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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	**No. M:06-cv-01791-VRW**
	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
This Document Relates Solely To:	No Hearing Scheduled
*Guzzi v. Obama et al.** (Case No. 06-cv-06225-VRW)	Chief Judge Vaughn R. Walker

* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, President Obama is substituted in his official capacity as a defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Plaintiff bases this action on a generalized grievance challenging a foreign intelligence surveillance program that is no longer operative. To be precise, Plaintiff challenges a program described by the President in December 2005, known as the "Terrorist Surveillance Program" or "TSP," pursuant to which the National Security Agency ("NSA") targeted the content of international communications to or from the United States where one party was reasonably believed to be a member or agent of al-Qaeda or an affiliated terrorist organization. *See* Complaint ¶¶ 17-22 (Dkt. 1 in 06-cv-136-JEC (N.D. Ga.)) (attached hereto as Exhibit 1). Plaintiff alleged that this program was unlawful because it allowed electronic surveillance in violation of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq.*, and the U.S. Constitution, *see* Ex.1 ¶¶ 37, 53-56.

Defendants moved to dismiss because Plaintiff lacked standing on the face of his Complaint. After Defendants' Motion was fully briefed, the action was transferred to this Court. This supplemental memorandum addresses intervening events that further require dismissal of the case. Since the Motion was briefed, several courts—including this Court as well as the U.S. Courts of Appeals for the Sixth Circuit—have held that plaintiffs bringing similar causes of action lack standing to pursue their claims.

Moreover, as Defendants previously notified the Court, the Foreign Intelligence Surveillance Court ("FISC") issued orders on January 10, 2007, authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one or more of the parties to the communication is a member or agent of al-Qaeda or an associated terrorist organization. Any electronic surveillance that was occurring as part of the TSP is now being conducted pursuant to the FISC orders; as a result, the President decided not to reauthorize the TSP, which has now lapsed.

In short, the requested relief would exceed the Court's constitutional authority. Whether viewed as an issue of standing or mootness, the FISC orders reinforce the conclusion evident from the beginning—that this suit, seeking only prospective relief concerning the now-defunct TSP, must be dismissed.

BACKGROUND

In contrast to other actions pending before this Court, *see, e.g.*, *Shubert v. Bush*, 07-cv-693-VRW, Plaintiff does not allege that the NSA presently undertakes a "dragnet" of supposed content surveillance. Rather, Plaintiff challenges the particular program described in December 2005—the lapsed TSP—through which the President authorized the NSA to intercept the content of certain communications where there are reasonable grounds to believe that the communication originated or terminated outside the United States and a party to the communication is an agent of al-Qaeda or an affiliated terrorist organization. *See* Ex.1 ¶¶ 22, 48.

Notably, Plaintiff did not allege that he was subject to, or was subjected to, the TSP, but instead claimed a more tenuous injury. According to Plaintiff, he developed relationships with foreign individuals residing inside and outside of the United States, including those living in the Middle East or of middle-eastern descent. *See id.* ¶¶ 42-43. Plaintiff stated that, prior and subsequent to the September 11, 2001 attacks, he engaged these individuals in conversations about terrorist attacks, his beliefs about the "validity and/or effectiveness of terroristic methods, philosophies, strategies, recruitment, targets and other related subjects," *id.* ¶ 45, as well as criticism of the President's actions in the post-September 11 armed conflict, *id.* ¶¶ 46-47. In lieu of direct injury, Plaintiff alleged simply that because of the TSP he "fears that if he continues to engage in the aforementioned unfettered dialogue concerning terrorists, terrorist philosophies, terrorist methodologies, terrorist targets and the American responses thereto he has already become or will become a target" of this program, *id.* ¶ 50; *see id.* ¶ 49, and as a result he has "been forced to refrain from communicating freely and candidly in his international communications about topics that are likely to trigger electronic monitoring" under the program, *id.* ¶ 51. Based on this "injury," Plaintiff alleged that the TSP violated his rights under the First and Fourth Amendments, the constitutional principle of separation of powers, and the President's duty under Article II to ensure that the laws are faithfully executed. *Id.* ¶¶ 53-56. He seeks only prospective relief—a declaration that the TSP violated the Constitution and FISA and an injunction against the program.

Plaintiff brought suit in the Northern District of Georgia. *See generally id.* On July 18,

2006, Defendants moved to dismiss the action, (Dkt. 8-1 in 06-cv-136-JEC (N.D. Ga.)) (attached hereto as Exhibit 2); (Dkt. 8-2 in 06-cv-136-JEC (N.D. Ga.)) (attached hereto as Exhibit 3), arguing that Plaintiff's complaint failed on its face to meet the "'irreducible constitutional minimum'" of standing, *see* Ex.3 at 7 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In particular, Defendants asserted that Plaintiff's claim of alleged harm—the chilling effect on his communications caused by knowledge of the TSP—was squarely foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972). Much like in this case, the *Laird* plaintiffs challenged a military surveillance program, in that instance designed to gather information about potential domestic civil disturbances, claiming a similar "chill" injury. The Court rejected this claim, however, holding that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim or present objective harm or threat of specific future harm." *Id.* at 13-14. In the absence of "actual present or immediately threatened injury" from government action, the Court refused, in essence, to ratify plaintiffs' attempt to use discovery to conduct a broad-scale investigation of intelligence gathering activities in pursuit of a constitutionally infirm advisory opinion. *Id.* at 14; *see* Ex.3 at 9-10. Based on *Laird*'s clear precedent, other courts have likewise dismissed similar actions challenging alleged surveillance activities for lack of standing. *See* Ex.3 at 10-11 (citing *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982), and *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984)). As Defendants stated, the "chilling" effect that Plaintiff claimed as an injury, based on contacts with individuals of middle-eastern descent that are not asserted to be the agents of al-Qaeda and its affiliates targeted by the TSP, is more tenuous even than the claims rejected in *Laird*, *Halkin* and *United Presbyterian*. *See* Ex.3 at 12-14; Ex.5 at 4-9.

After the parties completed briefing on Defendants' motion to dismiss, (Dkt. 10 in 06-cv-136-JEC (N.D. Ga.)) (attached hereto as Exhibit 4); (Dkt. 13 in 06-cv-136-JEC (N.D. Ga.)) (attached hereto as Exhibit 5), the action was transferred to this Court as part of the multi-district litigation, *In re National Security Agency Telecommunications Records Litigation*, 06-cv-1791-VRW, on September 29, 2006. During the pendency of this Motion, the circumstances have changed substantially. As Defendants advised the Court, on January 10, 2007, a Judge of the FISC "issued orders authorizing the Government to target for collection international

communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." (Dkt. 127-1 at 1 in 06-cv-1791-VRW). As a result, "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval" of the FISC. (*Id.*); (*see also* Dkt. 175, 176-1 in 06-cv-1791) (public and classified, *ex parte* and *in camera* declarations of Keith B. Alexander, Director of the NSA). Accordingly, the President determined not to reauthorize the TSP, and the program lapsed. (Dkt. 127-1 at 1-2 in 06-cv-1791-VRW). In other words, the activities that Plaintiff claims to have been unlawful for failing to comply with FISA are now conducted pursuant to orders of the FISA Court.

ARGUMENT

I. PLAINTIFF LACKED STANDING TO CHALLENGE THE TERRORIST SURVEILLANCE PROGRAM FROM THE BEGINNING, AND THE FISC ORDERS UNDERSCORE THAT THE COURT LACKS JURISDICTION OVER HIS CLAIMS.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. "A party invoking federal jurisdiction," here Plaintiff, "has the burden of establishing its standing to sue." *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 999 (N.D. Cal. 2006) (citing *Lujan*, 504 U.S. at 561); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *see also Renne v. Geary*, 501 U.S. 312, 316 (1991) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke . . . the exercise of the Court's remedial powers.") (internal quotation marks and citations omitted). To meet this burden, Plaintiff must demonstrate: (1) that he has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks, footnote and citations omitted).

"Additionally, where, as here, [Plaintiff] seek[s] declaratory and injunctive relief, [he]

must demonstrate that [he is] 'realistically threatened by a *repetition* of the violation.'" *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (quoting *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001)); *see Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("A threatened injury must be certainly impending to constitute injury in fact.") (internal quotation marks and citation omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) ("If Lyons has made no showing that he is realistically threatened by a repetition of his experience . . . then he has not met the requirements for seeking an injunction in a federal court . . . ."); *see generally* Ex.3 at 7-8.

Separate from this constitutional minimum, the Supreme Court "has held that when the asserted grievance is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975), *quoted in Amnesty Int'l v. McConnell*, 646 F. Supp. 2d 633, 643 (S.D.N.Y. 2009); *see Jewel v. NSA*, —F. Supp. 2d—, 2010 WL 235075, at *8 (N.D. Cal. Jan. 21, 2010). In addition, "[a] citizen may not gain standing by claiming a right to have the government follow the law." *Jewel*, 2010 WL 235075, at *8 (citing *Ex Parte Levitt*, 302 U.S. 633 (1937), and *Flast v. Cohen*, 392 U.S. 83 (1968)).

A. Plaintiff Lacks Standing to Bring His Claims for Declaratory and Injunctive Relief.

The "injury in fact" (and, in actions seeking declaratory or injunctive relief, the "realistically threatened by a repetition of the injury") prong of standing is the foremost requirement of the doctrine. *See Steel Co.*, 523 U.S. at 103. Plaintiff's claimed injury amounts to "fears that if he continues to engage" in certain activities, "he has already become or will become a target" of the challenged program, the TSP. Ex.1 ¶ 50. These speculative "fears," he claims, "force[] [him] to refrain from communicating freely and candidly in his international communications." *Id.* ¶ 51. As noted in Defendants' Motion to Dismiss, however, Plaintiff's reliance on such a tenuous injury for standing purposes is squarely foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972), in which the Court held that "[a]llegations of subjective 'chill' are not an adequate substitute for a claim of present objective harm or a threat of specific future harm," *id.*

at 13-14; *see* Ex.1 at 9-10. And as also described in Defendants' Motion, courts interpreting *Laird* have likewise rejected for lack of standing claims that government action—in particular, alleged government surveillance activities—have chilled putative plaintiffs from engaging in allegedly constitutionally protected activities. *See* Ex.1 at 10-14 (citing *Halkin* and *United Presbyterian*); Ex.5 at 4-9 (same); *see generally Am. Civil Liberties Union (ACLU) v. NSA*, 493 F.3d 644 (6th Cir. 2007); *Amnesty Int'l*, 646 F. Supp. 2d 633.

This result is not an aberration, but rather stems, in part, from the nature of the equitable relief Plaintiff requests. To seek prospective relief, even a plaintiff who demonstrates a past violation must show that he is "realistically threatened by a repetition of his experience." *Lyons*, 461 U.S. at 109. Thus, in *Lyons*, the Court drew upon a long line of precedent to find that an individual who claimed to be a past victim of a challenged police use-of-force policy lacked standing to request injunctive relief because he failed to demonstrate a realistic possibility that police would again use such force on him. *Lyons*, 461 U.S. at 105, 109; *see also id.* at 102-05 (citing, among others, *Ashcroft v. Mattis*, 431 U.S. 171 (1977) (per curiam); *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974); and *Golden v. Zwickler*, 394 U.S. 103 (1969)); *see Buritica v. United States*, 8 F. Supp. 2d 1188,1195-97 (N.D. Cal. 1998) (noting that application of "strict standing requirements" like those articulated in *Lyons* ensures that a plaintiff has a sufficient personal stake in the outcome of litigation). Contrary to the plaintiff in *Lyons*, Plaintiff here has not even established that he was subject in the past to the alleged surveillance he challenges. Unlike plaintiffs in other cases before this Court, he does not claim to be in contact with individuals who could be suspected to be agents of al-Qaeda or associated terrorist forces—a prerequisite for the surveillance program that he challenges. But like the plaintiffs in *Lyons*, *Zwickler* and other cases, Plaintiff's Complaint fails to demonstrate any realistic possibility that the challenged surveillance has been, or will be, applied to him.

The clear trend in *Laird* and *Lyons*, as applied to challenges to alleged surveillance activities at issue in cases like *Halkin* and *United Presbyterian*, is that plaintiffs only have standing to request prospective relief if they show both a concrete and immediate injury and a

realistic possibility that the activity will applied to them in the future. Events since the motion to dismiss was briefed only serve to confirm this trend and demonstrate that Plaintiff's speculative claim of a subjective "chill" is insufficient to invoke the Article III jurisdiction of a federal court.

Most recently, this Court has dismissed actions challenging alleged NSA surveillance activities—including those under the TSP at issue in Plaintiff's Complaint—for lack of standing. In *Jewel v. NSA*, —F. Supp. 2d—, 2010 WL 235075 (N.D. Cal. Jan. 21, 2010), the plaintiffs only alleged facts, similar to those at issue here, that they had foreign contacts and held a "good faith basis" that they had been surveilled. *Id.* at *6.[1] As here, "[t]he complaint contains no factual allegations specifically linking any of the plaintiffs to the alleged surveillance activities; it contains only the allegations of domestic and international telephone and electronic mail use." *Id.* "[B]oiled to their essence," the Court held, the cases represented "efforts by citizens seeking to redress alleged misfeasance by the executive branch." *Id.* at *7. But "[a] citizen may not gain standing by claiming a right to have the government follow the law," *id.* at *8 (citing *Ex parte Levitt*, 302 U.S. 633 (1937)); "[t]he essence of standing is the party's direct, personal stake in the outcome," *id.* (citing *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). In short, the plaintiffs failed to allege facts "that would differentiate them from the mass of telephone and internet users in the United States and thus make their injury 'concrete and particularized'" such to establish their standing. *Id.* at *9 (quoting *Lujan*, 504 U.S. at 560); *see also id.* at *8 (drawing parallels with taxpayer standing cases such as *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007)).[2]

The same defects this Court described in *Jewel* are fatal to this Plaintiff's claim. As in

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[1] In the same Order, this Court dismissed the actions in *Jewel v. NSA*, 08-cv-4373-VRW and *Shubert v. Obama,* 07-cv-693-VRW. The *Jewel* plaintiffs' allegations, if anything, were more detailed than those of the *Shubert* plaintiffs quoted above, by alleging more detailed claims of injury, including that they were customers of named telecommunication companies and detailing the carriers' supposed involvement in the alleged government surveillance. *See, e.g.*, *Jewel*, 2010 WL 235075, at *4-5.

[2] The Court further noted that, in cases like these raising serious constitutional and national security issues, "only plaintiffs with strong and persuasive claims to Article III standing may proceed." *Id.* at *9.

Jewel, the gravamen of Plaintiff's suit is a generalized grievance about alleged "misfeasance by the executive branch." As in *Jewel*, Plaintiff's speculative fears of surveillance based on his foreign contacts—without even pleading facts sufficient to establish that those contacts would be suspected as agents of al-Qaeda or its associates, a necessary prerequisite to be targeted by the challenged program—do nothing to differentiate him from the mass of similarly-situated telephone and internet users in the United States. And as in *Jewel*, Plaintiff's case should be dismissed for lack of standing.

This Court's *Jewel* decision is not alone in dismissing claims such as Plaintiff's. In *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), the U.S. Court of Appeals for the Sixth Circuit considered the plaintiffs' standing based on circumstances identical to those presented here. The *ACLU* plaintiffs, like Plaintiff here, challenged the TSP based on, among other contentions, a claim that the TSP chilled their exercise of constitutional rights because it caused them to refrain from engaging in foreign contacts. *Id.* at 657, 659-60. Although the Sixth Circuit issued three separate opinions, the Judges in the majority—Judges Batchelder and Gibbons—agreed with the central premise of Defendants' Motion. Analyzing *Laird* and its progeny, Judge Batchelder concluded that plaintiffs' allegations of a "chill" injury in support of their First Amendment claim was insufficient to establish that element of the standing inquiry. *See id.* at 660-66. As Judge Batchelder noted, "[e]ven assuming these fears are imminent rather than speculative, this is still a tenuous basis for proving a *concrete* and *actual* injury." *Id.* Indeed, Judge Batchelder continued, "even if their allegations are true, the plaintiffs still allege only a subjective apprehension and a personal (self-imposed) unwillingness to communicate, which falls squarely within *Laird*. In fact, this injury is even *less* concrete, actual, or immediate than the injury in *Laird*." *Id.* (citation omitted). Likewise, Plaintiff's alleged injury here is simply his "subjective apprehension" and a "[]self-imposed[] unwillingness to communicate." *See, e.g.*, Ex.1 ¶¶ 49, 51. As in *ACLU*, *Laird* controls this case. And for reasons described in Defendants' Motion, *Laird* and its progeny requires that this case be dismissed. *Id.* at 665 ("The plaintiffs' first alleged injury, arising from a personal subjective chill, is no more concrete . . . than the injury alleged in

Laird. The injury in *Laird* was insufficient to establish standing . . . the plaintiffs' first injury is likewise insufficient to establish standing."); *see also, e.g.*, *id.* at 673 (applying similar analysis to dismiss Fourth Amendment claims).

Judge Gibbons reached the same conclusion through reasoning that would squarely foreclose Plaintiff's claim. In his view, "[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP." *Id.* at 688 (Gibbons, J., concurring). As the *ACLU* plaintiffs had not established that they were in fact subject to the TSP, Judge Gibbons, like Judge Batchelder, found that they failed to meet their burden of establishing standing. *Id.* at 691 (Gibbons, J., concurring). Plaintiff here would fare no differently under this standard, because he has utterly failed to allege facts sufficient to demonstrate that he was *personally* subjected to the TSP, as opposed to speculative fears based on public reporting about the program. *Id.* at 689-90 (Gibbons, J., concurring); *see Amnesty Int'l*, 646 F. Supp. 2d at 657. Plaintiff has not pled any facts that would establish a concrete and particularized injury. Thus for either reason articulated by the *ACLU* majority, Plaintiff's speculative claim of injury is insufficient to support standing.

Moreover, the U.S. District Court for the Southern District of New York recently dismissed a challenge of the FISA Amendments Act of 2008, in which plaintiffs' basis for standing was the supposed chill of their communications with foreign nationals due to fear of alleged NSA surveillance activities—virtually identical to Plaintiff's allegations. *See Amnesty Int'l*, 646 F. Supp. 2d at 642. The court in *Amnesty International*, relying in particular upon *Laird*, *United Presbyterian*, *ACLU* and other surveillance cases, noted that the plaintiffs, like the Plaintiff here, only "allege that their communications are chilled by the sheer existence of the challenged policy without connecting the policy to their own speech." *Id.* at 653. The *Amnesty International* plaintiffs thus "failed to show that they are subject to the statute other than by speculation and conjecture, which is insufficient for standing." *Id.* at 654. Likewise, Plaintiff's vague allegations of fear based on contacts with foreign nationals, who are not alleged to be subject to the TSP, are wholly insufficient to demonstrate a concrete and immediate injury or a

realistic possibility that he will be subject to the alleged activities in the future.

Similarly, in *Al-Haramain v. Bush*, 507 F.3d 1190 (9th Cir. 2007), the U.S. Court of Appeals for the Ninth Circuit held that (absent preemption), "Al-Haramain cannot establish that it suffered injury in fact, a 'concrete and particularized injury,'" and that "its claims must be dismissed." *Id.* at 1205. Notably, the court stated that "[i]t is not sufficient for Al-Haramain to speculate that it might be subject to surveillance under the TSP simply because it has been designated a 'Specially Designated Global Terrorist.'" *Id.* But such a claim is far more concrete and particularized than the "chill" injury, based on speculative fears and self-imposed restraint from contacting individuals who have no alleged connection with al-Qaeda or associated terrorist groups targeted by the TSP, that Plaintiff alleges in this case. As the *Al-Haramain* plaintiffs failed to establish their standing (absent preemption) despite being named a terrorist organization, Plaintiff here has failed to meet his burden and demonstrate a concrete injury.[3]

In sum, "[c]ourts have explicitly rejected standing based on a fear of surveillance in circumstances similar to those in this case." *Amnesty Int'l*, 646 F. Supp. 2d at 645. A long line of precedent, from *Laird* to this Court's recent work in *Jewel*, demonstrates that generalized grievances or speculative fears are insufficient to establish standing. Plaintiff offers no reason for this Court to divert from the trend—indeed, *Jewel* is dispositive—and it should accordingly dismiss the case.

B. The FISC Orders Underscore that Plaintiff Cannot Establish Standing.

The central premise on which Plaintiff's case rests—surveillance under the TSP without statutory authority —is no longer operative. The FISC orders underscore that Plaintiff cannot establish his standing under the injury (and, in this context, realistic threat of a repetition of the

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[3] The reserved question in *Al-Haramain* pertained to whether FISA preempted the Government's ability to assert the state secrets privilege over information that Al-Haramain claimed *would* prove a concrete and particularized injury. There is no such claim here. Plaintiff's alleged injuries are simply more speculative than those *Al-Haramain* determined to be insufficient, and they would be too speculative for Plaintiff to demonstrate status as an "aggrieved person" under FISA. 50 U.S.C. § 1806(f); *see Jewel*, 2010 WL 235075, at *9.

injury), causation or redressability prongs of the standing inquiry, and the fact that the TSP is no longer in effect confirms Plaintiff's lack of standing.

Even where a plaintiff alleges that his rights were violated in the past—and, as noted above, Plaintiff here has failed even to plead such facts—he lacks standing to obtain prospective relief absent a "real and immediate threat" that he will suffer the same injury in the future. *Lyons*, 461 U.S. at 103; *see Gest*, 443 F.3d at 1181. The discontinuance of the TSP negates any such threat because Plaintiff cannot credibly claim any *continuing* chill caused by a program that has lapsed for more than three years and has been supplanted by activities authorized by the FISC. Indeed, this authorization proves the point; it cannot be that Plaintiff could suffer any legitimate "chill" based on a fear of being subject to surveillance activities that have supplanted the now-defunct TSP and are authorized by the FISC. *See ACLU*, 493 F.3d at 668 (noting that all wiretaps are "secret," therefore the NSA's possession of a warrant would have no impact on a party's subjective willingness or unwillingness to make foreign contacts).[4] Accordingly, the fact that the TSP has lapsed, and that any activities conducted under that program are now under FISC authority, renders it impossible for Plaintiff to establish an imminent threat of future injury under his "chill" theory. *See Amnesty Int'l*, 646 F. Supp. 2d at 649 ("But the cases are clear that an actual and well-founded fear of enforcement depends upon a reasonable showing that the plaintiff is subject to the challenged law or regulation.").

Thus, as Plaintiff seeks only prospective relief, his case must be dismissed because there is no basis on which he can establish a real and immediate threat that he will be surveilled by the TSP in the future, when the challenged activity is no longer operative. To the extent Plaintiff

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[4] Indeed, as the *ACLU* court noted, even if any TSP activities had not already been brought under FISC authority, Plaintiff's requested relief would not have redressed his alleged injury, because surveillance conducted pursuant to a warrant under FISC order would still be "secret," and would therefore have no effect on his alleged "chill" injury. *See ACLU*, 493 F.3d at 671-72; *see also Mayfield v. United States*, 588 F.3d 1252, 1259-60 (9th Cir. 2009). Failing this prong of the standing inquiry, Plaintiff's case should be dismissed even if he had alleged an injury in fact. *See ACLU*, 493 F.3d at 672.

seeks injunctive relief from TSP surveillance, there is no program left to enjoin. And to the extent Plaintiff seeks a declaratory judgment, his claim is foreclosed by, among others, *Golden v. Zwickler*, 394 U.S. 103 (1969). There, the Court held that an individual lacked standing to seek declaratory judgment of the unconstitutionality of a statute prohibiting anonymous election-related handbills. The complaint in that case focused on a then-forthcoming election, but the Court found it "most unlikely" that the candidate involved—who had become a state judge in the interim—would again run for office. *Golden*, 394 U.S. at 109. "Since . . . the prospect was neither real nor immediate of a campaign involving the Congressman, it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred in the complaint," *id.*, and the plaintiff therefore failed to establish standing, *see* Ex. 5 at 7-9; *see also Buritica*, 8 F. Supp. 2d at 1195-97 (surveying cases).

In this case, the TSP has lapsed and any activities occurring under that program are now conducted under FISC authority. Thus, as in *Zwickler*, it is "highly unlikely," even if Plaintiff had alleged past injury, that he would in the future be subject to unauthorized TSP activities. "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again," *Lyons*, 461 U.S. at 111, and supplanting the TSP with FISC supervision makes it "wholly conjectural" that Plaintiff will suffer any future injury, *Golden*, 394 U.S. at 109. For reasons described above, "[t]he speculative nature of [Plaintiff's] claim of future injury," in light of the lapse of the challenged program, "requires a finding that this prerequisite of equitable relief has not been fulfilled," *id.*, and provides an additional basis for dismissing this case.[5]

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[5] In addition, the Court could find that Plaintiff's allegations of injury are too speculative and conjectural to satisfy Article III standing requirements at the pleading stage. "A complaint may be dismissed on jurisdictional grounds when it 'is "patently insubstantial," presenting no federal question suitable for decision.'" *Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009) (quoting *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994)). At best, Plaintiff merely speculates that he was subject to the now-defunct TSP without alleging any facts—such as contacts with agents of al-Qaeda or its associates—that would make the allegation plausible. This is insufficient to invoke the Court's jurisdiction. *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937

II. EVEN IF PLAINTIFF HAD STANDING TO SEEK PROSPECTIVE RELIEF, THE LAPSE OF THE TSP MOOTS ANY FURTHER CLAIMS.

Because Plaintiff lacked standing from the beginning of this suit—as further confirmed by the FISC orders—exceptions that apply to the mootness doctrine, such as for cases capable of repetition, but evading review, are inapplicable. "'[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.'" *Jackson v. Cal. Dep't of Mental Health*, 399 F.3d 1069, 1073 (9th Cir. 2005) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000)); *see also Lyons*, 461 U.S. at 109 ("The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help . . . for Lyons' lack of standing . . . rest[s] . . . on the speculative nature of his claim that he will again experience injury as the result of that practice . . . .").

At any rate, even if the Court found that Plaintiff had standing to assert his claim for equitable relief, the Court would lack jurisdiction to grant such relief because the lapse of the TSP means that the case is moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997) (noting that court need not resolve its doubts about standing because the question of mootness also "goes to the Article III jurisdiction" of the court). "Article III requires that a live controversy persist through all stages of the litigation"; if this condition is not met, "the case becomes moot, and its resolution is no longer within [the Court's] purview." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005); *see Cntr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963-65 (9th Cir. 2007); *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994).

Regardless how the Court resolves the standing inquiry—though Defendants submit that the answer is clear from an application of *Jewel*, as well as *Laird* and *Lyons*—Plaintiff's

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(2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

challenge to the TSP is now moot. The progam is no longer in place; it has been defunct for more than three years; any surveillance occurring as part of the TSP is now under the supervision of another court; and no injunctive relief can be provided from an activity that is already inoperative. Even as to a claim for declaratory judgment, the lapse of the TSP negates the "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" that would "warrant the issuance of a declaratory judgment." *Center for Biological Diversity*, 511 F.3d at 963 (internal quotation marks and citation omitted). Where the challenged government activity is no longer in place, it cannot be said that a substantial controversy exists between the parties of such immediacy and reality to warrant judicial relief. *See id.* at 964 (noting that no case or controversy remains where the claimed adverse effect is "'so remote and speculative'" that there is "'no tangible prejudice to the *existing interests* of the parties'") (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 123 (1964)).

There is no basis to find an exception to the operation of the mootness doctrine in the principle that there has been a "voluntary cessation" of allegedly unlawful activity. *See, e.g.*, *Laidlaw*, 528 U.S. at 189. The Government has not terminated the TSP in response to Plaintiff's suit. Rather, it worked with the FISC for some time to obtain authorization for any surveillance activities that were occurring under the TSP. (*See* Dkt. 127-1 at 1, Dkt. 175-1 ¶ 3 in 06-cv-1791-VRW). There is no voluntary cessation where the Government has made a policy decision to alter a policy at issue in a case, *see Cntr. for Biological Diversity*, 511 F.3d at 965, but, in any event, in this case an independent judicial body has now acted to provide additional and sufficient legal authority for the activity that Plaintiff challenged.

Similarly, Plaintiff's claims cannot proceed on the exception to the mootness doctrine for activities that are capable of repetition, yet evading review. This exception only applies in "'exceptional circumstances'" where the challenged activity was too short in duration to be litigated before its expiration and there is "'a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *Lyons*, 461 U.S. at 109, and *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)

(per curiam)). "A mere physical or theoretical possibilty" of repetition is not sufficient—there must be a "'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (citation omitted). Likewise, the mere possibility that the government may reinstate a disputed policy does not overcome mootness. "Rather, there must be evidence indicating that the challenged [policy] likely will be reenacted." *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997). And, it follows, as with the standing inquiry, a plaintiff's simple "fear of 'the *possibility*'" of recurrence is insufficient to overcome mootness. *Smith v. Univ. of Washington Law School*, 233 F.3d 1188, 1195 (9th Cir. 2000) (quoting *Noatak*, 38 F.3d at 1510).

Plaintiff offers nothing—not even speculation, though that too would be insufficient—to suggest that he might be subjected to surveillance under the now-defunct TSP in the future. Indeed, the facts that any activities previously authorized under that program are now conducted pursuant to FISC authority, and that the TSP lapsed more than three years ago, militates against any finding of a "demonstrated probability" that the controversy will recur. *Murphy*, 455 U.S. at 482. At best, as with the injury required to sustain standing, Plaintiff offers only a generalized fear of unlawful surveillance. This is far from an "exceptional circumstance" warranting an exception to the mootness doctrine.[6]

CONCLUSION

For the foregoing reasons, and for all the reasons stated in our prior submissions, the Court should grant Defendants' Motion to Dismiss.

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[6] Apart from the constitutional mootness doctrine, a court may in its discretion refuse to entertain a suit that "is so attenuated that considerations of prudence and comity for coordinate branches of government counsel that court to stay its hand and to withhold relief it has the power to grant." *Greenbaum v. EPA*, 370 F.3d 527, 534-35 (6th Cir. 2004) (quoting *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)). In this case, prudential considerations provide an independent basis for dismissal. This case presents sensitive constitutional questions about the authority of coordinate Branches to authorize foreign intelligence during wartime. That activity has now been supplanted by orders from another court, the FISC, and at the very least prudence dictates deference to that process by finding this matter to be moot.

Date: February 1, 2010

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CERTIFICATE OF SERVICE

I certify that I have on this day served this Supplemental Memorandum in Support of Defendants' Motion to Dismiss by causing copies to be electronically mailed, and deposited in the United States mail, addressed to:

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Dated: February 1, 2010

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