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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, 17th 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 5. The United States “Intelligence Community” includes the Office of the Director
20 of National Intelligence; the Central Intelligence Agency; the National Security Agency; the
21 Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National
22 Reconnaissance Office; other offices within the Department of Defense for the collection of
23 specialized national intelligence through reconnaissance programs; the intelligence elements of
24 the military services, the Federal Bureau of Investigation, the Department of the Treasury, the
25 Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau
26 of Intelligence and Research of the Department of State; the elements of the Department of
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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
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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
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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 content¹ 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.
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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
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¹ 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.
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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.
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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
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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
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1 intelligence information, sources, and methods described herein in order to prevent exceptionally
2 grave harm to the national security of the United States.

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4 I declare under penalty of perjury that the foregoing is true and correct.
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7 DATE: 30 Oct 2009

Dennis Blair

8 DENNIS C. BLAIR
9 Director of National Intelligence
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