United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5377 **September Term, 2017**

FILED ON: JULY 10, 2018

NATHAN MICHAEL SMITH,
APPELLANT

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00843)

Before: GRIFFITH, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties and their presentations at oral argument. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the appeal be dismissed as moot and the district court's November 21, 2016 order be vacated. *See Pharmachemie B.V. v. Barr Labs.*, 276 F.3d 627, 634 (D.C. Cir. 2002) ("Where happenstance has made a matter moot, the standard practice is to vacate the decision of the district court.").

Nathan Smith, formerly a Captain in the U.S. Army, filed suit against the President in May 2016. At the time of his complaint, Smith was deployed in Kuwait as an intelligence officer supporting Operation Inherent Resolve (the "Operation"), which is the military effort to defeat the Islamic State of Iraq and the Levant (ISIL). Smith seeks a declaratory judgment that the President's use of military force against ISIL in the Operation violates the War Powers Resolution (WPR) and Article II of the Constitution. This is so, Smith alleges, because the President has not secured specific congressional authorization for the Operation as required by the WPR. He claims that the President has instead improperly relied on congressional authorizations that do not pertain to ISIL. Because Smith thinks the Operation is unlawful, he alleges that he "suffers legal injury because, to provide support for an illegal war, he must violate his oath" to defend the Constitution. The district court dismissed Smith's claim for lack of standing and for raising non-justiciable political

questions. Smith appealed, but we now hold that his lawsuit has become moot.

Federal courts "may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). Because "an actual controversy must be extant at all stages of review," *Davis v. FEC*, 554 U.S. 724, 732-33 (2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)), we must dismiss Smith's case as moot "if events have so transpired that the decision will neither presently affect [his] rights nor have a more-than-speculative chance of affecting them in the future," *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990). We find that Smith's oath-related controversy is no longer ongoing because he has left the military: Smith tendered an unqualified resignation from active duty in October 2016, he was released from active duty in June 2017, and he was honorably discharged from the military effective May 21, 2018. Because Smith has finished his military service, his oath-related controversy is no longer ongoing.

Smith argues that an actual controversy remains because his resignation was conditional. In his resignation memorandum, Smith included a "demand" that he have the "right of reinstatement" if his objections to the Operation were to prevail in court. According to Smith, the Army's "acceptance" of his conditional resignation "eliminates any mootness problems associated with this lawsuit." Relatedly, Smith invokes the "constructive service" doctrine, *see Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980), and suggests the Army unlawfully forced him to resign by making him choose between either violating his oath or undergoing military discipline. Smith argues his controversy remains ongoing because the court could issue "a declaratory judgment vindicating his 'right to reinstatement'" at the "rank and pay he would have obtained if the war had been conducted legally in the first place."

Smith's argument is twice mistaken. As a preliminary matter, Smith's voluntary resignation was expressly *unqualified*. *See* Smith Suppl. Br. Ex. A ("Unqualified Resignation for Smith"); *id.* ("I, Nathan M. Smith . . . tender my unqualified resignation . . . ."); *id.* ("I desire to tender my resignation."); *id.* ("I understand that my release from active duty is voluntary . . . ."). And in merely accepting Smith's unqualified resignation, the Army never suggested any "acceptance" of Smith's purported condition. *See id.* at Ex. B; *id.* at Ex. C (noting Smith's "unqualified resignation").

But even more fundamentally, the right to reinstatement is not the controversy alleged in Smith's complaint. There, Smith alleged that he was injured because supporting the Operation would violate his oath. *That* controversy is no longer live. "[T]he wrong at issue for mootness purposes is defined by the plaintiffs' theory set forth *in the complaint*." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 323 (D.C. Cir. 2009) (emphasis added); *see also Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 105 (D.C. Cir. 2016); *Clarke v. United States*, 915 F.2d 699, 703 (D.C. Cir. 1990) (en banc) ("[W]here plaintiffs are resisting a mootness claim we think they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief."). Here, Smith's original controversy is no longer live because he resigned from the Army and thus no longer faces the oath-related injury alleged in his complaint.

Nor does Smith's oath-related claim fall within the mootness exception for injuries that are "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). The "capable of repetition" prong requires "a reasonable expectation that the same complaining party"—that is, the plaintiff in the potentially moot case—"would be subjected to the same action again." *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 370 (D.C. Cir. 1992) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Here, Smith's unqualified resignation from the military ends any "reasonable expectation" that he personally will "be subject to the same action again." *Kingdomware Techs.*, 136 S. Ct. at 1976 (quoting *Spencer*, 523 U.S. at 17). Although his case may have been capable of repetition while Smith remained a ready reservist, *see Doe v. Sullivan*, 938 F.2d 1370, 1378 (D.C. Cir. 1991) (applying the "capable of repetition" exception because of the challenger's "continuing status as a member of our armed forces"), after his discharge Smith no longer faces any prospect of redeployment that could implicate his oath.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk