

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

MDL Docket No 06-1791 VRW

NATIONAL SECURITY AGENCY  
TELECOMMUNICATIONS RECORDS  
LITIGATION

Case No C 07-1115 VRW

ORDER

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This order pertains to:

CENTER FOR CONSTITUTIONAL RIGHTS,  
a New York Nonprofit Law Firm;  
TINA M FOSTER, GITANJALI S  
GUTIERREZ, SEEMA AHMAD, MARIA  
LAHOOD and RACHEL MEEROPOL,  
United States Citizens and  
Attorneys at Law,

Plaintiffs,

v

BARACK H OBAMA, President of the  
United States; NATIONAL SECURITY  
AGENCY and KEITH B ALEXANDER, its  
Director; DEFENSE INTELLIGENCE  
AGENCY and MICHAEL D MAPLES, its  
Director; CENTRAL INTELLIGENCE  
AGENCY and PORTER J GOSS, its  
Director; DEPARTMENT OF HOMELAND  
SECURITY and MICHAEL CHERTOFF,  
its Secretary; FEDERAL BUREAU OF  
INVESTIGATION and ROBERT S  
MUELLER III, its Director; JOHN D  
NEGROPONTE, Director of National  
Intelligence,

Defendants.

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1 This case is part of multi-district litigation stemming  
2 from the Terrorist Surveillance Program ("TSP"), a warrantless  
3 surveillance program carried out by the federal government from  
4 2001 to 2007. On May 27, 2010, defendants – certain high-ranking  
5 government officials and associated government agencies – filed a  
6 renewed motion to dismiss or, in the alternative, for summary  
7 judgment based in part on plaintiffs' failure to establish  
8 standing. Doc #731/39.<sup>1</sup> On July 29, 2010, plaintiffs filed a  
9 renewed motion for summary judgment and opposition to defendants'  
10 motion for summary judgment. Doc ##742/46, 743/47. For the  
11 reasons discussed below, the court GRANTS defendants' motion for  
12 summary judgment and DENIES plaintiffs' motion for summary  
13 judgment.

14  
15 I

16 On January 17, 2006, plaintiffs filed an action in the  
17 United States District Court for the Southern District of New York.  
18 Doc #333-1/16-1. Plaintiffs alleged that defendants engaged in  
19 electronic surveillance without court order and thereby violated  
20 the Foreign Intelligence Surveillance Act ("FISA"), the Separation  
21 of Powers Doctrine and the First and Fourth Amendments. Id at 2.  
22 Plaintiffs based these allegations primarily upon statements by  
23 President George W Bush and other officials in December 2005  
24 admitting that the National Security Agency ("NSA") had monitored,  
25 without a warrant, communications between the United States and a  
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27  
28 <sup>1</sup> Documents will be cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-1115) in the following format: Doc #(MDL)/(individual).

1 foreign country where one of the parties was believed to be a  
2 member or affiliate of al-Qa'ida. Id at 8.

3           The complaint alleges that plaintiff Center for  
4 Constitutional Rights ("CCR") represented, and continues to  
5 represent, clients who are suspected by the United States  
6 government of having some link to al-Qa'ida or other terrorist  
7 organizations. Doc #333-1/16-1 at 2-3. These clients include  
8 Muslim foreign nationals detained after the September 11 terrorist  
9 attacks as persons "of interest" and others detained as "enemy  
10 combatants" at Guantanamo Bay. Id. Plaintiffs - CCR and five of  
11 its attorneys who represent such clients - "believe that their  
12 conversations and emails with [CCR clients], and with other persons  
13 abroad with whom they have communicated in connection with these  
14 cases, have been subject to surveillance pursuant to the [TSP]." Id  
15 at 3. Plaintiffs further allege that "[i]t is likely that  
16 [p]laintiffs' privileged attorney-client communications were and  
17 continue to be intercepted by Defendants." Id.

18           Plaintiffs claim that they were harmed by the  
19 government's surveillance program in various ways. Plaintiffs  
20 allege that, after they became aware of the program, they were  
21 compelled to "institute protective measures to reduce the potential  
22 impact of such surveillance on their representation of their  
23 clients." Doc #333-1/16-1 at 12. Plaintiffs allege that they were  
24 forced to stop "communicating with certain individuals at all by  
25 phone or mail," "avoid[] subjects central to the attorney-client  
26 relationship and work product in electronic communications with  
27 others" and "undertake international travel to avoid the risk of  
28 jeopardizing the confidentiality of privileged communications." Id

1 at 12-13. In addition to the expenses these measures imposed on  
2 plaintiffs, plaintiffs claim that they have suffered "irreparable  
3 harm to their ability to advocate vigorously on their clients'  
4 behalf." Id at 13.

5 Plaintiffs also allege that, because the government's  
6 surveillance program "permits the surveillance of conversations of  
7 people for whom the government would not be able to establish  
8 probable cause that the subject of surveillance is an agent of a  
9 foreign power," it has "negatively affected [p]laintiffs' ability  
10 to communicate with clients, co-counsel, witnesses, and other  
11 relevant individuals in the course of carrying out their role as  
12 advocates for their clients and others." Doc #333-1/16-1 at 13.  
13 That is, "[k]nowledge that their conversations may be overheard  
14 chills persons outside the United States who are not agents of  
15 foreign powers from contacting the [p]laintiffs through electronic  
16 means to seek their legal advice and/or to provide information in  
17 connection with legal matters." Id. Plaintiffs allege that this  
18 has caused "irreparable harm to their ability to effectively  
19 advocate for [their clients], and will continue to inflict such  
20 harm until it is stopped." Id.

21 Plaintiffs' complaint requests various forms of equitable  
22 relief. Plaintiffs request that the court: (1) "[d]eclare that  
23 [d]efendants' program of warrantless surveillance is unlawful, and  
24 enjoin any further such warrantless surveillance"; (2) "[o]rder  
25 that [d]efendants disclose to [p]laintiffs all unlawful  
26 surveillance of [p]laintiffs' communications carried out pursuant  
27 to the program"; (3) "[o]rder that all [d]efendants turn over to  
28 [p]laintiffs all information and records in their possession

1 relating to [p]laintiffs that were acquired through the warrantless  
2 surveillance program or were the fruit of surveillance under the  
3 program, and subsequently destroy any such information and records  
4 in [d]efendants' possession"; (4) "[a]ward costs, including an  
5 award of attorneys' fees under the Equal Access to Justice Act, 28  
6 [USC] § 2412(d)(1)(A)" and (5) "[a]ward such other relief as the  
7 Court may deem just and proper." Doc #333-1/16-1 at 15.

8 On March 9, 2006, plaintiffs moved for partial summary  
9 judgment. Doc ##333-2/16-2, 333-3/16-3. On May 26, 2006,  
10 defendants moved to dismiss plaintiffs' action or, alternatively,  
11 for summary judgment. Doc ##327-1/12-1, 327-3/12-3. Both  
12 plaintiffs and defendants received amicus briefs in support of  
13 their motions.

14 On February 23, 2007, this case was consolidated with the  
15 In re National Security Agency Telecommunications Records  
16 Litigation multi-district litigation, Case Number 06-md-1791, and  
17 transferred to the undersigned sitting in the Northern District of  
18 California. See Doc #179/xxx.<sup>2</sup> Judge Lynch in the Southern  
19 District of New York did not rule on the outstanding motions to  
20 dismiss and for summary judgment before the case was transferred.  
21 The parties agreed to file supplemental briefs and have oral  
22 argument on the outstanding motions. Doc #289/2. On June 8, 2007,  
23 defendants filed a supplemental brief in support of their original  
24 motion. Doc #308/3. Defendants also submitted, for ex parte in  
25 camera review, a classified memorandum and a classified

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27 <sup>2</sup>Documents contained in the MDL docket but not in the docket for  
28 this particular case are listed with "xxx" rather than an individual  
docket number.

1 declaration. Doc ##309/4 & 310/5. On July 10, 2007, plaintiffs  
2 filed a supplemental memorandum in support of their original motion  
3 for summary judgment and in opposition to defendants' motion. Doc  
4 #328/13.

5 On August 9, 2007, the court held oral arguments on the  
6 parties' motions. Doc #348/20. On August 10, 2007, plaintiffs  
7 moved for leave to file a supplemental complaint challenging the  
8 Protect America Act of 2007, which temporarily amended FISA, as  
9 unconstitutional under the First and Fourth Amendments. Doc  
10 #347/19. Defendants opposed. Doc #381/22. On January 28, 2009,  
11 the court denied plaintiffs' motion as moot on the grounds that the  
12 Protect America Act had expired in February 2008 and had not been  
13 reauthorized. Doc #555/29.

14 In response to the court's request on January 20, 2010,  
15 Doc #702/31, the parties submitted a joint status report on March  
16 19, 2010 explaining the status of the case and the proceedings  
17 necessary to resolve it. Doc #716/35. Among the issues addressed  
18 by the parties was the fact that the TSP had been discontinued in  
19 early 2007. Id. Plaintiffs stated that "[e]ven if the NSA Program  
20 challenged in [p]laintiffs' original summary judgment papers is no  
21 longer in active operation with respect to the continuing  
22 interception of communications," plaintiffs' request for an order  
23 requiring defendant to disclose all unlawful surveillance of  
24 plaintiffs, turn over all information pertaining to plaintiffs that  
25 was acquired through the TSP and destroy any such information in  
26 defendants' possession was still "necessary to remedy the harms set  
27 forth in [p]laintiffs' summary judgment papers." Id at 3.  
28 Defendants continued to argue that plaintiffs' claims should be

1 dismissed or summary judgment granted because plaintiffs lack  
2 standing. Id at 4-7. The court ordered the parties to renew their  
3 cross-motions and file new oppositions and replies. Doc #720/36.

4 On May 27, 2010, defendants filed a renewed motion to  
5 dismiss or for summary judgment. Doc #731/39. On July 29, 2010,  
6 plaintiffs filed a renewed motion for summary judgment and an  
7 opposition to defendants' motion. Doc ##742/46, 743/47. On  
8 September 14, 2010, defendants filed an opposition to plaintiffs  
9 summary judgment motion and in reply to plaintiffs' opposition.  
10 Doc #749/49. On October 5, 2010, plaintiffs filed a reply to  
11 defendants' opposition. Doc #750/50.

12  
13 II

14 The following is a statement of the relevant facts of the  
15 case, drawn largely from plaintiffs' declarations and included  
16 documents, and construed most favorably to plaintiffs.

17 On December 17, 2005, President Bush gave a radio address  
18 stating that shortly after September 11, 2001 he authorized the NSA  
19 to intercept "the international communications of people with known  
20 links to [al-Qa'ida] and related terrorist organizations." Doc  
21 #333-4/16-4 at 39-40. In a December 19, 2005 press conference,  
22 Attorney General Alberto Gonzales explained that the program  
23 involved surveillance of communications between a party in the  
24 United States and a party outside of the United States where there  
25 is "a reasonable basis to conclude that one party to the  
26 communication is a member of [al-Qa'ida], affiliated with [al-  
27 Qa'ida], or a member of an organization affiliated with [al-  
28 Qa'ida], or working in support of [al-Qa'ida]." Doc #333-4/16-4 at

1 62. In a speech on January 23, 2006, Deputy Director of National  
2 Intelligence (and former NSA Director) Michael Hayden confirmed  
3 that under the program this "reasonable basis" determination was  
4 made by a NSA intelligence expert without court involvement. Doc  
5 #333-4/16-4 at 90-91. This program has been referred to by the  
6 government and others as the Terrorist Surveillance Program  
7 ("TSP"). See, for example, Doc #308/3 at 5.

8           On January 17, 2007, Attorney General Gonzales sent a  
9 letter regarding the TSP to various members of Congress. Doc  
10 #127/xxx. In the letter, Gonzales explained that a Foreign  
11 Intelligence Surveillance Court judge had issued orders  
12 "authorizing the Government to target for collection international  
13 communications into or out of the United States where there is  
14 probable cause to believe that one of the communicants is a member  
15 or agent of [al-Qa'ida] or an associated terrorist organization."  
16 Doc #127-1/xxx at 1. "As a result of these orders, any electronic  
17 surveillance that was occurring as part of the [TSP] will now be  
18 conducted subject to the approval of the Foreign Intelligence  
19 Surveillance Court" - that is, in compliance with FISA. See *id.*  
20 Gonzales stated that "under these circumstances, the President has  
21 determined not to reauthorize the [TSP] when the current  
22 authorization expires." *Id.* at 1-2.

23           Plaintiffs have "served as counsel in many cases alleging  
24 violations of constitutional and human rights as a result of the  
25 detention and interrogation practices of the [Bush] administration  
26 in connection with anti-terrorism policies and practices." Doc  
27 #333-4/16-4 at 3. Most of plaintiffs' clients are represented pro  
28 bono, with no expectation that they will ever pay any expenses



1 related to their representation. Id at 3. CCR "is committed to  
2 the use of law as a positive force for social change" and  
3 "considers litigation to be not merely a tool for advancing  
4 precedent but also a fulcrum around which to organize mass  
5 movements for political change and a means of giving voice to the  
6 aspirations of oppressed peoples." Id at 2-3.

7           The individual attorney plaintiffs regularly communicate  
8 with individuals who "fit within the criteria articulated by  
9 Attorney General Gonzales for targets of the [TSP] \* \* \* or are  
10 reasonably likely to be viewed by the United States as fitting  
11 within those criteria." Doc #333-4/16-4 at 4. Specifically,  
12 plaintiffs Gutierrez, Foster and Ahmad work on habeas corpus  
13 petitions for designated "enemy combatants" held at Guantanamo Bay.  
14 Id at 3-5. They regularly communicate with family members of  
15 detainees, "former detainees who have been released and returned to  
16 their home countries," and various witnesses, lawyers and other  
17 individuals who reside in foreign countries, including persons who  
18 have been designated by the United States as "enemy combatants."  
19 Id. Plaintiff LaHood represents Maher Arar, who resides in Canada  
20 and has been declared by the United States to be a member of al-  
21 Qa'ida, in a civil suit and regularly communicates with him by  
22 phone and email. Id at 5. Plaintiff Meeropol is the lead attorney  
23 in the Turkmen v Ashcroft civil class action on behalf of Muslim  
24 non-citizens detained shortly after September 11, 2001 and declared  
25 to be "of interest" to the September 11 terrorism investigation.  
26 Id at 5-6. Meeropol regularly communicates with these actual and  
27 potential class members, all of whom reside outside the United  
28 States. Id at 5-6.

1           Plaintiffs did not produce, in response to defendants'  
2 motion for summary judgment, any evidence that they were actually  
3 surveilled under the TSP. Instead, plaintiffs limited their  
4 evidence and argument to the claim that their constitutional rights  
5 were "chilled" by the mere risk that they were surveilled under the  
6 TSP. Plaintiffs claim that this risk forced them to review past  
7 communications that may have been intercepted by the TSP, take  
8 corrective action and implement measures to prevent future  
9 communications from being intercepted by the government. See Doc  
10 #333-4/16-4 at 6-10. Plaintiffs have attempted to avoid electronic  
11 communication concerning sensitive matters with overseas contacts  
12 and have traveled internationally to discuss such matters in  
13 person. Id at 7-9.

14           In January 2006, CCR and its staff submitted requests to  
15 various agencies under the Freedom of Information Act seeking all  
16 records obtained through warrantless electronic surveillance, which  
17 required "[s]ubstantial expenditures of staff time and effort." Id  
18 at 7. Plaintiffs also drafted interrogatories in Turkmen v  
19 Ashcroft seeking to discover any attorney-client communications  
20 that were monitored or intercepted, and CCR attorneys have been  
21 instructed by CCR's director to move for such disclosure in other  
22 cases where surveillance is suspected. Id at 6, 9. Plaintiffs  
23 allege that this "divert[s] staff time and organizational resources  
24 away from core mission tasks," which "hurts [their] organization by  
25 reducing the number of cases [they] can bring, and undermin[ing  
26 their] ability to litigate [their] existing cases in the most  
27 effective manner." Id at 9-10.

28 //

1           Plaintiffs also claim to have suffered less quantifiable  
2 harm since learning about the existence of the TSP. Plaintiffs  
3 believe that given their knowledge of the existence and nature of  
4 the TSP they are ethically required to avoid international  
5 electronic communications involving sensitive information. See Doc  
6 ##333-7/16-7 at 2-5, 333-8/16-8 at 3-6, 333-9/16-9 at 2-3.  
7 Plaintiffs submitted a declaration from Professor Stephen Gillers,  
8 a specialist in legal ethics, stating that "[i]n light of what is  
9 now known about the [TSP] and given the nature of CCR's work as  
10 detailed in submissions to the Court, CCR attorneys and their  
11 support persons have substantial reason to fear that telephonic,  
12 fax, and e-mail communications \* \* \* that they may have or have had  
13 with CCR clients, or with third persons or each other in the course  
14 of representing clients, have been or will be intercepted by the  
15 United States. Doc #333-6/16-6 at 4. As a result, "CCR attorneys  
16 may not ethically use \* \* \* these electronic means of communication  
17 in exchanging or collecting \* \* \* [n]early all communications with  
18 or about clients." Id at 4-5. Because international travel is not  
19 an effective substitute for easy electronic communications,  
20 plaintiffs have not been able to communicate with overseas clients  
21 and contacts as much as desired and believe that the quality of  
22 their litigation has been undermined.

23           Plaintiffs have also deemed it necessary to inform  
24 persons communicating with them via electronic means that their  
25 conversation may be subject to government surveillance. See, for  
26 example, Doc ##333-7/16-7 at 3, 333-8/16-8 at 5. William Goodman,  
27 the director of CCR, states that "it is difficult to imagine a  
28 worse thing to have to say at the onset of a relationship with a

1 client, witness, or other person with whom one wishes to work  
2 closely" because it "inevitably [makes] the CCR staffer appear to  
3 be in some fashion an agent of the United States government, or  
4 [makes] our organization appear suspect due to the fact that  
5 communications with us are subject to government surveillance."  
6 Doc #333-7/16-7 at 3. Plaintiffs imply that the lack of trust  
7 thereby created has negatively impacted the quality of their  
8 litigation activities.

10 III

11 Summary judgment is proper where the pleadings, discovery  
12 and affidavits show that there is "no genuine issue as to any  
13 material fact and the moving party is entitled to judgment as a  
14 matter of law." FRCP 56(c). A court will grant summary judgment  
15 "against a party who fails to make a showing sufficient to  
16 establish the existence of an element essential to that party's  
17 case, and on which that party will bear the burden of proof at  
18 trial \* \* \* since a complete failure of proof concerning an  
19 essential element of the nonmoving party's case necessarily renders  
20 all other facts immaterial." Celotex Corp v Catrett, 477 US 317,  
21 322-23 (1986).

22 "It goes without saying that those who seek to invoke the  
23 jurisdiction of the federal courts must satisfy the threshold  
24 requirement imposed by Article III of the Constitution by alleging  
25 an actual case or controversy." City of Los Angeles v Lyons, 461  
26 US 95, 101 (1983). Standing is a jurisdictional requirement  
27 grounded in Article III of the Constitution. Lujan v Defenders of  
28 Wildlife, 504 US 555, 559 (1992). To establish Article III

1 standing, a plaintiff must establish: (1) it suffered an "injury-  
2 in-fact," which is both "concrete and particularized" and "actual  
3 or imminent;" (2) a causal connection between the injury and the  
4 conduct complained of and (3) that it is likely that the injury  
5 will be "redressed by a favorable decision." Id at 560-61. The  
6 party invoking federal jurisdiction bears the burden of  
7 establishing these elements, and each element must be supported  
8 with the manner and degree of evidence required at the successive  
9 stages of the litigation. Id at 561. "At the pleading stage,  
10 general factual allegations of injury resulting from the  
11 defendant's conduct may suffice \* \* \*. In response to a summary  
12 judgment motion, however, the plaintiff can no longer rest on such  
13 'mere allegations,' but must 'set forth' by affidavit or other  
14 evidence 'specific facts'[" Id. An affidavit that contains  
15 "only conclusory allegations, not backed up by statements of fact,  
16 \* \* \* cannot defeat a motion for summary judgment." Shane v  
17 Greyhound Lines, Inc, 868 F2d 1057, 1061 (9th Cir 1989).

18  
19 IV

20 The court first turns to whether plaintiffs have  
21 introduced sufficient evidence to establish standing for their  
22 claim under the First Amendment. Defendants contend that  
23 "[p]laintiffs' allegations of a subjective chill coupled with an  
24 unwillingness to communicate are insufficient to establish injury-  
25 in-fact." Doc #731/39 at 16. According to defendants, "where the  
26 challenged conduct has unquestionably ceased, as here, plaintiffs'  
27 allegations of a subjective chill \* \* \* are insufficient to confer  
28 standing for their First Amendment claim." Id at 21.

1           Plaintiffs maintain that they continue to suffer harm to  
2 their "First Amendment interest in litigating against the  
3 government." Doc #743/47 at 12. Plaintiffs argue that "any  
4 responsible attorney would have to conform their behavior to  
5 account for the possibility that potential clients and witnesses  
6 might be tainted by the possibility of past government  
7 interception," meaning that "CCR will have to exercise caution  
8 going forward in using such individuals in litigation." Id at 12-  
9 13. This "need for caution interferes with [CCR's] ability to  
10 construct a case under the ordinary assumptions of confidentiality  
11 that underpin our adversary system of justice." Id at 13.

12           Plaintiffs also argue that "third parties might sensibly  
13 be hesitant to communicate freely with CCR staffers even absent a  
14 risk of current unlawful interception," creating "a current risk  
15 that third parties who communicated with [CCR] previously will now  
16 be less willing to do so, knowing that the government may have been  
17 listening in on those earlier calls." Doc #743/47 at 11.

18           Other than references to "possibilities" and "risks,"  
19 plaintiffs do not argue and have presented no evidence that they  
20 were unlawfully surveilled. Instead, plaintiffs characterize the  
21 uncertainty about whether they were surveilled, the possible  
22 existence of records of that surveillance and the purportedly  
23 reasonable actions taken in response to it as the harm, alleging  
24 that it exerts a "chilling effect" on the exercise of their First  
25 Amendment rights. Doc #743/47 at 21-22.

26           The question, then, is whether such chilling effects –  
27 where there is no evidence that plaintiffs were actually surveilled  
28 under the TSP – are sufficient to establish the "concrete and

1 particularized" injury required for Article III standing. Lujan,  
2 504 US at 560.

3  
4 A

5 In Laird v Tatum, 408 US 1 (1972), the Supreme Court  
6 considered whether the chilling of First Amendment rights by the  
7 existence of an allegedly unlawful government surveillance program  
8 presented a justiciable controversy. The Court recognized that  
9 "constitutional violations may arise from the deterrent, or  
10 'chilling,' effect of governmental regulations that fall short of a  
11 direct prohibition against the exercise of First Amendment rights."  
12 Id at 11. The Court, however, found no case that involved a  
13 "chilling effect aris[ing] merely from the individual's knowledge  
14 that a governmental agency was engaged in certain activities or  
15 from the individual's concomitant fear that, armed with the fruits  
16 of those activities, the agency might in the future take some other  
17 and additional action detrimental to that individual." Id at 11.  
18 The Court emphasized that "[a]llegations of a subjective 'chill'  
19 are not an adequate substitute for a claim of specific present  
20 objective harm or a threat of specific future harm." Id at 14-15.

21 Plaintiffs attempt to distinguish Laird by relying  
22 heavily on Presbyterian Church (USA) v United States, 870 F2d 518  
23 (9th Cir 1989). In Presbyterian Church, the plaintiff churches  
24 claimed that their First and Fourth Amendment rights were violated  
25 when "INS agents entered the churches wearing 'body bugs' and  
26 surreptitiously recorded church services." Id at 520. The  
27 plaintiffs alleged that their right to free exercise of religion  
28 and association was abridged and that "as a result of the

1 surveillance of worship services, members have withdrawn from  
2 active participation in the churches." Id at 520-22. The court  
3 ruled that the plaintiffs had established standing because "[w]hen  
4 congregants are chilled from participating in worship services \* \*  
5 \* because they fear the government is spying on them and taping  
6 their every utterance, \* \* \* a church suffers organizational injury  
7 because its ability to carry out its ministries has been impaired."  
8 Id at 522. The court distinguished Laird as involving a chilling  
9 effect "caused, not by any specific action of the Army directed  
10 against the plaintiffs, but only by 'the existence and operation'  
11 of the surveillance program in general." Id. That is, the  
12 plaintiffs in Laird did not allege that they were actually  
13 surveilled, but "only that they could conceivably become subject to  
14 the Army's domestic surveillance program." Id.

15 In this case, the fear that plaintiffs describe as  
16 chilling the exercise of their First Amendment rights is far closer  
17 to Laird than Presbyterian Church. The alleged injury here is, in  
18 fact, more speculative than in Laird given that (unlike Laird) the  
19 government has ceased the activities that gave rise to the lawsuit.  
20 Instead, there is only a fear that plaintiffs may have been subject  
21 to unlawful surveillance in the past combined with a fear that some  
22 "agency might in the future take some other and additional action  
23 detrimental to [them]." Laird, 408 US at 11. Moreover, at least  
24 some of the ongoing burdens described by plaintiff cannot fairly be  
25 traced to the TSP itself. Plaintiffs' declarations describe at  
26 length the disruption to their operations resulting from their  
27 inability to use quick and efficient electronic communications.  
28 Even assuming (without deciding) that such fears and measures were



1 reasonable and that such an injury is sufficiently concrete to  
2 confer standing, the TSP cannot provide a justification for  
3 continuing to incur such costs. The TSP ended in 2007. Doc  
4 #127/xxx. With no reason to believe that they or their clients are  
5 being illegally monitored, there is no imperative (ethical or  
6 otherwise) to avoid the use of electronic communications.

7 The facts of this case are simply not analogous to  
8 Presbyterian Church, in which the chilling effect was caused by  
9 actual, substantiated unlawful surveillance of four churches  
10 lasting almost a year. 870 F2d at 520. That set of facts  
11 demonstrated "specific present objective harm or a threat of  
12 specific future harm" in a way that plaintiffs here cannot. See  
13 Laird, 408 US at 15; Presbyterian Church, 870 F2d at 522. In  
14 short, there is no "specific action \* \* \* directed against the  
15 plaintiffs," only a fear that plaintiffs may have been unlawfully  
16 surveilled, may conceivably suffer an unfair disadvantage in  
17 litigation at some point in the future and that some third parties  
18 may be unwilling to communicate or cooperate with plaintiffs based  
19 on their uncertainty about the details of the TSP. That is  
20 insufficient to establish injury in fact for purposes of Article  
21 III standing.

22  
23 B

24 Even if the possibility of harm in this case were  
25 sufficiently concrete to constitute injury in fact, the injury  
26 claimed by plaintiffs is not itself cognizable under the First  
27 Amendment. Although litigation is unquestionably protected by the  
28 First Amendment when it is used as a means of political expression

1 and advocacy, the First Amendment does not protect against every  
2 conceivable burden or difficulty that may arise during litigation.  
3 Plaintiffs rely upon NAACP v Button, 371 US 415 (1963), to support  
4 their First Amendment claim, arguing that "[w]hat was true of the  
5 NAACP in the 1960's is certainly true of CCR today" and "the [TSP]  
6 intrudes on plaintiffs' right to 'petition for redress of  
7 grievances," \* \* \* and on their 'political expression.'" Doc #333-  
8 3/16-3 at 47.

9 In NAACP, the NAACP and its Legal Defense and Education  
10 Fund frequently sought out aggrieved persons, informed them of  
11 their legal rights and offered to represent them without charge in  
12 school desegregation and other such cases. NAACP, 371 US at 419-  
13 22. Typically, the NAACP did so at meetings of parents and  
14 children at which its representatives would explain the steps  
15 necessary to achieve school desegregation and offer legal  
16 representation. Id at 421. Litigation was just one strategy used  
17 to promote the ultimate goal of the NAACP, "to secure the  
18 elimination of all racial barriers which deprive Negro citizens of  
19 the privileges and burdens of equal citizenship rights in the  
20 United States." Id at 419. In 1956, the state of Virginia enacted  
21 a statute making it a criminal violation to solicit legal business  
22 through the use of "an agent for an individual or organization  
23 which retains a lawyer in connection with an action to which it is  
24 not a party and in which it has no pecuniary right or liability."  
25 Id at 424. The Virginia Supreme Court of Appeals held that the  
26 NAACP, its members and its attorneys had practiced criminal  
27 solicitation as defined in the statute. Id at 433-34. On appeal,  
28 the United States Supreme Court read the Virginia statute as

1 "proscribing any arrangement by which prospective litigants are  
2 advised to seek the assistance of particular attorneys." Id at  
3 433. The court held that the statute "unduly inhibit[s] protected  
4 freedoms of expression and association" and posed "the gravest  
5 danger of smothering all discussion looking to the eventual  
6 institution of litigation on behalf of the rights of members of an  
7 unpopular minority." Id at 434, 437.

8 Unlike the plaintiffs in NAACP, whose legal activities on  
9 behalf of minorities were criminalized by an exceedingly broad  
10 state law, plaintiffs in the present case claim to be harmed  
11 because there is a risk "that the government may have access to  
12 aspects of CCR's litigation strategy" as well as a risk "that third  
13 parties who communicated with [CCR] previously will now be less  
14 willing to do so." Doc #743/47 at 11. Plaintiffs also claim to be  
15 harmed by the need to take steps to assess the scope of any past  
16 surveillance and to ensure that no confidential communications are  
17 disclosed in the future. Id at 10, 13. Although plaintiffs appear  
18 to have established that their litigation activities have become  
19 more costly due to their concern about the TSP, plaintiffs remain  
20 free to pursue their political goals by litigating against the  
21 government, and continue to do so vigorously. Plaintiffs have not  
22 provided any precedent for the notion that the First Amendment  
23 protects against a "risk \* \* \* that the government may have access  
24 to aspects of [a plaintiff's] litigation strategy" where there is  
25 no proof that any surveillance in fact occurred. Id at 11. Nor  
26 have plaintiffs provided precedent for a protected First Amendment  
27 right "to litigate \* \* \* cases in the most effective manner." Doc  
28 #333-4/16-4 at 9-10.

1 In short, plaintiffs have not shown that they "personally  
2 ha[ve] suffered some actual or threatened injury as a result of the  
3 putatively illegal conduct," Valley Forge Christian College v  
4 Americans United for Separation of Church and State, Inc, 454 US  
5 464, 472 (1982), especially in light of the "clear precedent  
6 requiring that the allegations of future injury be particular and  
7 concrete." Steel Co v Citizens for a Better Environment, 523 US  
8 83, 109 (1998). Plaintiffs have therefore failed to establish  
9 standing for their First Amendment claim.  
10

11 V

12 In their renewed motion for summary judgment and  
13 opposition to defendants' motion for summary judgment, plaintiffs  
14 make little attempt to establish standing for their remaining  
15 claims under FISA, the Fourth Amendment and the separation of  
16 powers doctrine. Nevertheless, the court will briefly examine  
17 whether plaintiffs have established standing for these other  
18 claims.

19 FISA establishes a cause of action for an "aggrieved  
20 person \* \* \* who has been subjected to an electronic surveillance  
21 or about whom information obtained by electronic surveillance of  
22 such person has been disclosed or used in violation of section  
23 1809." 50 USC § 1810. As discussed at length by this court in the  
24 related case Al-Haramain Islamic Foundation v Obama, Case No C 07-  
25 0109, only by presenting evidence of actual surveillance can a  
26 plaintiff establish the "aggrieved person" status necessary to  
27 proceed with a FISA claim. See In re NSA Telecoms Records  
28 Litigation, 564 F Supp 2d 1109, 1131-35 (ND Cal 2008). Because

1 plaintiffs have presented no evidence of such surveillance, they  
2 have failed to establish standing for their FISA claim.

3           The same is true of plaintiffs' Fourth Amendment claim.  
4 "[T]he rights assured by the Fourth Amendment are personal rights,  
5 [which] \* \* \* may be enforced \* \* \* only at the instance of one  
6 whose own protection was infringed by the search and seizure."  
7 Rakas v Illinois, 439 US 128, 133-38 (1978) (quotation omitted).  
8 Plaintiffs therefore cannot establish Fourth Amendment standing  
9 without showing that they were in fact subject to unreasonable  
10 search or seizure. Plaintiffs have not done so.

11           Finally, plaintiffs' claim based on the separation of  
12 powers doctrine also fails. Plaintiffs have failed to establish  
13 that they were subjected to the unlawful program at issue: the TSP.  
14 Plaintiffs cannot establish, therefore, that the government's  
15 alleged violation of separation of powers principles by  
16 implementing the TSP caused plaintiffs any "actual injury  
17 redressable by the court." United States v Hoyt, 879 F2d 505, 514  
18 (9th Cir 1989) (ruling that a defendant not subject to the statute  
19 at issue did not have standing to challenge it); see also  
20 Immigration and Naturalization Service v Chadha, 462 US 919, 935-36  
21 (1983) (claims asserted under the separation of powers doctrine are  
22 subject to the traditional Article III standing requirements).  
23 Unlike other cases in which standing to bring a separation of  
24 powers claim was found, plaintiffs cannot establish that they were  
25 actually subjected to the conduct alleged to have violated the  
26 separation of powers. See, for example, Chadha, 462 US at 923,  
27 935-36 (reviewing whether one house of Congress could order the  
28 plaintiff deported); Buckley v Valeo, 424 US 1, 117 (1976)

1 (reviewing whether the Federal Election Commission could make  
2 rulings regarding the plaintiff); Glidden Co v Zdanok, 370 US 530,  
3 532-33 (1962) (reviewing whether the plaintiffs' cases could be  
4 adjudicated by judges from non-Article III courts).

5 Accordingly, plaintiffs have failed to establish standing  
6 for any of their claims and summary judgment in favor of defendants  
7 is appropriate.

8  
9 VI

10 For the reasons stated above, defendants' motion for  
11 summary judgment is GRANTED. Doc #39. Plaintiffs' motion for  
12 summary judgment is DENIED. Doc #47. Defendants are ordered to  
13 submit and serve a proposed form of judgment in accordance with  
14 this order no later than February 7, 2011; plaintiffs shall submit  
15 and serve any objections to defendants' form of judgment not later  
16 than February 14, 2011.

17 Upon entry of judgment, the clerk is directed to  
18 terminate all motions and close the file for Center For  
19 Constitutional Rights v Obama, Case Number 07-cv-1115. The clerk  
20 is further directed upon entry of judgment herein to terminate all  
21 motions and close the file for the multi-district litigation In re  
22 National Security Agency Telecommunications Records Litigation,  
23 Docket No MDL-1791.

24  
25 IT IS SO ORDERED.



26  
27 VAUGHN R WALKER  
28 United States District Judge