IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

(U) GOVERNMENT'S SUPPLEMENTAL SUBMISSION DISCUSSING THE IMPLICATIONS OF THE INTERVENING FISA COURT ORDERS OF JANUARY 10, 2007

(U) Defendants-Appellants, the National Security Agency, *et al.*, hereby file this supplemental submission to address an intervening judicial event that has a significant bearing on this litigation. As defendants notified this Court on January 11, 2007, the Foreign Intelligence Surveillance Court ("FISA Court")—as the result of a process that began before the Terrorist Surveillance Program ("TSP") was publicly disclosed and before this litigation was filed—issued orders on January 10, 2007 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. In light of these intervening FISA Court orders, any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the FISA Court, and the President, after determining that the FISA Court orders provide the necessary speed and agility to protect the Nation, has determined not to reauthorize the TSP when the current authorization expires.

(U) This suit is predicated on the notion that the TSP is unlawful because it authorized electronic surveillance that was not supervised by the FISA Court. As the Government has explained in its briefs, the TSP was lawful and in accordance not only with statutory authority but also the President's inherent constitutional authority. Nevertheless, now that the President has decided not to reauthorize the TSP, and any electronic surveillance that was being conducted under the TSP is now being conducted solely subject to the FISA Court's approval, the essential predicate for plaintiffs' claims and request for relief no longer exists. Accordingly, the intervening FISA Court orders fundamentally alter the nature of this litigation.

(U) As explained below, whether viewed in terms of the mootness or standing elements of the Article III case-or-controversy requirement, or in terms of the underlying merits arguments addressed in our prior submissions, the new FISA Court orders reinforce and independently compel the conclusion that the district court's decision must be vacated and that this suit seeking only prospective relief concerning the TSP must be dismissed. Moreover, to the extent resolution of these issues would

require delving into the operational details of surveillance, that inquiry would implicate state secrets, and thus the intervening event also confirms that the state secrets privilege precludes litigation of this case and itself requires dismissal of this action and vacatur of the district court's decision.[1/]

(U) STATEMENT

A. (U) Plaintiffs' Challenge to the TSP and the District Court's Decision.

(U) This action was filed by plaintiffs a year ago to "challenge[] the constitutionality of a secret government program"—the TSP—that authorized surveillance of international communications into and out of the United States with individuals linked to al Qaeda. *See* Complaint ¶ 1 [JA 18]. Although the Government publicly acknowledged the existence of the TSP, the methods and means of the TSP's operation were not divulged, and they remain secret, highly classified, and subject to an assertion of the state secrets privilege. The central premise of all of plaintiffs' claims is that the TSP is unlawful because it is not conducted subject to court approval in accordance with certain provisions of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. 1801, *et seq.* *See* Complaint ¶¶ 1, 19-38, 54

[1/] **(U)** We are filing public and classified versions of this supplemental submission. The public version is accompanied by a public declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency. The classified version is accompanied by a classified declaration of General Alexander.

[JA 18, 22-29, 31] ("Under the Program, the NSA does not obtain judicial review before or after intercepting the communications of people inside the United States."); ACLU Br. at 24-26, 30-32, 39-44, 52-53.

(U) The district court issued an order enjoining the TSP in its entirety. The court held that, on the basis of the public record, plaintiffs had standing to sue; the TSP violated the Fourth Amendment because it operated without warrants and did not comply with the FISA; the TSP violated the First Amendment because it violated the Fourth Amendment; and, for similar reasons, the TSP violated the separation of powers. The court ruled that the Government had properly invoked the state secrets privilege in this case, but it rejected the Government's argument that the privilege precluded litigation of plaintiffs' standing and of the underlying merits of their claims. The Government contests each of these adverse holdings on this appeal, and has submitted both public and classified briefs explaining, *inter alia*, why plaintiffs lack standing, why the TSP was lawful and in accordance with FISA, and why this case cannot be litigated absent state secrets.

B. [REDACTED TEXT]

[REDACTED TEXT]

C. (U) The FISA Court Orders of January 10, 2007.

[REDACTED TEXT]

D. (U) The Attorney General's Letter Of January 17, 2007.

(U) On January 17, 2007, the Attorney General sent a public letter to Senate Judiciary Committee Chairman Leahy and Ranking Member Specter. The letter (which was filed with the Court the same day) advised 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." Letter from the Attorney General to Senators Leahy and Specter (Jan. 17, 2007), at 1.[2/] The letter elaborated that, "[a]lthough, as we have previously explained, the [TSP] fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages." *Ibid.* "Accordingly," the letter concluded, "under these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires." *Id.* at 1-2.

[2/] (U) The FISA Court was established by FISA and is composed of district court judges from different circuits who are appointed by the Chief Justice. *See* 50 U.S.C. 1803. Appeals may be heard by a panel of three judges appointed by the Chief Justice. *Ibid.*; *see, e.g.*, *In re Sealed Case*, 310 F.3d 717 (FIS Ct. of Rev. 2002).

E. [REDACTED TEXT]

[REDACTED TEXT]

(U) ARGUMENT

(U) The FISA Court orders of January 10, 2007 eliminate the central premise upon which plaintiffs' case and the district court's injunction are built. In this action for prospective relief only, plaintiffs alleged that the activities that were conducted under the TSP were unlawful because they were carried out under the authorization of the President, but "without court approval" pursuant to the FISA. *See, e.g.*, Complaint ¶¶ 1, 38 [JA 18, 29]. On this basis, plaintiffs claimed that the challenged surveillance violates the Fourth Amendment (and, derivatively, the First Amendment), the FISA itself, and, for the same reasons, the separation of powers. *See* Complaint ¶¶ 3, 192-95 [JA 18, 75]; ACLU Br. at 24-26, 30-32, 39-44, 52-53. In the wake of the new FISA Court orders, however, any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the FISA Court, and the President has determined not to reauthorize the TSP when its current authorization expires. *See* Alexander Decl. ¶¶ 3-4.[3/] Thus, plaintiffs'

[3/] **(U)** As the Government has explained in its briefs, plaintiffs have not demonstrated that they have been subject to any "electronic surveillance" within the meaning of FISA, and that determination could not be made without disclosing state secrets. *See* Gov. Br. at 41-42. Therefore, it remains an unresolved issue in this litigation whether any "electronic surveillance" within the meaning of FISA was being conducted under the TSP at all.

challenge to the President's statutory and constitutional authority via-a-vis the TSP no longer has any live significance.

(U) The Supreme Court has stressed that federal courts must avoid needlessly addressing serious constitutional issues, *see, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), and should proceed with special caution where the President's war powers are implicated, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion). These considerations are especially apt here, where litigating this action would require both delving into extremely sensitive state secrets and possibly deciding the extraordinarily important constitutional issue of the scope of the President's inherent constitutional authority to conduct foreign intelligence surveillance in wartime. Especially in light of these considerations, there is no longer any appropriate basis for proceeding with this litigation, given both that the President has determined not to reauthorize the TSP, and that the central premise for plaintiffs' action—that any electronic surveillance that was being conducted was without court authorization—no longer exists. There is, therefore, no longer any live genuine controversy to adjudicate.[4/]

[4/] **(U)** To be clear, the Government continues to maintain that the TSP was lawful, and, among other things, in accordance with the FISA, 50 U.S.C. 1809(a)(1), the Authorization for Use of Military Force, and the President's inherent authority as Commander in Chief. The intervening FISA Court orders, however, eliminate the central premise for each of plaintiffs' claims challenging the TSP. In these circumstances, it is well-settled that the litigation may not go forward for the reasons

(U) As explained below, there are several different legal doctrines that lead to the same result in analyzing the impact of the January 10, 2007 FISA Court orders on this case: the case must be dismissed and the district court's decision vacated. In addition, the latest development underscores the Government's central submission all along—that this case cannot go forward in light of the state secrets privilege—because it is not possible to evaluate fully the Court's jurisdiction, the merits of the plaintiffs' claims, or the impact of the FISA Court orders without delving into state secrets concerning the operational details of the surveillance at issue. The operation of the state secrets privilege therefore in itself continues to require dismissal of the action and vacatur of the district court's decision.

A. (U) Mootness.

1. (U) Plaintiffs' challenge to the TSP is now moot. The surveillance activity they challenge—electronic surveillance not subject to FISA Court approval, *see* Complaint ¶ 1 [JA 18]—does not exist. And the specific relief they sought and were awarded—injunction of the TSP—cannot redress any claimed injury because no electronic surveillance is being conducted under the TSP and, instead, any electronic surveillance activities at issue are now being conducted subject to FISA Court

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explained in the text above, and that the extraordinary legal issues raised by this case should be reserved for an instance in which they are concretely presented.

approval. *See* Alexander Decl. ¶ 3.[5/] To the extent plaintiffs dispute the basic facts or suggest that exceptions to the mootness doctrine may apply, their contentions are meritless and would require exploration of the operational details of the surveillance in question, which would implicate state secrets and would therefore be barred by the state secrets privilege.[6/]

(U) This is not an instance of "voluntary cessation" of allegedly unlawful activity. *See, e.g.*, *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 857 (6th Cir. 2005) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The Government has not ceased

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[5/] **(U)** The fact that plaintiffs have also sought declaratory relief does not affect the determination of mootness. "The Article III case or controversy requirement is as applicable to declaratory judgments as it is to other forms of relief." *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985).

[6/] **(U)** Closely related to the Article III mootness doctrine is the prudential mootness doctrine, which addresses "not the power to grant relief, but the court's discretion in the exercise of that power." *Chamber of Commerce v. Department of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980). Thus, a court may refuse to entertain a suit that, while "'not actually moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand and to withhold relief it has the power to grant.'" *Greenbaum v. EPA*, 370 F.3d 527, 534-35 (6th Cir. 2004) (quoting *Chamber of Commerce, supra*). In the circumstances presented here, the prudential mootness doctrine provides an independent basis for vacating the district court's decision and dismissing the case. Indeed, if this Court concludes that plaintiffs' challenge to the TSP is not moot, the extraordinarily sensitive constitutional questions raised about the authority of the coordinate Branches to authorize (or restrict) foreign intelligence gathering during wartime makes this case a natural candidate for application of the prudential mootness doctrine.

surveillance—instead, the facts and legal authorities have changed. An independent judicial body—the FISA Court—has now acted to provide additional and wholly sufficient legal authority for the activity in question. Thus, unlike the typical voluntary cessation case, the Government has in no sense terminated its conduct in response to plaintiffs' suit. Rather, the intervening event here provides legal authority that plaintiffs claimed was absent. As the culmination of a lengthy process that began prior to the inception of this litigation, the FISA Court has now issued new judicial orders that establish the court involvement that plaintiffs claim (erroneously, in the Government's view) was impermissibly absent under the TSP. Thus, the "voluntary cessation" exception to mootness does not apply.[7]

[REDACTED TEXT]

(U) Plaintiffs' challenge is similarly not "capable of repetition, yet evading review." *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *Cleveland Nat'l Air Show, Inc. v. Department of Transportation*, 430 F.3d 757, 761 (6th Cir. 2005). The "capable of repetition, yet evading review" exception applies only in "'exceptional circumstances,'" *Lewis*, *supra*, where "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; *and* (2) there was a reasonable expectation that the same complaining party would be

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[7] **[REDACTED TEXT]**

subjected to the same action again.'" *Cleveland Nat'l Air Show*, *supra* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added)). Neither prong of that exception applies here. There is nothing about the duration of the TSP that inherently precluded litigation over its legality. Nor, as we have shown, is there any "reasonable expectation" that the complained-of harm from the TSP might recur, much less that any of the plaintiffs in this case would actually be (or could demonstrate that they would be) subject to any such harm.

(U) Any speculation that the FISA Court orders might not be reauthorized and that the President would determine to reauthorize the TSP is not sufficient to overcome mootness or satisfy the capable of repetition doctrine. As the Supreme Court has emphasized, "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein*, 423 U.S. at 149). Here, no such "reasonable expectation" or "demonstrated probability" exists that the challenged conduct—TSP-authorized electronic surveillance—will recur. *See Nat'l Black Police Ass'n*, 108 F.3d at 349 (possibility that government defendant may reinstate a rescinded policy does not enough overcome mootness; "[r]ather, there must be evidence indicating that the challenged [policy] likely will be reenacted"). Moreover, even in the event of renewal of the Presidential program after a hypothetical modification of the FISA orders, there would be no reason to assume

that the *same* controversy would be presented or that it would by its nature evade review.[8/]

(U) Furthermore, the general reluctance that courts have to presume that challenged conduct will recur is particularly appropriate here, where the suit involves a constitutional challenge to the actions of the President as Commander in Chief in wartime. At a minimum, a court should insist on a "demonstrated probability" that the challenged conduct will recur before proceeding to issue what would be likely to amount to an advisory opinion on extremely sensitive constitutional issues.[9/]

[8/] **(U)** Even if the FISA Court orders were not reauthorized in full, there is no reason to assume that they would not be reauthorized in part. At that point, any controversy that might exist concerning future surveillance activities would be different from the controversy giving rise to this case. That fact provides an additional reason why the capable-of-repetition-yet-evading-review exception does not apply, because that exception requires the plaintiff to show that the "*same* controversy" is likely to recur, *Murphy*, 455 U.S. at 482 (emphasis added). Moreover, there is nothing about the duration of a surveillance program, unlike a parade permit or abortion controversy, that suggests disputes would systematically evade review.

[9/] **(U)** While this action was brought to obtain prospective relief enjoining surveillance under the TSP, the district court's injunction might be read to bar the Government from using any intelligence collected under the TSP. That reading is out of step with the focus of plaintiffs' challenge and the district court's decision on surveillance activity being conducted on a going-forward basis. In any event, even if the order were interpreted to apply to the use of intelligence collected under the TSP, the order would still have to be vacated. What intelligence was collected under the TSP is a quintessential state secret that would not provide the basis for any judicial relief in this case. Moreover, because plaintiffs cannot carry their burden of showing, and the Government cannot confirm or deny, whether they were subject to surveillance at all under the TSP, plaintiffs would lack standing to press for any such

2. **(U)** "When a civil case becomes moot pending appellate adjudication, 'the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (ellipses omitted)). The Supreme Court has elaborated that, in assessing whether vacatur is appropriate, "the principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). "[A]bsent unusual circumstances, the appellate vacatur decision under *Bancorp* is informed almost entirely, if not entirely, by the twin considerations of fault and public interest." *Ford v. Wilder*, 469 F.3d 500, 506 (6th Cir. 2006) (internal quotation omitted).

(U) These considerations demand vacatur of the judgment below. Vacatur is appropriate for the same basic reason that the voluntary cessation doctrine is inapplicable: the critical event was the product of an intervening act of a coordinate Branch of the Government. The Executive Branch is in no meaningful way at "fault," to use the Supreme Court's term in *Bancorp*, for the actions of an Article III Court

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judicial relief concerning the use of intelligence collected under the TSP. And plaintiffs' contention that they have standing based on their claim that their conversations in the *future* will be "chilled" clearly cannot support standing to obtain relief relating to intelligence collected in the *past*.

that have mooted this case. *See Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 353 (D.C. Cir. 1997) (courts accord the Executive Branch a "presumption of legitimate motive"); *see also Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc). Indeed, the FISA Court—which, like this Court, controls its own orders—could have chosen to issue its orders after this litigation had concluded, or, indeed, chosen not to issue them at all.

(U) The public interest points strongly in the same direction. The district court in this case has addressed a set of extraordinarily sensitive questions touching upon issues of statutory construction and constitutional law, separation of powers, and, ultimately, Presidential authority in a time of war. The district court's resolution of these questions, and its concomitant treatment of the Government's assertion of the state secrets privilege, are, at a minimum, open to serious debate. The Nation's leaders have employed various means of electronic surveillance without explicit statutory authorization in prior wars without any definitive judicial resolution of the significant constitutional issues raised in this litigation. Ordinary principles of constitutional avoidance counsel strongly against leaving in place a moot and unreviewed district court decision addressing those extraordinarily sensitive issues. *See Nat'l Black Police Ass'n*, 108 F.3d at 353-54; *see also United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976) (noting the need for special caution before court resolves "nerve-center constitutional problems").

(U) Under these circumstances, and considering the context in which the case has become moot on appeal, no equitable basis exists for leaving the court's judgment in place in the absence of an opportunity for appellate review. *See Arizonans for Official English*, 520 U.S. at 75 (vacatur appropriate in light of judgment's federalism implications); *Stewart v. Blackwell*, __ F.3d __ [2007 WL 77853] (6th Cir. 2007) (en banc) ("vacatur is generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party").

(U) Vacatur is further warranted because there are, at a minimum, serious questions as to whether the district court ever possessed Article III jurisdiction to hear this case or enter judgment resolving its merits. As shown in our briefs, *see* Gov. Br. at 19-30; Gov. Reply Br. at 9-23, and as reiterated in the next section of this filing, plaintiffs lacked Article III standing at the inception of this case, and that threshold jurisdictional defect now is further underscored by the FISA Court's January 10 orders. Thus, because this Court has the option of dismissing this case either on Article III standing or mootness grounds, *see* p. 18 n.10, *infra*, the compelling equitable reasons for not permitting the district court's judgment to remain on the books are compounded if the Court ultimately elects to dismiss for Article III mootness without resolving the serious issues of Article III standing that have been present in this case from its beginning.

B. (U) Standing.

(U) Wholly apart from mootness, the new FISA Court orders underscore that plaintiffs cannot establish their standing to sue under either the injury, causation, or redressability prongs of the standing inquiry, and that the case must be dismissed for this independent reason as well. Among other points, our appellate briefs demonstrated that the claimed "chilling effect" of the TSP cannot support plaintiffs' standing because a chilling effect could not give rise to a cognizable injury for standing purposes, and, even if it could, it is at best speculative to assert that any chilling effect is caused *by the TSP*, as opposed to other sources (including the prospect of electronic surveillance authorized by FISA Court order), or that any injury from such a chilling effect would be redressed by enjoining the TSP. *See* Gov. Br. at 29; Gov. Reply Br. at 18-19. In any event, those questions could not fairly be litigated without recourse to state secrets, as discussed in our briefs. The new FISA Court orders of January 10, 2007 confirm the correctness of this analysis.

(U) Plaintiffs sought to enjoin the TSP because it supposedly injured them by "chilling" their communications, but, under the FISA Court's new orders, any electronic surveillance formerly occurring under the TSP is now being conducted solely subject to the approval of the FISA Court itself. As we have previously shown, plaintiffs cannot meaningfully claim to be chilled by the TSP when (under their own characterizations) their communications may be subject to other, *non-TSP*

surveillance, nor can they show how the harm they allege from the TSP could be redressed when the same communications may be subject to FISA-authorized surveillance wholly apart from the TSP. *See* Gov. Br. at 29; Gov. Reply Br. at 18-19. The absence of any conceivable "chill" caused by the TSP is all the more apparent given that the Attorney General has publicly explained that any electronic surveillance that used to occur under the TSP now occurs subject to the approval of the FISA Court.

(U) Moreover, the Supreme Court has made clear that, in order for standing to exist, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Plaintiffs claim to be harmed because of allegedly unlawful surveillance conducted with Presidential authorization under the TSP, but without judicial sanction or basis in the FISA. *See, e.g.*, Complaint ¶ 1 [JA 18]. There is no likelihood that redress for plaintiffs' claimed injuries could be obtained at this point in light of the fact that the TSP is set to expire and any electronic surveillance that plaintiffs are challenging is now being conducted subject to the approval of the FISA Court. *See* Alexander Decl. ¶¶ 3-4. Lacking redressability, plaintiffs have no

standing to litigate their claims, a conclusion that holds true even if the case had not been rendered moot.[10/]

C. (U) The Merits.

(U) On the merits, the essential premise that underlies plaintiffs' complaint is that the activity they seek to challenge is unlawful because it is not authorized by any court order and violates the FISA. *See, e.g.*, Complaint ¶¶ 1, 38 [JA 18, 29]. That allegation is now plainly unsustainable on its own terms: as explained, any electronic surveillance that was being conducted under the TSP is now being conducted subject to the approval of the FISA Court. *See* Alexander Decl. ¶ 3.

[REDACTED TEXT]

(U) The key point is that, in light of the authorization now provided by the FISA Court, none of the alleged electronic surveillance complained of is being

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[10/] **(U)** As shown in our briefs, plaintiffs' "chill" theory of standing provides a legally insufficient foundation upon which a court may base Article III jurisdiction. *See* Gov. Br. at 25-30; Gov. Reply Br. at 13-18. This point by itself remains an independent and fully applicable ground requiring dismissal and vacatur of the district court's decision. Thus, this Court could properly hold that the district court lacked Article III jurisdiction, and vacate its judgment, without resolving the question of mootness. *See Arizonans for Official English*, 520 U.S. at 66 (analyzing standing before mootness, but holding that it need not resolve its "grave doubts" on standing "because the former question [mootness], like the latter [standing], goes to the Article III jurisdiction of this Court and the courts below"); *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (explaining that courts may choose between jurisdictional grounds); *Ailor v. City of Maynardville*, 368 F.3d 587, 596-97 & n.5, 599-600 (6th Cir. 2004) (resolving standing before mootness).

conducted outside of the FISA Court process. Plaintiffs' underlying claims on the merits therefore manifestly fail on their own terms, even assuming *arguendo* that a valid jurisdictional basis existed for addressing their claims in the first place.

D. (U) The State Secrets Privilege.

(U) The state secrets privilege continues to apply to this case for all of the reasons previously discussed in our briefs, and, like mootness and standing, presents a threshold basis on which this Court may dismiss plaintiffs' suit without first resolving other jurisdictional questions. *See Tenet*, 544 U.S. at 6 n.4; *see also* p. 18, n.10, *supra*. While the fact of the new FISA Court orders, like the fact of the TSP's existence, has been made public, the methods and means authorized by those orders, like the operational details of the TSP, remain classified and cannot be divulged. The information embraced by the privilege in this case is highly sensitive in nature, and goes to the heart of how the Government's foreign intelligence gathering is conducted at a time when the Nation is at war with an enemy that has already inflicted devastating damage on the United States by operating through a shadowy terrorist network. For all of the reasons previously discussed, disclosure of these matters would threaten grave harm to national security, and the state secrets privilege thus remains fully applicable.[11/]

[11/] **(U)** On January 17, 2007, in response to a request from the Senate Judiciary Committee to provide the Committee with copies of the FISA Court's January 10,

[REDACTED TEXT].[12/]

(U) CONCLUSION

(U) For the foregoing reasons, and for the reasons stated in our briefs, the district court's judgment should be vacated and this case dismissed.

2007 orders, FISA Court Presiding Judge Kollar-Kotelly sent a letter stating that, "[a]s the presiding judge of the [FISA Court], I have no objection to this material being made available *to the Committee*"; "[h]owever, the Court's practice is to refer any requests for classified information to the Department of Justice"; and, "[i]n this instance, the documents that are responsive to your request contain classified information[.]" *See* Letter from Judge Kollar-Kotelly to Senators Leahy and Specter (Jan. 17, 2007) (emphasis added). The letter concluded: "If the Executive and Legislative Branches reach agreement for access to this material, the Court will, of course, cooperate with the agreement." We do not understand Judge Kollar-Kotelly to have suggested that any *public* dissemination of the FISA Court's orders would be appropriate. The Executive Branch does not publicly release classified information concerning methods, means, and operational details of ongoing, clandestine surveillance activities. More to the point, the longstanding practice is that FISA Court orders remain classified and not subject to public dissemination because, among other things, publication of FISA Court orders would notify the enemy of our targets and means of conducting surveillance.

[REDACTED TEXT]

[12/] **(U)** Plaintiffs' datamining claims were properly dismissed for reasons discussed in our briefs. As noted, the Government has never confirmed or denied any datamining, and the district court properly dismissed plaintiffs' datamining claim on the basis of the state secrets privilege. *See* Gov. Reply Br. 49-52.

Respectfully submitted,

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