IN JEWEL DECISION, ARTICLE III USES ARTICLE I TO REBUT ARTICLE II

The 9th Circuit just released its decisions in two warrantless wiretap suits: Jewel, which claimed that the dragnet collection of communications from the Folsom Street AT&T facility violated FISA, Electronic Communication Privacy Act, and the Stored Communications Act; and Hepting, which argued that the FISA Amendments Act—which grated the telecoms retroactive immunity for their illegal wiretapping—was unconstitutional. Both opinions were authored by Margaret McKeown.

The Hepting decision is a slam dunk win for the telecoms. While there are some interesting—and perhaps dubious moves—in the decision, the Circuit completely upheld Vaughn Walker's District Court ruling that the retroactive immunity granted to the telecoms was constitutional.

But that huge win for the telecoms relies on the Circuit's observation that Congress has the authority to pass laws regarding surveillance. And that's what gets the government in trouble in Jewel. The Circuit based its decision that Carolyn Jewel had standing to sue the government for collecting her communications on that same principle—that Congress could and had passed laws that regulate surveillance—**including the private right of action for claims of illegal surveillance**.

> Both the ECPA and the FISA prohibit electronic interception of communications absent compliance with statutory procedures. The SCA likewise prohibits the government from obtaining certain communication records. Each statute explicitly creates a private

> right of action for claims of illegal surveillance.

McKeown's opinion then uses the authority of Congress to dismiss the notion that this question—whether the Executive could be punished for its illegal surveillance of Jewel—should be thrown back in Congress' lap. Congress has already weighed in on the issue, McKeown points out, both in the underlying statutes (providing for a judicial avenue of relief), and in the FAA (granting immunity to the telecoms but not the government).

> After labeling Jewel's claim as an effort "to redress alleged malfeasance by the executive branch," the district court stated that "the political process, rather than the judicial process," may be the appropriate avenue. There is little doubt that Jewel challenges conduct that strikes at the heart of a major public controversy involving national security and surveillance. And we understand the government's concern that national security issues require sensitivity. That being said, **although the claims arise from political conduct and in a context that has been highly politicized, they present straightforward claims of statutory and constitutional rights**, not political questions. See Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986).
>
> **The district court's suggestion that Congress rather than the courts is the preferred forum ignores two important points: To begin, Congress already addressed the issue and spelled out a private right of action in the FISA, ECPA and SCA**. And, in 2008, "[p]artially in response to the[ ] [wiretapping] suits, Congress held hearings and ultimately passed legislation that

> provided retroactive immunity to the companies . . . but expressly left intact potential claims against the government." Hepting, slip op. at 21573.
>
> Focusing on the federal statutory causes of action, the prudential analysis is simplified: "prudential standing is satisfied when the injury asserted by a plaintiff arguably falls within the zone of interests to be protected or regulated by the statute." Akins, 524 U.S. at 20 (internal citations, quotation marks and alterations omitted). **In the surveillance statutes, by granting a judicial avenue of relief, Congress specifically envisioned plaintiffs challenging government surveillance under this statutory constellation**. [my emphasis]

Congress already has weighed in on this highly political issue, McKeown says, and when they did so anew in 2008, they did nothing to limit plaintiffs' right to sue the government for its illegal wiretapping. On the contrary, Congress specifically left claims against the government intact.

Now, the Circuit's decision that Jewel has a right to sue doesn't mean she'll win her suit. It suggested that the Court still must weigh whether Jewel has statutory, rather than constitutional, standing. (Here and elsewhere, the 9th relies on a SCOTUS decision written by Anthony Kennedy from last summer, Bond v. US.)

> For example, the district court's determination that Jewel was not an "Aggrieved Person" under the FISA or a qualified plaintiff under the other statutes is a merits determination, not a threshold standing question. Statutory "standing, unlike constitutional standing, is not jurisdictional." Noel v. Hall, 568 F.3d 743, 748 (9th Cir. 2009). The question whether a plaintiff

> states a claim for relief typically relates to the merits of a case, not to the dispute's justiciability, and conflation of the two concepts often causes confusion. See Bond v. United States, 131 S. Ct. 2355, 2362 (2011); see also Steel Co. v. Citizens for Better Env't., 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." (emphasis in original)).

But elsewhere, the court suggests the government may have already tacitly admitted that Jewel has standing. In perhaps the most interesting part of the opinion, McKeown calls the government on its inconsistent stance in two difference FISA cases. Ostensibly to show the 9th Circuit's approach to FISA matches that adopted by the 2nd Circuit in Amnesty Intl v. Clapper, McKeown notes that in that case, the government said a plaintiff could obtain standing only by proving her communications had been intercepted, whereas in this case, the government argued that interception in fact was not enough to achieve standing.

> The government's position in Amnesty International appears to be in tension with its argument here. There, the government "argue[d] that the plaintiffs can obtain standing only by showing either that they have been monitored or that it is 'effectively certain' that they will be monitored." Id. at 135. **Shifting its position, the government argues here that Jewel lacks standing even if her communications were in fact captured and monitored**. The government does not deny Jewel's allegations but sidesteps the issue, asserting that "plaintiffs offer nothing other than

> bare speculation for their assertion that any surveillance is ongoing outside of [FISA Court] authorizations." **That approach conflates the ultimate merits question—whether the surveillance exceeded statutory or constitutional authority**—with the threshold standing determination. [my emphasis]

And whether or not Jewel can prove she has standing under the terms of the statutes binding even the executive (of note, the 9th also reversed Walker's dismissal of another plaintiff whose complaint he had deemed too vague), McKeown makes it clear that others may well clearly have that statutory standing—and have the right to sue as a result.

Hepting, read in isolation, upholds the notion that Congress can and did grant the telecoms immunity for their illegal cooperation in Bush's illegal wiretap program.

But Hepting read together with Jewel holds that Congress' authority to grant private citizens the right to sue when the government illegally wiretaps them is just as strong as its authority to grant private telecom companies immunity for cooperating in such illegal wiretapping.

In short, the 9th Circuit just said to the government that it could have one—telecom immunity—or another—immunity from citizens' efforts for redress for illegal surveillance, but it can't have both. The Executive doesn't get to pick and choose when it wants to bow to the authority of Congress' Article I powers.