

1 BETH S. BRINKMANN  
 Deputy Assistant Attorney General  
 2 DOUGLAS N. LETTER  
 Terrorism Litigation Counsel  
 3 JOSEPH H. HUNT  
 Director, Federal Programs Branch  
 4 VINCENT M. GARVEY  
 Deputy Branch Director  
 5 ANTHONY J. COPPOLINO  
 Special Litigation Counsel  
 6 MARCIA BERMAN  
 Senior Trial Counsel  
 7 PAUL E. AHERN  
 Trial Attorney  
 8 U.S. Department of Justice  
 Civil Division, Federal Programs Branch  
 9 20 Massachusetts Avenue, N.W.  
 Washington, D.C. 20001  
 10 Phone: (202) 514-4782  
 Fax: (202) 616-8460

11 *Attorneys for the Government Defendants*

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

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

**No. M:06-cv-01791-VRW**  
  
**EXHIBIT 1 TO GOVERNMENT  
 DEFENDANTS' MEMORANDUM IN  
 SUPPORT OF RENEWED MOTION  
 TO DISMISS AND FOR  
 SUMMARY JUDGMENT**

19 \_\_\_\_\_ )  
 20 This Document Relates Solely To: )  
 21 *Shubert et al. v. United States of America et. al.* )  
 (Case No. 07-cv-00693-VRW) )

**PUBLIC DECLARATION OF  
 DENNIS C. BLAIR,  
 DIRECTOR OF  
 NATIONAL INTELLIGENCE**

Date: December 15, 2009  
 Time: 10:00 a.m.  
 Courtroom: 6, 17<sup>th</sup> Floor  
 Chief Judge Vaughn R. Walker

1 I, Dennis C. Blair, do hereby state and declare as follows:

2 **INTRODUCTION**

3  
4 1. I am the Director of National Intelligence (DNI) of the United States. I have held  
5 this position since January 29, 2009. In 2002, I retired as an Admiral from the United  
6 States Navy after a 34-year career, which included my service as Commander-in-Chief of the  
7 U.S. Pacific Command. During my naval career, I also served as Director of the Joint Staff and  
8 as Associate Director of Central Intelligence for Military Support, as well as in policy positions  
9 on the National Security Council staff. From 2003 to 2006, I was President and CEO of the  
10 Institute for Defense Analyses, an organization that analyzes and makes recommendations on  
11 national security policy matters.

12  
13 2. The purpose of this declaration is to formally assert, in my capacity as the  
14 Director of National Intelligence and head of the United States Intelligence Community, the  
15 military and state secrets privilege (hereafter "state secrets privilege") and a statutory privilege  
16 under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect intelligence  
17 sources and methods that are at risk of disclosure in this case. The statements made herein are  
18 based on my personal knowledge as well as on information provided to me in my official  
19 capacity as the Director of National Intelligence.

20  
21 **SUMMARY**

22  
23 3. In the course of my official duties, I have been advised of this lawsuit and the  
24 allegations at issue in the plaintiffs' Amended Complaint. In personally considering this matter,  
25 I have executed a separate Classified *In Camera*, *Ex Parte* Declaration dated October 30, 2009.  
26 Moreover, I have read and personally considered the information contained in the Public and in  
27 the Classified *In Camera*, *Ex Parte* Declarations of Lieutenant General Keith B. Alexander,  
28 Director of the National Security Agency, executed on October 30, 2009 (hereafter "Public NSA

1 Declaration” and “Classified NSA Declaration”). Disclosure of the information covered by this  
2 privilege assertion reasonably could be expected to cause exceptionally grave damage to the  
3 national security of the United States and, therefore, the information should be excluded from  
4 any use in this case. In addition, it is my judgment that sensitive state secrets are so central to the  
5 subject matter of the litigation that any attempt to proceed in the case will substantially risk the  
6 disclosure of the classified privileged national security information described herein and will  
7 therefore risk exceptionally grave damage to the national security of the United States.  
8

#### 9 **BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE**

10 4. The position of Director of National Intelligence was created by Congress in the  
11 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 1011(a) and  
12 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of Title I of  
13 the National Security Act of 1947). Subject to the authority, direction, and control of the  
14 President, the Director of National Intelligence serves as the head of the U.S. Intelligence  
15 Community and as the principal adviser to the President, the National Security Council, and the  
16 Homeland Security Council for intelligence matters related to the national security. *See* 50  
17 U.S.C. § 403(b)(1), (2).  
18  
19

20 5. The United States “Intelligence Community” includes the Office of the Director  
21 of National Intelligence; the Central Intelligence Agency; the National Security Agency; the  
22 Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National  
23 Reconnaissance Office; other offices within the Department of Defense for the collection of  
24 specialized national intelligence through reconnaissance programs; the intelligence elements of  
25 the military services, the Federal Bureau of Investigation, the Department of the Treasury, the  
26 Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau  
27 of Intelligence and Research of the Department of State; the elements of the Department of  
28

1 Homeland Security concerned with the analysis of intelligence information; and such other  
2 elements of any other department or agency as may be designated by the President, or jointly  
3 designated by the DNI and heads of the department or agency concerned, as an element of the  
4 Intelligence Community. *See* 50 U.S.C. § 401a(4).

5  
6 6. The responsibilities and authorities of the Director of National Intelligence are set  
7 forth in the National Security Act of 1947, as amended. *See* 50 U.S.C. § 403-1. These  
8 responsibilities include ensuring that national intelligence is provided to the President, the heads  
9 of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of  
10 Staff and senior military commanders, and the Senate and House of Representatives and  
11 committees thereof. *See* 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the  
12 objectives of, determining the requirements and priorities for, and managing and directing the  
13 tasking, collection, analysis, production, and dissemination of national intelligence by elements  
14 of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for  
15 developing and determining, based on proposals submitted by the heads of agencies and  
16 departments within the Intelligence Community, an annual consolidated budget for the National  
17 Intelligence Program for presentation to the President, and for ensuring the effective execution of  
18 the annual budget for intelligence and intelligence activities, and for managing and allotting  
19 appropriations for the National Intelligence Program. *Id.* § 403-1(c)(1)-(5).

22  
23 7. In addition, the National Security Act of 1947, as amended, provides that “[t]he  
24 Director of National Intelligence shall protect intelligence sources and methods from  
25 unauthorized disclosure.” 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI  
26 establishes and implements guidelines for the Intelligence Community for the classification of  
27 information under applicable law, Executive orders, or other Presidential directives and access to  
28 and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible

1 for the establishment of uniform standards and procedures for the granting of access to Sensitive  
2 Compartmented Information (“SCI”) to any officer or employee of any agency or department of  
3 the United States, and for ensuring the consistent implementation of those standards throughout  
4 such departments and agencies. *Id.* § 403-1(j)(1), (2).

5 8. By virtue of my position as the Director of National Intelligence, and unless  
6 otherwise directed by the President, I have access to all intelligence related to the national  
7 security that is collected by any department, agency, or other entity of the United States. *See* 50  
8 U.S.C. § 403-1(b); Executive Order 12333 § 1.3(a), as amended. Pursuant to Executive Order  
9 No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order 13292 (March 25, 2003),  
10 reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me  
11 to exercise original TOP SECRET classification authority.  
12  
13

14 **ASSERTION OF STATE SECRETS PRIVILEGE**

15 9. After careful and personal consideration of the matter, based upon my own  
16 knowledge and information obtained in the course of my official duties, including the  
17 information contained in the Public and Classified *In Camera*, *Ex Parte* Declarations of  
18 Lieutenant General Keith B. Alexander, Director of the National Security Agency, I have  
19 determined that the disclosure of certain information—as set forth herein and described in more  
20 detail in my classified declaration and in the Classified NSA Declaration—would cause  
21 exceptionally grave damage to the national security of the United States and, therefore, must be  
22 protected from disclosure and excluded from this case. Thus, as to this information, I formally  
23 assert the state secrets privilege. In addition, it is my judgment that sensitive state secrets are so  
24 central to the subject matter of the litigation that any attempt to proceed in the case will  
25 substantially risk the disclosure of the privileged information described herein and in more detail  
26 in the classified declarations, and will therefore risk exceptionally grave damage to the national  
27  
28

1 security of the United States.

2 **ASSERTION OF STATUTORY PRIVILEGE UNDER NATIONAL SECURITY ACT**

3 10. Through this declaration, I also hereby invoke and assert a statutory privilege held  
4 by the Director of National Intelligence under the National Security Act to protect the  
5 information described herein. *See* 50 U.S.C. § 403-1(i)(1). My assertion of this statutory  
6 privilege for intelligence sources and methods is coextensive with and protects the information  
7 subject to my state secrets privilege assertion.  
8

9 **INFORMATION SUBJECT TO ASSERTIONS OF PRIVILEGE**

10 11. In general and unclassified terms, the following categories of information are  
11 subject to my state secrets and statutory privilege assertions:  
12

- 13 A. Information concerning the specific nature of the al-Qaeda  
14 terrorist threat; and  
15 B. Information that may tend to confirm or deny whether the  
16 plaintiffs have been subject to any alleged NSA intelligence  
17 activity that may be at issue in this matter; and  
18 C. Any information concerning NSA intelligence activities,  
19 sources, or methods that may relate to or be necessary to  
20 adjudicate plaintiffs' allegations, including allegations that  
21 the NSA, with the assistance of telecommunications  
22 carriers, indiscriminately intercepts the content of  
23 communications and also, to the extent applicable to  
24 plaintiffs' claim, the communications records of millions of  
25 Americans as part of an alleged "Program" authorized by  
26 the President after 9/11. *See, e.g.*, Amended Compl. ¶¶ 1-8.

27 The scope of this assertion includes but is not limited to:

- 28 (i) Information concerning the scope and operation  
of the now inoperative "Terrorist Surveillance Program"  
("TSP") regarding the interception of the content of certain  
one-end international communications reasonably believed  
to involve a member or agent of al-Qaeda or an affiliated  
terrorist organization, and any other information related to  
demonstrating that the NSA does not otherwise engage in  
the content surveillance dragnet that the plaintiffs allege;  
and

1 (ii) Any other information concerning NSA  
2 intelligence activities, sources, or methods that would be  
3 necessary to adjudicate the plaintiffs' claims, including, to  
4 the extent applicable, information that would tend to  
5 confirm or deny whether or not the NSA obtained from  
6 telecommunications companies communication  
7 transactional records; and

8 (iii) Information that may tend to confirm or deny  
9 whether any telecommunications carrier has provided  
10 assistance to the NSA in connection with any alleged  
11 activity.

### 12 DESCRIPTION OF INFORMATION AND HARM OF DISCLOSURE

13 12. As set forth in my classified declaration submitted solely for the Court's *in*  
14 *camera* and *ex parte* review, disclosure of information in the foregoing categories would cause  
15 exceptionally grave harm to national security. I briefly summarize below, in unclassified terms,  
16 the information subject to my privilege assertion and the harms to national security that would  
17 result from disclosure of this information.

18 13. First, I am asserting privilege over information that would reveal whether  
19 particular individuals, including the named plaintiffs in this lawsuit, have been subject to the  
20 alleged NSA intelligence activities. Disclosure of such information would cause exceptionally  
21 grave damage to the national security. The NSA cannot publicly confirm or deny whether any  
22 particular individual is subject to surveillance activities. If the NSA were to reveal that an  
23 individual is the target of surveillance, the collection capability of that individual would certainly  
24 be compromised. On the other hand, if the NSA were to reveal that an individual is not the  
25 target of surveillance, adversaries would know that a particular individual has avoided  
26 surveillance and is a secure source for communicating. Moreover, providing assurances to those  
27 individuals that are not being targeted quickly becomes unworkable when faced with a case in  
28 which the individual has in fact been targeted. If the NSA were to confirm that any specific

1 individual is not the target of surveillance, but later refuse to confirm or deny that information in  
2 a case involving an actual target, it would be apparent that surveillance was occurring in the  
3 latter case. The only recourse for NSA is to neither confirm nor deny whether someone has been  
4 targeted or subject to NSA activities, regardless of whether the individual has been targeted or  
5 not. To say otherwise when challenged in litigation would result in the frequent, routine  
6 exposure of NSA information, sources, and methods, and would severely undermine surveillance  
7 activities in general.  
8

9       14.     Second, I am also asserting privilege over any other facts concerning NSA  
10 intelligence activities, sources, or methods that may relate to or be necessary to adjudicate the  
11 plaintiffs' claims, including, but not limited to, allegations that the NSA, with the assistance of  
12 telecommunication companies, has indiscriminately intercepted the content and obtained large  
13 quantities of communications records as part of the Program authorized by the President after  
14 9/11. *See, e.g.*, Amended Compl. ¶¶ 1-4, 58. As noted above, my privilege assertion  
15 encompasses (1) facts concerning the operation of the now-defunct Terrorist Surveillance  
16 Program, including any facts needed to demonstrate that the TSP was limited  
17 to the interception of the content<sup>1</sup> of one-end foreign communications reasonably believed to  
18 involve a member or agent of al-Qaeda or an affiliated terrorist organization, and that the NSA  
19 does not otherwise conduct a dragnet of content surveillance as the plaintiffs allege; and, to the  
20 extent relevant, (2) information concerning whether or not the NSA obtains communication  
21 transactional records from telecommunications companies.  
22  
23  
24

25       15.     As the NSA indicates, *see* Public NSA Decl. ¶ 19, the NSA's collection of the  
26 content of communications under the TSP was directed at international communications in which  
27 a participant was reasonably believed to be associated with al-Qaeda or an affiliated  
28

---

<sup>1</sup> The term "content" is used herein to refer to the substance, meaning, or purport of a communication, as defined in 18 U.S.C. § 2510(8).



1 organization. Thus, as the Government has previously stated, plaintiffs' allegation that the NSA  
2 has indiscriminately collected the content of millions of communications sent or received by  
3 people inside the United States after 9/11 under the TSP is false. I concur with the NSA that to  
4 the extent it must demonstrate in this case that the TSP was not the content dragnet plaintiffs  
5 allege, or demonstrate that the NSA has not otherwise engaged in the alleged content dragnet,  
6 highly classified NSA intelligence sources and methods about the operation of the TSP and other  
7 NSA intelligence activities would be disclosed or at risk of disclosure which would cause  
8 exceptionally grave harm to national security.  
9

10 16. To the extent implicated by the plaintiffs' allegations in this case, I am also  
11 asserting privilege over information concerning whether or not the NSA obtained from  
12 telecommunications companies the transactional records of those companies' customers,  
13 including the plaintiffs. *See* Amended Compl. ¶¶ 5-8, 58. I concur with the NSA that  
14 confirmation or denial of any information concerning this allegation would cause exceptionally  
15 grave harm to national security, including by risking disclosure of whether or not the NSA  
16 utilizes particular intelligence sources and methods and, thus, the NSA's capabilities or lack  
17 thereof.  
18

19 17. Likewise, I am asserting privilege over information that may tend to confirm or  
20 deny whether or not any telecommunications provider has assisted the NSA with alleged  
21 intelligence activities. The disclosure of any information that would tend to confirm or deny  
22 allegations of such assistance would cause exceptionally grave harm to the national security.  
23 Confirming or denying such allegations, again, would reveal to foreign adversaries whether or  
24 not the NSA utilizes particular intelligence sources and methods and, thus, would either  
25 compromise actual sources and methods or disclose that the NSA does not utilize a particular  
26 source or method. Such confirmation or denial would also replace speculation with certainty for  
27  
28

1 hostile foreign adversaries who are balancing the risk that a particular channel of communication  
2 may not be secure against the need to communicate efficiently.

3 18. Finally, to the extent specific information about the al-Qaeda threat is relevant to  
4 litigation of plaintiffs' allegations as to post-9/11 actions taken to meet that threat, such  
5 information could not be disclosed without revealing intelligence sources, methods, and  
6 information of the United States and thereby causing exceptionally grave damage to the national  
7 security. Therefore, I assert the state secrets and DNI statutory privilege to protect such  
8 information from disclosure.  
9

10 19. I am unable to describe further on the public record the information covered by  
11 my privilege assertion and the national security harms associated with the disclosure of such  
12 information. Accordingly, I respectfully refer the Court to my classified declaration, along with  
13 the NSA's classified declaration, both of which are submitted in this case solely for the Court's  
14 *in camera* and *ex parte* review.  
15

### 16 CONCLUSION

17 20. In sum, I am asserting the state secrets privilege and the DNI's statutory privilege  
18 set forth in 50 U.S.C. § 403-1(i)(1) to protect the classified national security information  
19 described herein, in my classified declaration and in the Classified NSA Declaration. Moreover,  
20 because proceedings in this case risk disclosure of privileged and classified intelligence-related  
21 information, I respectfully request that the Court not only protect that information from  
22 disclosure, but to take all steps necessary, including dismissal of this action, to protect the  
23  
24  
25  
26  
27  
28

1 intelligence information, sources, and methods described herein in order to prevent exceptionally  
2 grave harm to the national security of the United States.

3  
4 I declare under penalty of perjury that the foregoing is true and correct.  
5

6  
7 DATE: 30 Oct 2009

Dennis Blair

8 DENNIS C. BLAIR  
9 Director of National Intelligence  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28