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The Question Is Moot: Considering the Limits of Judicial Authority

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In Jesse Jackson's famous *Saturday Night Live* sketch, every question was moot. Luckily for litigants, our courts take a more forgiving view. This term, the U.S. Supreme Court will consider questions relating to justiciability in a diverse array of cases touching upon national security, trademark law, the Fair Labor Standards Act and the Hague Convention. Each case turns on whether there is a "case" or "controversy," as required by Article III of the Constitution.

Did Plaintiff Suffer an Injury Capable of Redress?

The Supreme Court will address the limits of the standing doctrine in a case involving national security, *Clapper v. Amnesty International USA*. In *Clapper*, a group including attorneys and media organizations is challenging the constitutionality of recent amendments to the Foreign Intelligence Surveillance Act of 1978, which created new procedures for government surveillance of foreign citizens. The plaintiffs argue that they have standing to sue because they "fear" the government will monitor their sensitive and privileged international communications under the act, and they have therefore taken "costly and burdensome" protective measures.

The U.S. Court of Appeals for the Second Circuit held that the plaintiffs' subjective "fear" afforded them standing in these circumstances. The court held that the plaintiffs suffered "injuries in fact" that were "fairly traceable" to the act's new surveillance procedures. The court's conclusion rested on two findings: (1) the plaintiffs' asserted injuries were "based on a reasonable interpretation of the challenged statute and a realistic understanding of the world"; and (2) the plaintiffs provided evidence that their jobs require them to communicate regularly "with precisely the sorts of individuals that the government will most likely seek to monitor" under the act.

At oral argument in the Supreme Court in late October, the justices seemed conflicted about whether the act poses an imminent threat to plaintiffs. Justice Elena Kagan challenged the governme plaintiffs' argument rests on a "cascade of speculation." She asked the U.S. solicitor whether he would "pick up the phone in the face of this statute and talk to" a client as terrorist group. This point resonated with Justice Anthony Kennedy, who said it would "malpractice" to make that call. On the other hand, Chief Justice John Roberts and J

expressed doubts about the imminence of any potential injury.

The case may ultimately turn on a different aspect of standing doctrine — redressability. While the plaintiffs seek to enjoin the government from conducting surveillance under the section of the act at issue, the government contends that there are multiple other ways in which the plaintiffs' international communications may be collected. If the plaintiffs cannot demonstrate that the relief they request from the court will redress their injuries, the justices may "compromise" and reverse the Second Circuit on this basis.

Is the Court Still Able to Provide Meaningful Relief?

Standing and mootness are often considered two sides of the same coin, and the court's focus this term on redressability in both the standing and mootness contexts only underscores the doctrines' close relationship. *Chafin v. Chafin* is an international child-custody case involving a child who was born in Scotland but moved to Alabama with her parents. When the child's mother was deported to Scotland, she filed a petition in an Alabama federal court seeking the child's return to Scotland under the Hague Convention. The district court granted the mother's request, and the child joined her mother abroad over her father's objections. The father appealed.

The Eleventh Circuit dismissed the appeal as moot based on its belief that reversal of the district court's order would not provide the father any meaningful relief. In particular, the appellate court applied its own precedent holding that lower courts are "powerless" under the Hague Convention to order the child's return to the United States, and, as such, could not provide any "actual affirmative relief" on remand. The Eleventh Circuit stated that "any words by us would be merely advisory."

The Supreme Court has previously stressed that a case remains live as long as the court can issue "any effectual relief whatever" to "affect the matter in issue." Given this lenient standard, the Eleventh Circuit may have applied mootness doctrine too aggressively. For example, several other circuits have noted — in similar international child-custody disputes following the child's exit from the United States — that a favorable court decision could result in a parent voluntarily returning the child to the United States, impact the assessment of costs and fees, or have positive implications on a future custody proceeding in the United States.

Is the Case Resolved?

In two cases, the court is poised to apply the mootness doctrine in answering the same basic question — is the "case" resolved? Both cases analyze whether changed circumstances in the course of litigation had the effect of extinguishing the Article III "case or controversy."

The first case examines whether a plaintiff's voluntary dismissal of its complaint deprives a federal court of continuing jurisdiction over the defendant's counterclaims. Nike's motto in selling shoes may be, "Just do it," but its motto in litigating this first case appears to have been, "Shouldn't have done it." In that case, *Already v. Nike*, Nike initially filed a lawsuit alleging that Already was selling shoes that infringed Nike's "Air Force 1" trademark. The defendant responded with an aggressive counterclaim seeking a declaratory judgment invalidating Nike's trademark.

Nike weighed its options and the risk of losing the counterclaim, and it ultimately decided that litigation discretion was the better part of business valor. Thus, during the discovery process, Nike dismissed its own complaint with prejudice and delivered to the defendant a covenant not to sue for any alleged future infringement or unfair competition. In other words, Nike wanted the dispute with Already to go away forever. Already had other ideas, though, and it asked the district court to permit the counterclaims to proceed.

The district court in New York dismissed Already's counterclaims because, based on Nike's covenant not to sue, there was no longer a case or controversy. The Second Circuit affirmed, based on its conclusion that it was "hard to imagine a scenario that would potentially infringe [Nike's trademark] and yet not fall" under the covenant.

At oral argument in early November, the Supreme Court justices pressed both sides' lawyers on the adequacy of Nike's covenant. Some justices, like Justice Sonia Sotomayor and Kennedy, seemed sympathetic to Already, which might need to reveal to Nike the scope of its future business strategy in order to receive a covenant of sufficient breadth. On the other hand, both Kagan and Roberts expressed skepticism that any covenant would have satisfied Already and pressed the company's lawyer to define exactly what was missing from Nike's covenant.

It appears that this case will come down to the court's view of the completeness of Nike's offer, which is an issue also in play in another mootness case arising in Philadelphia, *Genesis HealthCare v. Symczyk*. *Symczyk* involves a single plaintiff, Laura Symczyk, who sued her employer under the Fair Labor Standards Act. Her lawsuit covered only her own FLSA damages. Before Symczyk filed a motion for conditional certification for collective action, she received an offer of judgment under Federal Rule of Civil Procedure 68 in full satisfaction of her individual claims. Symczyk never accepted the offer.

U.S. District Judge Michael Baylson of the Eastern District of Pennsylvania held that the defendant's offer of complete relief mooted the case. Baylson rejected Symczyk's contention that the offer was incomplete because it did not address relief for other, unknown potential "class" members. In reaching that conclusion, Baylson relied heavily on the unique structure of the FLSA, whose collection actions resolve only the claims of the litigants before the court who affirmatively chose to opt-in to a case. Plaintiffs who did not opt-in to an FLSA collective action remain free to pursue their own claims in separate actions. For that reason, Baylson distinguished the Supreme Court's cases holding that offers of judgment to lead plaintiffs in Rule 23 (opt-out) class actions did not moot those cases.

The Third Circuit reversed. The court held that, if Symczyk ultimately moved for conditional certification "without undue delay," her motion would "relate back" to the date of the initial complaint. This approach, which is applied in the Rule 23 context, affords lead plaintiffs time to discover whether additional class members exist. The Third Circuit adopted this rule to prevent defendants from using Rule 68 offers to "pick off" the named plaintiffs before a collective action could be conditionally approved.

The Supreme Court will address whether such an exception to Article III is necessary or appropriate in the FLSA context, where no plaintiffs' claims are lost by recovery of complete relief by the lead plaintiff. As in the *Already* case, there will be a good deal of squabbling on the subject of the completeness of the defendant's offer. Perhaps more interestingly, though, is the potential statements that the court may make about collective action, in general, especially in light of its recent focus on streamlining Rule 23 class-action litigation and its recognition that most defendants abandon even meritorious defenses following certification. In this way, the court may conclude that an offer of complete relief to a plaintiff, where no other plaintiffs' claims are compromised, does not warrant an exception to the mootness doctrine and, instead, would only serve to benefit plaintiffs attorneys.

Future Impact

The Supreme Court's statements on justiciability in the coming term will impact almost every case litigated in federal court. The allergy to advisory opinions is strong in our Constitution, and several cases in this term provide the court with opportunities to refine the rules of when the courthouse doors are open to litigants. •

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