

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

MDL Dkt. No. 06-1791-VRW

PUBLIC DECLARATION
OF J. MICHAEL McCONNELL,
DIRECTOR OF NATIONAL
INTELLIGENCE

This Document Relates to:

Shubert v. Bush, Case No. 07-693

Hon. Vaughn R. Walker

PUBLIC DECLARATION OF J. MICHAEL McCONNELL,
DIRECTOR OF NATIONAL INTELLIGENCE

I, J. Michael McConnell, do hereby state and declare as follows:

INTRODUCTION

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since February 2007. Previously, I have served as the Executive Assistant to the Director of Naval Intelligence, as the Chief of Naval Forces Division at the National Security Agency, as Director of Intelligence for the Joint Chiefs of Staff during Operation Desert Storm, and as the Director of the National Security Agency.

2. In the course of my official duties, I have been advised of this lawsuit and the allegations at issue in the Plaintiffs' Amended Complaint. The statements made herein are based on my personal knowledge as well as on information provided to me in my official capacity as Director of National Intelligence. In personally considering this matter, I have executed a separate classified declaration dated May 25, 2007, and lodged *in camera* and *ex parte* in this case. Moreover, I have read and personally considered the information contained in the Public and *In Camera, Ex Parte* Declarations of Lt. Gen. Keith B. Alexander, Director of the National Security Agency, submitted in this case.

1 3. The purpose of this declaration is to formally assert, in my capacity as the
2 Director of National Intelligence and head of the United States Intelligence Community, the
3 military and state secrets privilege (hereafter “state secrets privilege”) and a statutory privilege
4 under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect intelligence
5 information, sources, and methods that are at risk of disclosure in this case. Disclosure of the
6 information covered by this privilege assertion reasonably could be expected to cause
7 exceptionally grave damage to the national security of the United States and, therefore, the
8 information should be excluded from any use in this case. In addition, I concur with Gen.
9 Alexander’s conclusion that, because the very subject matter of this lawsuit concerns highly
10 classified and critically important foreign intelligence activities, the risk is great that further
11 litigation will lead to the disclosure of information harmful to U.S. national security and,
12 accordingly, that this case should be dismissed. *See* Public and *In Camera* Alexander
13 Declarations.

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16 **BACKGROUND ON DIRECTOR OF NATIONAL INTELLIGENCE**

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

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26 5. The United States “Intelligence Community” includes the Office of the Director
27 of National Intelligence; the Central Intelligence Agency; the National Security Agency; the
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1 Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National
2 Reconnaissance Office; other offices within the Department of Defense for the collection of
3 specialized national intelligence through reconnaissance programs; the intelligence elements of
4 the military services, the Federal Bureau of Investigation, the Department of the Treasury, the
5 Department of Energy, the Drug Enforcement Administration, and the Coast Guard; the Bureau
6 of Intelligence and Research of the Department of State; the elements of the Department of
7 Homeland Security concerned with the analysis of intelligence information; and such other
8 elements of any other department or agency as may be designated by the President, or jointly
9 designated by the DNI and heads of the department or agency concerned, as an element of the
10 Intelligence Community. *See* 50 U.S.C. § 401a(4).
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13 6. The responsibilities and authorities of the Director of National Intelligence are set
14 forth in the National Security Act. *See* 50 U.S.C. § 403-1. These responsibilities include
15 ensuring that national intelligence is provided to the President, the heads of the departments and
16 agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military
17 commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C.
18 § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the
19 requirements and priorities for, and managing and directing the tasking, collection, analysis,
20 production, and dissemination of national intelligence by elements of the Intelligence
21 Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for developing and
22 determining, based on proposals submitted by the heads of agencies and departments within the
23 Intelligence Community, an annual consolidated budget for the National Intelligence Program
24 for presentation to the President, and for ensuring the effective execution of the annual budget
25 for intelligence and intelligence-related activities, and for managing and allotting appropriations
26 for the National Intelligence Program. *Id.* § 403-1(c)(1)-(5).
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1 7. In addition, the National Security Act of 1947, as amended, provides that “[t]he
2 Director of National Intelligence shall protect intelligence sources and methods from
3 unauthorized disclosure.” 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI
4 establishes and implements guidelines for the Intelligence Community for the classification of
5 information under applicable law, Executive orders, or other Presidential directives and access to
6 and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible
7 for the establishment of uniform standards and procedures for the grant of access to Sensitive
8 Compartmented Information (“SCI”) to any officer or employee of any agency or department of
9 the United States, and for ensuring the consistent implementation of those standards throughout
10 such departments and agencies. *Id.* § 403-1(j)(1), (2).

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13 8. By virtue of my position as the Director of National Intelligence, and unless
14 otherwise directed by the President, I have access to all intelligence related to the national
15 security that is collected by any department, agency, or other entity of the United States.
16 Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order
17 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the
18 President has authorized me to exercise original TOP SECRET classification authority.

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20 **ASSERTION OF STATE SECRETS PRIVILEGE**

21 9. After careful and actual personal consideration of the matter, based upon my own
22 knowledge and information obtained in the course of my official duties, including the
23 information contained in the Public and *In Camera* Declarations of Gen. Alexander, I have
24 determined that the disclosure of certain information—as set forth herein and described in more
25 detail in my classified declaration and in the classified declaration of General Alexander—would
26 cause exceptionally grave damage to the national security of the United States and, therefore,
27 must be protected from disclosure and excluded from this case. Thus, as to this information, I
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1 formally assert the state secrets privilege. In addition, it is my judgment that sensitive state
2 secrets are so central to the subject matter of the litigation that any attempt to proceed in the case
3 will substantially risk the disclosure of the privileged information described herein and in more
4 detail in the classified declarations, and will therefore risk exceptionally grave damage to the
5 national security of the United States.

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

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

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14 **INFORMATION SUBJECT TO CLAIM OF PRIVILEGE**

15 11. The information subject to the state secrets and statutory privileges I am asserting
16 includes the following:

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18 A. Information that may tend to confirm or deny whether the
19 Plaintiffs have been subject to any alleged NSA
intelligence activity that may be at issue in this matter; and

20 B. Information concerning NSA intelligence activities,
21 sources, or methods, including:

22 (1) Information concerning the scope and operation of the
23 Terrorist Surveillance Program, including information that
24 may be needed to demonstrate that the TSP was limited to
one-end foreign al Qaeda-related communications and that
25 the NSA does not otherwise engage in the content
surveillance dragnet that the Plaintiffs allege; and

26 (2) Any other information concerning NSA intelligence
27 activities, sources, or methods that would be necessary to
28 adjudicate the Plaintiffs' claims, including, to the extent
applicable, information that would tend to confirm or deny
whether the NSA collects large quantities of
communication records information; and

1 C. Information that may tend to confirm or deny whether
2 Verizon/MCI, AT&T, or any other telecommunications
3 carrier has assisted the NSA with the alleged intelligence
4 activities.

5 12. First, although Plaintiffs' allegations of NSA surveillance are broad, they appear
6 to be premised on the notion that the President authorized certain intelligence activities after the
7 terrorist attacks of September 11, 2001. To the extent that Plaintiffs are challenging the Terrorist
8 Surveillance Program ("TSP")—an intelligence program aimed at al Qaeda, the existence of
9 which was acknowledged by the President in 2005—and to the extent specific information about
10 the al Qaeda threat underlying the President's authorization for the TSP is needed to adjudicate
11 its lawfulness, such information could not be disclosed without revealing substantive intelligence
12 knowledge of the United States and thereby causing exceptionally grave damage to the national
13 security. Therefore, I assert the state secrets and statutory privilege to protect such information
14 from disclosure.
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16 13. Second, I am also asserting privilege over any information tending to confirm or
17 deny whether particular individuals, including the named Plaintiffs in this lawsuit, have been
18 subject to alleged NSA intelligence activities. Disclosure of such information would cause
19 exceptionally grave harm to the national security. As should be obvious, confirming or denying
20 whether a specific person is a target of surveillance would disclose either who is being
21 targeted—thus compromising that collection—or who is not being targeted, thus revealing to
22 adversaries that an individual is a secure source for communicating or, more broadly, the
23 methods being used to conduct surveillance. Moreover, providing assurances that someone is
24 not being targeted becomes unworkable, and itself revealing, when cases arise where an
25 individual may be targeted, because refusing to confirm or deny only in cases where surveillance
26 is occurring would effectively disclose and compromise that surveillance. The only recourse for
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1 NSA is to neither confirm nor deny whether someone has been targeted or subject to NSA
2 activities, regardless of whether the individual has been targeted or not. To say otherwise when
3 challenged in litigation would result in the frequent, routine exposure of NSA information,
4 sources, and methods, and would severely undermine surveillance activities in general.

5 14. Third, I am asserting privilege over any other facts concerning NSA intelligence
6 sources and methods that would be needed to adjudicate this case. This encompasses (1) facts
7 concerning the operation of the TSP and any other NSA intelligence activities needed to
8 demonstrate that the TSP was limited as the President stated to the interception of one-end
9 foreign communications reasonably believed to involve a member or agent of al Qaeda or an
10 affiliated terrorist organization, and that the NSA does not otherwise conduct a dragnet of
11 content surveillance as the Plaintiffs allege; (2) other classified facts about the operation of the
12 TSP that would be necessary to adjudicate the lawfulness of that program, to the extent it is at
13 issue in this case; and (3) to the extent applicable, facts that would confirm or deny whether the
14 NSA collects large quantities of communication records information.

15 15. In December 2005, the President stated that the TSP did not involve the collection
16 of purely domestic communications, or international communications with no al Qaeda
17 connection. I concur with General Alexander that if the NSA had to demonstrate in this case that
18 the TSP was limited as the President stated, and not a dragnet as the Plaintiffs claim, and that the
19 NSA does not otherwise engage in the dragnet that Plaintiffs allege, sensitive and classified facts
20 about the operation of the TSP and NSA intelligence activities would have to be disclosed. I also
21 concur with Gen. Alexander that confirmation or denial of any information concerning
22 allegations, to the extent applicable in this case, that the NSA collects communication records
23 would also disclose information about whether or not the NSA utilizes particular intelligence
24 sources and methods and, thus, the NSA's capabilities or lack thereof. In my judgment, such
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1 disclosures would risk exceptionally grave harm to national security by, for example, enabling
2 foreign adversaries either to evade particular channels of communications that are being
3 monitored, or to exploit channels of communications that are not subject to NSA activities.

4 16. Fourth, by alleging that they are subscribers of AT&T and Verizon, Plaintiffs
5 appear to put at issue whether or not those companies have provided classified assistance to the
6 NSA with respect to alleged intelligence activities. The disclosure of any information that would
7 tend to confirm or deny allegations of such assistance—to the extent those allegations are at
8 issue in this case—would cause exceptionally grave harm to the national security. Confirming or
9 denying such allegations, again, would reveal to foreign adversaries whether or not the NSA
10 utilizes particular intelligence sources and methods and, thus, either compromise actual sources
11 and methods or disclose that the NSA does not utilize a particular source or method. Such
12 confirmation or denial would also replace speculation with certainty for hostile foreign
13 adversaries who are balancing the risk that a particular channel of communication may not be
14 secure against the need to communicate efficiently.

15 17. I am unable to describe further on the public record the information covered by
16 my privilege assertion and the national security harms associated with the disclosure of such
17 information. Accordingly, I respectfully refer the Court to my classified declaration, along with
18 Gen. Alexander's classified declaration, both of which were submitted in this case for the
19 Court's *in camera, ex parte* review.
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25 I declare under penalty of perjury that the foregoing is true and correct.

26 DATE: 24 MAY 07

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28 J. MICHAEL McCONNELL
Director of National Intelligence