

 KeyCite Red Flag - Severe Negative Treatment
Reversed in Part, Vacated in Part by Alliance to End Repression v.
City of Chicago, 7th Cir.(Ill.), July 2, 1997
1991 WL 206056

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United States District Court, N.D. Illinois, Eastern
Division.

ALLIANCE TO END REPRESSION, et al.,
Plaintiffs,
v.
The CITY OF CHICAGO, et al., Defendants.

Nos. 74 C 3268, 75 C 3295. | Oct. 3, 1991.

Opinion

MEMORANDUM OPINION AND ORDER

ANN C. WILLIAMS, District Judge.

*1 This matter is before the court on the cross motions for summary judgment filed by the FBI and by Chicago CISPEs. The American Civil Liberties Union (“ACLU”) filed a brief in support of Chicago CISPEs’ motion. The court referred this matter to Magistrate Judge Lefkow for a report and recommendation. In a thorough and well reasoned report, the Magistrate Judge recommended that the petitioner’s motion for summary judgment be granted, and that the respondent’s motion be denied. For the foregoing reasons, the Magistrate Judge’s report and recommendation is adopted in whole.

Background

The undisputed facts of this case were explained in great detail in the Magistrate Judge’s Report and Recommendation, and those findings of fact are adopted by this court. For purposes of this opinion, the court notes the following. The Consent Decree at issue was signed in 1980 and approved by the court on August 11, 1981, *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182 (N.D.Ill.1981).

The Chicago Committee in Solidarity with the People of El Salvador (Chicago CISPEs), and several other petitioners brought this action against the Federal Bureau of Investigation under the enforcement provisions of the Consent Decree, ¶ 5.1 and ¶ 5.2. The petitioners are representatives of the class as defined in the August 1981

Consent Decree.

Paragraph 3.4 sets out the basic tenets of the Consent Decree. It provides in part that the FBI, in conducting domestic security investigations and inquiries, will only be concerned with conduct that is forbidden by a criminal law of the United States, or by a state criminal law when authorized by a federal statute, and that the FBI will not investigate activities protected by the First Amendment of the United States Constitution, or the lawful exercise of any right secured by the Constitution or laws of the United States. Paragraph 3.4 also states that:

(b) The FBI, in investigating United States persons shall not employ any technique designed to impair their lawful and constitutionally protected political conduct or to defame the character or reputation of a United States person.

(c) The FBI shall conduct its investigations with minimal intrusion consistent with the need to collect information or evidence in a timely and effective manner, and shall conduct investigations in a manner reasonably designed to minimize unnecessary collection and recording of information about the lawful exercise of First Amendment rights.

Paragraph 5.1, one of the enforcement provisions of the Decree states that any former named plaintiff, member of the plaintiff classes, or a U.S. person¹ residing in the City of Chicago prior to the effective date of the Decree may petition the Court for a finding that a violation of any of the terms of the Decree has occurred or is occurring, and for an appropriate order to enforce the Decree.

Paragraph 5.2 states that

If the Court finds that a pattern of substantial noncompliance or a serious intentional noncompliance with the terms of the Stipulation has occurred or is occurring, it shall make such order as it deems just and necessary to insure future compliance with the Stipulation.

Petitioners claim that the Decree was violated when the FBI investigated them from March 1983 through June 1985, in connection with the National CISPEs investigation. Petitioners were investigated following paid informant Frank Varelli’s “tip” that CISPEs was involved in international terrorist activity. The National CISPEs investigation led to investigations of groups closely related to CISPEs. There were 178 “spin-off” investigations nationally, lasting for varying periods of time. There were 19 spin-off investigations in Chicago, aside from the investigation of Chicago CISPEs.² Many of the individuals and organizations the FBI investigated,

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and kept information on, had extremely limited contacts and connections with Chicago CISPES.

*2 The FBI has admitted that there were clear deficiencies with the way in which they dealt with Varelli, in that neither his reliability or his background were ever investigated, and the FBI did not verify the accuracy of Varelli's information during much of the investigation. One year after the CISPES investigation began, the FBI learned that some of Varelli's information was unreliable. FBI Director Sessions said that the FBI should have known, at that time, that the CISPES investigation should be discontinued. The investigation nonetheless continued for another year until June, 1985.

The investigative techniques used by the FBI in Chicago Field Office are also relevant to this discussion. To note a few of these techniques, the FBI used infiltrators who joined, or were already members of Chicago CISPES and reimbursed them for any costs they incurred. FBI Headquarters sent the Chicago Field Office airtels, stating that penetration of Chicago CISPES inner circles was imperative, and that penetration would be accomplished through the use of informers. The Chicago Field Office of the FBI used undercover agents to attend CISPES meetings and fund-raising events which were open to the public. Without Chicago CISPES' knowledge, the FBI obtained copies of all deposits, cancelled checks, transfer requests, notations, authorized representatives signature cards for CISPES' accounts at the Community Bank and Trust of Edgewater. Also, without the knowledge or consent of Chicago CISPES and without the required signature of at least an Assistant Director or a higher Headquarters official, the FBI obtained long distance telephone records of the Chicago CISPES office to determine the identity of its membership and contacts.

Finally, at the direction of Headquarters, the FBI conducted a photographic surveillance on April 1, 1985 outside the private residence of one Chicago CISPES leader and on April 8, 1985, submitted his photograph and background data for inclusion in the Terrorist Photograph Album, and sent copies to the FBI's International Terrorism Unit II and the FBI's Terrorist Research and Analytical Center. The FBI gathered unpublished telephone and social security numbers of Chicago CISPES members and associates.

The information gathered, maintained and disseminated by the Chicago Field Office concerned the lawful exercise of First Amendment rights by Chicago CISPES, its members and associates. (Mag. R & R, pp. 8-11). On June 3, 1985, in their review of the CISPES investigation, the Department of Justice ("Justice") concluded that CISPES was involved in political activities involving First Amendment rights, and was not involved in international terrorism. Even though Justice instructed the receiving offices to close their investigations of CISPES,

the Chicago Field Office continued to collect and record information regarding Chicago CISPES' lawful exercise of First Amendment rights.

William Sessions became head of the FBI in November, 1987. He ordered an in-depth inquiry into the CISPES investigation in response to Congressional interest in the issue. At a Congressional hearing, Sessions admitted that the FBI had investigated essentially political activities, and that FBI field offices ignored instructions from Headquarters regarding these investigations.

*3 After reviewing the results of the CISPES inquiry, Sessions took action to prevent recurrence, and requested that the Attorney General approve the formation of a joint Department of Justice-FBI working group to make recommendations to the Attorney General regarding the modification of existing FBI guidelines in light of the CISPES experience. Sessions made a number of additional changes regarding investigations, including restricting to FBI Headquarters the decision to initiate an international terrorism investigation. He refined the review process to insure that if essentially political activities are investigated, high level officials are aware of that surveillance and that the surveillance must be fully justified. (Mag. R & R pp. 12-13). The Director also ordered additional training of FBI agents nationwide on how to deal with activities protected by the First Amendment. Further, the FBI has disciplined the appropriate personnel connected with the CISPES investigation, and made arrangements to move all the records that were accumulated throughout the course of the investigation to the National Archives.

In light of the above facts, both sides now seek summary judgment in this matter. The FBI contends that petitioners have no cause of action, since the FBI's changes in policy and procedure moot petitioner's request for relief. Petitioners and the ACLU³ contend that the evidence presented in this case indicates that the FBI has violated the Consent Decree, and that their requests for relief are not moot. Petitioners seek enforcement of the Decree, and order of compliance, expungement of the records that were collected about them, and training of FBI personnel about the Decree.

Conclusions of Law

Before considering the motions for summary judgment, the court must determine whether there is a cause or controversy present in this case for the court to hear, which is the first major area of contention between the parties. As was noted above, the court adopts the Magistrate Judge's report and recommendation in whole. However, since numerous objections to the report were

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filed repeating or slightly modifying the arguments before the Magistrate Judge, the court will reiterate the Magistrate Judge's findings where necessary. The court also adopts those findings by the Magistrate Judge which are not specifically reiterated in this opinion.

Res Judicata

The FBI contends that the petitioners are estopped from bringing this action by the judgment of the United States District Court for the District of Columbia in *Committee in Solidarity With the People of El Salvador v. Sessions*, 738 F.Supp. 544 (D.D.C.1990) ("CISPES I").⁴ Res judicata requires the same parties, their privies, and the same claims. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Further, "under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.*

*4 Res judicata (claim preclusion) does not apply to this action, since res judicata cannot bar litigation which could not have been raised in the prior adjudication. This case is an action to enforce a 1981 consent decree which was issued in the United States District Court for the Northern District of Illinois. Since, any proceeding to enforce the decree must be filed in this court, the District of Columbia's court's ruling cannot constitute res judicata as to this proceeding.

Second, res judicata requires a prior decision on the merits. *Allen v. McMurry*, 449 U.S. 90, 94 1980. Since no court has ever found that defendants' actions were lawful, the FBI cannot utilize the doctrine of res judicata to preclude the plaintiffs from showing that those actions were unlawful. *Continental Casualty Co. v. Canadian Universal Insurance Co.*, 605 F.2d 1340, 1345 (5th Cir.1979). Dismissal for lack of jurisdiction or lack of justiciability does not constitute an adjudication on the merits, and does not preclude this action. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4436, pp. 338, 340-344; *McCarney v. Ford Motor Co.*, 657 F.2d 230, 232-34 (8th Cir.1981).

Finally, res judicata does not apply here because the petitioners were not parties to the prior claim, or in privity with parties in the prior adjudication. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). *CISPES I* was filed by CISPES headquarters and certain individuals, none of whom are petitioners in this suit. Evidence that the D.C. plaintiffs were not "privies" of the petitioners stems from the fact that the D.C. plaintiffs could not adequately represent the legal interests of the petitioners since they could not move to enforce the Chicago consent decree. The court also notes that the D.C. plaintiffs did not seek to expunge the FBI files, or seek any training of the FBI regarding the First Amendment rights of FBI targets. Hence, the court

agrees that the doctrine of res judicata does not apply to this action.

Collateral Estoppel

The FBI also contends that this action is moot because the doctrine of collateral estoppel precludes the petitioners from relitigating the issues of mootness and their lack of standing. The Magistrate Judge found that the doctrine is not applicable to this action for a number of reasons, and the court agrees.

In general, collateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court's judgment, and (4) those issues are identical to the issues raised in the subsequent suit.

Amoco Oil Co. v. Johnson, 856 F.2d 967, 969 (7th Cir.1988).

As the Magistrate Judge correctly found, collateral estoppel does not apply in this case. First, this litigation involves different parties from CISPES I. Further, none of the mootness or standing issues which were resolved in the prior litigation recur in this proceeding. Here, petitioners do not seek transfer of the CISPES files, they seek expungement of the files, based on the legal right to expunge illegally obtained information. Petitioners also seek judicial interpretation of the consent decree, and further training of the FBI regarding the terms of the Consent Decree. All relief sought is based upon fears of future improper intelligence gathering. None of these issues were actually litigated, or resolved by the D.C.Court. Finally, petitioners have standing to enforce the consent decree, which is fundamentally different from standing to file a new lawsuit. For these reasons, the doctrine of collateral estoppel does not apply.

The Petitioner's Claim is Not Moot

I

*5 Aside from the FBI's arguments that CISPES I moots this action, the FBI also suggests that the case is moot because the FBI is no longer investigating CISPES, so the petitioners are no longer being harmed. Further, since the Director of the FBI has ordered far-reaching measures to

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ensure greater direction and future control of investigations, there is no danger of future harm to the petitioners, there is no actual controversy, and no further relief is necessary. The Magistrate Judge rejected each of these arguments, and the court agrees with her reasoning.

The Magistrate Judge found that the petitioners' claim is not moot. While recognizing that Article III limits subject matter jurisdiction of the federal courts to the adjudication of actual controversies between parties, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), the Magistrate Judge noted that judicial review is also appropriate where, in the case of government action, controversies may recur but, because of their nature may continue to defeat review. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974). The standard of proof for showing likelihood of repetition is that there is a "reasonable expectation" of recurrence, which means that a controversy is "capable of repetition based on expectations that while reasonable, [are] hardly demonstrably probable." *Honig v. Doe*, 484 U.S. 305, 318 (1988).

As the Magistrate Judge correctly explained, to establish mootness based on voluntary cessation of unlawful activity, the FBI has the burden of showing that there is no likelihood of recurrence. *United States v. W.T. Grant*, 345 U.S. 629, 632–33 (1953). Voluntary discontinuation of a practice "will end the case or controversy when recurrence of the dispute among the parties is very unlikely." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 877 (7th Cir.1987).

The Magistrate Judge found that although the FBI has enacted new guidelines, they have also enacted new guidelines in the past which were meant to prevent this type of investigation, and those guidelines were not completely effective.⁵ Hence, in light of these circumstances, the FBI's new regulations are not sufficient proof that the Decree will not be violated in the future. See *Campbell v. McGruder*, 580 F.2d 521, 541 (D.D.C.1978) (City and Department of Corrections' sporadic attempts to deal with overcrowding conditions in jail were not enough to moot case when previous efforts had been ineffective). Further, since FBI guidelines can be repealed or modified in the future they do not guarantee future compliance. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Anderson v. City of Albany*, 321 F.2d 649 (5th Cir.1963). Finally, the FBI has not shown that there is no reasonable expectation of recurrence against either the named petitioners or other members of the class protected by the consent decree. The Magistrate Judge reasonably concluded that because there is a reasonable likelihood of repetition this claim is not moot.

⁵ Further, to establish mootness, the FBI must also

demonstrate that its conduct did not evade review during the time that the allegedly illegal action occurred. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911); see also, *Ross v. Lucey*, 349 F.Supp. 264, 267–68 (E.D.Wis.1972)⁶ In the instant case, the FBI's investigation did, for the most part, evade review. Much of the information Chicago CISPES would have needed to bring an action against the FBI was classified while the investigation was in progress. Chicago CISPES had no way of knowing the extent of the FBI's investigation, or determining whether the FBI was violating the consent decree while the investigation was in progress.⁷ In sum, the Magistrate Judge correctly determined that this action is not moot because the challenged activity is capable of repetition, and capable of evading review. *Honig v. Doe*, 484 U.S. 305 (1988).

II

The FBI argues that the petition should be dismissed as moot because even if a violation of the Decree were found, paragraph 5.2 of the Consent Decree does not authorize further proceedings.⁸ The FBI contends that the consent decree limits court orders to those which are "necessary to insure future compliance with the Stipulation." The FBI contends that since they voluntarily discontinued the practices in question no relief is necessary, and the court cannot offer a remedy to the petitioners. The FBI comments that the petitioners desire to have an opinion from the court regarding whether the decree was violated is not enough to sustain their claim if no other relief is necessary.

The ACLU argues that the Consent Decree is in some respects, a contract made in settlement of a dispute, and that it therefore creates rights in the parties and designated beneficiaries to the contract. Chicago CISPES is invoking relief provided by the Decree, and because relief is available under the Decree, petitioners' claims cannot be moot. Paragraph 5.1, allows the court to find that a violation occurred, and paragraph 5.2, provides for enforcement orders.⁹ Findings can be made under ¶ 5.1 even if an order is not necessary because the Decree was crafted to present systematic abuses. A finding would take the form of a declaratory judgment, providing relief to the plaintiff by finding that a violation has occurred, and would serve to prevent future misconduct by clarifying what conduct is forbidden. The ACLU also argues that a finding of a violation is equivalent to an award of nominal damages, which is an appropriate remedy for breach of contract. The court agrees with this analysis.

Further, the FBI's arguments concerning mootness with respect to these petitioners are misplaced. As the Magistrate Judge found, the petitioners are seeking relief

in addition to a statement of the law, because they are seeking expungement of the records collected by the FBI. The Magistrate Judge also correctly found that since the petitioners in this case are representatives of a class, even if there is little likelihood of recurrence as to Chicago CISPES and the other petitioners, if there is a danger of recurrence within the protected class, this is enough to keep the controversy alive. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 398–99 (1980).¹⁰

III

*7 In her discussion on mootness the Magistrate Judge also correctly considered court rulings in other cases involving alleged harm from the existence of harmful records. In *Paten v. LaPrade*, 524 F.2d 862 (3rd Cir.1975) the plaintiff sought to expunge a record which the FBI gathered about her. The file was designated “SM–SWP”, for “subversive material Socialist Worker’s Party”, but it was not clear whether the file would be disseminated to others. Citing, *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C.Cir.1974), a case involving the maintenance of arrest records, the *Paten* court determined that while the plaintiff could not determine the exact consequences of her file, it was clear that she had alleged a cognizable legal injury. *Paten*, 524 F.2d 868.

The files in this case are designated “IT” for “International Terrorism”, and are classified with the number “199C” which designates “Foreign Counterintelligence—Terrorism.” 44 Fed.Reg. 58981–86 (1970). All of the information contained in these files concerns the petitioners’ protected First Amendment activity. This court agrees that the injury to petitioners in this case, as in *Paten*, is obvious.

Where expungement is sought due to the violation of constitutional rights, “determination of the propriety of an order directing expungement involves a balancing of interests; the harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance.” *Doe v. U.S. Air Force*, 812 F.2d 738, 741 (D.C.Cir.1987) quoting *Hobson v. Wilson*, 737 F.2d 1, 65 (D.C.Cir.1984), quoting *Paten*, 524 F.2d at 868. The transfer of the CISPES files to the National Archives does not moot petitioners’ request for expungement. See *Doe*, 812 F.2d at 741 (Fact that unconstitutionally gathered material was held in a closed file which would be destroyed in a period of years did not establish that an expungement order would be inappropriate if the constitutional violation were proven). The court agrees that petitioners’ claims is not moot because a remedy is clearly available to them.

IV

The FBI contends that it cannot be said that the entry of an order will change the FBI’s behavior toward the petitioners, and that since the petitioners do not seek any changes in the procedures recently adopted by the Attorney General and the Director, the case is moot.

The court disagrees with this argument. First, the petitioners correctly argue that the burden is on the respondent FBI to show that there is no reasonable likelihood of recurrence, and the FBI has failed to meet that burden. As was noted above, there is evidence that future violations of the decree are possible despite the FBI’s recent changes. Our finding that there is a reasonable likelihood that future violations will occur is influenced, in part, by the FBI’s contentions that there was no violation of the Decree. Continued claims of legality weigh heavily against assertions that the challenged activity is unlikely to recur. See e.g., *Jaeger v. Douglas County School District*, 862 F.2d 824, 833–34 (11th Cir.1989).

*8 The FBI also contends that the petitioners lack standing “in the Article III sense” to seek further relief from this court, since the court is without power to award prospective relief in this proceeding. The FBI consent decree has only two requirements for standing, which are set forth in ¶ 5.1. First a putative petitioner must be either a former named plaintiff, a member of the plaintiff class, or a U.S. person. Second the plaintiff must have resided in the City of Chicago prior to August 11, 1981, the effective date of the consent decree. All six named petitioners satisfy these requirements, so no further showing is necessary to establish standing.

The Motion for Summary Judgment

Chicago CISPES claims that the FBI is guilty of “a pattern of substantial non-compliance” and/or “a serious intentional non-compliance” with ¶ 3.4(c) of the Consent Decree, within the meaning of ¶ 5.2 of the Consent Decree, and that the Decree has been violated in Chicago, not just outside of the City as claimed by the FBI.¹¹ The violations include overly intrusive investigations by the FBI in which they unnecessarily collected and recorded First Amendment information in violation of ¶ 3.4(c) of the Consent Decree, an overly broad scope and duration of the investigations, and the use of overly intrusive investigative techniques. Petitioners claim that a court order is necessary to insure further compliance with the Decree. Petitioners also request expungement of the files

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gathered on them, notification and training of the FBI agents about the Decree, and attorney's fees under 42 U.S.C. § 1988, and common law for monitoring and enforcing compliance with the Consent Decree.

The FBI argues that Chicago CISPES has not shown a violation of § 3.4 of the Decree because it has shown neither a pattern of substantial non-compliance or serious intentional non-compliance, as required by ¶ 5.2. They further argue that no violation of the decree took place in Chicago, because only the Chicago Field Office is bound by the Decree. They claim that the Chicago investigations by the Field Office were not overly intrusive, and that the Office's investigative techniques were appropriate.

Paragraph 5.2 of the Consent Decree authorizes the entry of an enforcement order if the court finds either "a serious intentional noncompliance" or "a pattern of substantial noncompliance." The Magistrate Judge found that the FBI was guilty of serious intentional noncompliance with the Decree. In determining whether the FBI's investigation complied with the Decree, the Magistrate Judge considered the actions of the FBI as a whole, as they effected events in the City of Chicago. As was noted above, the basis for the CISPES investigation were allegations by Frank Varelli that CISPES was taking orders and sending military assistance to the El Salvadoran guerrillas, and that certain individuals in the Dallas CISPES were planning terrorist acts. The FBI's director has admitted that the FBI never adequately investigated Varelli's background, or reliability and that the FBI did not adequately verify the accuracy of Varelli's information during much of the investigation. Sessions admitted that the investigation would not have developed as it did if Varelli's reliability had been properly scrutinized, since without the Varelli's tip there would not have been sufficient predication for an international terrorism investigation of CISPES.

*9 The FBI argues that these facts are not relevant because they did not take place in Chicago. This argument is not persuasive. As the cause of the actions that took place in Chicago, these actions are relevant. The court notes that certain especially intrusive investigative techniques were needlessly used in Chicago, including infiltration, gathering of telephone toll records, gathering of bank checking account records, photographic surveillance at a private residence and labeling a Chicago CISPES leader as a "terrorist". Paragraph 3.4(c) provides that "[T]he FBI shall conduct its investigations with minimal intrusion consistent with the need to collect information or evidence in a timely manner." The court agrees with the Magistrate Judge's conclusion that:

there was no verified basis for the CISPES investigation, so there was no need for the collection of information or evidence, as permitted by ¶ 3.4(c), within the city of Chicago, so investigation of the breadth and scope of the

Chicago investigation in which only information regarding the petitioner's lawful exercise of First Amendment rights was collected, certainly constitutes non-compliance with the Consent Decree. The voluminous records collected by the FBI in Chicago regarding petitioner's exercise of First Amendment right pretty well speaks for themselves that the scope and breadth of the investigation went beyond that contemplated by the Decree. Had the facts demonstrated that the FBI verified Varelli's reliability as they should have, it would have known that the Chicago investigation was not justified in either scope or duration. The FBI's actions constitute a serious violation of the Consent Decree.

Magistrate Judge's R & R at 29.

In their objections to the report and recommendation, the FBI suggests that the incidents described and relied upon in the Magistrate Judge's findings do not amount to a violation of the decree because all of these errors were committed by FBI personnel outside of Chicago, and that FBI personnel in Chicago were only following orders when they acted pursuant to other officials' requests. The FBI argues that in order to prove an intentional violation of the Consent Decree, Chicago CISPES must show that the Chicago Field Office of the FBI knew that there was no basis for the FBI's investigation, that carrying on the investigation would violate the Consent Decree, and that there was a decision to proceed with the investigation in violation of the Consent Decree. These arguments are unpersuasive. First, as the Magistrate Judge noted, the respondent in this case is the FBI, not the FBI's Chicago Field Office, meaning that the Agreement regulated the conduct of the entire FBI, not just the FBI's Chicago Field Office. FBI officials both inside and outside of the Chicago area are bound not to cause the forbidden actions to occur in Chicago. Plainly, any investigation conducted in the City of Chicago by any part of the FBI is subject to the Consent Decree.¹²

*10 The Magistrate Judge also found that the FBI's violations of the decree were intentional. She noted that Volume 22, Words and Phrases defines "intentional violation" (Pocket Part 1989) as requiring that the actor commit the forbidden act with culpable knowledge of the nature, but not necessarily the illegality of the act. *Black's Law Dictionary*, 5th Edition, (1979), states that intention "when used with reference to civil and criminal responsibility, a person who contemplates any result, as not as likely to follow from a deliberate act of his own, may be said to intend that result, whether he desires it or not." The Magistrate Judge correctly concluded that because the FBI signed the Consent Decree with full knowledge of its terms, and because the investigation at issue was undertaken deliberately, the FBI's actions were intentional. Therefore, the Magistrate Judge correctly found that the FBI had engaged in "serious intentional

non-compliance” with the Consent Decree.¹³

Remedies

The FBI argues that, because ¶ 5.2 of the decree only allows for relief “just and necessary to insure future compliance with the Stipulation”, and that since the FBI has already assured future compliance through its internal rule changes, no remedy is necessary in this action. This argument was rejected by the Magistrate Judge, because (as explained above) this remedy is not sufficient to prevent future recurrences.

The Magistrate Judge concluded that some of the remedies requested by CISPES are appropriate. She found that a proposed remedy which would directly effect Chicago CISPES for damage already done is expungement of the files. As the Magistrate Judge explained, federal courts are empowered to order the expungement of government records, where necessary, in order to vindicate Constitutional rights. In addition, a right not to be adversely affected in the future by information may exist if the information was acquired by “fatally flawed procedures.” *Doe*, 812 F.2d at 741. Further, even “statutes requiring the maintenance and regulating destruction of agency records do not prevent an order requiring expungement, but must yield to statutory or constitutional rights elsewhere guaranteed.” *Id.*

The Magistrate Judge concluded that the factors weighing in favor the destruction of these records are the correction of the FBI’s misconduct by the destruction of the fruits of the violation and the protection of the subjects of this investigation. The Magistrate Judge also noted the stigma attached to being included in a file designated as “international terrorism.” The Magistrate Judge noted, however, that the government’s historical interest in maintaining the files, and that the alleged protection to the petitioners’ from future investigative uses of the documents weighs against destruction. While favoring expungement of the files given the record presented, the Magistrate Judge found that the parties had presented little evidence as to their interest in maintaining or destroying the files, so it might be appropriate for the court to collect additional evidence on this issue. The court adopts this recommendation, and will allow the parties to brief the issue of expungement, despite their objections, before making a final determination on this issue.¹⁴

The FBI is Ordered to Comply with the Decree

*11 Chicago CISPES asked that the court either issue an interpretation of the Decree stating that the FBI investigation violated the Decree, or issue an order requiring the FBI to comply. The FBI argues that these remedies are not necessary because even if it did violate the Decree, the Decree allows relief only if there is danger of future violation of the Decree, and because the court may not merely interpret the Decree.

The FBI contends that any proposed enforcement order must meet two requirements. First, by the terms of the Consent Decree itself (¶ 5.2), the order must be a means to “insure future compliance” with the Consent Decree. Second, as a matter of constitutional law, it must operate to “redress” the grievances of the parties before the court by affecting the future behavior of the FBI toward those parties.

In the instant case, many possible enforcement orders would satisfy both the constitutional test and the terms of the Consent Decree by operating to increase the likelihood of future compliance. The court is persuaded that a declaration that a violation of the Consent Decree occurred “would affect the behavior” of the FBI by disabusing it of the notion that the Consent Decree places no limits on the ability of portions of the FBI to utilize the Chicago Field Office to conduct investigations or maintain records which, unbeknownst to it, do not comply with the Consent Decree. The FBI would recognize that the organization as a whole has the responsibility to ensure that each investigation conducted in Chicago must comply with the Decree. As the ACLU notes, a simple order to henceforth comply with the decree would “affect the behavior” of the FBI by exposing it to the clear threat of contempt penalties for future violations of a court order.

Finally, as the Magistrate Judge noted, the standard set by the Consent Decree is that an order is appropriate to prevent future violations. In the instant case, there is a disagreement between the parties arising from a concrete situation as to the interpretation of the Consent Decree. Since there is a possibility of repetition of this type of behavior, and the Consent Decree prohibiting this behavior is still in effect, an interpretation of the Consent Decree stating that the FBI violated it would lend appropriate guidance to all parties in the future. The court agrees, and finds that the investigation at issue violated the Consent Decree. The FBI is ordered to henceforth comply with the Consent Decree.

The court is also persuaded that further training of FBI personnel is also a proper subject for the enforcement order. While the FBI contends that the issue is whether there are specifically identified deficiencies in the present FBI training, the court finds that what is at issue is whether future compliance with the consent decree could be improved with additional training. FBI personnel in

Chicago and elsewhere should be made aware that all investigations in Chicago must comply with the Consent Decree, regardless of where they are initiated. Additional or better training should reduce the negligence and error which produced the violations in this case. As recommended by the Magistrate Judge, the court will reopen discovery for the limited purpose of exploring what training regarding compliance with the requirements of the Consent Decree the FBI now provides, and what additional or different training might better assure future compliance. The court will then determine whether an order for notification and training is appropriate.

Contempt Finding

*12 Petitioners' July 1988 Petition to Enforce the Consent Decree requested "a finding that the FBI is in contempt of Court." CISPES did not request a contempt finding in their October 1989 motion for summary judgment because of their confusion regarding what terms of what Consent Decree applied in this case. Once CISPES determined which Agreement applied, they renewed their demand for a finding of contempt against the respondent in their reply memorandum to the motion for summary judgment.

The Magistrate Judge declined to rule on the request that the FBI be found in contempt of court. In light of the petitioners' failure to present this request in their opening memorandum in support of the motion for summary judgment, the court finds that Magistrate Judge's decision was proper. The court will not excuse CISPES' failure to properly brief, or to properly request a contempt finding in a timely manner, by ruling on that issue at this juncture in the proceedings.

Fees

Chicago CISPES requests an award of costs and

Footnotes

- 1 Under paragraph 6.3:
The term "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association or organized in the United States or substantially composed of United States citizens or aliens admitted for permanent residence, or a corporation incorporated in the United States.
The parties before the court were parties to the original Consent Decree, or have standing to enforce the Decree under its terms. Chicago CISPES has resided in Chicago since the summer of 1980, most likely July 1980. The other petitioners have resided in the City since the 1970s, or the late 1960s. The FBI is a party to the consent decree.
- 2 Petitioner CISPES notes that 18 of the 19 targets of these investigations were identified by the FBI.
- 3 The FBI objects to the ACLU's participation in these proceedings. The court finds that the ACLU is a proper party to this action.

attorney's fees under common law for monitoring and/or enforcing compliance with the Consent Decree, or for fees pursuant to 42 U.S.C. § 1988. The FBI argued that it is protected by sovereign immunity from an award of fees, and that CISPES cannot collect fees under 42 U.S.C. § 1988 because it did not prove a violation of the Civil Rights Act.

As the Magistrate Judge explained, the court has power to impose attorney's fees as part of its inherent power to impose sanctions for violations of its decrees. *Wisconsin Hospital Assoc. v. Revitz*, 820 F.2d 863, 869 (7th Cir.1987). The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(b) allows for an award of attorney's fees against the government "to the same extent that another party would be liable under common law or under the terms of any statute which specifically provides for such an award." Because the FBI violated the decree, attorney's fees and costs should be awarded to Chicago CISPES. The court agrees.

The court rejects the FBI's argument that petitioners have not prevailed. This court has found that the FBI violated the consent decree, and has the ordered the FBI to comply with the decree. In addition, the court will be considering additional remedies. In its objections to the report and recommendation, the FBI contends that fees may not be appropriate because whether this is a civil action is "another, far more difficult question". This is a new argument which could have been, but was not raised before the Magistrate Judge. Further, there is no law or any real development of the argument as presented.

Conclusion

For the foregoing reasons, the Magistrate Judge's report and recommendation is adopted. The petitioners' motion for summary judgment is granted, and the respondent's motion is denied.

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The ACLU argues that the Consent Decree is in some respects, a contract made in settlement of a dispute, and that it, therefore, creates rights in the parties and designated beneficiaries to the contract. Breach of a promise included in the contract is actionable both by the beneficiary who is deprived of the intended benefit and the contracting party who gave consideration for the promise to confer those benefits. As a contracting party, the ACLU is aggrieved by every violation or threatened violation of the contract, and therefore has right to participate in these proceedings to enforce the decree. *See Berger v. Heckler*, 771 F.2d 1556, 1564–65 (2d Cir.1985) (Above analysis applied to analogous fact pattern).

4 National CISPES' action against the FBI in *CISPES I*, was based on the same investigation at issue here. Plaintiffs in CISPES I argued that the FBI investigation violated their rights under the First Amendment, and the Privacy Act of 1974, 5 U.S.C. § 552a. The court dismissed CISPES' complaint for mootness, finding 1) that plaintiffs' demand for an injunction directing the CISPES FBI files to be sent to the National Archive was moot when the FBI agreed to send all copies of the files to the Archives; 2) that plaintiffs' fears regarding possible future injury from use of the FBI files did not create sufficient tangible personal injury to grant plaintiffs standing to pursue their First amendment claim; and 3) that the Privacy Act did not confer standing to plaintiffs' organizations.

5 The Magistrate Judge noted that in the 1970's the FBI and the Justice Department issued new executive orders, regulations and guidelines forbidding the needless gathering of First Amendment information, yet the FBI conducted its overly broad, overly intrusive CISPES investigation. The Magistrate Judge also noted that during the CISPES investigation from 1983 to 1985 the Chicago Field Office was instructed by FBI Headquarters not to gather information about lawful First Amendment activity, but the Chicago Field Office collected such information anyway.

6 In that case, the court found that the challenged government action evaded review even though it was not of short duration. The case indicates that the "capable of repetition, but evading review exception" is intended to deal with the "risk that effective remedies cannot be provided except in the event of repetition." *See also, Federal Practice and Procedure: Jurisdiction* 2d § 3533.8, p. 370. The court agrees with petitioners' argument that this concern is as relevant to clandestine violations as to violations of short duration.

7 The petitioners' ability to file suit against the FBI is greatly constrained. CISPES petitioners could file this enforcement proceeding only because they previously obtained portions of their files under the Freedom of Information Act, 5 U.S.C. § 552. Petitioners were still forced to file proceedings after investigations were over since 5 U.S.C. § 552(c)(1) (1986) permits the FBI to refuse to confirm or deny the existence of files of an on-going investigation, and 5 U.S.C. § 5529(b)(7)(A) permits the FBI to refuse to produce the reports of an ongoing investigation. It would appear that petitioners could not file a enforcement proceedings until after the could confirm their suspicions regarding the breadth and extent of the FBI investigation, without subjecting themselves to sanctions under Rule 11.

8 Section 5.2 of the provision provides:

5.2 If the Court finds that a pattern of substantial noncompliance or a serious intentional non-compliance with the terms of the Stipulation has occurred or is occurring, it shall make such order as it deems just and necessary to insure future compliance with the Stipulation.

9 The provisions of 5.2 have been noted above (See *infra*, fn. 8. Section 5.1 provides as follows:

5.1 A former named plaintiff, a member of the plaintiff class, or a U.S. person residing in the City of Chicago prior to the effective date of this Stipulation may at any time after final approval of the settlement petition the Court for a finding that a violation of any terms of the Stipulation has occurred or is occurring and for an appropriate order to enforce the Stipulation. Each such petition shall be supported by an affidavit or declaration under penalty of perjury, setting forth the facts upon which the petition is based. If the Court finds, based upon facts alleged, that there are reasonable grounds to believe that a violation of the terms of the Stipulation has occurred or is occurring, the Court shall permit petitioner to conduct such discovery as the Court deems appropriate as provided in the Federal Rules of Civil Procedure and shall thereafter hold a hearing to determine the factual and legal issues raised by the petition.

10 In a related argument, the FBI cites *Martin v. Davies*, 917 F.2d 336 (7th Cir.1990) to argue that the claim is barred because only those individuals who would be personally affected by future violations of the Decree may seek protection against future violations. The reliance on *Martin* is misplaced. *Martin* is distinguishable from this case because in that case the plaintiff did not seek enforcement of the Consent Decree. Plaintiff filed a new action, attempting to remedy the government's action only "against him", without concern for the other class members. *Id.* at 339. In addition the plaintiff was not a certified class member, and his claim was partially barred by the doctrine of res judicata. This action is not moot with respect to the petitioners or to the class. Further, the court is persuaded that the petitioners will be personally affected by violations of the Decree.

11 Paragraph 3.4(c) of the Consent Decree states:

(c) The FBI shall conduct its investigations with minimal intrusion consistent with the need to collect information or evidence in a timely and effective manner, and shall conduct investigations in a manner reasonably designed to minimize unnecessary collection and recording of information about the lawful exercise of First Amendment rights.

12 The petitioners rightly argue that the FBI as an institution must arrange its affairs to ensure that the Decree will be complied with,

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and that the record in this case shows that the FBI has failed to do this by intentionally conducting activities in Chicago which violated the decree. In the instant case, the complained of investigations took place in Chicago, in violation of the Decree. The FBI Director admitted that the scope of the Dallas investigation was improperly expanded to include an investigation of Chicago CISPES, and that based on the information they had and subsequently obtained, the scope of their investigation should have been limited to specific individuals allegedly involved in planning terrorist acts in Washington, D.C.

Similarly, the FBI's argument that law enforcement officers commit no violation of the Constitution by relying on the information or advice received from other law enforcement officers of agencies, is unpersuasive. First, whether the Chicago office relied on the orders of the Dallas office of Headquarters is of little importance, since the entire FBI was bound to ensure that the Decree was not violated. Further, the misconduct of one FBI field office cannot be insulated from challenge by that office's requesting other offices to perform the wrongful acts. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971) (Court found that police officers called upon to aid other officer in arrest could assume that officer had probable cause; "where, however, the contrary turns out to be true an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.")

13 CISPES objects to the fact that the Magistrate did not evaluate whether there was a pattern of non-compliance. Having determined that the FBI violated the terms of the Decree by engaging in serious intentional non-compliance with the Decree, the court is not required to evaluate whether there was also a "pattern of substantial non-compliance."

14 The FBI claims that mere compensation for past violations, such as the destruction of files which were obtained in violation of the decree, is not permissible purpose for an enforcement order, since only future violations may be considered. The court disagrees, since destruction of the fruits of the FBI's unlawful conduct would certainly deter future violations, by placing the Government on notice that it will not be permitted to derive any benefit from these sorts of violations.