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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATION RECORD LITIGATION.	MDL No. 06-1791 C 07-1115
	San Francisco, California Thursday, August 9, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

Michael Avery, Professor of Law
Suffolk University Law School
120 Tremont Street
Boston, Massachusetts 02108-4977

Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
By: Shayana Kadidal, Senior Attorney

Cindy Cohn, Legal Director
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, California 94110

Law Offices of J. Ashlee Albies
205 SE Spokane Street, Suite 300
Portland, Oregon 97202
By: J. Ashlee Albies, Attorney at Law

(Appearances continued on next page)

Reported By: Katherine A. Powell, CSR #5812, RPR, CRR
Official Reporter - U.S. District Court

Appearances continued:

For Defendants: U.S. Department of Justice
Civil Division
20 Massachusetts Avenue N.W.
Washington, D.C. 20530
By: Anthony J. Coppolino,
Special Litigation Counsel
Andrew H. Tannenbaum, Trial Attorney

P R O C E E D I N G S

AUGUST 9, 2007 2:51 P.M.

THE CLERK: Last matter, MDL number 06-1791, In Re National Security Agency Telecommunications Records Litigation. The matter before the Court relates to docket number 07-1115, Center for Constitutional Rights versus George Bush.

THE COURT: Appearance, Counsel.

MR. AVERY: Good afternoon, Your Honor.

Michael Avery for the Center for Constitutional Rights.

THE COURT: Mr. Avery, good afternoon.

MS. ALBIES: Good afternoon, Your Honor. Ashlee Albies for the plaintiff.

THE COURT: Good afternoon.

MR. KADIDAL: Good afternoon, Your Honor.

Shayanna Kadidal, with the Center for Constitutional Rights.

MS. COHN: Good afternoon, Your Honor.

Cindy Cohn on behalf of the executive committee for the overall MDL.

THE COURT: Very well. Good afternoon Ms. Cohn.

MR. COPPOLINO: Good afternoon, Your Honor.

Anthony Coppolino, Department of Justice, for the government.

MR. TANNENBAUM: Good afternoon, Your Honor.

Andrew Tannenbaum also for the government.

THE COURT: Mr. Tannenbaum.

Let's see, who is going to be arguing this afternoon? You, Mr. Avery?

MR. AVERY: If it please the Court, I would argue the substantive parts of our motion, and Mr. Kadidal would argue with regard to the standing and mootness issues, if we get into those issues, Your Honor.

THE COURT: I suspect we will.

MR. AVERY: Yes, but I would like to address, first, principally, the Fourth Amendment issue.

And I would like to start by outlining for the Court where we are in this litigation at this point, since there has been a rather extraordinary development in the case with the bill that was passed by Congress and signed by the president on Sunday, which affects these matters.

The defendants gave notice to the Court of that legislation yesterday. And I would like to start, if it please the Court, by describing what the plaintiffs perceive the effect of that legislation to be on this lawsuit.

THE COURT: All right.

MR. AVERY: Before the legislation was passed, the principal issues in the case related to the separation of powers questions, whether the President had inherent authority

to engage in warrantless electronic surveillance without or perhaps over Congressional opposition; and the question of whether or not that issue had been rendered moot by the fact that in January of 1970, the government went to the Foreign Intelligence Surveillance Court and began doing surveillance pursuant to the orders of the Foreign Intelligence Surveillance Court.

Last weekend, Congress passed a bill which redefined the term "electronic surveillance" as it relates to the Foreign Intelligence Surveillance Act in these proceedings, and which gave the government new powers, extraordinary powers, unprecedented powers to engage in electronic surveillance that go far beyond what the government was doing under the Terrorist Surveillance Program or what it might have done under the Foreign Intelligence Surveillance Act.

We would acknowledge, and I want to be clear about this from the outset, that Congress having acted as it did over the weekend, with respect to surveillance that takes place into the future, sort of moots out our separation of powers argument.

The President is no longer acting on his own. He is acting pursuant to authority that was given to him by Congress in the so called Protect America Act that was signed last Sunday by the President.

On the other hand, neither the President nor Congress

have the power to repeal the Fourth Amendment. And so the principal argument that we make, at it this point, is a Fourth Amendment argument. And to put it most succinctly, what we are here today to argue is that the amendments to FISA that were passed over the weekend and the Protect America Act are unconstitutional under the Fourth Amendment.

Now, we have previously briefed the Fourth Amendment issues in this case, but we would like to have, subsequent to the argument today, with the Court's approval, an opportunity to file a further brief on that issue.

And we would also intend to file with leave of the Court a supplemental complaint in this case. In fact, we have it with us today, and with the Court's permission would file it this afternoon, to set out the situation as it exists now, in other words, the statutory situation after it exits after the enactment of the new legislation, and to make our claims for relief under that -- or in the face of that statute.

THE COURT: Well, why shouldn't I, knowing that by way of background, proceed to the issue of standing and mootness, nonetheless? Because the standing and mootness issues are going to be with us even with your amended complaint and even with your Fourth Amendment challenge.

MR. AVERY: I think the Court should take up the issues of standing and mootness, but I would like an opportunity, if the Court would allow it, to lay out what the

new statute does first, because I think it alters the situation with respect to standing, and it certainly alters the situation with respect to mootness.

There is no claim --

THE COURT: How so?

MR. AVERY: Well, there is no claim that our Fourth Amendment arguments were moot. Our Fourth Amendment arguments are not altered either by what the government did in January or by what the government is doing now. In fact, our Fourth Amendment arguments are heightened as a result of the new situation.

THE COURT: Well, they certainly altered your arguments considerably. What, basically, you are seeking now is a declaration of unconstitutionality of the recent legislation.

MR. AVERY: That's correct, sir.

And we are also seeking a declaratory judgment with regard to the prior practice of the President on the argument that those issues are not moot because the statute that Congress passed terminates by its own terms 180 days from passage unless Congress acts to renew it.

So 180 days from now, unless there is any intervening action by Congress, we'll be back to the situation as --

THE COURT: We have a hard enough time as judges determining what Congress has done, much less determining what

Congress is going to do.

MR. AVERY: Correct. And what they have done is to pass a bill that lasts only for 180 days.

THE COURT: I understand that. But why isn't that declarative of what the law has been in the past? Why should --

MR. AVERY: Because it's not for Congress to declare what the law is; it's for this court to declare what the law is. That's been true since Marbury vs. Madison.

THE COURT: But I could certainly look to what Congress interprets as guiding what the law is, and particularly in an area that's highly unsettled as this is.

MR. AVERY: You can look to what Congress has said. In fact, in Marbury vs. Madison, Chief Justice Marshall said: I'll take into account what Congress did. After all, the members of Congress that passed the Judiciary Act of 1789, are the same people who drafted the Constitution. That, of course, is no longer the case. So when we get to Morrison --

THE COURT: In more ways than one.

MR. AVERY: Yes.

When we get to Morrison vs. the United States, Chief Justice Rehnquist says: We don't have to pay very much attention to what Congress thinks anymore. We think that the Violence Against Women Act is unconstitutional. We are going to declare it unconstitutional.

So we are not looking at a statute here that was passed by the framers. Far from it. And if I could, Your Honor, I would just like to lay out the principal aspects of that statute that I think bear both on the standing issue and on the Fourth Amendment issue.

What makes this statute so extraordinary is that under the Foreign Intelligence Surveillance Act, and even under the Terrorist Surveillance Program, as the government described it, the targets of surveillance were foreign governments or agents of foreign governments. And agents of foreign governments were defined as including terrorists or people engaged in counter-surveillance or issues of that sort.

THE COURT: That was in what enactment?

MR. AVERY: The Foreign Intelligence Surveillance Act, as enacted in 1978.

THE COURT: '78.

MR. AVERY: Yes. Section -- 18 U.S.C. Section 501, if memory serves. It was Section 101 of the statute defined various terms, including foreign powers and agents of foreign powers.

There was some subsequent amendment to the agents of foreign powers, but it continued to be the case and, in fact, the government argued this itself, when it argued the case In Re Sealed -- In Re Sealed what? In Re Sealed case before the appellate court of the Foreign Intelligence Surveillance Court.

It continued to be the case that there was an air of criminality, whether you want to call it terrorism, counterintelligence, but there was an air of criminality that was associated with the term "agents of foreign powers."

Now, under the new statute, to engage in electronic surveillance all the National Security Intelligence Director and the Attorney General have to determine is that they are seeking foreign intelligence information. There's no longer any requirement that it relates to a foreign government or an agent of a foreign power. It simply has to be foreign intelligence information.

And the definition of "foreign intelligence information" is still supplied to us by the original statute, by the 1978 FISA statute. And that includes, Your Honor, information that relates to a foreign government that may affect the foreign affairs of the United States.

In other words, the extraordinary thing about the statute that was passed last weekend is that it has nothing to do with terrorism. It has nothing to do with armed threats against the United States. It has nothing to do with criminality.

The only requirement under the bill is that the government be engaged in seeking foreign intelligence information, which can be information which relates to a foreign government that affects the foreign affairs of the

United States. It could be commercial information. It could be cultural information. I suppose it could relate to the Olympics.

THE COURT: The what?

MR. AVERY: The Olympics.

You may recall that we've used the Olympics for foreign policy purposes by boycotting the Moscow Olympics.

It could relate to anything that affects the foreign policy or the foreign affairs of the United States.

Well, this is really a very different world than we were in before last weekend. Because before last weekend, the government argued that the reason what they were doing did not violate the Fourth Amendment was because of the special needs exception, the doctrine that the government can proceed without a warrant where there are special needs beyond ordinary law enforcement that require them to proceed with particularized suspicion or without a warrant.

And it is, Your Honor, the analysis of the special needs exception that has changed so drastically between last week and this week.

Last week, when the government argued the special needs expression -- exception, they could talk about the fact that terrorism poses such extraordinary dangers, and the need to respond swiftly to terrorism dictates that they go forward without seeking a warrant in all these cases.

We never agreed with that argument. We briefed it at length in our papers which are before the Court. But that was their argument.

Now, now to make a special needs argument they have to say that the entire program of surveillance that is contemplated by the Protect America Act is justified by the special needs exception. And they can't do that.

And we are asking Your Honor, as swiftly as possible, because this litigation has already gone on for 18 months, this program has already gone on since shortly after September 11th, we are asking this court as swiftly as possible to declare this statute unconstitutional.

Why do I say that the special needs argument is so different now? There's an excellent Law Review article, Your Honor, written by Judge Gould of the Ninth Circuit, together with Mr. Stern, who is a practicing attorney who I gather was a former clerk of Judge Gould.

And the entire Law Review article, which is at 77 Southern California Law Review, is based on the ticking bomb hypothetical; the government's favorite hypothetical in this litigation.

The entire article is based on the ticking bomb hypothetical. And Judge Gould and Mr. Stern analyzed the question of whether or not the ticking bomb hypothetical -- in other words, the government has information that somewhere in a

hundred houses there is an atom bomb that's going to go off shortly. Can the government search all 100 houses, even though it doesn't have probable cause to search any individual house among the known hundred?

They analyze this article, this hypothetical, by asking: Are there any exceptions to the warrant requirement which would permit this?

And they conclude that there are not. And that's an unsatisfactory answer to them because everybody wants to -- everybody wants to resolve the ticking bomb hypothetical by saying, well, of course you can find the ticking bomb.

So they discuss at some length the special needs exception, and they suggest certain I think what they call tweaking that might be done of the special needs exception in order to answer the ticking bomb hypothetical.

In the course of that discussion, they analyze two issues which are important to the statute that was passed over the weekend. The first is narrow tailoring and the other is standardless discretion.

The question is, when the government comes and argues the special needs exception, the cases demonstrate -- and this would be easier to lay out in a written brief -- but the cases demonstrate that there are these two requirements: First, that there be narrow tailoring; that whatever the danger is that the government says justifies these special needs measures has to

be addressed narrowly by the program that they are adopting.

Justice O'Connor speaks about this in the Edmond case. All the cases that -- all the cases in the special needs exception address this in one way or another. Judge Gould calls it the efficacy of the program in the Law Review article.

Here the program that's adopted is so much broader than the need -- I mean, we concede there is some need to address the question of terrorism and that there is an argument which has to be met, that that would call into play some sort of extraordinary measures.

The question is: Does a statute that allows them to surveil anybody who is overseas, even if that person is talking to someone in the United States, and even if the person overseas is a U.S. person, as long as it relates to the foreign affairs of the United States, is that narrowly tailored to address that need? Of course not.

So the statute that was passed over the weekend doesn't remotely begin to meet the narrowly tailored requirement. As Justice Ginsburg said in one of the cases, there's a difference between tailoring which is ineffective and no tailoring at all. This is no tailoring at all.

The second issue, Your Honor, is the issue of standardless discretion. If we look, for example, at the special needs cases having to do with urine tests, whether it's a question of government employees or high school students that

are being drug tested, the cases have been very careful to say that there has to be a program in effect which does not allow standardless discretion on the part of the officials who implement the program. There has to be a protocol. Either you've got to make all the students submit to the urine test or you have to test them randomly.

If you have a highway checkpoint, you either have to stop all the cars or you have to stop them randomly. You can't allow the officers in the field to decide who is going to be subject to the search.

But that's precisely what the litigation that was passed last weekend does. There is no set of rules or guidelines which the National Security Director or the Attorney General can look to to say, who -- of all the people in the world whose behavior affects the foreign policy of the United States, whose conversation should we listen to?

It's entirely up to them. And it's never reviewed by any court. Never reviewed by any court. The only issue in the statute that's subject to court review is whether or not they have some kind of plan in place to determine who's outside the United States and who's not.

And, by the way, this is sort of a shell game in the statute. The statute says they have to come up with a plan to allow that to be reviewed by the Foreign Intelligence Surveillance Court. But in a statute that's only going to last

for 180 days, they don't have to submit that to the Foreign Intelligence Surveillance Court for 120 days; and the court doesn't have to rule on it for 180 days. So even that judicial review is a little illusory, I would say.

But to go back to the main point, in deciding who to listen to, the National Security Director and the Attorney General have unbounded discretion to listen to anybody in the world who's outside the United States, whom they reasonably believe to be outside the United States, whose behavior may affect the foreign affairs of the United States. Even if they are talking to someone in the United States.

So for these two reasons, Your Honor, because there's no narrow tailoring -- in fact, no tailoring at all -- and because there is standardless discretion, we would suggest that the special needs exception to the Fourth Amendment does not apply here.

THE COURT: All right. Let's hear the government on this, before we turn to the other issues.

MR. AVERY: Thank you.

THE COURT: Mr. Coppolino, are you going to address this?

MR. COPPOLINO: Yes, Your Honor.

Your Honor, here is what I am going to address. I'm not going to address his arguments. And I'll tell you why. These issues are not before the Court.

This statute, as Mr. --

THE COURT: I suppose the question is whether or not I should allow an amendment to bring these issues.

MR. COPPOLINO: That's not before the Court either.

They have not filed a motion to supplement their complaint. They sent me an e-mail yesterday, which I got on my Blackberry when my plane landed in San Francisco, saying they were thinking of doing it and did I have any thoughts.

We sent them an e-mail back this morning, and I said, well, we'll see you in court, and maybe we'll chat about it, because I do have some thoughts about that.

THE COURT: Well, I bet you do.

MR. COPPOLINO: Yes. And my first thought is, Let me see your motion; let me see what you intend to move to supplement the complaint; and then we'll tell you what our position is on the motion to supplement. If we don't oppose it, or if we do and a motion to supplement is granted, then the complaint will be supplemented, and all of these issues that he has just addressed for the past 15 or 20 minutes would then be before the Court.

They are not before the Court in the complaint that is pending or in the motions that are pending. And that -- that is -- you know that is why we haven't briefed these issues at all.

And the statute was just passed last Saturday, I

believe, signed by the President shortly thereafter.

THE COURT: Reminds me of an objection that a lawyer once made that something was irrelevant; which I overruled on the grounds, well, it may be irrelevant, but it's interesting so let's hear it.

Same point here, isn't it?

MR. COPPOLINO: I think, frankly, they are using this as a forum to draw attention to their objections to this statute.

And, you know, I suppose all is fair in litigation. But the reality of the matter is, Your Honor, if you are going to follow proper procedure, it is not before this Court. When it is before the Court, it will be briefed and then argued if it is before this Court.

I assume when they file -- if they get to file a supplemental complaint, if you grant that motion, and it is filed, there will then be briefing on the constitutionality of this new statute, at which point you will have the benefit of --

THE COURT: Of your view.

MR. COPPOLINO: -- full and thorough brief from the United States government on that.

And I would just add one final point, is that if I heard what he said correctly, he has just conceded away the motions that we are here on, Your Honor. He said that his

claims with respect to the separation of powers argument are moot, as we have argued.

The separation of powers argument, by the way, is linked to the FISA authority argument, because their pending complaint says that the challenged surveillance activity is unlawful for, among other reasons, not being consistent with statutory authority.

And at the present moment, the FISA has been amended for a temporary period of six months, to authorize or to at least recognize that the government's -- the definition of electronic surveillance was amended to provide that surveillance can occur at targets overseas, outside the definition of electronic surveillance.

So that amendment, at least for six months, negates the merits of their FISA statutory claim. The existing Fourth Amendment claim was predicated on a showing of actual direct interception, under the Terrorist Surveillance Program. They abandoned that claim in New York when they conceded that they could not prove any direct actual interception of any of their clients in light of the state secrets privilege.

So based on what Mr. Avery just said, every single claim they have raised in the existing complaint that is before you is now moot and should be dismissed for that reason alone.

Having said all that, Judge Walker, if you would like to -- would like me or them to address themselves to the

current complaint and the current issues in this case, I would be happy to do that.

THE COURT: I would indeed, and invite you to do so.

MR. COPPOLINO: Thank you, Your Honor.

I don't know how familiar you have had a chance to become with the CCR case. We certainly have thrown a great deal at you with all these MDL cases, and I don't envy you for that. So I thought I would just start briefly by distinguishing it from some of the other cases that we've had before you.

THE COURT: All right.

MR. COPPOLINO: First, this is a narrower case than the Hepting case, or the Verizon case is the case that you are going to hear about on August 30. It's a case that's been brought solely against the government. There is no issue or allegation of any alleged involvement by telecommunications carriers.

They don't allege a contents surveillance dragnet, which is at issue in Hepting and Verizon. They don't challenge any alleged call records program. They challenge only the surveillance activity that the President had announced in December 2005, which we call the Terrorist Surveillance Program.

And that program, as I think you are familiar with from at least the Hepting case, it was a program in which the

President authorized the interception of the content of international communications to or from the United States reasonably believed to involve members or agents of Al Qaeda or affiliated terrorists organizations.

That is all that is at issue in this case, number one. Number two, they don't dispute that that activity is no longer operative.

I will agree with Mr. Avery on one point that he made. The circumstances that gave rise to this case have changed considerably since it was brought. But they had changed considerably even before this legislation had passed.

As you know, Your Honor, we submitted materials to you, I think starting in January of 2007, after the President and the Attorney General indicated that the Terrorist Surveillance Program had not been reauthorized by the President, that the FISA court had issued orders pursuant to which any surveillance activity that was occurring under the TSP is now occurring under FISA.

So what's now at issue in the existing complaint -- assuming they haven't conceded it away, which I believe they have -- is their fear of a recurrence of the Terrorist Surveillance Program, and specifically whether that fear of its recurrence is justified to continue to -- for this Court to continue to exercise its jurisdiction.

Now, as you may have seen from our original briefings

in this case, which we filed before Judge Lynch in the Southern District, we have contested their standing from the outset on the face of the complaint.

That is that we've argued that their allegations of a so-called chill injury under Laird vs. Tatum were never sufficient from the outset.

And now that the TSP that they have challenged is inoperative, we continue to argue that the jurisdictional basis for this case is even more unfounded.

Whether you consider it as an issue of standing or mootness -- and we briefed both of those issues to the Court -- the Court does not have jurisdiction to proceed, in our view, on the face of the complaint with respect to the current complaint.

And there are lots of legal theories, Laird vs. Tatum, First Amendment chill issues, mootness and so on. But before we get to that, I thought I would just try to make a general overarching point as to what they are asking you to do today, or at least what they were asking you to do in their pending motion for summary judgment which is still before the court unless withdrawn.

And that is, they are asking you to engage in what we regard as an extraordinary and unprecedented exercise of Article III jurisdiction, by attempting to enter prospective relief as to President's authority to authorize foreign

intelligence surveillance in the future, pursuant to his on inherent constitutional authority.

And this would be as to all succeeding presidents of the United States. So far as I can tell, there is no limitation on that. They still want declaratory and injunctive relief. And those are the only things at issue here: Prospective declaratory and injunctive relief. To order the President and all succeeding presidents never to reauthorize something like the Terrorist Surveillance Program, again, based on the fear that they think, first, it might recur; secondly, that it might be similar to what the President did before; third, that it might affect some of their clients.

If I can convey anything to you today, Your Honor, it's that the law absolutely does not support the Court's exercise of jurisdiction with respect to that. And there's lots of reasons why that's so.

It's not just because they didn't have standing from the beginning. I can lay that out for you, if you want to go back a year so ago.

It is that, fundamentally, the Court is not in a position to anticipate all future circumstances that might confront the President or the nation, that may require an exercise by the President of his inherent constitutional authority to order foreign intelligence surveillance.

Under the plaintiff's view, at least as I understood

it before Mr. Avery got up, this case would never be moot because the executive branch today has reserved its position that the TSP was a lawful exercise of the President's statutory and constitutional authority, and that we have not disavowed the President's authority to do that.

Now, if you think about that for a moment, it's highly unlikely that any President would disavow that they had the authority to do something under their Article II powers as commander in chief to protect the nation.

THE COURT: Did you say Article III?

MR. COPPOLINO: I said Article II, I thought.

THE COURT: I was hoping you said Article III. Hoping that maybe we had more authority than I anticipated when I came into this job. Maybe I misheard.

MR. COPPOLINO: You have my vote for President, Your Honor.

THE COURT: All right.

MR. COPPOLINO: But, actually, you are Article III; the President is Article II, unless I messed that up.

By and large, the point I'm trying so make is simply that your jurisdiction under Article III is limited to actual cases and controversies.

The President's authority under Article II is to be the commander in chief. And his first and foremost duty is to protect the nation from attack.

And they have come in here and they've said, enter an injunction and enter declaratory relief in anticipation of something that hasn't happened, may never happen again, may happen in some different fashion, when it does happen it may not affect their clients.

THE COURT: But it did happen, didn't it?

MR. COPPOLINO: Sure it did happen. But it did happen once is not a basis for Article III jurisdiction forever into the future.

Look, there is one key case you should look at, that having re-read it today I really would urge you to take careful consideration of, and that is the Lyons case.

Because the Lyons case is a nice intersection between the doctrines of mootness and standing. And it throws into the mix the doctrine under which you could attain injunctive relief.

And I hadn't realized it until I re-read it again today, but there is a passage in Lyons which is very interesting. It's actually the first issue in the case. Where the government, which I think was City of Los Angeles -- this was a case about an individual, as you are probably very well familiar with, which was subject to a choke hold policy. And he filed a suit for declaratory and injunctive relief. He also had a suit for damages.

But in the Supreme Court case that the Court

considered, they said, look, his claim is not moot because the government and the City of Los Angeles had announced a six-month moratorium in that policy, and they said, well, it's temporary.

But you don't have jurisdiction to attain declaratory or injunctive relief, with particular emphasis on injunctive relief, although they did talk about declaratory relief as well.

What the Court said was, the plaintiff had come in there saying, I was subject to something in the past. I think it was illegal.

Leave aside for a moment whether they were actually subject to this policy. But Mr. Lyons clearly was because he was stopped and choked, so he was subject to that policy. He said, I want an injunction to prevent that from happening again.

The Court, citing very black letter standards for standing and for Article III jurisdiction in general, you must show that you have sustained or are imminently threatened with sustaining an injury before you can obtain injunctive relief. Your injury must be actual or imminent, and not conjectural or hypothetical.

And the Court said, Even though you have been subject to this in the past, we are not giving you an injunction for prospective relief.

Interestingly enough, in that discussion -- I confess I hadn't caught it until I re-read it -- they talked about the intersection with the mootness doctrine. Because in this case they say, This case is not moot because the President has reserved the right to do this again; another President might do it. And I don't think, by the way, that is sufficient, just on its face, to proceed even under standard mootness doctrine.

But Lyons really puts an end to that, because they say, The doctrine of voluntary cessation of alleged unlawful conduct, we don't think it applies here at all. But if it does, Lyons said, If that doesn't apply when you're seeking injunctive relief there is a separate question that you have to consider. You still can't get injunctive relief if you are speculating that you might be harmed again in the future.

That is exactly what they are doing. It is rampant, rank speculation that this might recur. They have no evidence of that.

Of course, the only basis for that argument is the government holds to its legal position that this may -- this is within the President's authority, as I assume you would have expected we would, and as I think is to be expected, clearly not enough to invoke the Court's jurisdiction for prospective relief under Article III under Lyons, and I don't even think it's close.

It's clear that you have to show you are immediately

in danger of sustaining a future injury to get prospective relief. And that's even with the mootness doctrine.

That's what I think takes the legs out of the existing complaint, in light of the fact that even under their complaint the alleged unlawful activity is now subject to FISA court orders. I think that's key.

Now, if you wanted to run through -- if you had any doubt about that, by the way, Your Honor -- and you may, but I don't think there is much doubt -- but if you had doubt about it, I think the doctrine of constitutional avoidance should end it, because they are still asking you to adjudicate a very significant constitutional question.

And that is, did the President violate his constitutional authority in authorizing this activity to protect the United States from future terrorist attacks at the hands of Al Qaeda? Did the President exceed his authority in authorizing the surveillance to use the statutory authority under FISA?

Those are very serious constitutional questions. We would, on the merits of course, defend the President's actions. We have asserted the state secrets privilege to the extent necessary, if we had to adjudicate the merits, but we think there are serious threshold jurisdictional problems here.

In light of the fact the TSP is not operative anymore, you can and should avoid all of that just on the basis

of that law. But the doctrine of constitutional avoidance makes clear that a court should not pass on significant questions of constitutionality unless adjudication is unavoidable.

It's clearly unavoidable here. These questions may never arise again in the future. Even if a president determined that it was somehow necessary to authorize surveillance outside of FISA, in a circumstance where the threat had to be met in a manner that FISA didn't cover, even as it may be amended in the future, which is another thing we don't know, Congress may give the President new tools, may not, or the circumstance may arise that the tools that the President has five, ten, 20, 50 years from now, who knows, communications technology may change. We can't predict that.

And so where we don't know what will happen in the future, where we don't know the threat, we don't know the tools necessary, it is -- in my view would be an extraordinarily injudicious exercise of authority to step forward and say, I've got to issue declaratory relief here; I've got to decide these constitutional questions.

Now, I have to tell you, Judge Walker, I worked long and hard preparing an argument on all of the issues that have been raised in CCR over the last couple of years, whether or not there was standing at the beginning.

And I think there is like a whole bunch of issues

that we've laid out for you. Did they have standing at the beginning, under the alleged chill under Laird?

THE COURT: Why don't you address that.

MR. COPPOLINO: Sure.

THE COURT: If you spent two years working on the argument, I don't want to foreclose --

MR. COPPOLINO: I have been arguing the same case for two years. I did finally win in the Sixth Circuit, so that was good.

The first issue is whether or not at the time the suit was filed their threshold allegation of an alleged First Amendment chill injury was valid under Laird.

I should add, by the way, that they have also alleged they were actually directly intercepted. No proof of that. They have largely abandoned that. Their one claim of injury --

THE COURT: Well, they claim that they are lawyers whose ability to communicate with their clients has been frustrated because they have reasonable apprehension that their communication, their privileged communications with clients are going to be intercepted.

MR. COPPOLINO: Right. That's the Laird allegation of a chill injury. Now, we think it's covered by Laird. Mr. Kadidal or Mr. Avery, whoever is going to argue it, will present to you various points reflected in their briefs that Laird doesn't cover it.

So I think you have to start, first of all, with: What is the claim, and what does Laird apply to? Laird was a case in which the plaintiffs allege that they feared they were going to be surveilled under an existing government surveillance type of program. And we think that their allegation here is not fundamentally different.

And one thing I would point out, Laird did not apply some new different standing test. It actually went back to and it applied a test which has been reiterated over the years, similar to the Lyons test, which is that to invoke the judicial power of the federal courts under Article III, you must show that you have sustained or are in immediate danger of sustaining an injury.

That was the standard that Laird applied, and the Court said, All you're challenging is the existence of a program, your alleged fears from that program. That is subjective apprehension because you have no proof that you've ever been intercepted or that you are subject to that program. You fear that you might be. You may have some good reasons for that.

In Laird, by the way, a couple of those plaintiffs were actually subject to the program. They were in the files that the government had gathered, which was an investigation, investigative program about civil disturbances in the United States during the 1960s.

Notwithstanding, the Court said you just can't come to court and say, I fear being surveilled by a program because it exists. You have to show more.

And the "more," we submit to you, is that you have to show that the government is actually doing something to you, in order to show that you have sustained or you have to show that there is some particular requirement that clearly applies to you but whereby you could show you are admittedly threatened with some injury. And we submit, Your Honor, they haven't done that.

Now, how do they deal with Laird? It's the key case. And there are some lower court cases that apply it: United Presbyterian in the D.C. Circuit, Presbyterian Church here in the Ninth Circuit. Which is a case they rely on quite heavily and is very distinguishable.

THE COURT: Why is distinct?

MR. COPPOLINO: It's quite distinguishable, Your Honor.

The heart of the distinction is this. The Presbyterian Church case in the Ninth Circuit, the facts essentially were this: The government, I believe it was the INS, had entered that church and had actually surveilled the congregation during its services and meetings. And this was established on the record.

There were some criminal trials in which this had

come out. And there was no dispute that the surveillance had occurred. As a result of the fact that the surveillance had occurred, the plaintiff said, We have suffered injuries; some people aren't showing up anymore because they fear they are going to continue to be surveilled by the government.

The most fundamental and I think the most obvious factual difference between that case is actual surveillance occurred, and it was undisputed that it occurred.

And the injury that the plaintiffs in Presbyterian Church allege flowed from that, loss of church attendance -- which they could point to, they could certainly try to document -- resulted from undisputable conduct which had occurred.

A recent Sixth Circuit decision, ACLU vs. NSA, Judge Batchelder and Judge Gibbons analyzed various cases in which they looked at these standing questions. The Friends of the Earth vs. Laidlaw was one of them. Presbyterian Church was another one. A whole bunch of them. Laird.

And they made the point that whether you are operating under Laird or Article III standing authority in general, you cannot speculate about being injured. You have to be able to -- you have to allege and then ultimately you have to prove on summary judgment or during trial that you have, in fact, been subject to the conduct that you're challenging. And then, if you can prove that, at that point you can say, We have

harms that have resulted from that.

In Friends of the Earth, the indisputable conduct was that a polluter was discharging pollutants into the river where the plaintiffs lived nearby. And the Court said what's different about that case is there is no dispute that that was happening. And the people who lived nearby demonstrated, through affidavits and their testimony, that they were harmed by the fact that there were pollutants in the river nearby to where they were living.

The plaintiffs in this case want to skip the first step. They want to say, We're harmed by the existence of the TSP; we've had to alter our communication, alter our behavior.

What's missing from that, as I think Judge Batchelder and Judge Gibbons correctly concluded, in my view, is that there is no question the conduct happened in Friends of the Earth vs. Laidlaw.

But there is a big question that it happened here because, in fact, they don't know, they are speculating about whether they have been subject to surveillance, number one.

And, number two, second issue, if you have to reach it -- and we don't think you have to -- is that if you have to try to prove whether this was true, whether or not the -- that they were subject to the TSP, you need to understand the operations of that program.

Their allegation, Your Honor, is that all you need to

know is the Terrorist Surveillance Program was directed at Al Qaeda communications. And that's it. And that some of their clients are suspected Al Qaeda. And based on that, they assert, We are subject to this program, and that's all you need to know, that's the only objective fact you need to know, and then from that see the reaction that we -- that we had and we're objectively harmed.

Here is the problem with that. It still does not -- it is still a matter of speculation that even though that is the general goal of the program, is to detect Al Qaeda -- no surprise there -- they cannot show and they don't know whether they themselves have been subject to this activity.

That's a failure of both allegation and of proof, it seems to us, Your Honor. Judge Batchelder, I thought, made an interesting point and a correct point. It's possible that their clients were, but it's equally as possible that they were not. And that's what makes the allegations conjectural.

It's a replay of a case that we saw in the D.C. Circuit, United Presbyterian Church vs. Reagan, in which plaintiffs had come in challenging another surveillance program authorized by executive order. And they made the argument, Look, we're more likely to be covered by this program.

The plaintiffs in Halkin made the same argument. Said that, We're more likely to be covered by the government's surveillance activities; we like to protest; we engage in

political activities; we have contacts with people overseas that are likely to be surveilled.

It's the same type of allegation here. What the courts in that case said was that even though you may be at greater risk than the public at large, it is still not sufficient to show a genuine threat.

Remember, you have to bear in mind -- as you may know, this was Judge Scalia who wrote this United Presbyterian decision in the D.C. Circuit. Said it is --

THE COURT: Presbyterians are all over the litigation of America.

MR. COPPOLINO: They've got theirs and we've got ours. I think both cases help us.

The bottom line was, the mere fact that surveillance was authorized does not mean you are subject to it. You may be; may not be. But it is not akin to a kind of statutory requirement that unquestionably applies to you.

I think, in addition to Presbyterian Church, other cases that they cite -- I mentioned Laidlaw. There is a case called Orzonoff, which was a First Circuit case decided by Judge Breyer, now Justice Breyer.

And he specifically applied the Laird case to a situation in that case where an individual was required to take a loyalty oath in order to obtain the job in a government organization, an international aid organization.

And Judge now Justice Breyer, specifically looked at the issue of: What does Laird mean when it says you can't just allege a chill; you have got to allege something more than a chill, in order to have standing to vindicate your rights for a First Amendment violation? He said, Well, there's something more. It's something the government does to you. They did it to this guy. They made him comply with this loyalty oath, or he doesn't get the job.

And that was akin to a case that I think the Laird court itself cited, where if you don't actually comply with the government requirement, you're going to be -- you're going -- there's going to be a disadvantage that will flow, you can then bring a standing claim. You would then have standing to show that you were actually affected by government conduct and injured thereby.

Another case they cite, Meest vs. Keen, it's just not even close to being on point. It was a case where -- it was a California state legislator who had to comply with the federal statute which required him to register and report the fact that he was showing a film that the government had labeled as political propaganda.

Those were statutory requirements that indisputably applied to him. There is no question about it. He met the terms and conditions of the statute. Far different scenario from what you have with speculation that you may be subject to

surveillance, which is what they have.

So, Your Honor, we've laid a lot of this out in our brief.

THE COURT: You can wrap up.

MR. COPPOLINO: I might be being a bit repetitive.

On this point I will wrap up by saying that, at the beginning their allegations of chill were entirely insufficient. Now that the TSP is inoperative, their allegations are even more insufficient because it doesn't exist anymore.

I've never seen a case involving chill injury that is alleged to result from a program that doesn't exist. Remember, Laird was the present existence of a surveillance program. That's the problem with their standing at the beginning of the case. It is only gotten worse since.

I'll make this point and sit down. There's a lot more to this case, but the main point I'll make is we reserve a state secrets privilege here, as we did in Verizon and Hepting, but you don't need to reach it here for all the reasons I just mentioned.

If you are convinced by those reasons -- our privilege assertion has covered the operational details of the Terrorist Surveillance Program, whether or not these plaintiffs have been surveilled, the particular threats that the program is designed to meet. Those facts would be necessary to

adjudicate their standing in this case, whether it's a claim of direct interception or with respect to chill, to show factually whether they have valid grounds to believe that this program covered them.

In addition, the state secrets privilege would be directly relative to deciding the issues on the merits. I can address that if you want.

THE COURT: I assume we are going to get some guidance on that. I don't know about in the near future, but we are going to get some guidance on that from the Ninth Circuit.

MR. COPPOLINO: Very well, Your Honor. If you want to -- if you want me to walk through that later, I will. I wanted to at least leave --

THE COURT: Walk through what?

MR. COPPOLINO: Walk through the fact that if they get past the jurisdictional hurdles on the face of the case -- which seem insurmountable to us now -- you do have to at least take into account at that stage the state secrets privilege.

I will make this point. They have not contested the assertion of the privilege -- it's been contested somewhat in Verizon -- and have been suggesting this isn't a secret and that isn't a secret. We'll deal with those issues on August 30.

They have contested the consequences of the privilege

assertion. Our view is that it requires dismissal. Their view is that it does not.

So the consequences issue is joined because they moved for summary judgment; we moved for summary judgment. And the question before you, should you reach the merits, is, do you need state secrets to decide the case? And we think you do.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Coppolino.

Now, let me ask the reporter. Do we need a break? Let's take five minutes, then we'll resume with oral argument.

(Recess.)

THE COURT: Very well. Counsel? Tell me, you are Mr. --

MR. KADIDAL: I am Mr. Kadidal.

THE COURT: Very well.

MR. KADIDAL: The Center for Constitutional Rights, for plaintiffs.

THE COURT: Yes, Mr. Kadidal.

MR. KADIDAL: I would like to offer you a brief roadmap of where I intend to go with this. That depends on how much Your Honor is interested in hearing some of the arguments.

THE COURT: Oh, I'm very interested. That's not the problem.

MR. KADIDAL: I think we have established that this

is an interesting case. Many of these arguments, I think, were argued pretty thoroughly before Judge Lynch in the oral arguments --

(Reporter interrupts.)

THE COURT: They were extensively briefed before Judge Lynch. As your colleague, Mr. Avery, has pointed out, and Mr. Coppolino has pointed out, the ground is shifting.

MR. KADIDAL: That's right. And I want to clarify one thing.

What Mr. Avery meant was, by saying that the separation of powers issue was mooted out as to the new statute is simply that we don't have a separation of powers objection to the new statute.

We believe, for reasons that I'll lay out, that the existence of a new statute doesn't moot our existing four claims as to the so-called TSP or NSA program that we objected to in --

THE COURT: I think that's how I understood his statement.

MR. KADIDAL: Well, let me definitively correct it for the record. I've conferred with my co-counsel, and that is what he meant.

So in terms of the roadmap of where I'm going, first, I want to address mootness issues around the new statute, then mootness around the notion of voluntary cessation that was

briefed in our supplemental briefs. That is the idea that --

THE COURT: No, let's do it in reverse order. Let's talk about standing, at the very beginning.

What is the basis for standing, putting aside the new statute? What organizational standing does CCR have and what standing do the individual plaintiffs have?

MR. KADIDAL: Sure.

Well, the fundamental basis for standing here is the chilling effect, the deterrent effect on speech and advocacy that is created by the existence of this program.

Now, in terms of organizational standing, I believe we mentioned this in a footnote in the initial summary judgment brief. Basically, just saying that the other individual legal staff at CCR shares some of the same interests as the staffers who are named plaintiffs in the case, and that there is no real reason for their individual participation in the case; therefore, the organization has a representative standing on their behalf.

THE COURT: Mr. Coppolino spent some time talking about the Ninth Circuit Presbyterian case, as opposed to the D.C. Presbyterian case.

And in that situation, if I understand the facts of that case -- this is consistent with Mr. Coppolino's argument -- the church there was able to demonstrate that, in fact, its services had been surveilled, had been monitored by

the INS individuals.

That's not true with CCR, is it?

MR. KADIDAL: No, it's not.

This is a secret surveillance program. As far as I know, there are very few parties who can make a claim of actual surveillance; two criminal defendants, Iyman Faris and Mohammed Junaid Babar. And their case is where I believe government officials, speaking as sort of off-the-record sources, have told the media. I believe that NSA information was used in their criminal trials, or somehow in their criminal investigations and in the Haramian case, which I believe it's part of this MDL now.

THE COURT: It is. And the church in that case was able to demonstrate, if I understand it, or at least raise a triable issue, that the church's attendance had fallen off as a result of the INS program.

Can CCR make any similar claim here?

MR. KADIDAL: Right. Well, I think, you know, the way we characterize the injury to the church was essentially that it was sort of professional harm to their role as sort of a ministry to the community, that they were less able to perform that function. CCR I think in the same way.

You can see the two affirmations of our former legal director, Bill Goodman, talking about the ways this program has made it more difficult for us to function, how it sort of

created professional costs for us, how it creates a situation where it's uncomfortable for us to -- or uncomfortable for clients to deal with us.

There are sort of incidents in the other affirmations of the attorney plaintiffs, describing situations where clients were unwilling to communicate with us over certain issues, where we have to refrain from communicating with certain clients about sensitive issues until we could meet with them in person and so forth.

These are sort of the same sorts of professional injuries to our ministry, which is carrying out public interest litigation, which is a sort of function that is protected by the First Amendment in the same way that religious practice is protected. It's that injury that underlies the organizational standing.

Now, you know, in terms of --

THE COURT: Well, if I remember the Presbyterian case, too, there was no claim for prospective relief. Is that not correct? Am I correctly remembering that case?

MR. KADIDAL: I thought that the claims were primarily for prospective relief. I don't have it in front of me.

THE COURT: I beg your pardon?

MR. KADIDAL: I just don't have the case in front of me right now.

THE COURT: Well, the Court of Appeals said, "As we are unable to assess the likelihood that the churches will be subject to INS surveillance in the future, we are unable to determine whether they have standing to seek prospective relief against such surveillance."

I guess prospective relief was requested, but the Ninth Circuit's decision did not reach the question of prospective relief.

MR. KADIDAL: Well, you know, in terms of the prospective relief that we are requesting, I think the central point we want to make in response to the notion that one has to always produce evidence of past actual surveillance is simply that, you know, that evaluation about prospective relief is always going to be a contingent one; that there is no guarantee that if someone is subject to actual surveillance in the past that they are going to be subject to actual surveillance in the future. There's always going to be an evaluation made.

THE COURT: One could make the determination of probability or lack of probability of surveillance in the future; can not one?

MR. KADIDAL: What's that?

THE COURT: Can't one make at least an assessment of the probability of future surveillance?

MR. KADIDAL: Absolutely. I think that sort of assessment of probability is really something that's

contemplated by the fact that we have any, you know, sort of chilling effect cases heard by the federal judiciary at all; that the sort of deterrent effect of some sort of government policy or program or past activity on future activity is always going to be contingent.

I think that's really something that's sort of contemplated by Laird and all the other chilling effect cases where standing was found; many of which we cite in our opposition to the motion to dismiss.

Now, you know, the government claims that if actual surveillance was required by two D.C. Circuit cases -- and we addressed this argument I think in great length before Judge Lynch, so please cut me off if I am getting repetitive or redundant here.

The way that we see Laird is really sort of setting forth two operating principles in chilling effect cases. First, that the fear causing plaintiffs to be deterred from acting should be objectively reasonable; and, second, that the harm asserted be something tangible and objective in that sense. Not mere psychological injury or distress, or the like, but instead what's referred to as concrete harm in many of the other Supreme Court cases since Laird, that are sort of major pronouncements on standing.

So, you know, in terms of the fear being objectively reasonable, that goes to the sort of speculative sort of aspect

of claims like the ones in Lyons, that Mr. Coppolino is speaking to. And in terms of the objectivity of the harm, that goes to, you know, really, how concrete the injury is.

So professional harm is the one recognized in the Ninth Circuit Presbyterian Church case, or the ones that we assert we believe fall into the objective harm category.

Now, the two cases that the government relies on from the D.C. Circuit for the proposition that you always have to prove actual surveillance in the past, in order to have a chilling effect claim going forward, really, we think, fail both of those -- sort of have both of those aspects of the analysis. But, primarily, they fail the notion -- the element that the fear should be objectively reasonable.

So in United Presbyterian Church, which is actually a case that was brought by the Center for Constitutional Rights, the -- you know, the Court goes to some length to spell out the fact that, really, there are no substantive claims made there that any future government action under the executive order --

THE COURT: Talking about the D.C. case?

MR. KADIDAL: Right, D.C. Circuit case.

No substantive claims that in any future government action under the executive order that was challenged there would be illegal.

This was an executive order that President Reagan issued, essentially, a few years after FISA was passed, that

basically sort of spelled out sort of guidelines for surveillance on agents of foreign powers. And, in fact, it appears that it was ostensibly designed to eliminate some of the excesses that the church had sort of related in its reports; and, yet, the plaintiffs went ahead and challenged it.

You know, it's important to point out one thing that we do know now, that we didn't know before Judge Lynch. We've managed to acquire the archival records, the complaint and the dispositive motions in both Halkin and United Presbyterian Church.

So I can tell you definitively that in United Presbyterian Church there was no allegation, for instance, that any of the plaintiffs there were attorneys. And we've made a great deal out of the fact that our attorney plaintiffs in the current case are especially vulnerable to government intrusions on the confidentiality of their communications.

Professor Gillers put in an affirmation saying, you know, that it's no defense, for instance, to say that this information is never going to be introduced in any trial against your plaintiffs. Attorneys have a duty merely to protect confidentiality per se; and that this isn't, you know, sort of discretionary obligation. It's absolutely obligatory.

So if you go back to United Presbyterian Church, there are no attorney plaintiffs there. That factors in, essentially, as a way of saying that, you know, there is no

special vulnerability to harm; and, therefore, looking at that first Laird factor, that, you know, it's not objectively reasonable for these sort of plaintiffs to fear anything from the government executive -- from the executive order that was at issue there. There was nothing illegal about it and they weren't even particularly, you know, sort of sensitive to the sort of harm that might have occurred if that surveillance were illegal.

Same thing applies to Halkin. Again, that's a case where by the time it had gotten back up to the Circuit in Halkin 2, the only claims that really remained were claims about the NSA forwarding sort of a watch list -- sorry, other agencies forwarding watch lists of the plaintiffs to the NSA. Nothing about, you know, sort of threshold illegality of any surveillance that was going on there.

Again, in Halkin we've examined the archives, and there's no allegation that any of the plaintiffs were especially vulnerable to harm. No allegation that they were attorneys involved there.

And, again, this is all sort of laid out in the transcript of the oral argument before Judge Lynch. But there's -- you know, there's really nothing about those claims that -- that tilts in the illegality.

So, again, I think all these things factor into whether or not they had a reasonable fear of the government's

actions that they are complaining about. So I think it really -- both of those cases really fail the first aspect of what Laird demands in terms of objectivity, not subjectivity, in a chilling effect -- in a case making chilling effect claims.

So, you know, I think in terms of the government's objections to our standing at this point, there are really two sort of rules that they would want to put out there, sort of formalistic rules about standing in these kind of cases.

One of them is that anybody challenging a surveillance program has to show that they were an actual target beforehand, in order to go forward with a chilling effect claim.

Again, for the reasons I have just spelled out, we don't think that's the case. Chilling effect claims are always going to involve a contingent sort of future sort of fear of harm; and, therefore, the Court's always going to be in the position of having to evaluate both how extreme the harm is and what the possibility is of it occurring.

The other rule that defendants want to sort of put forward is kind of a mechanistic rule for disposing of some of these chilling effect claims; is that coercive action of some sort, whether real or threatened, is required.

There are sort of citations to the language in Laird that talks about regulatory prospective or compulsory action

being a requirement before you can sort of go forward with a chilling effect claim under Laird.

And I think, you know, now that we are in the Ninth Circuit with this case, that claim is completely foreclosed by Presbyterian Church; which says specifically that government activity doesn't need to rise to the level of coercive action in order to support standing.

THE COURT: All right. Anything further, Mr. Kadidal?

MR. KADIDAL: Well, there are the mootness questions, which I think we can get to next.

THE COURT: All right.

MR. KADIDAL: I just want to say a word or two about Lyons.

Mr. Coppolino is correct to say that the Court found that Mr. Lyons was speculating about future harm. But I think a major factor in that case was simply that Lyons would have had to be stopped for his own sort of future criminal conduct. And that was something, I think, that troubled the Court in reaching that sort of a conclusion.

The government has always asserted that our claims of injury here are speculative unless there's actual surveillance. And for reasons I've already laid out, I think that's not, you know, something that makes sense under all the other chilling effect cases that we've cited, and certainly not under Laird.

So to talk a little bit about the mootness arguments, as to the new statute, you know, we're 500 pages into the briefing in this case. We haven't had the chance to brief the effect of this new sunsetting statute yet.

But I just want to briefly mention that there is certainly an ample number of cases in the statutory repeal context that make clear that the same strict voluntary cessation standards apply where a statute is revised, where it may actively be reverted to its old form.

So, for instance, there are a pair of cases that have been before the Supreme Court in the last 25 years, talking about the situation where a legislature repeals an offending statute, but there is a risk that it may simply repass it in exactly the same form.

So in the City of Mesquite vs. Aladdin's Castle, the Supreme Court made it clear that voluntary cessation of principles apply in the context of statutory changes, and held that, quote, In this case, the City's repeal of the objectionable language would not preclude it from reenacting the same provision, unquote. And the Court held the issue moot. So the Court went on to hit the merits in that case.

This was reenforced about a decade later, in Northeastern Florida Contractors vs. Jacksonville, where the Court said, again, if automatic mootness was the rule, quote, defendants could moot a case by repealing the challenged

statute and replacing it with one that differs only in some insignificant respect.

Now, you know, there are cases that kind of go all over the map on these kind of -- in these kind of situations. But the main consideration seems to be the likelihood of reversion. Which was quite clear in City of Mesquite, and Northern [sic] Florida Contractors, where the defendants either said explicitly that they would reenact the statute or that they already had respectively.

Here we are in the same situation. We know that it's automatically going to revert to the situation that prevailed before last weekend, in six months.

So we feel that this falls squarely into the voluntary cessation box; and, therefore, we think it's perfectly appropriate for this Court to, so to speak, clear the underbrush by deciding some of these sort of preliminary standing and other issues that were raised in the motion to dismiss and the motion for summary judgment in the six-month injury before this statute either sunsets or is replaced by something else.

If Your Honor doesn't have questions about that, let me just say a few words about the voluntary cessation notion.

You know, the government said in its supplemental brief that the January FISA court orders created a situation where our claims were essentially moot, because the government

was going to cease the TSP in response to the availability of surveillance under those orders.

Well, as we set forth in our supplemental brief, there is a very heavy burden that's on any defendant trying to prove that a case should be held moot in this sort of voluntary cessation context.

Defendant has to show that it's absolutely clear that the conduct can't reasonably be expected to recur. And the burden shift is on the government, which is something I think they ignore throughout their briefing on this issue.

Once we show the initial standing, the burden is on -- the initial standing existed prior to this sort of changed circumstance, the burden is on the government to show that it's absolutely clear that there is no reasonable chance of recurrence.

This standard, in fact, was recently reinvoked by the Supreme Court in the parens involved case, the case about the Seattle and Louisville affirmative action or -- rather, I guess, sort of involving sort of balancing of races in public schools in those cities.

And the Supreme Court again said that it's got to be absolutely clear, and it's a heavy burden on the defendants to show that despite having sort of voluntarily ceased the practice that was challenged, that the case should go on.

Now, you know, a couple of points which we've laid

out in our supplemental briefs, but I would just like to quickly touch on.

First of all, the new orders appear to have been revoked in April. I suppose it's a point we haven't laid out in our supplemental brief.

But it appears from some disclosures in the press, from members of Congress, that at some point at around the 90-day review point from the January orders, another FISA judge refused to reauthorize, at least in part, some part of those orders. And that coincides with some unexplained classified lodgings that were filed in both this court and in the Sixth Circuit in April.

Now, you know, the government in its reply briefs in that ACLU appeal said that, quote, The President has not disavowed authority to reauthorize the program in the event that the FISA court orders are not reviewed.

So we think that, you know, obviously creates a situation where we would continue to have a fear that the defendants would sort of reinstitute their program of warrantless surveillance.

The defendants have claimed that the executive has both the right and duty to carry out such extra statutory surveillance whenever it sees fit.

Defense counsel acknowledge they can opt out of operating under these orders whenever they see fit -- the FISA

court hasn't barred them from doing so -- and that they can do so simultaneously with operating under the new orders.

And even if they disavow all those options, in light of today's -- in light of the new statute, that new statute itself is temporary.

So we would fundamentally dispute this idea that the TSP is no longer active, as Mr. Coppolino said earlier. We think, certainly, this case is amenable to judicial resolution right now; that there's no particular reason to wait for six months to see what the outcome is in terms of, you know, any new statute that Congress passes or the sunsetting of this recent statute.

THE COURT: Very well. Thank you, Mr. Kadidal.

All right. Two minutes. Two minutes, Mr. Coppolino, but no more than two minutes. Then I want to speak to Ms. Cohn and you.

MR. COPPOLINO: Okay. Your Honor.

First, very quickly, our point on this objective harm argument, that they have objective harms by pointing to their own burdens, that misuses the term in Laird.

The subjective fear is contracted -- contrasted with an objective showing that you are actually covered by the particular surveillance activity. So I think they misused that term.

You can't just point to your own harms. Anyone could

do that. They could say, Well, I've reacted; I'm harmed. That's objective. The question is the cause of the harm; are you speculating about the cause, which is what they are doing here.

He mentioned Mr. Gillers. And I would just point out that in his declaration about the ethical obligations of the attorneys to do certain things, he's got a whole series of assumptions of the facts as to how the Terrorist Surveillance Program works.

Obviously, he doesn't know. And I don't criticize him for that. But the point is that if you had any doubt about whether they were actually chilled, you would have to look at how the thing works.

And their own expert makes assumptions about how it works and whether or not that would actually, in fact, chill them. We don't argue there has to be an actual regulatory or proscriptive imposition of some kind of a requirement on the plaintiffs in order for Laird to be -- in order to beat Laird.

Judge Gibbons addressed this question in her concurring opinion, and she didn't actually agree that you could only demonstrate a chill injury by showing that there was some regulatory or proscriptive action taken against you.

But she made this point: All standing authority, whether it's Luhan (phonetic), Friends of the Earth, Laird, they all make this point, you can't speculate about what's

causing your harm; you have to be able show it.

And so we're not resting on the fact that you have to show there was some actual regulation applying to you. We are, however, making the point that you can't just simply speculate about what's happening to you.

Final point I would just make, Your Honor, and that is that -- first of all, do you have any questions that we can answer before you rule? If you have any questions about the classified filings, we can try to do that in some secure setting.

But just to reiterate, this is, I think, a case where they are greatly speculating about their future harm, and it's foreclosed by Lyons. And the circumstances have changed.

So whatever happens with respect to this statutory provision and the briefing on that, you should at least dismiss this complaint on jurisdictional grounds.

You don't even need to reach the state secret's privilege to do that. The political branches are very much engaged in this matter, as is the FISA court. They have the proper secure channels to address these issues. And at least as it exists as of today, the CCR complaint should be dismissed.

If they supplement and you let them supplement, and there is a new dispute about the statute, we'll address it at that time.

Thank you, Your Honor.

THE COURT: Very well. Thank you, Mr. Coppolino.

And Mr. Coppolino and Ms. Cohn, since Ms. Cohn is here representing --

MR. AVERY: Your Honor, before you leave our case, could we address what's going to happen next in our case?

THE COURT: Well, I suppose.

MR. AVERY: Thank you, sir.

THE COURT: What do you anticipate is going to happen next, that you haven't already talked to me about?

MR. AVERY: I had intended my reference or our supplemental complaint to be a sort of oral motion to the Court for permission to file it.

But if you would rather have a written motion, I would like to have some time period within which we might file that written motion. And then I would suggest to the Court that we brief that within the next two weeks.

THE COURT: Do you need leave to file that motion?

MR. AVERY: I don't think so.

THE COURT: I don't think so either.

MR. AVERY: All right. So we will file a written motion. But it would be helpful to us if we could set a briefing schedule with regard to the issues that will be raised by that new motion for a preliminary injunction.

THE COURT: Let me suggest you first talk to

Mr. Coppolino and tell him what you have in mind. See if you can work out a briefing schedule. If you can't, well, then proceed in accordance with the local rules.

MR. AVERY: Thank you, Your Honor.

THE COURT: I'm sure that Mr. Coppolino would appreciate the opportunity to make life easy for him.

MR. AVERY: Well, we tried to give Mr. Coppolino that opportunity yesterday, Your Honor.

And the reason that I'm sort of pushing for a quicker resolution in this matter is that we filed this complaint a very, very long time ago. It sat in front of Judge Lynch for months. As he said on the record himself, he did not schedule a hearing in the matter because he was waiting to see if Congress acted.

We argued it in front of Judge Lynch in September of 2006. He then sat on it further, until it was referred by the Multi District Litigation panel to this Court.

THE COURT: Maybe he knew that he wasn't going to have the case.

MR. AVERY: I won't speculate about what may or may not have motivated Judge Lynch.

But I will say that I take very, very seriously the question of whether or not the judiciary is going to respond to what the government is doing with regard to this surveillance program, in a timely fashion before the current President

leaves office. Which, by the way, it's coincidentally exactly when this new statute is going to effectively terminate.

And I would -- because they say it's 180 days, but then they can issue an order for another year. So it's actually about as much time as Mr. Bush has in office.

So I am -- I am suggesting to the Court, and maybe this is just the way I'm used to doing things in the District of Massachusetts -- and if it's not in the local rules here, I apologize.

But I would suggest we file our brief on this matter within two weeks, and the government file within two weeks after that, and we have some prompt completion of the briefing on the question of whether or not the new statute is constitutional.

THE COURT: Let me reiterate my suggestion. You talk to Mr. Coppolino. If you can work out something, that's fine. If you can't, proceed in accordance with the local rules.

MR. AVERY: Thank you, Your Honor.

THE COURT: All right. Now, Ms. Cohn and Mr. Coppolino, I know not all of the defendants in all of the cases are here. So I'm going to ask you -- probably Ms. Cohn more than anyone else, because she's undoubtedly in communication with all of the parties on both sides of the case -- to do something that would be of great assistance to the Court.

And that would be to provide some chambers copies of the following documents: In the Verizon case -- this is Verizon's motion to dismiss for lack of personal jurisdiction -- we need chambers copies of docket numbers 268, 269 -- I beg your pardon. I beg your pardon. What we need are, in that case, 313, document 313, 314, 317, 318 and 321. Okay. Got those?

MS. COHN: 313 --

THE COURT: 313.

MS. COHN: 313, 314, 317, 318 and 321.

THE COURT: Correct.

Then in the Shubert vs. Bush case, on the motion to dismiss what we need is docket number 335, a chambers copy of 335.

And in connection with the Chulsky case -- I believe it was filed in Chulsky. In any event, it was in the motion to dismiss in Chulsky, Riordan and Bready. We need a chambers copy of docket number 340. That's a reply memorandum.

MS. COHN: 340?

THE COURT: 340.

MS. COHN: That's -- I'm sorry.

THE COURT: Three four zero.

And, further, going forward in all the cases, when you file those chambers copies, be sure to indicate what the docket number is on the chambers copy, so we're able to relate

what's provided to chambers with what's in the document very easily. All right.

MS. COHN: We will do that, Your Honor.

I have one quick question for you, which is, there is a pending stipulation in front of the Court about the hearing date for the Verizon motions.

THE COURT: This is on the 30th?

MS. COHN: On the 30th. And it hadn't been signed. And counsel asked me to check to make sure the Court had it on their docket, to make sure it was going forward since they hadn't received the stipulation back.

THE COURT: I believe that's been signed. Let me talk to the clerk.

THE CLERK: You haven't signed it.

THE COURT: Do we have it on calendar for the 30th?

THE CLERK: That they're stipulating to whether you are going to allow that to also be included for the 30th.

THE COURT: Allow what to be included on the 30th?

THE CLERK: Those motions to be included, to be heard on August 30. I was going to get stipulation, if I can just grab that.

THE COURT: All right. Why don't you grab that.

MS. COHN: That would put Verizon and Shubert together on the 30th.

THE COURT: And that's at the request of all the

parties; is that correct?

MS. COHN: Yes.

MR. COPPOLINO: You signed the Shubert stipulation, so that is scheduled for the 30th. And the Verizon stipulation was filed, as Ms. Cohn pointed out. And it's the same date.

We actually had a conference call with Ms. Klein a while back and had all the parties on the phone. And I thought we had all reached agreement on the 30th, for both Verizon and Shubert. But you hadn't signed the stipulation on Verizon. You did on Shubert.

THE COURT: There was apparently an oversight or a slip-up somewhere along the line.

MS. COHN: That's what we were hoping.

THE COURT: Let me see that stipulation. We will clear that up.

MS. COHN: Is that all, Your Honor?

THE COURT: That's all for me at the moment. I think that's what we need by way of chambers copies.

MS. COHN: Great.

THE COURT: Hold on for a minute, and we'll take a look at that stipulation.

All right. This looks fine.

Thank you, counsel, very much.

MS. COHN: Thank you.

THE COURT: Any other housekeeping?

MS. COHN: That's it.

THE COURT: Very well. Thank you.

(Proceedings concluded 4:23 p.m.)

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CERTIFICATE OF REPORTER

I, KATHERINE A. POWELL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in MDL 06-1791, In re National Security Agency Telecommunication Record Litigation, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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Katherine A. Powell, CSR 5812, RPR, CRR

Monday, August 20, 2007

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