirmatively refused to stipulate that it will abide by the district court's order to conduct electronic surveillance within FISA's boundaries. *See* Ex. D. It is thus anything *but* clear that the government's wrongful conduct "could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189-90 (quotation marks omitted). The Supreme Court and this Court have not hesitated to reject mootness claims where the possibility of a party resuming disputed conduct appeared much less likely than here.[12]

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[12] For example, this Court rejected a mootness claim in an action challenging an overbroad and vague ordinance that had expired because the ordinance nevertheless "lies dormant, ready to be brought back to life if the need for it reoccurs." *Leonardson v. City of East Lansing*, 896 F.2d 190, 194 (6th Cir. 1990). Similarly, the Supreme Court did not find moot a vagueness challenge to an ordinance repealed during litigation because the repeal "would not preclude [the city] from reenacting precisely the same language if the District Court's judgment were vacated." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982). Moreover, in actions seeking to prohibit antitrust violations, the Supreme Court has rejected mootness claims where defendants ceased their unlawful activity after litigation commenced and claimed no intent to commit future violations. *E.g.*, *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. at 202-03 (organization members disbanded and foreswore future violations); *W.T. Grant Co.*, 345 U.S. at 632-33 (defendants dissolved interlocking directorates and claimed no interest in reviving them).

Instead, the government argues that the voluntary cessation doctrine does not apply here at all because the government "has not ceased surveillance—instead, the facts and legal authorities have changed." Gov't. Supp. Br. 9-10. This argument is too clever by half. Plaintiffs' challenge—and the district court's decision—is that the President can conduct electronic surveillance of U.S. citizens and lawful residents in the United States *only* pursuant to FISA. The government now says that it is voluntarily ceasing its non-FISA electronic surveillance. That the government will conduct other surveillance going forward under a different legal authority has no bearing on the question of whether it is "absolutely clear" that the government will not revert to non-FISA electronic surveillance.

Similarly, that an "independent judicial body" has now provided additional legal authority for electronic surveillance, Gov't. Supp. Br. 10, does not remove this case from the voluntary cessation doctrine. Clearly, the government was the catalyst here; it was the government that sought approval from the FISC judge. And in fact the government did not cease its non-FISA electronic surveillance because a FISC judge ordered it to. It was only "*after* determining that the FISA Court orders provide[d] the necessary speed and agility" that the President *decided* that he would comply with them. Gov't. Supp. Br. 2 (emphasis added). This indicates that if the President had not been satisfied with the orders, he could have ignored them, and that he could decide to ignore them in the future if he becomes

dissatisfied with their requirements. And given the government's insistence that the Program details and the FISA judge orders remain secret, plaintiffs and the public will have no way of knowing whether and when the FISA orders expire or the President re-authorizes non-FISA surveillance.[13] In short, the FISC judge's orders, whatever they say, do not preclude the government from resuming non-FISA electronic surveillance, which is the relief plaintiffs seek here.

The government also erroneously argues that this case is moot because, if the President were to resume warrantless electronic surveillance, "there would be no reason to assume that the same controversy would be presented." Gov't. Supp. Br. 11-12. Again, the controversy here is whether the government can conduct electronic surveillance outside of FISA, and the requested relief is an order that the government stay within FISA. That will be the exact same challenge and requested relief should the President revive electronic surveillance outside FISA.

Perhaps because its voluntary cessation argument is a non-starter, the government sets up a strawman to attack by focusing on the "capable of repetition, yet evading review" exception and eliding the distinction between it and voluntary cessation. In so doing, the government attempts to flip its "heavy burden" of

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[13] Moreover, these orders are apparently not permanent thus making it all the more likely that the President will revive the Program if the orders are not reauthorized or, even if they are, impose requirements deemed unacceptable by the government. *See* Gov't. Supp. Br. 12 n.8 (discussing implication if "FISA Court orders were not reauthorized in full").

showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth*, 528 U.S. at 189-90 (quotation marks omitted), and put it on plaintiffs to demonstrate the "probability that the same controversy will recur involving the same complaining party." Gov't. Supp. Br. 11 (quotation marks omitted). This gets it exactly backwards. Rather than plaintiffs having to show that the conduct is likely to recur, under the voluntary cessation doctrine, it is the *government* that must show that the conduct could *not* reasonably be expected to recur. And, here, not only has the government not disavowed warrantless electronic surveillance, it has gone out of its way to repeatedly emphasize that the President had—and still has—the lawful authority to do so.[14]

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[14] The government's urging that this Court could, and should, dismiss this case on prudential mootness grounds (Gov't. Supp. Br. 9 n.6) also fails. Given the President's repeated assertions that non-FISA electronic surveillance is perfectly legal and that nothing will prevent him from reviving the Program, the controversy presented by this case is anything but "attenuated." When "determining whether it should dismiss a case which is not technically moot, but in which the defendant voluntarily has discontinued the challenged activity, the court should consider whether there remains some cognizable danger of recurrent violation." *Community for Creative Non-Violence v. Hess*, 745 F.2d 697, 700 (D.C. Cir. 1984). In both of the cases cited by the government, however, the challenged activity was unlikely to recur. *See Chamber of Commerce v. Department of Energy*, 627 F.2d 289, 292 (D.C. Cir. 1980) (per curiam); *Greenbaum v. EPA*, 370 F.3d 527, 534-35 (6th Cir. 2004). Another factor relevant to the Court in *Greenbaum*, and not present here, was that the Court could "no longer afford petitioners any meaningful relief." 370 F.3d at 534.

B. The District Court's Judgment Should Not Be Vacated.

For the reasons discussed above, this case is not moot. Thus, contrary to the government's suggestion, the question of vacatur does not even arise. Plaintiffs note, however, that vacatur would be inappropriate even if this case *had* become moot during the pendency of the appeal. Vacatur is an "extraordinary" remedy, and it is the party "seeking relief from the status quo" who must demonstrate equitable entitlement to it. *See United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994); *Ford v. Wilder,* 469 F.3d 500, 505 (6th Cir. 2006). As the Supreme Court has explained, "[t]o allow a party who steps off the statutory path [of appeal from an adverse judgment] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Bancorp,* 513 U.S. at 27; *id.* at 26 ("[j]udicial precedents are presumptively correct and valuable to the legal community as a whole").

The courts have made clear that vacatur is appropriate only where mootness results "through happenstance—circumstances not attributable to the parties" or through the "unilateral action of the party who prevailed in the lower court." *Stewart v. Blackwell*, __ F.3d __, 2007 WL 77853, at *1 (6th Cir. 2007) (quotation marks omitted). In such contexts, vacatur serves the purposes of erasing a

judgment "the loser *was stopped from opposing* on direct review." *Ford*, 469 F.3d at 505 (emphasis added). Vacatur is wholly inappropriate, however, where mootness results from the voluntary action of the party seeking relief from the lower court judgment. *Bancorp*, 513 U.S. at 25-26 (vacatur inappropriate where "losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal"). "[V]oluntary forfeiture of review constitutes a failure of equity that makes the burden [to prove entitlement to vacatur] *decisive*." *Id.* (emphasis added); *Ford*, 469 F.3d at 506 (finding vacatur inappropriate where "defendants were responsible for the mooting of [the] case").

The problem with the government's vacatur argument here is that, to the extent the legal and factual landscape has changed, it has changed because of the government's voluntary conduct. For one thing, it was the *government's* decision to seek new authority from a FISA judge – it was not ordered to do so, and, under the government's own theory (a theory that it continues to advance today), the law did not require it to do so.[15] At some point, the government voluntarily chose to

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[15] *See, e.g.*, January 18 Judiciary Committee transcript, at 14 (Attorney General Gonzales explaining that the President initially authorized the surveillance without FISA court involvement "because there was a firm belief, *and that belief continues today* that he does have the authority under the Constitution to engage in electronic surveillance of the enemy in a limited basis during a time of war") (emphasis added); Transcript of Background Briefing by Senior Justice Department Officials, Jan. 17, 2007, *available at* http://www.fas.org/irp/news/2007/01/doj011707.html (Senior Justice Department official explaining "*we continue to believe* as we've always said . . . that the

seek new authority from a FISA judge.[16] If the legal and factual landscape has changed, it is only because the government voluntarily decided to change it. Vacatur is therefore inappropriate. *Cf. Ford,* 469 F.3d at 507 n.10 ("defendants' [own] legislative action mooted a case brought directly against them in circumstances that they should have known would moot the appeal"); *Blankenship v. Blackwell*, 429 F.3d 254, 259 (6th Cir. 2005) (refusing to grant "extraordinary equitable remedy" of vacatur where "at least some of the blame for the mootness of this case lies with Appellants").

Vacatur would be inappropriate here even if the FISA judge who issued the new orders had issued those orders *sua sponte*. The government does not suggest that the new orders required the Program to be shut down. Rather, on the government's own account, the new orders simply authorized the President to conduct certain surveillance under the supervision of the FISA Court. The decision to cease conducting surveillance *outside* the FISA process, however, was

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President has the authority to authorize the terrorist surveillance program, that he has that authority under the authorization for the use of military force and under Article II of the Constitution. *That's not changing*").

[16] *See, e.g.*, Jan. 18 Judiciary Comm. Hearing Tr., at 29 (Attorney General Gonzales stating, in response to the question whether seeking FISA authorization was "merely voluntary," that "the president has shown maturity and wisdom here in this particular decision. He recognizes that there is a reservoir of inherent power that belongs to every president. You use it only when you have to. In this case, *we don't have to*"); *id.* at 17 (Attorney General Gonzales stating "Senator, I must just say that we continue to believe that what happened in the past [the TSP], the president's actions, were of course lawful").

an entirely independent and voluntary one. Indeed, the government's continued claim that the President retains the authority to conduct surveillance outside the FISA process only underscores this point. As the government itself makes clear, the President has shut down the Program not because a FISA judge required him to do so but because he decided of his own accord to do so. *Cf. Bancorp*, 513 U.S. at 25 (vacatur not appropriate where the lower court "judgment is not unreviewable, but simply unreviewed by [the appellant's] own choice"); *19 Solid Waste Dept. Mechanics v. City of Albuquerque,* 76 F.3d 1142, 1145 (10th Cir. 1996) (refusing vacatur where government withdrew challenged policy).[17]

The public interest also militates against vacating the lower court opinion. As the Supreme Court held in *Bancorp,* judicial decisions "are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." 513 U.S. at 26. Because the decision entered by the district court protects the right of Americans to be free from electronic surveillance conducted outside of FISA, the public interest weighs strongly in favor of leaving the decision on the books. Moreover, if the decision

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[17] That the President may have decided against reauthorization *for the additional reason* that he secured new authority from the FISA court does not alter the unilateral character of that decision, where the President is free – in his own view – to return to surveillance outside of FISA at will. Where the President believes that FISA authorization was never required at all, the key intervening event is the *President's* decision to comply with FISA, not any purported authorization from the FISA court.

were vacated, nothing would prevent the President from authorizing the NSA to conduct electronic surveillance outside of FISA again. Absent an injunction, the President could resurrect the Program and the public might never learn of it. [18]

C. Plaintiffs Have Standing and Will Continue to Suffer Concrete Harm Absent an Injunction.

As explained in plaintiffs' opening brief, plaintiffs, who are lawyers, journalists and scholars, communicate directly by phone and email for business purposes with people the government suspects to be members or affiliates of terrorist organizations. Pl. Br. 10. They ceased having certain confidential communications with such people when they learned the government was engaging in electronic surveillance outside of FISA. Pl. Br. 11. The inability to communicate frankly has crippled lawyers from representing their clients effectively, and made it impossible for journalists and scholars to guarantee confidentiality to sources and activists; plaintiffs continue to incur substantial travel costs in order to communicate face-to-face. *Id.* at 12-14. Because there is a very real threat that the government could begin warrantless surveillance again at

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[18] That the government disagrees with the district court decision, Gov't. Supp. Br. at 14, is no basis for vacatur. *19 Solid Waste,* 76 F.3d at 1144-45 (rejecting argument that vacatur appropriate on the grounds that executive agency that withdrew challenged policy "believe[d] the district court's decision is wrong," noting that "[t]his rationale obviously collides head on with the Supreme Court's admonition that a party should not be allowed to use vacatur as a refined form of collateral attack on the judgment") (quotation marks omitted).

any time, the FISC judge's orders do nothing to alleviate the threat to plaintiffs' communications or the resulting harm to their professions.

With no assurance that the government will not violate FISA again, and no way to know when the government does so, plaintiffs have no choice but to continue to change their behavior because of the government's unlawful activity. *See* Pl. Br. 15-17; *see also, e.g., Friends of the Earth*, 528 U.S. at 184 (finding standing where "the affiants . . . state[d] that they would use the nearby [river] for recreation if [defendant] were not discharging pollutants into it"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156, 159 (4th Cir. 2000) (finding standing where affiant "testified that he and his family swim less in and eat less fish from [his] lake because of fears of pollution"); *Meese v. Keene*, 481 U.S. 465, 475 (1987) (finding standing where politician decided not to show films labeled as political propaganda by government because he feared it would impair his career).

These ongoing injuries to plaintiffs' rights are concrete and particularized, "fairly traceable to the challenged action of the defendant," and "likely" to be redressed by a favorable decision. *Friends of the Earth, Inc.*, 528 U.S. at 180-81; *see also* Pl. Br. 19-20. Although the government continues to mischaracterize plaintiffs' concrete injuries as a subjective "chill," Gov't. Supp. Br. 16, numerous other courts have found standing where plaintiffs suffered professional injuries

resulting from government investigations or surveillance. *See* Pl. Br. 14-15; *see also Ozonoff v. Berzak*, 744 F.2d 224, 228-230 (1st Cir. 1984); *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975); *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) *vac'd on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

Because the government has expressly retained the power to engage in surveillance outside of FISA, the concrete injuries plaintiffs continue to suffer from the threat of unlawful surveillance are far from speculative. *See* Gov't. Supp. Br. 7. Absent an order from this court, there is nothing to prevent the government from continuing to engage in warrantless surveillance outside of FISA at any time. Affirmation of the district court injunction would redress plaintiffs' injuries because it would enjoin the government from conducting surveillance outside of the FISA in the future. *See Friends of the Earth*, 584 U.S. at 185-186 ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress"). If surveillance outside of FISA were permanently enjoined, plaintiffs would be able to discuss sensitive information again over the telephone and via e-mail with clients, sources, and witnesses, and would not incur economic harm from being forced to travel to communicate with people face-to-face.

As the district court held, the harm caused by surveillance *outside of FISA* is clearly distinguishable from any harm that may result from FISA surveillance. JA 230 Memorandum Opinion ("Op."). Surveillance outside of FISA is neither approved by a neutral magistrate, grounded in probable cause, nor subject to any judicial review of its scope. Nor is such surveillance subject to any of the minimizing requirements that govern FISA interception of attorney-client communications.[19] In fact, the government has admitted that it does not distinguish attorney-client communications from other communications it intercepts.[20] According to the Supreme Court, the relevant standing inquiry "is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). However, a plaintiff "need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 (1982). To require otherwise would result in a "draconian interpretation of the redressability requirement that is justified by neither precedent nor principle . . . We decline to impose that burden upon litigants." *Id.* In summary, as the district court found,

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[19] *See* 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); *id.* § 1801 (h) (defining required "minimization procedures").

[20] JA 196-197, ¶14 (Dratel Decl).

plaintiffs' injuries "can unequivocally be traced to the [Program]" and would be redressed by the permanent injunction. JA 231 (Op.).

D. The Government's Reversal Reinforces the District Court Ruling that the President May Not Conduct Surveillance Outside of FISA.

The government's recent flip-flop reinforces rather than undermines plaintiffs' claims for relief from electronic surveillance conducted outside of FISA. The government tries to obscure the issues before the Court by suggesting that the FISC judge's orders may redress plaintiffs' claimed injuries. But the question before this Court is not whether the FISC orders comply with FISA or the Constitution. Rather, the question is whether the President can authorize electronic surveillance outside of FISA in the future. As the district court held, no more facts, let alone state secrets, are needed to decide that question. JA 221 (Op.); *see also* Pl. Br. 57-65. The legality of the FISC judge's orders is irrelevant to the inquiry, as is any potential application of the state secrets privilege to those orders.[21] Indeed, the government's announcement has only one effect on the merits of this litigation: it fatally undermines the government's prior argument that the FISA process was insufficient to address the President's needs as Commander-in-Chief. Under separation of powers principles long established and recently

[21] Plaintiffs note, however, that the government has not invoked the state secrets privilege over the FISC judge's orders.

reiterated by the Supreme Court,[22] that argument never justified the President's violation of an express prohibition enacted by Congress. *See* Pl. Br. 30-42. Now, the alleged factual basis upon which the government relied to support its broad view of executive authority has evaporated entirely.

Because the President has threatened to violate FISA again, plaintiffs and other Americans will have no assurance that their communications remain private absent this Court's affirmance of the injunction entered by the district court. Given the very real risk that the President will engage in intrusive and unchecked surveillance again – the very risk that threatened our democracy in the past and that Congress intended to eliminate by passing FISA – this court should exercise its important duty to ensure that the executive branch follows the law. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure." *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806). As the Supreme Court recently reiterated, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it

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[22] *See Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2774 n.23 (2006) (the President "may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers"), citing *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J. concurring); *Youngstown Sheet & Tube,* 343 U.S. at 637 (Burton, J. concurring) ("Congress authorized a procedure which the President declined to follow"); *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) (holding that the Habeas Corpus Act of 1863 barred the President from denying habeas corpus rights to a detainee capture outside the area of active conflict).

most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 US 507, 536 (2004) (plurality opinion).

CONCLUSION

For the foregoing reasons, this Court should reject the government's request to vacate the district court's judgment and dismiss the case, and instead should affirm the district court's judgment enjoining electronic surveillance outside of FISA.

DATED this 26th day of January 2007.

Respectfully submitted,

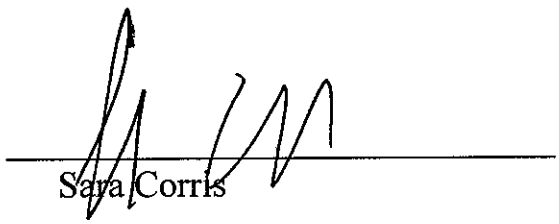
ANN BEESON
JAMEEL JAFFER
MELISSA GOODMAN
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
Telephone: (212) 549-2500
annb@aclu.org

MICHAEL J. STEINBERG
KARY L. MOSS
American Civil Liberties Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201-1343
Telephone: (313) 578-6814
msteinberg@aclumich.org

RANDY GAINER
Davis Wright Tremaine LLP
1501 Fourth Avenue
Seattle, Washington 98101-1688
Telephone: (206) 622-3150
randygainer@dwt.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains no more than 4500 words, and was prepared in 14-point Times New Roman font using Microsoft Word.

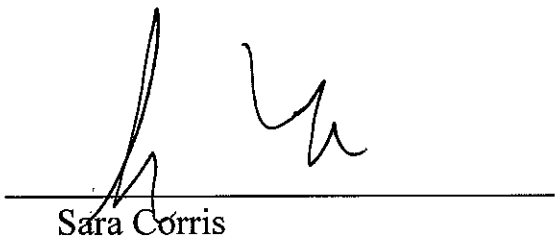


Sara Corris

CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2007, I served two copies of the foregoing brief upon the following counsel by FedEx next-day courier:

Douglas N. Letter
Thomas N. Bondy
Anthony A. Yang
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3602



Sara Corris

Exhibit A

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has

determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith

Exhibit B

ANN BEESON
ASSOCIATE LEGAL DIRECTOR

January 22, 2007

Douglas N. Letter
Thomas M. Bondy
Anthony A. Yang
United States Department of Justice
Room 7245
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Re: *American Civil Liberties Union v. National Security Agency,* Nos. 06-2095/2140 (pending before the 6th Circuit)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2601
F/212.549.2651
ABEESON@ACLU.ORG
WWW.ACLU.ORG

Dear Doug,

Last Wednesday, January 17, 2007, Attorney General Alberto Gonzales wrote a letter to Senators Patrick Leahy and Arlen Specter which stated that "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." The announcement appears to indicate that defendants in the above-named action may no longer have any objection to the injunction issued by the district court on August 17, 2006. Given the recent announcement by the Attorney General, I am writing on behalf of plaintiffs to ask whether defendants will agree to enter into a stipulation that they will comply with the district court's injunction. Plaintiffs propose the following stipulation:

STIPULATION:

Defendants stipulate that they are in compliance, and will remain in compliance, with the permanent injunction order issued on August 17, 2006, in *ACLU v. NSA,* as follows. *See American Civil Liberties Union v. National Security Agency,* 438 F.Supp.2d 754 (D.Mich. 2006). Defendants, its agents, employees, representatives, and any other persons or entities in active concert or participation with defendants, are permanently enjoined from directly or indirectly conducting warrantless interceptions of telephone and internet communications in contravention of the Foreign Intelligence Surveillance Act and Title III.

Please respond regarding defendants' position on the proposed stipulation by the close of business Wednesday, January 24, 2007. We look forward to your reply.

Sincerely,

Ann Beeson
Counsel for Plaintiffs

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

cc: Counsel of record

Exhibit C

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W., Room 7513
Washington, D.C. 20530-0001

PDK:DNL:TMBondy:AAYang
DJ# 145-15-2840

Tel: (202) 514-3602
Fax: (202) 307-2551

January 24, 2007

Ms. Ann Beeson
American Civil Liberties Union Foundation
Legal Department
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Re: *American Civil Liberties Union v. National Security Agency*,
Nos. 06-2095, 06-2140 (6th Cir.)

Dear Ms. Beeson:

We are writing to respond to your letter dated January 22, 2007, in which you request that the parties enter into a stipulation concerning the district court's injunction in the above-referenced appeal. As the Government has explained in its briefs, the Government's position is that the district court's injunction is not only unprecedented but entirely unfounded. In addition, as a procedural matter, the district court's injunction has been stayed, and, as a result, has not been binding on the Government. In any event, because we conclude that, in light of the intervening events, the proper disposition of this appeal is vacatur of the district court's judgment and accompanying injunction and dismissal of the underlying suit, the requested stipulation is not appropriate. Our views are detailed more fully in the supplemental submission enclosed with this letter.

Sincerely yours,

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