

1 MICHAEL F. HERTZ
 Acting 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 U.S. Department of Justice
 7 Civil Division, Federal Programs Branch
 8 20 Massachusetts Avenue, NW
 Washington, D.C. 20001
 9 Phone: (202) 514-4782
 10 Fax: (202) 616-8460

11 *Attorneys for the United States and*
 12 *Government Defendants Sued in their*
Official Capacities

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

16	CAROLYN JEWEL, <i>et al.</i>)	No. 08-cv-4873-VRW
17	Plaintiffs,)	PUBLIC DECLARATION
18)	OF DEBORAH A. BONANNI,
19	v.)	NATIONAL SECURITY AGENCY
20	NATIONAL SECURITY AGENCY <i>et al.</i>)	
21	Defendants.)	Date: June 25, 2009
22)	Time: 2:30 p.m.
23)	Courtroom 6, 17 th Floor
24)	Chief Judge Vaughn R. Walker

1
2 I, Deborah A. Bonanni, do hereby state and declare as follows:

3
4 **I. Introduction**

5 1. I am the Chief of Staff for the National Security Agency (NSA), an intelligence
6 agency within the Department of Defense. I have held this position since February 2006. As the
7 Chief of Staff, under our internal regulations, and in the absence of the Deputy Director and the
8 Director, I am responsible for directing the NSA, overseeing the operations undertaken to carry
9 out its mission and, by specific charge of the President and the Director of National Intelligence,
10 protecting NSA activities and intelligence sources and methods. I have been designated an
11 original TOP SECRET classification authority under Executive Order No. 12958, 60 Fed. Reg.
12 19825 (1995), as amended on March 25, 2003, and Department of Defense Directive No. 5200.1-
13 R, Information Security Program Regulation, 32 C.F.R. § 159a.12 (2000).
14
15

16
17 2. The purpose of this declaration is to support an assertion of the military and state
18 secrets privilege (hereafter "state secrets privilege") by the Director of National Intelligence
19 ("DNI") as the head of the intelligence community, as well as the DNI's assertion of a statutory
20 privilege under the National Security Act, to protect information related to NSA activities
21 described herein below. Lieutenant General Keith Alexander, the Director of the National
22 Security Agency, has been sued in his official and individual capacity in the above captioned case
23 and has recused himself from the decision of whether to assert the statutory privilege in his
24 official capacity. As the Deputy Director is currently out of the office on temporary duty, by
25 operation of our internal regulations and by specific delegation of the Director, I am authorized to
26 review the materials associated with this litigation, prepare whatever declarations I determine are
27 appropriate, and determine whether to assert the NSA's statutory privilege. Through this
28

1 declaration, I hereby invoke and assert the NSA's statutory privilege set forth in Section 6 of the
2 National Security Agency Act of 1959, Public Law No. 86-36 (codified as a note to 50 U.S.C.
3 § 402) ("NSA Act"), to protect the information related to NSA activities described herein below.

4 The statements made herein are based on my personal knowledge of NSA activities and
5 operations, and on information made available to me as the Chief of Staff of the NSA.
6

7 **II. Summary**

8 3. In the course of my official duties, I have been advised of this litigation and I
9 have reviewed the allegations in the Complaint in this case. In sum, plaintiffs allege that, after
10 the 9/11 attacks, the NSA received presidential authorization to engage in surveillance activities
11 far broader than the publicly acknowledged "Terrorist Surveillance Program" ("TSP"), which
12 involved the interception of specific international communications involving persons reasonably
13 believed to be associated with al Qaeda and affiliated terrorist organizations. Plaintiffs allege
14 that the NSA, with the assistance of telecommunication companies including AT&T, has
15 indiscriminately intercepted the content and obtained the communications records of millions of
16 ordinary Americans as part of an alleged presidentially-authorized "Program" after 9/11. *See*
17 Complaint at ¶¶ 2-13; 39-97. I cannot disclose on the public record the nature of any NSA
18 information implicated by the plaintiffs' allegations. However, as described further below, the
19 disclosure of information related to the NSA's activities, sources and methods implicated by the
20 plaintiffs' allegations reasonably could be expected to cause exceptionally grave damage to the
21 national security of the United States and, for this reason, are encompassed by the DNI's state
22 secrets and statutory privilege assertions, as well as by my assertion of the NSA statutory
23 privilege, and should be protected from disclosure in this case. In addition, it is my judgment
24 that sensitive state secrets are so central to the subject matter of the litigation that any attempt to
25 proceed in the case risks the disclosure of the classified privileged national security information
26
27
28

1 described herein and exceptionally grave damage to the national security of the United States.

3 **III. Background Information**

4 **A. The National Security Agency**

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

11
12
13 5. There are two primary reasons for gathering and analyzing foreign intelligence
14 information. The first, and most important, is to gain information required to direct U.S.
15 resources as necessary to counter external threats and in support of military operations. The
16 second reason is to obtain information necessary to the formulation of U.S. foreign policy.
17 Foreign intelligence information provided by the NSA is thus relevant to a wide range of
18 important issues, including military order of battle; threat warnings and readiness; arms
19 proliferation; international terrorism; counter-intelligence; and foreign aspects of international
20 narcotics trafficking.
21

22 **B. September 11, 2001 and the al Qaeda Threat.**

23
24 6. On September 11, 2001, the al Qaeda terrorist network launched a set of
25 coordinated attacks along the East Coast of the United States. Four commercial jetliners, each
26 carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al
27

28 ¹ Section 1.7(c) of 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 Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two
2 of the jetliners, which they deliberately flew into the Twin Towers of the World Trade Center.
3 Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third
4 jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth
5 jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville,
6 Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or
7 the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation
8 blow to the Government of the United States—to kill the President, the Vice President, or
9 Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—
10 the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition,
11 these attacks shut down air travel in the United States, disrupted the Nation's financial markets
12 and government operations, and caused billions of dollars of damage to the economy.

15 7. On September 14, 2001, a national emergency was declared “by reason of the
16 terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the
17 continuing and immediate threat of further attacks on the United States.” Presidential
18 Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also
19 immediately began plans for a military response directed at al Qaeda's training grounds and
20 havens in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint
21 Resolution authorizing the President of the United States “to use all necessary and appropriate
22 force against those nations, organizations, or persons he determines planned, authorized,
23 committed, or aided the terrorist attacks” of September 11. Authorization for Use of Military
24 Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) (“Cong. Auth.”).
25 Congress also expressly acknowledged that the attacks rendered it “necessary and appropriate”
26 for the United States to exercise its right “to protect United States citizens both at home and
27
28

1 abroad,” and acknowledged in particular that “the President has authority under the Constitution
2 to take action to deter and prevent acts of international terrorism against the United States.” *Id.*
3 pmb1.

4 8. Also after the 9/11 attacks, a Military Order was issued stating that the attacks of
5 September 11 “created a state of armed conflict,” *see* Military Order by the President § 1(a), 66
6 Fed. Reg. 57833, 57833 (Nov. 13, 2001), and that al Qaeda terrorists “possess both the capability
7 and the intention to undertake further terrorist attacks against the United States that, if not
8 detected and prevented, will cause mass deaths, mass injuries, and massive destruction of
9 property, and may place at risk the continuity of the operations of the United States
10 Government,” and concluding that “an extraordinary emergency exists for national defense
11 purposes.” Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34. Indeed, shortly after the
12 attacks, on October 2, 2001, NATO took the unprecedented step of invoking Article 5 of the
13 North Atlantic Treaty, which provides that an “armed attack against one or more of [the parties]
14 shall be considered an attack against them all.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63
15 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.
16
17
18

19 9. As a result of the unprecedented attacks of September 11, 2001, the United States
20 found itself immediately propelled into a worldwide war against a network of terrorist groups,
21 centered on and affiliated with al Qaeda, that possesses the evolving capability and intention of
22 inflicting further catastrophic attacks on the United States. That war is continuing today, at
23 home as well as abroad. Moreover, the war against al Qaeda and its allies is a different kind of
24 war, against a very different enemy, than any other war or enemy the Nation has previously
25 faced. Al Qaeda and its supporters operate not as a traditional nation-state but as a diffuse,
26 decentralized global network of individuals, cells, and loosely associated, often disparate groups,
27 that act sometimes in concert, sometimes independently, and sometimes in the United States, but
28

1 always in secret—and their mission is to destroy lives and to disrupt a way of life through
2 terrorist acts. Al Qaeda works in the shadows; secrecy is essential to al Qaeda’s success in
3 plotting and executing its terrorist attacks.

4 **IV. Information Protected by Privilege**

5 10. In general and unclassified terms, the following categories of information are
6 subject to the DNI’s assertion of the state secrets privilege and statutory privilege under the
7 National Security Act, as well as my assertion of the NSA statutory privilege:
8

- 9 A. Information that may tend to confirm or deny whether the
10 plaintiffs have been subject to any alleged NSA intelligence
11 activity that may be at issue in this matter; and
12 B. Any information concerning NSA intelligence activities,
13 sources, or methods that may relate to or be necessary to
14 adjudicate plaintiffs’ allegations, including allegations that
15 the NSA, with the assistance of telecommunications
16 carriers such as AT&T, indiscriminately intercepts the
17 content of communications and also collects the
18 communication records of millions of Americans as part of
19 an alleged presidentially authorized “Program” after 9/11.
20 *See, e.g.,* Complaint at ¶¶ 2-13; 39-97.

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

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

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

(iii) Information that may tend to confirm or deny
whether AT&T (and to the extent relevant or necessary,
any other telecommunications carrier), has provided

1 assistance to the NSA in connection with any alleged
2 activity.

3 **VI. Description of Information Subject to Privilege and the Harm of Disclosure**

4 **A. Information That May Tend to Confirm or Deny Whether the Plaintiffs Have Been
5 Subject to Any Alleged NSA Activities.**

6 11. The first major category of information as to which I am supporting the DNI's
7 assertion of privilege, and asserting the NSA's own statutory privilege, concerns information as
8 to whether particular individuals, including the named plaintiffs in this lawsuit, have been
9 subject to alleged NSA intelligence activities. As set forth below, disclosure of such information
10 would cause exceptionally grave harm to the national security.

11 12. As a matter of course, the NSA cannot publicly confirm or deny whether any
12 individual is subject to surveillance activities because to do so would tend to reveal actual
13 targets. For example, if the NSA were to confirm in this case and others that specific individuals
14 are not targets of surveillance, but later refuse to comment (as it would have to) in a case
15 involving an actual target, an actual or potential adversary of the United States could easily
16 deduce by comparing such responses that the person in the latter case is a target. There can be
17 great harm in revealing targets of foreign intelligence surveillance. If an individual knows or
18 suspects he is a target of U.S. intelligence activities, he would naturally tend to alter his behavior
19 to take new precautions against surveillance. In addition, revealing who is not a target would
20 indicate who has avoided surveillance and reveal the limitations of NSA's capabilities. Such
21 information could lead an actual or potential adversary, secure in the knowledge that he is not
22 under surveillance, to convey information; alternatively, such a person may be unwittingly
23 utilized or even forced to convey information through a secure channel to a hostile foreign
24 adversary. In short, revealing which channels are free from surveillance and which are not
25 would also reveal sensitive intelligence methods and thereby could help any adversary evade
26
27
28

1 detection and capitalize on limitations in NSA's capabilities.

2
3 **B. Information Related to NSA Activities, Sources, or Methods Implicated by the**
4 **Plaintiffs' Allegations and the Harm to National Security of Its Disclosure.**

5 **1. Plaintiffs' Allegations of a Communications Dragnet.**

6 13. I am also supporting the DNI's assertion of privilege and asserting the NSA's
7 statutory privilege over any other facts concerning NSA intelligence activities, sources, or
8 methods that may relate to or be necessary to litigate the plaintiffs' claims and allegations,
9 including that (i) the NSA is indiscriminately intercepting the content of communications of
10 millions of ordinary Americans, *see, e.g.*, Complaint ¶¶ 7, 9, 10, and (ii) that the NSA is
11 collecting the private telephone and Internet transaction records of millions of AT&T customers,
12 again including information concerning the plaintiffs' telephone and Internet communications.
13 *See e.g.*, Complaint ¶¶ 7, 9, 10, 13, 82-97. As described above, the scope of the government's
14 privilege assertion includes but is not limited to: (1) facts concerning the operation of the now
15 inoperative Terrorist Surveillance Program and any other NSA activities needed to demonstrate
16 that the TSP was limited to the interception of the content of one-end international
17 communications reasonably believed to involve a member or agent of al Qaeda or an affiliated
18 terrorist organization and that the NSA does not otherwise conduct the content surveillance
19 dragnet that the plaintiffs allege; and (2) information concerning whether or not the NSA obtains
20 transactional communication records from telecommunications companies such as AT&T as
21 plaintiffs allege. As set forth below, the disclosure of such information would cause
22 exceptionally grave harm to national security.
23
24
25

26 **(a) Information Related to the Terrorist Surveillance Program.**

27
28 14. After the existence of the TSP was officially acknowledged in December 2005,

1 the Government stated that the NSA's collection of the content of communications under the
2 TSP was directed at international communications in which a participant was reasonably
3 believed to be associated with al Qaeda or an affiliated organization. Plaintiffs' allegation that
4 the NSA has undertaken indiscriminate surveillance of the content of millions of
5 communications sent or received by people inside the United States after 9/11 under the TSP is
6 therefore false, again as the Government has previously stated.² But to the extent the NSA must
7 demonstrate that content surveillance under the TSP was so limited, and was not plaintiffs'
8 alleged content dragnet, or demonstrate that the NSA has not otherwise engaged in the alleged
9 content dragnet, highly classified NSA intelligence sources and methods about the operation of
10 the TSP and NSA intelligence activities would be subject to disclosure or the risk of disclosure.
11 The disclosure of whether and to what extent the NSA utilizes certain intelligence sources and
12 methods would reveal to foreign adversaries the NSA's capabilities, or lack thereof, enabling
13 them to either evade particular channels of communications that are being monitored, or exploit
14 channels of communications that are not subject to NSA activities---in either case risking
15 exceptionally grave harm to national security.

16
17
18
19 **(b) Plaintiffs' Allegations Concerning the Collection of Communication
20 Records.**

21 15. As noted above, plaintiffs also allege that the NSA is collecting the private
22 telephone and Internet transaction records of millions of AT&T customers, again including
23 information concerning the plaintiffs' telephone and Internet communications. *See, e.g.,*
24 Complaint ¶¶ 7, 9, 10, 13, 82-97. Confirmation or denial of any information concerning whether
25 the NSA collects communication records would also disclose information about whether or not
26
27
28

² *See, e.g.,* Public Declaration of NSA Director Alexander in the *Shubert* action (07-cv-693-VRW) at ¶ 16.

1 the NSA utilizes particular intelligence sources and methods and, thus, the NSA's capabilities or
2 lack thereof, and would cause exceptionally grave harm to national security.

3 **3. Plaintiffs' Allegations that AT&T Provided Assistance to the NSA with the**
4 **Alleged Activities.**

5 16. The third major category of NSA intelligence sources and methods as to which I
6 am supporting the DNI's assertion of privilege, and asserting the NSA's statutory privilege,
7 concerns information that may tend to confirm or deny whether or not AT&T (or to the extent
8 necessary whether or not any other telecommunications provider) has assisted the NSA with
9 alleged intelligence activities. Plaintiffs allege that they are customers of AT&T, and that AT&T
10 participated in the alleged surveillance activities that the plaintiffs seek to challenge. As set forth
11 below, confirmation or denial of a relationship between the NSA and AT&T (or other carriers)
12 on alleged intelligence activities would cause exceptionally grave harm to national security.

13
14 **VII. Conclusion**

15
16 17. In sum, I support the DNI's assertion of the state secrets privilege and statutory
17 privilege to prevent the disclosure of the information described herein and detailed herein. I also
18 assert a statutory privilege under Section 6 of the National Security Act with respect to the
19 information described herein which concerns the functions of the NSA. Moreover, because
20 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 also dismiss this case to prevent exceptional harm to the national security of the
23 United States.
24
25

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

DATE: 30 April 2009



DEBORAH A. BONANNI
Chief of Staff
National Security Agency

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28