

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

CAROLYN JEWEL, TASH HEPTING, GREGORY No C 08-cv-4373 VRW
HICKS, ERIK KNUTZEN AND JOICE WALTON,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs,

v

NATIONAL SECURITY AGENCY ET AL,

Defendants.

IN RE:

NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

MDL Docket No C 06-1791 VRW
Member case No C 07-0693 VRW

THIS DOCUMENT RELATES TO:

ORDER

VIRGINIA SHUBERT, NOHA ARAFA, SARAH
DRANOFF AND HILARY BOTEIN,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs,

v

BARACK H OBAMA ET AL,

Defendants.

_____ /

1 These two actions are among those filed in response to
2 revelations in the press, beginning in December 2005, that the
3 National Security Agency (NSA), an agency of the United States
4 government, had carried out one or more programs involving
5 warrantless electronic surveillance of telephone and e-mail
6 telecommunications into and out of the United States.

7 The various United States government defendants in these
8 cases (collectively, "the United States") have moved to dismiss
9 and/or seeks summary judgment as to all claims in both cases,
10 summarizing their arguments in nearly identical fashion thusly:
11 "the Court lacks subject matter jurisdiction with respect to
12 plaintiffs' statutory claims against the United States because
13 Congress has not waived sovereign immunity, and summary judgment
14 for the Government on all of plaintiffs' remaining claims against
15 all parties (including any claims not dismissed for lack of
16 jurisdiction) is required because information necessary to litigate
17 plaintiffs' claims is properly subject to and excluded from use in
18 the case by the state secrets privilege and related statutory
19 privileges." Jewel, C 08-4373 Doc #18 at 2; see also Shubert,
20 C 07-0693 Doc #680/38¹ at 2.

21 For the reasons stated herein, the court has determined
22 that neither group of plaintiffs/purported class representatives
23 has alleged an injury that is sufficiently particular to those
24 plaintiffs or to a distinct group to which those plaintiffs belong;
25 rather, the harm alleged is a generalized grievance shared in
26

27 ¹ Citations to documents in the Shubert docket will be in the following
28 format: Doc #xxx/yy, with the first number corresponding to the MDL docket (M:06-
1791) and the second corresponding to the individual docket (C:07-0693).

1 substantially equal measure by all or a large class of citizens.
2 “[I]njuries that are shared and generalized — such as the right to
3 have the government act in accordance with the law — are not
4 sufficient to support standing.” Seegers v Gonzales, 396 F3d 1248,
5 1253 (DC Cir 2005).

6 Accordingly, these actions must be, and hereby are,
7 DISMISSED with prejudice. The various other grounds advanced by
8 the Unites States are not ruled on herein and form no part of the
9 basis for this order. Judgment shall be entered against plaintiffs
10 in both actions.

11
12 I

13 A

14 In December 2005, news agencies began reporting that
15 President George W Bush had ordered the NSA to conduct, without
16 warrants, eavesdropping of some portion of telecommunications in
17 the United States and that the NSA had obtained the cooperation of
18 telecommunications companies to tap into a significant portion of
19 the companies’ telephone and e-mail traffic, both domestic and
20 international. See, e g, James Risen and Eric Lichtblau, Bush Lets
21 US Spy on Callers Without Courts, NY Times (Dec 16, 2005). A copy
22 of this article is attached.

23 In January 2006, the first of dozens of lawsuits by
24 customers of telecommunications companies were filed alleging
25 various causes of action related to such cooperation with the NSA
26 in warrantless wiretapping of customers’ communications. One such
27 lawsuit was Hepting v AT&T Corp, C 06-0672 VRW (ND Cal filed
28 January 31, 2006). The four plaintiffs in that suit were Tash

1 Hepting, Gregory Hicks, Erik Knutzen and Carolyn Jewel. In
2 addition to the dozens of cases filed against telecommunications
3 companies, several were filed against United States government
4 entities by individuals claiming to have been surveilled. In six
5 states, officials with oversight authority over public utilities
6 initiated administrative proceedings to investigate
7 telecommunications companies' alleged assistance to the NSA.

8 Several of the cases arising from the NSA's alleged
9 warrantless electronic surveillance were originally venued in the
10 Northern District of California; others were filed in federal
11 district courts throughout the United States. The instant case
12 brought by plaintiff Virginia Shubert and her co-plaintiffs against
13 George W Bush and other government officials was filed May 17, 2006
14 in the Eastern District of New York.

15 In 2006, the United States filed lawsuits seeking to
16 enjoin state officials in Maine, New Jersey, Connecticut, Vermont
17 and Missouri from pursuing their investigations into the alleged
18 disclosure of customer telephone records by various
19 telecommunication carriers to the NSA. These motions were based,
20 in general, on the Supremacy Clause of the United States
21 Constitution, the foreign affairs power of the federal government
22 and the state secrets privilege (SSP).

23 In the Hepting case and the other cases in which
24 individual plaintiffs sought to sue telecommunications companies,
25 the United States moved to intervene and simultaneously to dismiss,
26 asserting the SSP and arguing, in essence, that the SSP required
27 immediate dismissal because no further progress in the litigation
28 was possible without compromising national security. C 06-0672 VRW

1 Doc ##122-125. The telecommunications company defendants in the
2 case also moved to dismiss on other grounds. C 06-0672 VRW Doc
3 #86.

4 On July 20, 2006 the court denied the motions to dismiss,
5 holding that: the SSP did not categorically bar plaintiffs'
6 action; the subject matter of the action was not a state secret;
7 the SSP would not prevent the telecommunications company defendants
8 from disclosing whether they had received certifications
9 authorizing the alleged assistance to the government; statutory
10 privileges did not bar the action; plaintiff customers had
11 sufficiently alleged injury-in-fact to establish standing; and
12 neither a purported common law immunity nor the doctrine of
13 qualified immunity prevented plaintiffs from proceeding against the
14 telecommunications company defendants. The court certified its
15 order for an interlocutory appeal pursuant to 28 USC § 1292(b), but
16 denied the United States' request for a stay of proceedings pending
17 appeal. Hepting v AT&T Corp, 439 F Supp 2d 974 (ND Cal 2006).

18 On August 9, 2006, the Judicial Panel on Multidistrict
19 Litigation ordered all cases arising from the alleged warrantless
20 wiretapping program by the NSA transferred to the Northern District
21 of California and consolidated before the undersigned judge.

22 On July 24, 2007, the court denied the United States'
23 motion for summary judgment in its actions to enjoin the state
24 officials' investigations. The court determined that the states'
25 investigations into wiretapping activities did not violate the
26 doctrine of intergovernmental immunity, were not preempted by
27 federal statutes and did not infringe on the federal government's
28 power over foreign affairs to a constitutionally impermissible

1 degree. M 06-1791 Doc #334; 2007 WL 2127345. Because the Hepting
2 appeal was then pending, the court refrained from considering the
3 government's assertion of the SSP.

4 On August 30, 2007, the court heard a number of motions
5 including the United States' motion to dismiss the Shubert case
6 (Doc #295/yy). Doc #368.

7 On March 14, 2008, the Ninth Circuit entered an order
8 withdrawing the submission in the Hepting case. CA Docket No 06-
9 17132, Doc #109. In light of that order, this court terminated the
10 pending motion to dismiss in Shubert shortly afterward giving the
11 United States leave to petition the court to re-open the motion at
12 the next case management conference in the matter should the
13 circumstances so warrant. Doc #438.

14 On July 10, 2008, Congress amended the Foreign
15 Intelligence Surveillance Act of 1978 ("FISA"), 50 USC §§1801-71,
16 by enacting the FISA Amendments Act of 2008, Pub L No 110-261, 122
17 Stat 2436 (FISAAA), codified at 50 USC §1885a. Of special
18 relevance to these cases, the new law included a provision for the
19 benefit of telecommunications companies that allowed the United
20 States to invoke a newly-created immunity and thus seek dismissal
21 of cases brought against telecommunications companies by certifying
22 that certain narrowly-defined circumstances were present,
23 including, as relevant to this litigation, that the defendant had
24 "provided assistance to an element of the intelligence community
25 * * * in connection with an intelligence activity involving
26 communications that was — (I) authorized by the President during
27 the period beginning on September 11, 2001, and ending on January
28 17, 2007; and (ii) designed to detect or prevent a terrorist

1 attack, or activities in preparation for a terrorist attack,
2 against the United States." FISAAA also contained a provision
3 (section 803) depriving states of authority to: investigate;
4 require through regulation or any other means the disclosure of
5 information about; impose any administrative sanction for; or
6 commence or maintain a civil action pertaining to "alleged
7 assistance to an element of the intelligence community" into an
8 electronic communication service provider. 50 USC §1885b.

9 On August 28, 2008, the Ninth Circuit remanded Hepting v
10 AT&T without rendering a decision "in light of the FISA Amendments
11 Act of 2008." CA Docket No 06-17137 (9th Cir) Doc #116.

12 On September 18, 2008, plaintiffs Carolyn Jewel, Tash
13 Hepting, Gregory Hicks, Erik Knutzen and Joice Walton — all, with
14 the exception of Walton, named plaintiffs in the Hepting action —
15 filed the instant lawsuit against the NSA and various government
16 officials. Pursuant to Rule of Procedure of the Judicial Panel on
17 Multidistrict Litigation 7.5(a), Jewel was reassigned to the
18 undersigned judge but not added to the MDL docket.

19 On September 19, 2008, the United States filed its motion
20 to dismiss all claims against telecommunications company defendants
21 in these cases, including the pending master consolidated
22 complaints based on section 802 of FISAAA. Doc #469. On December
23 23, 2008, the United States moved for summary judgment in the
24 "state cases" relying on section 803 of FISAAA. Doc #536. On June
25 3, 2009, the court granted both motions, finding the provisions of
26 FISAAA at issue on the motions constitutional and therefore
27 enforceable by the United States in the manner prescribed by
28 statute. Doc ##639, 640.

1 The June 3 orders left only five MDL cases — those
2 brought by private individuals and entities and naming United
3 States government officials and agencies as defendants (Al-Haramain
4 Islamic Foundation, Inc et al v Bush et al, No C 07-0109; Center
5 for Constitutional Rights et al v Bush e al, No C 07-1115; Guzzi v
6 Bush, No C 06-6225; Shubert et al v Bush et al, No C 07-0693) and
7 one “tagalong action” transferred by order of the MDL Panel after
8 the United States’ motions were filed (McMurray et al v Verizon
9 Communications Inc et al, C 09-0131) — and Jewel v NSA. The
10 motions by the United States and the telecommunications company
11 defendants to dismiss the McMurray case were argued on June 3 and,
12 after reviewing supplemental briefs, the court dismissed McMurray.
13 Doc #661.

14 This concludes the general procedural history; a
15 discussion of the specific motions that are the subjects of this
16 order now follows.

B

19 Jewel v NSA. In Jewel, meanwhile, the United States
20 “government defendants” in their official capacities filed the
21 instant motion (on April 3, 2009) asking the court to “dismiss
22 plaintiffs’ statutory claims for lack of jurisdiction, uphold the
23 Government’s privilege assertions, enter summary judgment for the
24 Government Defendants, and dismiss the case as to all defendants
25 and all claims.” C 08-4373 Doc #18 at 35. Plaintiffs filed an
26 opposition (Doc #29), and defendants replied (Doc #31).

27 Those defendants sued in their individual capacities —
28 George W Bush, Richard B Cheney, David S Addington, Keith B

1 Alexander, Michael V Hayden, John D McConnell, John
2 D Negroponete, Michael B Mukasey, Alberto R Gonzales, and John D
3 Ashcroft (see Doc #14) — (some of whom had become private citizens
4 in the intervening months) sought to avoid responding to the
5 complaint pending the outcome of the dispositive motion and moved
6 the court for an order relieving them of the responsibility to
7 respond (Doc #32), a step which prompted plaintiffs to file a
8 counter-motion for "relief from improper motion for reconsideration
9 by individual capacity defendants." Doc #33. The court heard
10 arguments on the dispositive motion on July 15, 2009, after which
11 plaintiffs requested — and obtained — leave to file a
12 supplemental brief on the scope of FISA preemption of the SSP (Doc
13 ##38, 40); the United States responded with its own supplemental
14 brief on September 4, 2009. Doc #46. On September 17, 2009, the
15 court held a hearing on the individual capacity defendants' request
16 to defer responding to the complaint and the plaintiffs' counter-
17 motion. Doc #47.

18 The fifty-five-page complaint contains seventeen causes
19 of action. It alleges that plaintiffs are, variously, "an
20 individual residing in Livermore, California [who] has been a
21 subscriber and user of AT&T's residential long distance telephone
22 service since February 1995; an individual residing in San Jose,
23 California [who] has been a subscriber and user of AT&T's
24 residential long distance telephone service since February 1995; an
25 individual residing in Petaluma, California [who] has been a
26 subscriber and user of AT&T's WorldNet dial-up internet service
27 since approximately June 2000; an individual residing in Los
28 Angeles, California [who] has been a subscriber and user of AT&T's

1 WorldNet dial-up internet service from at least October 2003 until
2 May 2005; and an individual residing in San Jose, California [who]
3 is a current subscriber and user of AT&T's WorldNet dial-up
4 internet service. Doc #1 at 5, ¶¶20-24.

5 The complaint alleges a factual narrative beginning with
6 President George W Bush's approval of, and the NSA's and various
7 government officials' implementation of, surveillance activities
8 inside the United States without statutory authorization or court
9 approval, including electronic surveillance of Americans' telephone
10 and internet communications (id ¶¶39-49); these allegations have in
11 some form appeared in a number of books and thousands of print and
12 broadcast media stories and blog posts and, accordingly, can now
13 fairly be characterized as common knowledge to most Americans. The
14 Jewel complaint also contains allegations about AT&T's involvement
15 in the surveillance activities that are quite similar to those set
16 forth in the complaint in Hepting and discussed in the court's
17 opinion in that case, to wit, that AT&T and the NSA maintained
18 special rooms at a Folsom Street facility in San Francisco for
19 purposes of carrying out surveillance of AT&T's communications
20 networks. ¶¶50-81. 439 F Supp 2d at 989-90. Plaintiffs also
21 allege that since October 2001, defendants have "continually
22 solicited and obtained the disclosure" of all information in AT&T's
23 major databases of stored telephone and Internet records and that
24 these records include the records of plaintiffs' phone and/or
25 internet use. ¶¶82-97. The complaint contains no other
26 allegations specifically linking any of the plaintiffs to the
27 alleged surveillance activities.

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1 The complaint purports to set forth seventeen causes of
2 action against the United States and defendant government officials
3 in their official and individual capacities, claiming that the
4 alleged actions violate the First and Fourth Amendments of the
5 United States Constitution and the separation of powers doctrine,
6 as well as various statutory provisions — section 109 of FISA, 50
7 USC §1809; the Wiretap Act, as amended by the Electronic
8 Communications Privacy Act, 18 USC §2511(1)(a), (1)(c), (1)(d)
9 and(3)(a); and the Stored Communications Act, 18 USC §2703(a), (b)
10 and (c). Because the defendants are sued in both their official
11 and individual capacities, the originally-named defendants remain
12 in the suit in their individual capacities only, while new holders
13 of their offices are substituted in as defendants for official-
14 capacity purposes pursuant to FRCP 25(d).²

15 Plaintiffs seek declaratory, injunctive and other
16 equitable relief, including: a declaration that the surveillance
17 program as alleged violates plaintiffs' rights under the First and
18 Fourth Amendments, 18 USC §2511, 18 USC §2703, 50 USC §1809, the
19 Administrative Procedure Act and the constitutional separation-of-
20 powers principle; an injunction prohibiting defendants' continued
21 use of the program and requiring the defendants to turn over an
22 inventory of their pertinent stored communications and records;
23 statutory, actual and punitive damages to the extent permitted by
24 law and according to proof; and attorney fees. Doc #1 at 53.

25
26 ² Rule 25(d) provides: "An action does not abate when a public officer who
27 is a party in an official capacity dies, resigns, or otherwise ceases to hold office
28 while the action is pending. The officer's successor is automatically substituted
as a party."

B

1
2 Shubert v Bush. The parties held a telephonic status
3 conference on September 3, 2009 in which the United States
4 announced its intention to renew its motion to dismiss. The court
5 offered the parties the opportunity to supplement their earlier
6 submissions on the motion and set a briefing schedule. After a
7 series of stipulated continuances assertedly due to a Department of
8 Justice re-evaluation of the circumstances in which the United
9 States would invoke the SSP in litigation (Doc ##674, 679), the
10 United States filed its motion on October 30. The matter was fully
11 briefed and the court heard arguments and took the matter under
12 submission on December 15, 2009.

13 The Shubert complaint, which has never been amended,
14 alleges that each of the plaintiffs resides and works in Brooklyn,
15 New York and, variously: "frequently calls and sends emails to the
16 United Kingdom, France and Italy and has made similar
17 communications as part of her work"; "frequently calls and sends
18 emails to family and friends in Egypt from her home, and has made
19 telephone calls as a part of her work"; "regularly makes phone
20 calls and sends email both within the United States [and] calls the
21 Netherlands and sends emails to the Netherlands and Norway from her
22 home"; "makes phone calls and sends email both within the United
23 States, and outside the United States." As to each plaintiff, the
24 complaint alleges "a good faith basis to believe that she, like so
25 many millions of Americans, has been surveilled without a warrant
26 pursuant to the illegal Spying Program." Doc #1 at 3, ¶¶ 5-8.
27 Defendants named in the complaint are current and former government
28 officials George W Bush, Michael V Hayden, Keith B Alexander,

1 Alberto Gonzales, John Ashcroft and Does 1-100. The current
2 holders of the various offices held by the originally-named
3 defendants have been substituted pursuant to FRCP 25(d).

4 Plaintiffs' factual allegations rely on the above-
5 referenced December 2005 New York Times article, on public
6 statements by the President and on other publicly available
7 information (Complaint ¶ 46-92). The complaint contains no factual
8 allegations specifically linking any of the plaintiffs to the
9 alleged surveillance activities; it contains only the allegations
10 of domestic and international telephone and electronic mail use.
11 The complaint alleges only interception of plaintiffs'
12 communications, but not, as in the other cases in this MDL and in
13 Jewel, collection and storage of records of monitored
14 communications.

15 The complaint purports to set forth causes of action
16 under: FISA's section 1810 asserting that they, as "aggrieved
17 persons]" are entitled to damages under 50 USC § 1810; the ECPA;
18 the SCA; and the Fourth Amendment. Plaintiffs seek certification
19 of their suit as a class action; a declaratory judgment on all
20 claims; an award of liquidated and/or compensatory damages; an
21 award of punitive damages; and attorney fees and costs.

22
23 II

24 Upon careful consideration of the allegations of both
25 complaints, the court has concluded that neither the Jewel
26 plaintiffs nor the Shubert plaintiffs have alleged facts sufficient
27 to establish their standing to proceed with their lawsuit against

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1 the President, the NSA and the other high-level government
2 officials named as defendants in these lawsuits.

3 Although most of the plaintiffs and nearly all of the
4 relevant factual allegations are the same as in Hepting, the
5 standing problem presented in these cases is markedly different.
6 In Hepting, the court rejected the AT&T defendants' arguments for
7 dismissal based on lack of standing, noting that plaintiffs' status
8 as customers of AT&T who used its telecommunications services was
9 sufficient to withstand the motion to dismiss for lack of standing:

10 AT & T also contends "[p]laintiffs lack standing to
11 assert their statutory claims (Counts II-VII) because
12 the FAC alleges no facts suggesting that their
13 statutory rights have been violated" and "the FAC
14 alleges nothing to suggest that the named plaintiffs
15 were themselves subject to surveillance." * * * But
16 AT & T ignores that the gravamen of plaintiffs'
17 complaint is that AT & T has created a dragnet that
18 collects the content and records of its customers'
19 communications. See, e g, FAC, ¶¶ 42-64. The court
20 cannot see how any one plaintiff will have failed to
21 demonstrate injury-in-fact if that plaintiff
22 effectively demonstrates that all class members have
23 so suffered. * * * As long as the named plaintiffs
24 were, as they allege, AT & T customers during the
25 relevant time period (FAC, ¶¶ 13-16), the alleged
26 dragnet would have imparted a concrete injury on each
27 of them.

28 439 F Supp 2d at 1000. Citing FEC v Akins, 524 US 11 (1998), the
court also rejected AT&T's contention that the diffuse nature of
the harm from the alleged dragnet deprived individual AT&T
customers of standing:

 This conclusion is not altered simply because the
alleged injury is widely shared among AT & T
customers.

* * *

 Here, the alleged injury is concrete even though it is
widely shared. Despite AT&T's alleged creation of a
dragnet to intercept all or substantially all of its

1 customers' communications, this dragnet necessarily
2 inflicts a concrete injury that affects each customer
3 in a distinct way, depending on the content of that
4 customer's communications and the time that customer
5 spends using AT&T services. Indeed, the present
situation resembles a scenario in which "large numbers
of individuals suffer the same common-law injury (say,
a widespread mass tort."

6 439 F Supp 2d at 1001.

7 Whereas the gravamen of the Hepting plaintiffs' complaint
8 was rooted in a contractual relationship between private parties,
9 the Jewel and Shubert cases, boiled to their essence, are both
10 efforts by citizens seeking to redress alleged misfeasance by the
11 executive branch of the United States government.

12 As the court noted in Hepting, "[w]hether styled as a
13 constitutional or prudential limit on standing, the [Supreme] Court
14 has sometimes determined that where large numbers of Americans
15 suffer alike, the political process, rather than the judicial
16 process, may provide the more appropriate remedy for a widely
17 shared grievance." Id at 1000, quoting FEC v Akins, 524 US 11, 23.
18 This special species of standing problem is directly relevant here.

19 Stated more generally, "[s]tanding will be denied to one
20 alleging only a generalized interest, shared by a large segment of
21 the public. * * * The courts do not want to be viewed as a panacea
22 of all of society's ills, a task too large and often inappropriate
23 for them to handle. If an injury is far-reaching, it is likely
24 that a better solution would come from a political forum." Charles
25 H Koch, Jr, 33 Federal Practice and Procedure: Judicial Review of
26 Administrative Action § 8413 at 452.

27 A considerable jurisprudence has developed around United
28 States citizens and taxpayers attempting to challenge government

1 actions or the manner in which Congress or the executive branch
2 manages and spends public funds. By and large, these challenges
3 have failed on standing grounds:

4 Because the interests of the taxpayer are, in essence,
5 the interests of the public at large, deciding a
6 constitutional claim based solely on taxpayer standing
7 "would be, not to decide a judicial controversy, but
8 to assume a position of authority over the
9 governmental acts of another and co-equal department,
10 an authority which plainly we do not possess."

11 Hein v Freedom From Religion Foundation, 551 US 587, 601 (2007),
12 quoting Frothingham v Mellon, 262 US 447, 489 (1923).

13 Cases in which plaintiffs sue the government in order to
14 stop or expose constitutional or other transgressions by government
15 officials present special standing considerations. A citizen may
16 not gain standing by claiming a right to have the government follow
17 the law. Ex parte Levitt, 302 US 633 (1937). The essence of
18 standing is the party's direct, personal stake in the outcome as
19 opposed to the issues the party seeks to have adjudicated in the
20 litigation:

21 The fundamental aspect of standing is that it focuses
22 on the party seeking to get his complaint before a
23 federal court and not on the issues he wishes to have
24 adjudicated. The "gist of the question of standing" is
25 whether the party seeking relief has "alleged such a
26 personal stake in the outcome of the controversy as to
27 assure that concrete adverseness which sharpens the
28 presentation of issues upon which the court so largely
depends for illumination of difficult constitutional
questions."

29 Flast v Cohen, 392 US 83, 99 (1968), quoting Baker v Carr, 369 US
30 186, 204 (1962).

31 The two cases at bar are, in essence, citizen suits
32 seeking to employ judicial remedies to punish and bring to heel
33 high-level government officials for the allegedly illegal and

1 unconstitutional warrantless electronic surveillance program or
2 programs now widely, if incompletely, aired in the public forum.
3 Plaintiffs have attempted to present their complaint as something
4 narrower than a generalized grievance by alleging interference with
5 their telephone and/or broadband internet subscription and/or use.
6 But such allegations do not avoid the problem. Telephone
7 subscribership and internet use are widespread on the scale of the
8 paying of taxes or the holding of United States citizenship: in
9 November 2005, 92.9% of United States households subscribed to
10 telephone service — 107 million households in all.³ In December
11 2005, there were 51,218,145 high-speed internet connections in the
12 United States; one year later, there were 82,809,845; by the end of
13 2007, there were over 100,000,000.⁴ Allegations of telephone use
14 for international calls do not fare much better.

15 These cases allege both statutory and constitutional
16 violations. This court has written at length in another case in
17 this MDL, Al-Haramain Islamic Foundation, Inc v Bush et al, about
18 the allegations necessary to make out a prima facie case to
19 establish "aggrieved person" status in a lawsuit based on
20 electronic surveillance (see, for example, 50 USC §1801(k)). 564
21 F Supp 2d 1109(ND Cal 2008); 595 F Supp 2d 1077 (ND Cal 2009). In
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23 ³ Alexander Belinfante, Telephone Subscribership In The United States (Data
24 through November 2006), Industry Analysis and Technology Division Wireline
25 Competition Bureau, Federal Communications Commission (May 2007)at 6, Table 1
26 http://www.fcc.gov/Document_Indexes/WCB/2007_index_WCB_Report.htmlDOC-272904A1.pdf
(consulted December 29, 2009).

27 ⁴ "High-Speed Services for Internet Access: Status as of June 30, 2007,"
28 Industry Analysis and Technology Division, Wireline Competition Bureau, Federal
Communications Commission (March 2008)at 7, Table 1. Available at
http://www.fcc.gov/Document_Indexes/WCB/2008_index_WCB_Report.html, DOC-280906A1.pdf
(consulted December 29, 2009).

1 that case, plaintiffs were able to allege in an amended complaint
2 following dismissal of their original complaint "a sequence of
3 events pertaining directly to the government's investigations of
4 Al-Haramain Oregon" and the court denied the government's motion to
5 dismiss the amended complaint. 595 F Supp 2d at 1079. While
6 plaintiffs in Jewel and Shubert assert that they are aggrieved,
7 they neither allege facts nor proffer evidence sufficient to
8 establish a prima facie case that would differentiate them from the
9 mass of telephone and internet users in the United States and thus
10 make their injury "concrete and particularized" consonant with the
11 principles articulated in Lujan v Defenders of Wildlife, 504 US
12 555, 560 (1992).

13 As for plaintiffs' constitutional claims, "when a court
14 is asked to undertake constitutional adjudication, the most
15 important and delicate of its responsibilities, the requirement of
16 concrete injury further serves the function of insuring that such
17 adjudication does not take place unnecessarily." Schlesinger v
18 Reservists Committee to Stop the War, 418 US 208, 221 (1974). This
19 is especially true when, as here, the constitutional issues at
20 stake in the litigation seek judicial involvement in the affairs of
21 the executive branch and national security concerns appear to
22 undergird the challenged actions. In such cases, only plaintiffs
23 with strong and persuasive claims to Article III standing may
24 proceed.

25
26 III

27 Because the court GRANTS the United States' motions to
28 dismiss based on the specific standing grounds stated herein, the

1 court declines to rule on the sovereign immunity, SSP and other
2 issues raised in the United States' motions.

3 For the reasons stated herein, the government defendants'
4 motion to dismiss in Jewel et al v NSA et al, C 08-4373 Doc #18, is
5 GRANTED. Inasmuch as plaintiffs lack the particularized injury to
6 afford them standing to sue defendants in their official
7 capacities, so also plaintiffs lack standing to pursue claims
8 against defendants as individuals. The substitution of new
9 individuals into certain official positions during the pendency of
10 these actions does not affect this conclusion and hence renders
11 moot the motions at docket numbers 32 and 33 pertaining to the
12 obligation of the defendants sued in their individual capacity to
13 respond to the complaint. The motions at docket numbers 32 and 33
14 are therefore DENIED. Further, the court's ruling renders moot
15 plaintiffs' substitution of John C Yoo and Jack L Goldsmith for Doe
16 defendants 1 and 2, respectively. Doc #56. Plaintiffs therefore
17 are DENIED leave to amend the complaint.

18 For the reasons stated herein, the United States' motion
19 to dismiss in Shubert et al v Obama et al, C 07-0693 Doc #38 (MDL
20 Doc #680) is GRANTED.

21 The clerk is directed to close these two files and to
22 terminate all pending motions.

23
24 IT IS SO ORDERED.

25
26 

27 VAUGHN R WALKER
28 United States District Chief Judge