

BRANDON MAYFIELD GETS HOSED BY THE 9TH CIRCUIT

As Fatster noticed, the Ninth Circuit has ruled against Brandon Mayfield on his attempt to hold the PATRIOT Act declared unconstitutional under the Fourth Amendment.

Mayfield was a former suspect in the 2004 Madrid train bombings. After the Madrid bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The SNP submitted digital photographs of the fingerprints to Interpol Madrid, which subsequently transmitted them to the FBI in Quantico, Virginia. The FBI searched fingerprints in its system and, among other possibilities, produced Mayfield, an US citizen and lawyer from the Portland Oregon area, as an alleged match. FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield's law office, the children's schools, and other family activities. The FBI also applied to the Foreign Intelligence Security Court ("FISC") for authorization to surreptitiously place electronic listening devices in the Mayfield family home; searched the home while nobody was there; obtained private and protected information about the Mayfields from third parties; searched Mayfield's law offices; and placed wiretaps on his office and home phones. The application for the FISC order was personally approved by John Ashcroft, then the Attorney General of the United States.

The Spanish SNP, however, looked at the FBI evidence and found it lacking evidentiary credibility. In spite of this fact, the FBI submitted an affidavit to a US Federal court, stating that experts considered the identification of Mayfield 100% positive, intentionally failing to advise that the SNP had

reached a diametrically opposite conclusion. As a result, Mayfield was arrested and held on a material witness warrant, and the public informed of his identity and supposed involvement in the bombings. Over two weeks later, the SNP conclusively matched the fingerprint to an unrelated Algerian citizen and Mayfield was absolved. Mayfield sued the US Government under numerous theories including that the PATRIOT Act was unconstitutional under the Fourth Amendment. The government, being in an egregiously bad position, settled with Mayfield and even allowed the unusual provision that he could maintain the Fourth Amendment challenge to PATRIOT, but could only obtain declaratory relief, not monetary damages.

Mayfield pressed his complaint seeking a declaration that PATRIOT was unconstitutional under his stipulated facts, and the District Court of Oregon, in denying the government's motion to dismiss and granting Mayfield's motion for summary judgment, agreed with Mayfield and ruled in his favor. The government appealed to the 9th Circuit arguing that the trial court had no jurisdiction because Mayfield had already been compensated, that the court erred in finding PATRIOT unconstitutional and that other matters, in totality, placed the matter outside of the court's power to award redress. These arguments were proffered by the government in spite of it having knowingly and specifically agreeing that Mayfield intended to raise and argue said issues and agreeing in their unusual settlement agreement to let him do so.

The usually enlightened 9th Circuit, this time took it upon itself to contrive and contort a way out of holding the PATRIOT Act unconstitutional:

The government contends that the district court lacked jurisdiction over Mayfield's claims because Mayfield lacks the requisite Article III standing. According to the government, Mayfield's Fourth Amendment claim in the Amended

Complaint is based on past injuries and speculation about the possibility of future injuries. Furthermore, as the government argues, the retention of derivative materials obtained from the FISA activities would not be affected by a declaratory judgment because there is no requirement that the government release or destroy the fruits of an unlawful search. The government thus asserts that Mayfield has not demonstrated that his injury is “imminent” or will be redressed by the relief sought. See *Defenders of Wildlife*, 504 U.S. at 560-61.

Standing is a question of law that we review de novo. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). We also review de novo a grant of summary judgment. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). The district court determined that Mayfield alleged an ongoing injury by the very fact of the government’s retention of derivative FISA materials. *Mayfield*, 504 F. Supp. 2d at 1034. The court further concluded that a judgment declaring the challenged statutory provisions unconstitutional would likely result in the government’s making reasonable efforts to destroy the derivative materials in its possession. *Id.* We agree that Mayfield suffers an actual, ongoing injury, but do not agree that a declaratory judgment would likely redress that injury. See *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). We therefore reverse the judgment of the district court with regard to standing. We also vacate the district court’s judgment on the merits and do not address the question of whether the challenged provisions of FISA, as amended by the PATRIOT Act, are unconstitutional.

The full decision is here.

This appears on its face to be a very ill taken decision. The court has bent over, contrived and contorted to protect the government from action and challenge by Mayfield that the government knowingly and willingly agreed to permit him to carry on when the two parties reached their settlement agreement. Mayfield premised his agreement to settle upon being able to maintain the Fourth Amendment challenge to PATRIOT under the facts and circumstances of his case, the government so agreed and stipulated, Mayfield relied on the same, and the appellate court has come in and wantonly stripped Mayfield of the benefit of his bargain and agreement and unjustly and incredulously awarded the government with a benefit they gave away and were not entitled to. A stunning and curious ruling.