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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN FRANCISCO DIVISION**

15 IN RE NATIONAL SECURITY AGENCY)
 16 TELECOMMUNICATIONS RECORDS)
 17 LITIGATION)

No. M:06-cv-01791-VRW
DEFENDANTS' SUPPLEMENTAL
REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS OR FOR
SUMMARY JUDGMENT IN *Center for*
Constitutional Rights v. Bush (07-1115)

18 _____)
 19 This Document Relates Only To:)
 20 *Center for Constitutional Rights v. Bush,*)
 (Case No. 07-1115))
 21 _____)
 22 _____)

Judge: Hon. Vaughn R. Walker
 Date: August 9, 2007
 Time: 2 p.m.
 Courtroom: 6, 17th Floor

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INTRODUCTION

1
2 Plaintiffs are asking the Court to order the President to never again authorize a
3 surveillance activity that, it is undisputed, is no longer being conducted. Plaintiffs seek this
4 relief because they “fear” the President might some day reauthorize such surveillance outside of
5 the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq.* (“FISA”), and that they
6 might be subject to such future surveillance if they represent suspected terrorists whose
7 communications might fall within the scope of any such renewed surveillance. It would be an
8 extraordinary and impermissible exercise of Article III jurisdiction for the Court to decide the
9 significant constitutional questions that this case raised when the Terrorist Surveillance Program
10 (“TSP”) was operative, including whether to constrain the President’s authority to protect
11 national security in the face of unknown future threats. Federal courts do not sit to issue
12 advisory opinions on hypothetical questions; that is especially true where extraordinary
13 constitutional questions concerning the separation of powers are presented.

14 Granting prospective relief against hypothetical future actions is all the more unfounded
15 where Plaintiffs have never adequately alleged that the TSP ever caused them the type of
16 personal and cognizable harm required to have invoked the Court’s jurisdiction in the first place.
17 And, at this stage, the mere fact that the Executive Branch believes the President has authority to
18 undertake foreign intelligence surveillance (as several courts have recognized) in no way
19 indicates that Plaintiffs are personally threatened with the kind of concrete and imminent future
20 harm needed to have standing to seek prospective relief.

21 Moreover, even if Plaintiffs’ *allegations* of injury were sufficient as a matter of pleading,
22 the question now before the Court on summary judgement is whether Plaintiffs have met or
23 could meet their burden of proving that they are presently suffering an immediate and concrete
24 harm from the now-inoperative TSP. The fact that the TSP is no longer operative, without more,
25 precludes such a showing, and if any more facts are needed to adjudicate Plaintiffs’ standing—
26 such as whether Plaintiffs ever were subject to the TSP or face an imminent threat of future
27 injury from its recurrence—those facts are properly protected by the state secrets privilege.

28 The Court of Appeals for the Sixth Circuit recently confirmed that plaintiffs in the

1 identical circumstance presented here lack standing to challenge the TSP. *See American Civil*
 2 *Liberties Union v. National Security Agency*, ___F.3d ___, 2007 WL 1952370 (6th Cir. July 6,
 3 2007) (hereafter “*ACLU*”). There, the judges in the majority—Judges Batchelder and Gibbons—
 4 agreed with two central points Defendants make here. Judge Batchelder concluded that the
 5 plaintiffs’ allegation of chill injury in support of their First Amendment claim is insufficient
 6 under *Laird v. Tatum*, 408 U.S. 1 (1972), *see ACLU*, 2007 WL 1952730 at **8-21, while Judge
 7 Gibbons held that “[t]he disposition of all the plaintiffs’ claims depends upon the single fact that
 8 the plaintiffs have failed to provide evidence that they are personally subject to the TSP” in
 9 response to the Government’s summary judgment motion, and concluded that “the plaintiffs are
 10 ultimately prevented from establishing standing because of the state secrets privilege.” *See id.* at
 11 *34, *38. For either reason, and because any alleged chill from the now inoperative TSP is even
 12 more speculative and could not be proven, this case should be dismissed. Finally, as Defendants
 13 have previously demonstrated, even if these substantial jurisdictional obstacles could be
 14 overcome, state secrets would still be need to decide the merits of this case.

ARGUMENT

16 **I. THE COURT LACKED JURISDICTION WHEN THIS CASE**
 17 **COMMENCED; IT LACKS JURISDICTION NOW THAT THE**
 18 **CHALLENGED ACTIVITY IS NO LONGER OPERATIVE; AND ANY**
 19 **FACTS NEEDED TO ADJUDICATE THE QUESTION ARE PROPERLY**
 20 **PROTECTED UNDER THE STATE SECRETS PRIVILEGE.**

21 Plaintiffs’ Supplemental Memorandum makes clear that the primary ground on which
 22 they seek to establish their standing in this case is an alleged “chill” injury caused by their
 23 reaction to the existence of the TSP. *See* Compl. ¶¶ 43. They aver that they “face a credible
 24 threat of surveillance,” and that this “has an effect on their constitutionally protected activities.”
 25 Pls. Supp. at 12; *see also id.* at 15 (Plaintiffs allege they have “reasonable fears” resulting from
 26 government action). Plaintiffs’ alleged chill injury is based not only on their own fear of the
 27 TSP, but also on the alleged chill imposed by the TSP on their clients. *Id.* at 11. And, now that
 28 the TSP is inoperative, Plaintiffs claim that they still are chilled by the possibility of its
 recurrence because the Executive Branch holds to its position that the program was lawful and
 the President has authority to authorize foreign intelligence surveillance. Established principles

1 of law preclude finding that Plaintiffs have standing based on these allegations.¹

2 First, in contrast to the cases on which Plaintiffs rely, where it was undisputed that the
3 challenged conduct actually applied to the plaintiffs, here Plaintiffs' claims are based on
4 speculation that their communications were subject to interception under the TSP and their own
5 fear of any such surveillance. Such allegations of harm fall squarely within the kind of
6 subjective apprehension of surveillance rejected in *Laird* as a basis for standing.

7 Second, termination of the TSP negates any possible chilling effect on Plaintiffs; since
8 the TSP is not currently being conducted, Plaintiffs cannot plausibly claim that it presently chills
9 them. The mere fact that the Executive Branch continues to assert that the President has the
10 constitutional authority to engage in foreign intelligence surveillance and, thus, the mere
11 *possibility* that the Executive Branch might someday consider conducting surveillance *like* the
12 TSP, in no way establishes the kind of concrete and imminent future harm required for standing
13 to obtain prospective relief.

14 Third, even if Plaintiffs' *allegations* of injury were sufficient, critical facts needed to
15 adjudicate the jurisdictional issues in this case (standing and mootness) are covered by the state
16 secrets privilege in order to protect vital intelligence sources and methods. These facts include
17 whether Plaintiffs were subject to surveillance under the TSP, as well as operational facts about
18 the program needed to litigate whether Plaintiffs' fear of being subject to the program was
19 reasonable. In addition, facts concerning why and how the TSP has been supplanted by Foreign
20 Intelligence Surveillance Court ("FISA Court") action would be needed to address the likelihood
21 that the program may recur, which is relevant to both standing for prospective relief and
22 mootness.²

24 ¹ Plaintiffs do not argue that they have standing based on any actual interception of their
25 communications and could not prove such an allegation in light of the state secrets privilege.

26 ² Defendants address the standing issue first because, if the Plaintiffs could not establish
27 standing from the outset, and have no standing for prospective relief where the TSP is no longer
28 operative, there is no need to consider whether the case is moot. *See Friends of the Earth v.*
Laidlaw, 528 U.S. 167, 180 (2000); *ACLU*, 2007 WL 1952370, at *2, n.4. Conversely, if the
case is not moot, Plaintiffs still must have standing to proceed.

1 **A. Plaintiffs' Alleged Chill Injury Has Always Been**
2 **Constitutionally Insufficient to Establish Standing.**

3 Plaintiffs' alleged chill injury falls squarely within the holding of *Laird v. Tatum*, *supra*,
4 where, as here, the plaintiffs challenged the existence of a surveillance program, *see Laird*, 408
5 U.S. at 9, which they alleged "exercises a present inhibiting effect on their full expression and
6 utilization of their First Amendment rights." *Id.* at 10. The Supreme Court in *Laird* framed the
7 issue as "whether the jurisdiction of a federal court can be invoked by a complainant who alleges
8 that the exercise of his First Amendment rights is being chilled by the existence, without more,
9 of a governmental investigative and data gathering activity." *Laird*, 408 U.S. at 10. The Court
10 discussed prior cases in which it had found that a constitutional violation may arise from the
11 deterrent or chilling effect of governmental regulation, but concluded that in none of those cases
12 "did the chilling effect arise merely from the individual's knowledge that a government agency
13 was engaged in certain activities" *Id.* at 11.³ The Court then applied the "established
14 principle that to entitle a private individual to invoke the judicial power to determine that validity
15 of executive or legislative action he must show that he has sustained, or is immediately in danger
16 of sustaining, a direct injury as a result of that action" *Id.* at 13 (citation omitted). The
17 Court held that the plaintiffs in *Laird* "do not meet this test" because "[a]llegations of a
18 subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or
19 a threat of specific future harm[.]" *Id.* at 13-14.

20 Plaintiffs' effort to distinguish *Laird*, and their criticism of Judge Batchelder's analysis in
21 *ACLU* on this issue, is unavailing. They first take issue with the proposition that *Laird* requires
22 that government action be "regulatory, proscriptive, or compulsory" in order to establish injury-
23 in-fact on a chilling effect theory of standing. *See* Pls. Supp. at 12. But *Laird* itself uses these

24 ³ *Laird* discusses *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), which involved
25 denial of a bar membership for refusing to answer question about communist party; and
26 *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), which involved discharge from
27 employment due to political acts; and *Lamont v. Postmaster*, 381 U.S. 301 (1965), which
28 involved denial of delivery for communist propaganda mail; and *Baggett v. Bullitt*, 377 U.S. 360
(1964), which involved the requirement of an oath as condition of employment). *See* 408 U.S. at
11-12.

1 terms to describe cases in which a chilling injury was found, *see* 408 U.S. at 11-12, and goes on
2 to apply that standard in holding that the plaintiffs in *Laird* lacked standing. *See id.* at 13
3 (holding that “these decisions” have not eroded the requirement that a plaintiff must show direct
4 injury as a result of the challenged action and cannot merely allege subjective chill caused by the
5 existence of the program). Thus, in analyzing whether a chill injury could establish standing, the
6 Court in *Laird* looked to whether a proscriptive governmental action was applied to the
7 plaintiffs.⁴

8 But even if a plaintiff could establish standing for a First Amendment claim based on a
9 “chill” injury in the absence of regulatory or proscriptive action that applies to the plaintiff,
10 Plaintiffs still lack standing here. *Laird* and other cases firmly establish that to have Article III
11 standing a plaintiff must be able to establish that he or she has sustained or is immediately in
12 danger of sustaining a direct injury from the challenged action, *see Laird*, 408 U.S. at 13, and
13 cannot make that showing from a speculative fear that the challenged action might apply to him
14 or her. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge Christian Coll. v.*
15 *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *City of Los*
16 *Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Notably, Judge Gibbons specifically declined to
17 decide in *ACLU* whether regulatory or proscriptive action is required to have standing for a First
18 Amendment claim based on an alleged chill injury, *see ACLU*, 2007 WL 1952370, at *38 n.3,
19 but nonetheless concluded that standing requires proof that the challenged governmental activity
20 actually has been applied to the plaintiffs. *See id.* at *34-37.

21 On this issue—whether they must show that they were actually subject to the TSP—
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24 ⁴ Plaintiffs’ assertion that Judge Lynch agreed with their position on this particular issue
25 is suspect. *See* Pls. Supp. at 12, n. 24. Putting aside whether a judge’s questions and comments
26 at argument can be relied on as a definitive reflection of the judge’s views, in the exchange
27 where Judge Lynch said “I’m with you on that,” he explained: “That is, I don’t think that this
28 case can be governed or any case can be governed by taking some phrase, whichever side it
favors, out of *Laird* and saying, there’s the rule, now we plug in three facts and we get an
answer. But what I’m really trying to get at is, what was the problem in *Laird*?”). *See CCR*
Trans. (9/5/06) at 27:3-8 (Dkt. No. 12, Item # 14) (07-CV-1115).

1 Plaintiffs contend that, in contrast to the plaintiffs in *Laird*,⁵ their fears are “objectively
2 reasonable,” and that they can point to something “more” than a chill injury allegedly caused by
3 the TSP—namely injuries to their professional activities caused by the added burdens of
4 communicating securely with their clients. Specifically, Plaintiffs argue that their
5 communications “fall squarely within the terms of the policy, as described by the government,”
6 and that they are ethically required to undertake burdensome “countermeasures” in response to
7 the threat of the TSP. See Pls. Supp. at 15. This argument is wrong for two reasons: (i) the
8 allegation that they fall within the surveillance activity is based on conjecture; and (ii) without
9 establishing that the challenged governmental conduct actually applied to them, Plaintiffs’
10 alleged harms are no more than self-imposed injuries.

11 First, Plaintiffs’ assertion that their communications “fall squarely within the terms” of
12 the TSP is not an “objective” conclusion. Rather, Plaintiffs are *assuming* that their
13 communications fall within the TSP based on a limited public description that the program is
14 directed at international communications where one participant is reasonably believed to be a
15 member or agent of al Qaeda or an al Qaeda affiliated terrorist organization. See Defs. MSJ
16 Mem. at 1. But Plaintiffs simply do not know if they were subject to TSP surveillance. As
17 Judge Batchelder observed, plaintiffs’ allegation of injury rests on “the *possibility*” that their

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19 ⁵ Plaintiffs’ related contention that the plaintiffs in *Laird* were “not actually chilled,” see
20 Pls. Supp. at 12, n. 23, is inaccurate and misses a key distinction. The Supreme Court did
21 observe in a footnote that the plaintiffs in *Laird* “cast considerable doubt” on their own alleged
22 chill, based in part on statements from their counsel that his clients were not “cowed and chilled”
23 but “they’ve come into Court” to represent others. See 408 U.S. at 14, n. 7; *Tatum v. Laird*, 444
24 F.2d 947, 959 (D.C. Cir. 1971) (MacKinnon, J. concurring in part and dissenting in part). Based
25 on this the Supreme Court noted that “if respondents themselves are not chilled, but seek only to
26 represent” others they believe are chilled, they clearly lack a personal stake in the outcome. See
27 408 U.S. at 14, n. 7. But the Court went on to decide the *legal claim* made by plaintiffs in
28 *Laird*—namely, whether the allegations of a subjective chill are an adequate substitute for a
claim of specific present objective harm or a threat of specific future— and that is the same
claim raised here. Moreover, the Court of Appeals in *Laird* observed that the “record shows that
most if not all the appellants and/or the organizations of which they are members *have been the*
subject of Army surveillance reports and their names have appeared in Army records,” *id.* at 956
(emphasis added). Thus, unlike Plaintiffs here, the *Laird* plaintiffs were in a position to allege
that their chill injury was based in part on past surveillance of them.

1 overseas contacts will be subjected to the TSP, and thus the “alternative possibility remains that
 2 the NSA might *not* be intercepting, and might *never* actually intercept, any communications by
 3 any of the plaintiffs named in this lawsuit.” *ACLU*, 2007 WL 1952730 at *5 (emphasis in
 4 original). This is what makes Plaintiffs’ allegations conjectural.

5 It is not enough for Plaintiffs to allege that the TSP was directed at al Qaeda and that
 6 some of Plaintiffs’ clients are suspected of having al Qaeda ties. The plaintiffs in *Laird* also
 7 alleged that they fell within the terms of the surveillance as described by the government and
 8 were inhibited by the program. Indeed, as noted above, there was evidence in the *Laird* record
 9 that some of the plaintiffs there had been identified in the government surveillance files at issue.
 10 *See* note 4, *supra*. But *Laird* held that the plaintiffs nonetheless lacked standing, and cases
 11 applying *Laird* have rejected standing based on the notion that a group of plaintiffs are more
 12 likely to be subject to surveillance. As the D.C. Circuit stated in *United Presbyterian Church v.*
 13 *Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984):

14 Even if it were conceded that these factors place the plaintiffs at greater risk than
 15 the public at large, that would still fall far short of the “genuine threat” required to
 16 support this theory of standing, . . . as opposed to mere “speculative” harm,
 17 *It must be borne in mind that this order does not direct intelligence-gathering*
activities against all persons who could conceivably come within its scope, but
merely authorizes them.

18 *Id.* (citations omitted) (emphasis added); *see also Halkin v. Helms*, 690 F.2d 977, 1002 n. 89
 19 (D.C. Cir. 1982); *ACLU*, 2007 WL 1952370, at *36 (Gibbons, J. concurring) (“There is no
 20 relevant factual difference between the *United Presbyterian Church* plaintiffs, whose activities
 21 the D.C. Circuit conceded made them more likely to be subject to surveillance, *id.*, and the
 22 attorney-plaintiffs in this case, whose representations of ‘exactly the types of clients’ targeted by
 23 the TSP make them more likely to be targeted by the TSP.”).⁶

24 Second, the notion that a plaintiff can overcome *Laird* by pointing to self-imposed harms

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 26 ⁶ It should be noted that Plaintiffs allege they are chilled from communicating not only
 27 with clients who are possible al Qaeda suspects, including detainees at Guantanamo Bay Naval
 28 Station, *see* Compl. ¶¶ 36-39, but also more broadly with “other individuals in relation to these
 cases,” including family members of their clients, cooperating counsel, potential witnesses,
 officials of foreign governments, and human rights lawyers. *See id.* ¶¶ 36-38, 44.

1 turns that case on its head. The “more” required by *Laird* to establish standing means that a
2 plaintiff must show, not speculate, that the *government* has done something more to them. For
3 example, in *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), a case on which Plaintiffs rely, the
4 First Circuit (through then-Judge Breyer) analyzed what the Court in *Laird* meant by requiring
5 “more” than an alleged chill, and held that the “more” in that case was that the *government* had
6 imposed a requirement on the plaintiff to submit to a loyalty investigation as a condition of
7 seeking employment. *See Orzonoff*, 744 F.2d at 229; *see also ACLU*, 2007 WL 1952730, at *9
8 (Batchelder, J.) (by “something ‘more’” the *Laird* Court did not mean “more subjective injury or
9 other injuries that derive from the chilled speech”). In other words, the plaintiff in *Ozonoff* knew
10 and could establish that he had actually been subject to the challenged conduct. Absent such a
11 requirement, litigants could evade *Laird*’s constitutional standing limitations merely through
12 artful pleading by claiming not only that speech was chilled but by citing self-imposed
13 countermeasures taken in response. Indeed, in *Laird*, the Court rejected precisely the same
14 injury as Plaintiffs allege here—a “present inhibiting effect” on their speech, *see* 408 U.S. at 10.

15 **B. The Authority on Which Plaintiffs Rely is Inapposite.**

16 The principal cases on which Plaintiffs rely in their Supplemental Memorandum do not
17 support their position. If anything, they illustrate why Plaintiffs lack standing.

18 Plaintiffs rely heavily on *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir.
19 1989), but there is a critical difference between that case and this one: standing in *Presbyterian*
20 *Church* was predicated on the fact that the government had actually “entered the churches
21 wearing ‘body bugs’ and surreptitiously recorded church services.” *See id.* at 520. Thus,
22 plaintiffs’ alleged injury—the loss of congregants—was alleged to result from *actual*
23 surveillance that occurred inside the church.⁷ This is a plain example of a case in which the
24 plaintiffs alleged something “more” than a fear of surveillance. In this case, by contrast,

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⁷ The covert surveillance of the plaintiff churches in *Presbyterian Church* became a matter of public record during related criminal trials of individuals INS was investigating. *See* 870 F.2d at 520. *Presbyterian Church* could be considered a case that involved *direct* injury caused by surveillance that actually occurred.

1 Plaintiffs merely speculate that they were subject to the challenged surveillance activity.

2 *Meese v. Keene*, 481 U.S. 465 (1987), is likewise distinguishable. In *Keene*, the plaintiff
3 (a state legislator) challenged statutory provisions that required him to register, report, and
4 disclose the fact that he was engaging in propaganda if he showed certain foreign films. *See* 481
5 U.S. at 469. Because those provisions actually applied to the plaintiff and directly regulated his
6 conduct, the Supreme Court held that the harm to plaintiff's personal, political, and professional
7 reputation constituted injury in fact. *Id.* at 472. Again, this is the type of injury that *Laird*
8 recognized was something "more" than a subjective fear because the plaintiff "was subject to a
9 regulatory statute that directly and expressly" applied to him. *ACLU*, 2007 WL 1952370, at *12
10 (Batchelder, J.) (discussing *Keene*, 481 U.S. at 472-74); *see also Laird*, 408 U.S. at 11-12
11 (discussing *Lamont v. Postmaster*, 381 U.S. 301 (1965), where standing was found because the
12 challenged regulation required plaintiff to affirmatively request mail delivery of propaganda).⁸

13 Plaintiffs' reliance on *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,
14 528 U.S. 167 (2000), is also misplaced. Plaintiffs in *Laidlaw* were found to have standing to
15 challenge a company's discharge of pollutants into a river because they lived nearby and the
16 discharge "curtail[ed] their recreational use of that waterway and would subject them to other
17 economic and aesthetic harms." *Id.* at 184. There was no dispute in *Laidlaw* that the defendant
18 had in fact discharged pollutants into the river, and the Supreme Court's conclusion as to the
19 reasonableness of plaintiffs allegation of injury was based on this actual conduct. As Judge
20 Gibbons observed, Plaintiffs' view would "transform[] the holding in *Laidlaw*, under which the
21 plaintiffs who were *in fact subject to defendant's conduct* had standing because they reasonably
22 feared harm from that conduct, into a much broader proposition, under which plaintiffs may
23 establish standing by showing merely that they possess a reasonable *fear of being subject to*
24 *defendant's allegedly harmful conduct.*" *ACLU*, 2007 WL 1952370, at *35 (emphasis in
25

26 ⁸ The fact that harm to Keene's reputation would result from the reaction of third
27 parties—his constituents to his screening propaganda on behalf of a foreign power—does not
28 support standing in this case, since this harm was caused by the fact that the statutory
requirements undisputably applied to Keene's conduct.

1 original); *see also id.* at *32 (Batchelder, J.) (*Laidlaw* involved “a concrete, actual injury based
2 on the plaintiffs’ showing that the defendant’s unlawful discharge of pollutants into a particular
3 river was ongoing and may reasonably have caused nearby residents to curtail their use of that
4 waterway.”).⁹

5 **C. Plaintiffs’ Alleged Chill Injury Is Particularly Unfounded Where**
6 **Communications With al Qaeda Suspects Are Subject to Other**
7 **Surveillance.**

8 A final issue concerning Plaintiffs’ allegation of a chill injury should be addressed.
9 Judge Batchelder’s opinion recognizes that Plaintiffs’ alleged chill injury is insufficient because
10 any reasonable person would presume that communications with individuals who may be
11 associated with al Qaeda would be subject to surveillance. *See* Pls. Supp. at 16-19. Plaintiffs’
12 only response on this point is that “[t]here is a substantial difference between risks posed by
13 wholly unregulated executive surveillance, and the risk that one may be subjected to FISA
14 surveillance,” because FISA surveillance requires a showing of probable cause and compliance
15 with statutory minimization procedures concerning attorney client-communications. *See* Pls.
16 Supp. at 16-17. This is a false dichotomy. As Defendants have pointed out previously,¹⁰ the
17 potential means of obtaining intelligence of al Qaeda communications are not limited to FISA
18 surveillance, on the one hand, and “wholly unregulated executive surveillance” under the TSP on
19 the other. FISA requirements apply only to “electronic surveillance,” which is a carefully
20 defined term focusing on certain surveillance activities in the United States or involving a United
21 States person in the United States. *See* 50 U.S.C. § 1801(f).¹¹ Intelligence agencies of the

22 ⁹ As Judge Gibbons noted in *ACLU*, this is not to say that a plaintiff lacks standing until a
23 defendant has acted. *ACLU*, 2007 WL 1952370, at *34 n. 2. A “genuine threat” of enforcement
24 of a policy against a plaintiff who is demonstrably subject to that policy supports standing. *Id.*
25 (citing *Steffel v. Thompson*, 415 U.S. 452, 475 (1974)). But that authority does not apply where
a plaintiff merely fears that he is subject to the policy that may be enforced. *See id.*

26 ¹⁰ *See* Defs. Supp. at 10-11; Defs. MSJ Mem. at 23-24; Defs. MSJ Reply at 8-9.

27 ¹¹ The FISA definition of electronic surveillance encompasses the interception of the
28 content of wire or radio communications that are either sent or received by a particular known
and intentionally targeted United States person in the United States; or to or from a person in the

1 United States, including the NSA, are authorized by the President to collect foreign intelligence
2 information and may do so through means other than electronic surveillance subject to the FISA.
3 *See* Executive Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), 1981 WL 76054 (authorizing
4 the United States intelligence community to collect foreign intelligence information, including
5 the signals intelligence activities of the National Security Agency). Thus, for example, as
6 authorized by E.O. 12333, the NSA may undertake surveillance activities overseas that do not
7 fall within the FISA definition of electronic surveillance. Plaintiffs' clients may also be subject
8 to surveillance by foreign governments. Accordingly, FISA surveillance is not the only way to
9 acquire the content of communications other than through the TSP, and it is therefore unfounded
10 for Plaintiffs to contend that any "chill" in their communications with al Qaeda suspects results
11 solely from the existence of the TSP (or the threat of future surveillance if the TSP recurs).

12 Second, the notion that Plaintiffs and their clients are chilled solely by the threat of TSP
13 surveillance is purely a conjectural argument and, we submit, an implausible one. As Judge
14 Batchelder observed, to the extent surveillance causes a "chill" injury, it is the result of the
15 *surveillance*, not whether it was authorized by a warrant.

16 A wiretap is always "secret"—that is its very purpose—and because of this secrecy,
17 neither the plaintiffs nor their overseas contacts would know, with or without a
18 warrant, whether their communications were being tapped. Therefore, the NSA's
19 secret possession of a warrant would have no more effect on the subjective
willingness or unwillingness of these parties to "freely engage in conversations
and correspond via email," [. . .] than would the secret absence of that warrant. . .

20 *ACLU*, 2007 WL 1952370, at *16 (citation omitted). Plaintiffs should have been aware of the
21 various non-TSP ways in which communications with their clients can be intercepted—including
22 under FISA, or through possible overseas surveillance under E.O. 12333, or by foreign
23 governments. To claim a chill from just the TSP but not these other methods is not credible.

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25 United States that is acquired in the United States. *See* 50 U.S.C. § 1801(f) (1), (2). The
26 definition also encompasses the acquisition of the content of radio communications as to which
27 there is a reasonable expectation of privacy and where both the sender and all recipients are in
28 the United States, *id.* § 1801(f)(3), as well as the installation of a device in the United States to
acquire non wire or radio communications where there is a reasonable expectation of privacy, *id.*
§ 1801(f)(4).

1 Finally, Plaintiffs' contention that "attorneys could trust (and reassure their clients) that
2 their privileged communications would remain confidential" because of FISA minimization
3 procedures, Pls. Supp. at 16, is again a matter of conjecture. FISA itself does not preclude the
4 Government from intercepting such communications nor from disseminating them in all
5 circumstances. FISA requires that "[n]o otherwise privileged communications obtained in
6 accordance with, or in violation of, the provisions of this subchapter shall lose its privileged
7 status." *See* 50 U.S.C. § 1806(a). But FISA's definition of minimization procedures allows for
8 the retention and dissemination of information that is evidence of a crime which has been, is
9 being, or about to be committed and that is to be retained and disseminated for law enforcement
10 purposes, *see* 50 U.S.C. § 1801(h)(3), and whether a particular communication is in fact
11 privileged may depend on an after-the-fact assessment by a court.

12 Thus, a person subject to surveillance will not know: (i) whether he is being surveilled;
13 (ii) whether he is being surveilled under FISA; and (iii) if he is under FISA surveillance, whether
14 minimization procedures will actually result in the suppression of privileged communications
15 beforehand. In these circumstances, the notion that one form of surveillance of potentially
16 privileged communications should chill Plaintiffs more than another is, at best, speculative.
17 Certainly, Plaintiffs offer no *evidence* on which to justifiably conclude that it is their overseas
18 clients' fear of the absence of judicial supervision in the United States over possible surveillance
19 that causes them to be reluctant to communicate with Plaintiffs, as opposed to a general fear of
20 surveillance. *See ACLU*, 2007 WL 1952370, at *16 (Batchelder, J.).

21 **D. Where the TSP Is No longer Operative, Plaintiffs' Alleged**
22 **Chill Injury is All the More Unfounded.**

23 Plaintiffs' allegations of a chill injury are even more unfounded where, as here, the
24 challenged activity is no longer operative. As noted, well-established law provides that Plaintiffs
25 must demonstrate that they have sustained, or are immediately in danger of sustaining, injury
26 from the challenged action. *Lujan*, 504 U.S. at 560; *Valley Forge*, 454 U.S. at 472; *Lyons*, 461
27 U.S. at 101-02; *see also Laird*, 408 U.S. at 13. An alleged injury must be "actual or imminent,
28 not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101-02. Even where a plaintiff alleges

1 that his rights were violated in past incidents, he lacks standing to obtain prospective injunctive
2 relief absent a “real and immediate threat” that he will suffer the same injury in the future. *Id.* at
3 105. “[P]ast wrongs do not in themselves amount to that real and immediate threat of injury
4 necessary to make out a case or controversy.” *Id.* at 103 (citing *O’Shea v. Littleton*, 414 U.S.
5 488, 494 (1974) & *Rizzo v. Goode*, 423 U.S. 362, 372 (1976)). This “imminence requirement
6 ensures that courts do not entertain suits based on speculative or hypothetical harms.” *Lujan*,
7 504 U.S. at 564.

8 Thus, apart from whether their fear of surveillance under the TSP was conjectural and
9 insufficient to support standing when the program was operative, Plaintiffs’ claim that they
10 presently face an imminent threat of future harm falls well short of the constitutional minimum.
11 Plaintiffs do not contend that the TSP is ongoing. Instead, they assert only that it may recur
12 because the Government continues to maintain that the TSP was lawful and the President has
13 authority to direct foreign intelligence surveillance. *See* Pls. Supp. at 3-4. But these statements
14 of the Executive Branch’s position on principles of constitutional law simply cannot support a
15 finding of any threat of imminent future injury in order to invoke the Court’s jurisdiction.
16 Plaintiffs’ allegation of a chill injury has gone from fear that an existing policy might be applied
17 to them, to fear that a prior policy might recur and then might be applicable to them.¹²

18 The situation now presented by this case is therefore analogous to that in *Lyons*, where
19 the Supreme Court held that a plaintiff lacked standing to seek an injunction against future
20 enforcement of a police choke-hold policy because he could not credibly allege that he faced a
21 realistic threat of future injury from the policy despite having been subjected to a chokehold in
22 the past. *See Lyons*, 461 U.S. at 108 n. 8 (“[t]he reasonableness of Lyons’ fear is dependent upon
23 the likelihood of a recurrence of the allegedly unlawful conduct . . . and] [i]t is the reality of the
24 threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective
25 apprehensions.”). Indeed, if anything, Plaintiffs’ standing claims here are even weaker than in
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28 ¹² Notably, *Laird* itself involved a challenge to the “present existence” of a surveillance
system. *See* 408 U.S. at 9. That is no longer the case here.

1 Lyons, since the plaintiff in *Lyons* at least knew, and could show, that the challenged conduct
2 had been applied to him.

3 **E. Plaintiffs Could Not Establish Standing as a Factual Matter in**
4 **Light of the State Secrets Privilege.**

5 Assuming, *arguendo*, that Plaintiffs have *alleged* sufficient harm, they still would be
6 obligated to *prove* they have been injured by the TSP and the possibility of its recurrence. That
7 is, beyond whether Plaintiffs' chill allegations could survive Defendants' motion to dismiss,
8 Plaintiffs now bear the burden to prove their standing, either in response to Defendants' pending
9 motion for summary judgment or in support of their own. *Lujan*, 504 U.S. at 561. As
10 Defendants have previously demonstrated, the facts Plaintiffs need to actually prove they were
11 harmed by the TSP are properly subject to the state secrets privilege.¹³ The mere fact, described
12 on the public record, that the TSP sought to intercept al Qaeda communications is not sufficient
13 to adjudicate, on summary judgment, whether the TSP could reasonably be found to have
14 personally injured the Plaintiffs because it says nothing about how the TSP actually may have
15 impacted these Plaintiffs. *See, e.g., Laidlaw*, 528 U.S. at 175-76 (evidence established that
16 polluter violated environmental standards for discharges into river).

17 The Government's privilege assertion extends to facts concerning whether or not
18 Plaintiffs have been intercepted by NSA under the TSP, as well as facts concerning the operation
19 of the TSP. Such information is necessary to adjudicate either Plaintiffs' allegation of direct
20 surveillance, *see* Compl. ¶¶ 5, 43, or whether or not it is "objectively reasonable"—as Plaintiffs
21 put it—to find that their alleged harms in fact resulted from the TSP. Both Judges Batchelder
22 and Gibbons agreed that information covered by the state secrets privilege was needed for the
23 *ACLU* plaintiffs, who asserted the same injuries as the Plaintiffs here, to establish standing. *See*
24 *ACLU*, 2007 WL 1952370, at *38 (Gibbons, J.) and at *3, 5 n.13, 16, 17, 21 n.32, 23, 33

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26 ¹³ *See* Defs. MSJ Mem. at 24-27; Public Declarations of John D. Negroponte, Director of
27 National Intelligence, ¶ 12 and Maj. Gen. Richard J. Quirk, National Security Agency, ¶ 8;
28 *In Camera, Ex Parte* Classified Memorandum of the United States; *In Camera, Ex Parte*
Classified Declaration of John D. Negroponte, Director of National Intelligence; *In Camera, Ex*
Parte Classified Declaration of Maj. Gen. Richard J. Quirk, National Security Agency.

1 (Batchelder, J.). Judge Batchelder observed in particular that any determination as to whether
2 Plaintiffs' alleged chill was in fact "objectively reasonable" would require specific information
3 about the mechanics of the TSP, such as the number of communications being intercepted, the
4 percentage of the total that number represents, the actual selection and screening process, the
5 actual retention, dissemination, and disclosure policy. *ACLU*, 2007 WL 1952370, at *5 n.13.
6 Also among the fact issues that would be relevant to adjudicating Plaintiffs' chill theory when
7 the TSP was operative include (but are not limited to):

- 8 * Were the Plaintiffs actually intercepted under the TSP and, if not, why not?
- 9 * Did the TSP target the Plaintiffs' clients and, if not, why not?
- 10 * Did the TSP target people related to or associated with individuals such as
11 Plaintiffs' clients, including family members, witnesses, cooperating counsel, as
12 Plaintiffs allege, *see* Compl. 36-39, 44, and if not, why not?
- 13 * How did the TSP operate to select a target for interception?
- 14 * How many individuals were targeted for interception under the TSP?

15 In simple terms, to understand whether a policy harms a particular plaintiff would require
16 an exposition on how it worked. But here, evidence essential to adjudicating whether Plaintiffs
17 reasonably should have feared being subject to the TSP is properly protected under the state
18 secrets privilege. Whether the TSP had a narrow operational focus on particular al Qaeda targets
19 such that it did not threaten CCR's communications with their clients, or indeed, whether the
20 TSP's methodology might have captured some of Plaintiffs' communications, could not be
21 disclosed without revealing operational intelligence methods. *See In Camera, Ex Parte*
22 *Negroponete and Quirk Declarations*. Thus, the state secrets privilege protects from disclosure
23 the very information that might demonstrate whether Plaintiffs' fears were reasonable or
24 unfounded because doing so would disclose intelligence methods utilized under the TSP and
25 reveal to al Qaeda whether or to what extent NSA has targeted or could target their
26 communications.

27 Furthermore, now that the TSP is no longer operative, additional facts are necessary to
28 evaluate Plaintiffs' allegation of a chill injury based on a possible future recurrence of the
program, including (but not limited to):

1 * Why was the TSP supplanted in January 2007, what replaced it, and how does
2 this compare to the prior TSP?

3 * Is there, under the circumstances, any basis to conclude that the TSP is likely to
4 recur in light of the FISA Court Orders?

5 Plaintiffs concede that “[s]tanding for prospective relief *always requires proof* of the threat of
6 future injury” Pls. Supp. at 14 (emphasis added). The sole assertion advanced by Plaintiffs
7 in support of their claim of future injury is that the Executive Branch adheres to its view that the
8 President has constitutional authority under Article II to authorize foreign intelligence
9 surveillance. Again, even if this were a sufficient *allegation* of future harm, it is not remotely
10 sufficient as a factual matter to *demonstrate* an imminent threat of future harm. Actually
11 adjudicating whether or not Plaintiffs personally face an imminent threat of future injury from
12 the recurrence of the TSP would require delving into the background of the matters protected by
13 the state secrets privilege, including how the TSP operated before, whether it ever impacted
14 Plaintiffs, what is occurring now in its place, and whether under these circumstances there is an
15 imminent threat that the TSP would recur and threaten these particular Plaintiffs. *See*
16 *Defendants In Camera, Ex Parte Supplemental Memorandum*.¹⁴
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21 ¹⁴ “Standing is not dispensed in gross,” *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996),
22 and Plaintiffs would have to prove standing for each of their separate non-First Amendment
23 claims, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. ___, 126 S. Ct. 1854, 1867 (2006).
24 Defendants agree with Judge Batchelder that Fourth Amendment rights are *personal* rights
25 which ““may be enforced only at the instance of one whose own protection was infringed by the
26 search and seizure,”” *see ACLU*, 2007 WL 1952370, at **7 n.16, 21, and Plaintiffs could not
27 demonstrate that their own communications have been intercepted. *See also* Defs. Mem. at 24-
28 27; Defs. MSJ Reply at 9-10 (facts demonstrating the plaintiffs’ communications were
intercepted needed for Fourth Amendment claims under *Halkin v. Helms*, 598 F.2d 1, 9 (D.C.
Cir. 1978), *Halkins II*, 690 F.2d at 997-1000, and *Mitchell v. Ellsberg*, 709 F.2d 51, 65 (D.C. Cir.
1983), *cert. denied*, 465 U.S. 1038 (1984). Plaintiffs’ other statutory and constitutional claims
would also require proof of a direct, personal injury caused by the challenged actions. Also,
because prospective relief alone is sought, the lapse of the TSP negates any such relief as to
these claims as well.

1 **II. THIS CASE COULD ALSO BE DISMISSED AS MOOT, AND ANY**
2 **FACTUAL DISPUTE AS TO MOOTNESS COULD NOT BE**
3 **ADJUDICATED.**

4 In light of the foregoing, the Court need not reach the issue of mootness. Nonetheless,
5 Defendants submit they have met their burden of demonstrating mootness because it is
6 undisputed that the TSP has not been reauthorized and that any electronic surveillance that had
7 occurred under the TSP is now being conducted subject to the approval of the FISA Court. *See*
8 Dkt. 127-1 (MDL 1791) (Defendants' January 11, 2007 Notice to the Court). The standard
9 Plaintiffs cite—that it be “absolutely clear” that the challenged policy will not recur, *see* Pls.
10 Supp. at 2—applies to the applicability of the voluntary cessation doctrine, not the threshold
11 question of mootness itself, and, as set forth below, such a showing could not be made without
12 the disclosure of state secrets.

13 Defendants have not acceded to the Plaintiffs' position in this case, and the President's
14 decision not to reauthorize the TSP was not a voluntary cessation of the challenged conduct. *See*
15 Defs. Supp. at 13. Contrary to Plaintiffs' assertion, it would be inappropriate for the Court to
16 impute “manipulative conduct” and “bad faith” to the Government's efforts to gain FISA Court
17 approval for certain activities. *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (*en*
18 *banc*). *See* Pls. Supp. at 9-10, n.19. As we have explained, the Executive's decision to ensure
19 that all three Branches supported the vital foreign intelligence activities at stake is not
20 inappropriate and not inconsistent with its view that the TSP was lawful and in accordance with
21 the President's authority.

22 The fact that the President has not disavowed his authority to reauthorize the TSP is also
23 beside the point. The question is not whether the parties disagree about abstract questions of law
24 (they do); it is whether the underlying controversy remains live (it does not). There is no rule
25 that a party must disavow his legal position for Article III's mootness limitations to apply. Thus,
26 the mere fact that the Executive Branch believes the President has constitutional authority to
27 authorize foreign intelligence surveillance—something courts, including the FISA Court of
28 Review, have recognized, *see* Defs. MSJ Mem. at 39-40—does not establish a continuing “live”

1 controversy between the parties but only the entirely speculative possibility of a future one.¹⁵
2 Also, “a presumption of regularity attaches to actions of Government agencies,” *United States*
3 *Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), and where a coordinate Branch of Government
4 has implemented an intervening change in legal authority, the voluntary cessation exception is
5 “narrow” and generally has been held to apply only where it is “virtually certain” that the
6 legislature will repeal the new law. *Chemical Producers & Distributors Ass’n v. Helliker*, 463
7 F.3d 871, 878 (9th Cir. 2006). There is no reason to give *less* credence to a court authorization
8 than a legislative enactment for that purpose.

9 To the extent the Court finds that the lapse of the TSP is not sufficient grounds, by itself,
10 to find the case moot, then proof of mootness, and whether there has been any voluntary
11 cessation, or for that matter whether the TSP is likely to recur without review,¹⁶ would obviously
12 require facts that cannot be disclosed. Such facts would include how the TSP previously
13 operated and, by comparison, the nature of the FISA Court action described in Defendants’
14 classified submissions on the matter. *See* Defendants’ Classified Supplemental Memorandum
15 submitted for *ex parte, in camera* review. The mere public fact that the FISA Court has
16 authorized certain surveillance activities in lieu of the TSP is not enough to establish voluntary
17 cessation.

18 Finally, if there is any doubt as to whether the case is moot or whether Plaintiffs have
19 established an immediate and personal threat of future harm to obtain prospective relief, it would
20 contravene settled principles of constitutional avoidance to adjudicate the important legal
21 questions presented by this case. Reinforcing that point is the fact that those questions may
22 never again arise in their current posture. Even if a President determined in the future that the
23 defense of the Nation required foreign intelligence surveillance without the FISA Court’s
24 involvement, the context could be materially different. Plaintiffs’ sweeping contention that any

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26 ¹⁵ Plaintiffs’ assertion that the TSP “hangs over [their] heads . . . in exactly the same
27 manner” as before, *see* Pls. Supp. at 10, is specious. It cannot possibly be the case that a lapsed
surveillance program poses “exactly the same” threat as an operative one.

28 ¹⁶ Plaintiffs do not rely on this exception to the mootness doctrine. *See* Pls. Supp. at 9.

1 recurrence of the challenged surveillance outside of FISA would be invariably unlawful is
2 wrong; the underlying facts and exigent circumstances could easily vary in the future if a similar
3 dispute arose and, accordingly, it would be unwarranted to enter prospective relief as to possible
4 action by a future President of the United States that may be necessary to protect the nation from
5 a terrorist attack.¹⁷

6 **CONCLUSION**

7 For the foregoing reasons, and for all the reasons stated in our prior public and *in camera*,
8 *ex parte* classified submissions, Defendants' Motion to Dismiss or, in the Alternative, for
9 Summary Judgment, should be granted.

10 DATED: July 20, 2007

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23 ¹⁷ Finally, while jurisdictional issues may predominate the Court's consideration now
24 that the TSP has lapsed, Defendants reiterate in closing that the merits of Plaintiffs' claims
25 cannot be resolved on the public record. As explained at length in Defendants' classified
26 submissions, particular facts and circumstances concerning the operation of the Terrorist
27 Surveillance Program and the threat it was designed to meet would be essential evidence to
28 adjudicate the lawfulness of the TSP, but is properly protected by the state secrets privilege.
Accordingly, if jurisdiction is found, Plaintiffs' motion for summary judgement cannot be
adjudicated, and Defendants' motion to dismiss or for summary judgment must be granted due to
the state secrets privilege. *See* Defs. MSJ Mem. at 51-52 and Defs. Reply at 50-54.

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