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

14	CAROLYN JEWEL, <i>et al.</i>)	No. 08-cv-4873-JSW
15	Plaintiffs,)	
16	v.)	PUBLIC DECLARATION OF
17	NATIONAL SECURITY AGENCY <i>et al.</i>)	FRANCES J. FLEISCH,
18	Defendants.)	NATIONAL SECURITY AGENCY
19)	Date: November 2, 2012
20)	Time: 9:00 a.m.
21)	Courtroom 11, 19 th Floor
22)	Judge Jeffrey S. White

21 I, Frances J. Fleisch, do hereby state and declare as follows:

22 **I. Introduction**

23 1. I am the Executive Director for the National Security Agency (NSA), an
 24 intelligence agency within the Department of Defense. I have held this position since June 2010.
 25 As the Executive Director, I serve as an adjunct to the Deputy Director for all NSA matters.
 26 Under our internal regulations, and in the absence of the Director and Deputy Director, I am
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1 responsible for directing the NSA, overseeing the operations undertaken to carry out its mission
2 and, by specific charge of the President and the Director of National Intelligence, protecting
3 NSA activities and intelligence sources and methods. I have been designated an original TOP
4 SECRET classification authority under Executive Order No. 13526, 75 Fed. Reg. 707 (2009) and
5 Department of Defense Directive No. 5200.1-R, Information and Security Program Regulation,
6 32 C.F.R. § 159a.12 (2000).

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8 2. The purpose of this declaration is to support an assertion of the military and state
9 secrets privilege (hereafter, "state secrets privilege") by the Director of National Intelligence
10 ("DNI") as the head of the Intelligence Community, as well as the DNI's assertion of a statutory
11 privilege under the National Security Act, to protect information related to NSA activities
12 described herein below. General Keith B. Alexander, the Director of the National Security
13 Agency, has been sued in his official and individual capacity in the above captioned litigation
14 and has recused himself from the decision on whether to assert privilege in his official capacity.
15 As the Executive Director, and by specific delegation of the Director, I am authorized to review
16 the materials associated with this litigation, prepare whatever declarations I determine are
17 appropriate, and determine whether to assert the NSA's statutory privilege. Through this
18 declaration, I hereby invoke and assert the NSA's statutory privilege set forth in Section 6 of the
19 National Security Agency Act of 1959, Public Law No. 86-36 (codified as a note to 50 U.S.C. §
20 402) ("NSA Act"), to protect the information related to NSA activities described herein below.
21 The statements made herein are based on my personal knowledge of NSA activities and
22 operations, and on information made available to me as the Executive Director of the NSA. I
23 have executed a classified declaration concerning this matter solely for the Court's *in camera*, *ex*
24 *parte* review.
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II. Summary

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2 3. In the course of my official duties, I have been advised of the above-captioned
3 *Jewel* action, as well as a related action in *In re NSA Telecommunications Records Litigation*
4 (M:06-cv-1791)---*Shubert v. Obama* (07-cv-00693), and I have reviewed the allegations raised
5 in this litigation, including the Complaint filed in the *Jewel* action on September 18, 2008, and
6 the Second Amended Complaint (“SAC”) filed in the *Shubert* action on May 8, 2012.¹ In sum,
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8 plaintiffs allege that, after the 9/11 attacks, the NSA received presidential authorization to
9 engage in “dragnet” communications surveillance in concert with major telecommunications
10 companies. *See, e.g., Jewel* Compl. ¶¶ 2-3; *Shubert* SAC ¶¶ 1-7. Plaintiffs allege that the
11 presidentially-authorized activities at issue in this litigation went beyond the “Terrorist
12 Surveillance Program” (“TSP”), which was publicly acknowledged by the President in
13 December 2005 and was limited to the interception of specific international communications
14 involving persons reasonably believed to be associated with al Qaeda and affiliated terrorist
15 organizations. Rather, plaintiffs allege that other intelligence activities were also authorized by
16 the President after 9/11, and that, with the assistance of telecommunication companies including
17 AT&T and Verizon, the NSA has indiscriminately intercepted the content and obtained the
18 communications records of millions of ordinary Americans as part of an alleged presidentially-
19 authorized “Program” after 9/11. *See Jewel* Compl. ¶¶ 2-13; 39-97; *Shubert* SAC ¶¶ 1-7; 57-58;
20 60-91.
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26 ¹ This public declaration and my classified declaration submitted solely for *in camera, ex*
27 *parte* review, addresses and asserts privilege with respect to allegations raised in both the *Jewel*
28 and *Shubert* actions. In addition, the harm to national security that would result from the
disclosure of NSA sources and methods at issue in this litigation is applicable to similar
allegations concerning NSA activities raised in other lawsuits in *In re NSA Telecommunications*
Records Litigation (M:06-cv-1791).

1 4. I cannot disclose on the public record the specific nature of NSA information or
2 activities implicated by the plaintiffs' allegations. As described further below, the disclosure of
3 information related to the NSA's activities, sources and methods implicated by the plaintiffs'
4 allegations reasonably could be expected to cause exceptionally grave damage to the national
5 security of the United States. In addition, it is my judgment that sensitive state secrets are so
6 central to the subject matter of the litigation that any attempt to proceed in the case risks
7 disclosure of the classified privileged national security information described herein and
8 exceptionally grave damage to the national security of the United States. In particular, the fact
9 that there has been public speculation about alleged NSA activities, including in media reports,
10 books, or plaintiffs' declarations, does not diminish the need to protect intelligence sources and
11 methods from further exposure. The process of sorting out whether any allegation is true, partly
12 true, or wholly false, would necessarily risk or require disclosure of the intelligence sources and
13 methods and confirm to our adversaries whether or not, or to what extent, the NSA utilizes
14 certain sources and methods, and thereby cause exceptionally grave damage to the national
15 security.
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19 **III. Background Information**

20 **A. The National Security Agency**

21 5. The NSA was established by Presidential Directive in 1952 as a separately
22 organized agency within the Department of Defense. The NSA's foreign intelligence mission
23 includes the responsibility to collect, process, analyze, produce, and disseminate signals
24 intelligence (SIGINT) information, of which communications intelligence ("COMINT") is a
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1 significant subset, for (a) national foreign intelligence purposes, (b) counterintelligence purposes,
2 and (c) the support of military operations. *See* Executive Order 12333, § 1.7(c), as amended.²

3 6. The NSA's SIGINT responsibilities include establishing and operating an
4 effective unified organization to conduct SIGINT activities set forth in E.O. No. 12333,
5 § 1.7(c)(2). In performing its SIGINT mission, NSA has developed a sophisticated worldwide
6 SIGINT collection network. The technological infrastructure that supports the NSA's foreign
7 intelligence information collection network has taken years to develop at a cost of billions of
8 dollars and untold human effort. It relies on sophisticated collection and processing technology.

9 7. There are two primary reasons for gathering and analyzing foreign intelligence
10 information. The first, and most important, is to gain information required to direct U.S.
11 resources as necessary to counter external threats and in support of military operations. The
12 second reason is to obtain information necessary to the formulation of U.S. foreign policy.
13 Foreign intelligence information provided by the NSA is thus relevant to a wide range of
14 important issues, including military order of battle; threat warnings and readiness; arms
15 proliferation; international terrorism; counter-intelligence; and foreign aspects of international
16 narcotics trafficking.
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20 8. Foreign intelligence produced by COMINT activities is an extremely important
21 part of the overall foreign intelligence information available to the United States and is often
22 unobtainable by other means. Public disclosure of either the capability to collect specific
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25 ² Executive Order 12333, reprinted as amended in 50 U.S.C § 401 note, generally
26 describes the NSA's authority to collect foreign intelligence that is not subject to the FISA
27 definition of electronic surveillance, including activities undertaken abroad. Section 1.7(c) of
28 E.O. 12333, as amended, specifically authorizes the NSA to "Collect (including through
clandestine means), process, analyze, produce, and disseminate signals intelligence information
for foreign intelligence and counterintelligence purposes to support national and departmental
missions."

1 communications or the substance of the information derived from such collection itself can
2 easily alert targets to the vulnerability of their communications. Disclosure of even a single
3 communication holds the potential of revealing intelligence collection techniques that are applied
4 against targets around the world. Once alerted, targets can frustrate COMINT collection by
5 using different or new encryption techniques, by disseminating disinformation, or by utilizing a
6 different communications link. Such evasion techniques may inhibit access to the target's
7 communications and therefore deny the United States access to information crucial to the
8 defense of the United States both at home and abroad. COMINT is provided special statutory
9 protection under 18 U.S.C. § 798, which makes it a crime to knowingly disclose to an
10 unauthorized person classified information "concerning the communication intelligence activities
11 of the United States or any foreign government."
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14 **B. September 11, 2001 and the al Qaeda Threat**

15 9. On September 11, 2001, the al Qaeda terrorist network launched a set of
16 coordinated attacks along the East Coast of the United States. Four commercial jetliners, each
17 carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al
18 Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two
19 of the jetliners, which they deliberately flew into the Twin Towers of the World Trade Center.
20 Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third
21 jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth
22 jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville,
23 Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or
24 the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation
25 blow to the Government of the United States—to kill the President, the Vice President, or
26 Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—
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1 the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition,
2 these attacks shut down air travel in the United States, disrupted the Nation's financial markets
3 and government operations, and caused billions of dollars of damage to the economy.

4 10. On September 14, 2001, a national emergency was declared "by reason of the
5 terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the
6 continuing and immediate threat of further attacks on the United States," Presidential
7 Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also
8 immediately began plans for a military response directed at al Qaeda's training grounds and
9 havens in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint
10 Resolution authorizing the President of the United States "to use all necessary and appropriate
11 force against those nations, organizations, or persons he determines planned, authorized,
12 committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military
13 Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth.").
14 Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate"
15 for the United States to exercise its right "to protect United States citizens both at home and
16 abroad," and acknowledged in particular that "the President has authority under the Constitution
17 to take action to deter and prevent acts of international terrorism against the United States." *Id.*
18 pmb1.³
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24 ³ Following the 9/11 attacks, the United States also immediately began plans for a
25 military response directed at al Qaeda's training grounds and havens in Afghanistan. A Military
26 Order was issued stating that the attacks of September 11 "created a state of armed conflict," see
27 Military Order by the President § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001), and that al
28 Qaeda terrorists "possess both the capability and the intention to undertake further terrorist
attacks against the United States that, if not detected and prevented, will cause mass deaths, mass
injuries, and massive destruction of property, and may place at risk the continuity of the
operations of the United States Government," and concluding that "an extraordinary emergency
exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34.
Indeed, shortly after the attacks, NATO took the unprecedented step of invoking article 5 of the
Public Declaration of Frances J. Fleisch, National Security Agency
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1 11. As a result of the unprecedented attacks of September 11, 2001, the United States
2 found itself immediately propelled into a conflict with al Qaeda and its associated forces, a set of
3 groups that possesses the evolving capability and intention of inflicting further attacks on the
4 United States. That conflict is continuing today, at home as well as abroad. Moreover, the
5 conflict against al Qaeda and its allies is a very different kind of conflict, against a very different
6 enemy, than any other conflict or enemy the Nation has previously faced. Al Qaeda and its
7 affiliates operate not as a traditional nation-state but as a diffuse, decentralized network of
8 individuals, cells, and loosely associated, often disparate groups, that act sometimes in concert,
9 sometimes independently, and sometimes in the United States, but always in secret—and their
10 mission is to destroy lives and to disrupt a way of life through terrorist acts. Al Qaeda works in
11 the shadows; secrecy is essential to al Qaeda's success in plotting and executing its terrorist
12 attacks.
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15 12. After the September 11 attacks, the NSA received presidential authorization and
16 direction to detect and prevent further terrorist attacks within the United States by intercepting
17 the content⁴ of communications for which there were reasonable grounds to believe that (1) such
18 communications originated or terminated outside the United States and (2) a party to such
19 communication was a member or agent of al Qaeda or an affiliated terrorist organization. The
20 existence of this activity was disclosed by then-President Bush in December 2005 (and
21 subsequently referred to as the "Terrorist Surveillance Program" or "TSP").⁵
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25 North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties]
26 shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63
27 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

28 ⁴ 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).

⁵ On January 17, 2007, the Government made public the general facts that new orders of
the Foreign Intelligence Surveillance Court had been issued that authorized the Government to
Public Declaration of Frances J. Fleisch, National Security Agency
Carolyn Jewel, et al. v. National Security Agency, et al. (No. 08-cv-4873-JSW)

IV. Information Protected by Privilege

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2 13. I understand that the plaintiffs in *Jewel* and *Shubert* allege that they are customers
3 of telecommunications companies and that the NSA, with the assistance of telecommunications
4 carriers, has indiscriminately intercepted the content of the communications of millions of
5 ordinary Americans, including the plaintiffs, as part an alleged presidentially authorized
6 “Program” after 9/11.⁶ In addition, the plaintiffs in *Jewel* and *Shubert* allege that the NSA,
7 again with the alleged assistance of telecommunication carriers, has been and is continuing to
8 collect the private telephone and Internet communication transactional records of millions of
9 Americans.⁷
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13 target for collection international communications into or out of the United States where there is
14 probable cause to believe that one of the communicants is a member or agent of al Qaeda or an
15 associated terrorist organization; that, as a result of these orders, any electronic surveillance that
16 had been occurring as part of the TSP was then being conducted subject to the approval of the
FISA Court; and that, under these circumstances, the TSP was not reauthorized.

17 ⁶ Specifically, the *Jewel* Plaintiffs allege that, pursuant to a presidentially authorized
18 program after the 9/11 attacks, the NSA, with the assistance of AT&T, acquired and continues to
19 acquire the content of phone calls, emails, instant messages, text messages, web and other
20 communications, both international and domestic, of millions of ordinary Americans ---
“practically every American who uses the phone system or the Internet”--- including the
21 Plaintiffs. See *Jewel* Complaint ¶¶ 7, 9, 10; see also *id.* at ¶¶ 39-97. The *Shubert* Plaintiffs
22 similarly allege that the contents of “virtually every telephone, Internet and email
communication sent from or received within the United States since shortly after September 11,
2001,” including Plaintiffs’ communications, are being “searched, seized, intercepted, and
23 subject to surveillance without a warrant, court order or any other lawful authorization in
violation of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1810.” See *Shubert*
24 SAC ¶ 1; see also *id.* ¶¶ 5, 7.

25 ⁷ Specifically, the *Jewel* plaintiffs allege that NSA has “unlawfully solicited and obtained
26 from telecommunications companies the complete and ongoing disclosure of the private
27 telephone and internet transactional records” of millions of ordinary Americans, including
28 plaintiffs. See *Jewel* Complaint ¶¶ 7, 10, 11, 13, 82-97. The *Shubert* plaintiffs allege that “NSA
now monitors huge volumes of records of domestic emails and Internet searches. . . [and]
receives this so-called ‘transactional’ data from . . . private companies . . .” See *Shubert* SAC
¶ 102.

1 14. In general and unclassified terms, the following categories of information are
2 subject to the DNI's assertion of the state secrets privilege and statutory privilege under the
3 National Security Act, as well as my assertion of the NSA statutory privilege:

- 4 A. Information that may tend to confirm or deny whether the
5 plaintiffs have been subject to any alleged NSA intelligence
6 activity that may be at issue in this matter; and
- 7 B. Any information concerning NSA intelligence activities,
8 sources, or methods that may relate to or be necessary to
9 adjudicate plaintiffs' allegations, including allegations that
10 the NSA, with the assistance of telecommunications
11 carriers such as AT&T and Verizon, indiscriminately
12 intercepts the content of communications and also collects
13 the communication records of millions of Americans as
14 part of an alleged "Program" authorized by the President
15 after 9/11. *See, e.g., Jewel Comp.* ¶¶ 2-13; 39-97; *Shubert*
16 *SAC* ¶¶ 1-9; 57-58; 62-91.

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

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

27 (ii) Information concerning whether or not the NSA
28 obtained from telecommunications companies such as
AT&T and Verizon communication transactional records as
alleged in the Complaint; *see, e.g., Jewel Complaint* ¶¶ 10;
82-97; *Shubert SAC* ¶ 102; and

(iii) Information that may tend to confirm or deny
whether AT&T, Verizon (and to the extent relevant or
necessary, any other telecommunications carrier), have
provided assistance to the NSA in connection with any
alleged activity; *see, e.g., Jewel Complaint* ¶¶ 2, 7-8, 10; 13
50-97; *Shubert SAC* ¶¶ 6, 10-13; 66-68.

1 **V. Harm of Disclosure of Privileged Information**

2 15. As set forth in my classified declaration submitted for the Court's *in camera*, *ex*
3 *parte* review, disclosure of information in the foregoing categories would cause exceptionally
4 grave damage to national security. I briefly summarize the harms at issue below.

5 **A. Information Concerning Whether the Plaintiffs Have Been**
6 **Subject to the Alleged NSA Activities**

7 16. The first major category of information as to which I am supporting the DNI's
8 assertion of privilege, and asserting the NSA's own statutory privilege, concerns information as
9 to whether particular individuals, including the named plaintiffs in this lawsuit, have been
10 subject to alleged NSA intelligence activities. As set forth below, disclosure of such information
11 would cause exceptionally grave damage to the national security.
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13 17. As a matter of course, the NSA cannot publicly confirm or deny whether any
14 individual is subject to surveillance activities because to do so would tend to reveal actual
15 targets. For example, if the NSA were to confirm in these two cases and others that specific
16 individuals are not targets of surveillance, but later refuse to comment (as it would have to) in a
17 case involving an actual target, an actual or potential adversary of the United States could easily
18 deduce by comparing such responses that the person in the latter case is a target. The harm of
19 revealing targets of foreign intelligence surveillance should be obvious. If an individual knows
20 or suspects he is a target of U.S. intelligence activities, he would naturally tend to alter his
21 behavior to take new precautions against surveillance. In addition, revealing who is not a target
22 would indicate who has avoided surveillance and what may be a secure channel for
23 communication. Such information could lead an actual or potential adversary, secure in the
24 knowledge that he is not under surveillance, to help a hostile foreign adversary convey
25 information; alternatively, such a person may be unwittingly utilized or even forced to convey
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1 information through a secure channel to a hostile foreign adversary. Revealing which channels
2 are free from surveillance and which are not would also reveal sensitive intelligence methods and
3 thereby could help any adversary evade detection and capitalize on limitations in NSA's
4 capabilities.

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6 **B. Information Related to NSA Activities, Sources, or Methods Implicated by
Plaintiffs' Allegations of a Communications "Dragnet"**

7 18. I am also supporting the DNI's assertion of privilege and asserting the NSA's
8 statutory privilege over any other facts concerning NSA intelligence activities, sources, or
9 methods that may relate to or be necessary to litigate the plaintiffs' claims and allegations,
10 including that: (1) the NSA is indiscriminately intercepting the content of communications of
11 millions of ordinary Americans, *see e.g., Jewel Complaint* ¶¶ 7, 9, 10; *Shubert SAC* ¶¶ 1, 5, 7;
12 and (2) that the NSA is collecting the private telephone and Internet transactional records of
13 Americans with the assistance of telecommunications carriers, again including information
14 concerning the plaintiffs' telephone and Internet communications. *See Jewel Complaint* ¶¶ 7, 10,
15 11, 13, 82-97; *see Shubert SAC* ¶ 102. As described above, the scope of the government's
16 privilege assertion includes but is not limited to: (1) information concerning the now inoperative
17 "Terrorist Surveillance Program" and any other NSA activities that would be at risk of disclosure
18 or required in demonstrating that the NSA has not engaged in content "dragnet" surveillance
19 activities that the plaintiffs allege; and (2) information concerning whether or not the NSA
20 obtains transactional communications records from telecommunications companies. As set forth
21 below, the disclosure of such information would cause exceptionally grave damage to national
22 security.
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(1) Information Concerning Plaintiffs' Content Surveillance Allegations and the TSP.

19. After the existence of the TSP was officially acknowledged in December 2005, the Government stated that this activity was limited to the interception of the content of certain communications for which there were reasonable grounds to believe that: (1) such communication originated or terminated outside the United States; and (2) a party to such communication is a member or agent of al-Qaeda or an affiliated terrorist organization. Nonetheless, plaintiffs' allege that the NSA indiscriminately intercepts the content of communications of millions of ordinary Americans. *See e.g., Jewel* Complaint ¶¶ 7, 9, 10; *see Shubert* SAC ¶¶ 1, 5, 7. As the Government has also previously stated,⁸ plaintiffs' allegation that the NSA has undertaken indiscriminate surveillance of the content⁹ of millions of communications sent or received by people inside the United States after 9/11 under the TSP is false. But to the extent the NSA must demonstrate that content surveillance under the TSP was so limited, and was not plaintiffs' alleged content "dragnet," or demonstrate that the NSA has not otherwise engaged in the alleged content "dragnet," highly classified NSA intelligence sources and methods about the operation of the TSP and current NSA intelligence activities would be subject to disclosure or the risk of disclosure. The disclosure of whether and to what extent the NSA utilizes certain intelligence sources and methods would reveal to foreign adversaries the NSA's capabilities, or lack thereof, enabling them to either evade particular channels of

⁸ *See* Public Declaration of Dennis Blair, Director of National Intelligence, ¶ 15 (April 3, 2009) (Dkt. 18-3 in *Jewel* action (08-cv-4373)); Public Declaration of Deborah A. Bonanni, National Security Agency ¶ 14 (Dkt. 18-4 in *Jewel* action (08-cv-4373)); Public Declaration of Dennis Blair, Director of National Intelligence, ¶ 15 (October 30, 2009) (Dkt. 680-1 in *Shubert* action (MDL 06-cv-1791)); Public Declaration of Lt. Gen. Keith B. Alexander, National Security Agency ¶ 19 (Dkt. 680-1 in *Shubert* action (MDL 06-cv-1791)).

⁹ As noted above, 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 communications that are being monitored, or exploit channels of communications that are not
2 subject to NSA activities – in either case risking exceptionally grave damage to national security.
3 As set forth in my classified declaration, a range of operational details concerning the Terrorist
4 Surveillance Program, as well as other NSA sources and methods, remains properly classified
5 and privileged from disclosure, and could not be revealed to address plaintiffs’ content “dragnet”
6 allegations.
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8 **(2) Plaintiffs’ Allegations Concerning the Collection of Communication Records**

9 20. As noted above, plaintiffs in *Jewel* and *Shubert* also allege that the NSA is
10 collecting the private telephone and Internet transaction records of millions of Americans, again
11 including information concerning the plaintiffs’ telephone and Internet communications. *See,*
12 *e.g., Jewel* Complaint ¶¶ 7, 10, 11, 13, 82-97; *see Shubert* SAC ¶ 102. Again as set forth in my
13 classified declaration, confirmation or denial of any information concerning whether the NSA
14 collects communication records would also disclose information about whether or not the NSA
15 utilizes particular intelligence sources and methods and, thus, the NSA’s capabilities or lack
16 thereof, and would cause exceptionally grave damage to national security.
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19 **(3) Information Concerning Plaintiffs’ Allegations that Telecommunications Carriers**
20 **Provided Assistance to the NSA**

21 21. The final major category of NSA intelligence sources and methods as to which I
22 am supporting the DNI’s assertion of privilege, and asserting the NSA’s statutory privilege,
23 concerns information that may tend to confirm or deny whether or not AT&T and Verizon (or to
24 the extent necessary whether or not any other telecommunications provider) has assisted the
25 NSA with alleged intelligence activities. The *Jewel* plaintiffs and three of the *Shubert* plaintiffs
26 allege that they are customers of AT&T, and that AT&T participated in the alleged surveillance
27 activities that the plaintiffs seek to challenge. Additionally, at least one *Shubert* plaintiff also
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1 claims to be a customer of Verizon, and that Verizon similarly participated in the alleged
2 surveillance activities that the plaintiffs seek to challenge. As again set forth in more detail in
3 my classified declaration, confirmation or denial of a relationship between the NSA and AT&T,
4 Verizon, or any other telecommunication carrier on alleged intelligence activities would cause
5 exceptionally grave damage to national security. Confirming or denying such allegations of
6 assistance would reveal to foreign adversaries whether or not NSA utilizes particular intelligence
7 sources and methods and, thus, either compromise actual sources and methods or reveal that
8 NSA does not utilize a particular source and method. Such facts would allow individuals, to
9 include America's adversaries, to accumulate information and draw conclusions about how the
10 U.S. Government collects communications, its technical capabilities, and its sources and
11 methods.¹⁰ Any U.S. Government confirmation or denial would also replace speculation with
12 certainty for hostile foreign adversaries who are balancing the risk that a particular channel of
13 communication may not be secure against the need to communicate efficiently. Such
14 confirmation or denial would allow adversaries to focus with certainty on a particular channel
15 that is secure.

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19 22. Indeed, Congress recognized the need to protect the identities of
20 telecommunications carriers alleged to have assisted the NSA when it enacted provisions of the
21 FISA Amendments Act of 2008 that barred lawsuits against telecommunication carriers alleged

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25 ¹⁰ For example, if NSA were to admit publicly in response to an information request that
26 no relationship with telecommunications companies A, B, and C exists, but in response to a
27 separate information request about company D state only that no response could be made, this
28 would give rise to the inference that NSA has a relationship with company D. Over time, the
accumulation of these inferences would disclose the capabilities (sources and methods) of NSA's
intelligence activities and inform our adversaries of the degree to which NSA can successfully
exploit particular communications. Our adversaries can then develop countermeasures to thwart
NSA's abilities to collect their communications.

1 to have assisted the NSA after the 9/11 attacks. In enacting this legislation, the Senate Select
2 Committee on Intelligence, after extensive oversight of the Terrorist Surveillance Program,
3 found that “electronic surveillance for law enforcement and intelligence purposes depends in
4 great part on the cooperation of private companies that operate the nation’s telecommunications
5 system.” S. Rep. 110-209 (2007) at 9 (accompanying S. 2248, Foreign Intelligence Surveillance
6 Act of 1978 Amendments Act of 2007). Notably, the SSCI expressly stated that, in connection
7 with alleged post-9/11 assistance, “it would be inappropriate to disclose the names of the
8 electronic communication service providers from which assistance was sought, the activities in
9 which the Government was engaged or in which the providers assisted, or the details regarding
10 any such assistance.” *Id.* The Committee added that the “identities of persons or entities who
11 provide assistance to the intelligence community are properly protected as sources and methods
12 of intelligence.” *Id.*

13 * * *

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16 23. Any further elaboration on the public record concerning the foregoing matters
17 would reveal information that would cause the very harm that my privilege assertion and the
18 DNI’s privilege assertion are intended to prevent. As noted, my separate classified declaration,
19 submitted solely for *in camera, ex parte* review, provides a more detailed explanation of the
20 information and harms to national security at issue.
21

22 **VI. Conclusion**

23
24 24. In sum, I support the DNI’s assertion of the state secrets privilege and statutory
25 privilege to prevent the disclosure of the information described herein and detailed herein. I also
26 assert a statutory privilege under Section 6 of the National Security Act with respect to the
27 information described herein which concerns the functions of the NSA. Moreover, because
28 proceedings in this case risk disclosure of privileged and classified intelligence-related

1 information, I respectfully request that the Court not only protect that information from
2 disclosure but also dismiss this case to prevent exceptional harm to the national security of the
3 United States.

4
5 I declare under penalty of perjury that the foregoing is true and correct.
6

7
8 DATE: 9.11.12

Frances J. Fleisch

Frances J. Fleisch
Executive Director
National Security Agency